
Protecting EU common values within the Member States

An overview of
monitoring,
prevention and
enforcement
mechanisms
at EU level



STUDY

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An overview of monitoring, prevention and enforcement mechanisms at EU level

The present study analyses the existing and proposed mechanisms available to the institutions of the EU that may be deployed in order to monitor and enforce the observance of EU values by the Member States. More specifically, the study addresses the status and meaning of EU values (Article 2 TEU) and also discusses existing monitoring and preventive mechanisms (European Semester, EU Justice Scoreboard, Commission's rule of law framework, the Council's dialogues on the rule of law, and the preventive arm of Article 7 TEU) and enforcement mechanisms (preliminary reference rulings, infringement procedures and the sanctions arm of Article 7 TEU)). It also analyses a number of proposed mechanisms: the pact on democracy, the rule of law and fundamental rights; rule of law review cycle; reviewed Council dialogues on the rule of law; and the rule of law budgetary conditionality.

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Executive summary

Article 2 of the Treaty on European Union (TEU) lays down the founding values of the European Union, referring to 'human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities'. The provision defines the constitutional core of the European Union through a set of values that are shared by the Member States. The EU's founding values are binding not only on the EU institutions, but also on the Member States, as both candidate countries and Member States are required to comply with the EU's founding values by virtue of the Treaties (Articles 7 and 49 TEU) and certain consequences are attached to situations where such values are not observed (for example, the impossibility to accede to the EU or the possibility of sanctions).

EU primary law provides for various mechanisms that can and have been used to monitor, prevent breaches of, or enforce EU values within the Member States, namely, the two procedures provided for under Article 7 TEU (preventive and sanctions), infringement procedures (Articles 258-259 of the Treaty on the Functioning of the European Union – TFEU) and preliminary references (Article 267 TFEU). While the first mechanisms are to be used only in cases of systemic threats or breaches of EU values and are characterised by the leading role assumed by the Council of the European Union (Council, hereafter) and the European Council, the two other mechanisms can be described as judicial tools with regard to which the European Court of Justice assumes a major role.

Although the Treaties already provide for a range of tools that can be deployed to protect EU values within Member States, since 2007 the EU institutions have established a wide range of other mechanisms to monitor and prevent breaches of EU values in Member States. Between 2012 and 2014, the EU institutions created three monitoring and preventive tools to that end. The Commission launched its Justice Scoreboard in 2013, aimed at measuring the efficiency, quality and independence of the Member States' justice systems, and feeding into the European Semester process for economic governance. A year later, in 2014, the European Commission established its rule of law framework, a preventive mechanism aimed at addressing threats to EU values before Article 7 TEU procedures are launched, and finally the Council decided to set up its annual dialogues on the rule of law.

However, these new mechanisms have not exhausted the discussion on the adequacy of the EU toolbox to address Member States' deficiencies regarding EU values. In October 2016, Parliament called on the Commission to establish an EU pact on democracy, the rule of law and fundamental rights, to monitor compliance with those values in the Member States. Although the Commission did not take up the proposal to start with, in 2019, it decided to take stock of experience gained from applying the existing mechanisms to different Member States and launched a broad debate on how to strengthen the EU mechanisms to address common values deficiencies in the Member States. As a result, the Commission decided to establish a Rule of Law Review Cycle (2019), a monitoring tool that has yet to bear fruit, with the European Commission issuing its first rule of law report in September 2020. In a similar vein, as part of the 2021-2027 multiannual financial framework (MFF) legislative package, the Commission put forward a proposal for a regulation establishing rule of law conditionality, allowing EU institutions to withdraw or suspend EU funds for Member States with systemic deficiencies in that regard. At the time of writing, the proposal is still being considered by the co-legislators, although the introduction of rule of law conditionality was announced after the European Council special meeting of 17-21 July 2020 at which a political agreement was reached on the 2021-2027 MFF.

Taking these elements into account, this study aims to analyse the existing and proposed mechanisms for monitoring, prevention and enforcement of EU values within the Member States. The focus will be on their scope of application, the main procedural features and their effectiveness in addressing shortcomings in Member States as regards compliance with the common EU values enshrined in Article 2 TEU.

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ABBREVIATIONS

CFR	Charter of Fundamental Rights
CML	<i>Common Market Law Review</i>
ECJ	European Court of Justice
ECLR	<i>European Constitutional Law Review</i>
EJIL	<i>European Journal of International Law</i>
EP	European Parliament
EU WP	European University Institute working paper
GC	General Court
ICJL	<i>International Journal of Constitutional Law</i>
ICLQ	<i>International and Comparative Law Quarterly</i>
JCES	<i>Journal of Contemporary European Studies</i>
JCMS	<i>Journal of Common Market Studies</i>
JEPP	<i>Journal of European Public Policy</i>
JMWP	Jean Monnet working paper
OUP	Oxford University Press
TEC	Treaty establishing the European Community
TEEC	Treaty establishing the European Economic Community
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union

1. Introduction



Article 2 of the Treaty on European Union (TEU) enshrines the common founding values of the Union, referring to 'human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities'. Not only does the provision define the Union's identity through a set of values that comprise its **constitutional core**, it also stresses the commonality of those values by asserting that they are shared by the Member States. EU founding values are also referred to in Articles 3(1) and (5) TEU, where it is affirmed that their promotion inside and outside the EU is one of the Union's objectives. Article 21 TEU reiterates the EU's commitment to advance those values in its external relations, stating

that the European Union's external action 'is to seek to advance in the wider world, inter alia, the rule of law, the universality and indivisibility of human rights and respect for international law'.¹ The **EU is thus founded on common values** that express a European constitutional consensus captured by the Treaty makers, and that both the Union and its Member States undertake to uphold and promote within and outside its territory.

Although framed as 'values', Article 2 TEU standards are not deprived of **normative (legally relevant) character**. Some authors have questioned their enforceability and their binding nature as regards the Member States, claiming that the provision itself does not explicitly say that EU values bind Member States, that such a reading would not be easily reconcilable with some other provisions of the Treaties (i.e. Article 51 of the Charter of Fundamental Rights of the EU, limiting the scope of application of the Charter to the Member States when they implement EU law) and highlighting the difficulties attached to the delimitation of the scope of each of those values.² However, other scholars have pointed out that the values referred to in Article 2 TEU

are not to be considered merely desirable ideals or common ethical convictions, but rather legally binding norms through which the European Union embraces the postulates of liberal-democratic

EU values as shared values

The European Court of Justice affirmed in *Wightman* (Judgment of 10 December 2018, *Wightman and others v Secretary of State for Exiting the European Union*, [Case C-621/18](#)) that:

'As is apparent from Article 49 TEU, which provides the possibility for any European State to apply to become a member of the European Union, the European Union is composed of States which have freely and voluntarily committed themselves to the common values referred to in Article 2 TEU, which respect those values and which undertake to promote them, EU law being based on the fundamental premise that each Member State shares with all the other Member States, and recognises that those Member States share with it, those same values' (para. 63).

¹ GC judgment of 22 November 2018, *Thabet*, [T-274/16](#) and [T-275/16](#), para. 93.

² Eleonor Spaventa, [The interpretation of Article 51 of the EU Charter of Fundamental Rights: the dilemma of stricter or broader application of the Charter to national measures](#), European Parliament Policy Department C study, PE 559.930, 2016, p. 30.

constitutionalism.³ In this vein, it should be noted that the values of Article 2 TEU are included in the operative part of the Treaties (and not only in the preamble) and they are referred to both in Article 49 TEU, as regards **candidate countries**, and Article 7 TEU, as regards **current Member States**. As both candidate countries and Member States are **legally required to comply with EU's founding values** by virtue of the Treaties and certain consequences, including those of a legal nature, are attached to situations where such values are not observed (e.g. impossibility to accede to the EU or the possibility of sanctions), scholars have affirmed that those values bind, not only the European Union and its institutions, but also the Member States, even **beyond the areas of EU competence**.⁴ The rationale behind is clear: if complying with EU values is a pre-condition for full EU membership, respect for those values extends to any area, including those not covered by EU competences.

The European Commission has interpreted those provisions along the same lines.⁵ The European Parliament has referred to the Commission's interpretation, seemingly acknowledging that Article 2 TEU values bind Member States in all areas of activity.⁶ Similarly, the **ECJ has acknowledged the normative nature of EU values**, affirming that those values must be upheld in all areas of EU action, including in the field of the common foreign and security policy (CFSP).⁷ As regards Member States, the ECJ has referred to those values in recent preliminary references and infringement procedures (See Annex, Table 1), pointing out that EU law is based on the fundamental premise that all Member States **share those values, recognise them and uphold the EU law**

implementing them, a premise that justifies the existence of mutual trust between the Member States.⁸ Although the ECJ has not grounded any of its decisions exclusively in Article 2 TEU, it has frequently made reference to that provision together with some other Treaties or EU secondary law provisions, thus indicating that EU values can be concretised by referring to some other EU law provisions (i.e. Article 19 TEU and Article 47 of the Charter of Fundamental Rights concretise the 'rule

Normative character of EU values

The Court of Justice affirmed in *Celmer* (Judgment of 25 July 2018, [Case C-216/18 PPU](#), *Celmer*) that:

'That premiss [that all EU Member States share Article 2 TEU values] implies and justifies the existence of mutual trust between the Member States that those values will be recognised, and therefore that the EU law that implements them will be respected ...' (para. 35).

³ See for instance D. Kochenov, 'The Acquis and Its Principles: the Enforcement of the "Law" Versus the Enforcement of "Values" in the European Union' in A. Jakab and D. Kochenov (eds.), *The Enforcement of EU Law and Values*, OUP, 2017, pp. 9-10; L. Fumagalli, 'Articolo 2' in A. Tizzano (ed.), *Trattati dell'Unione Europea*, Giuffrè, 2014, p. 13; A. von Bogdandy, 'Founding Principles' in A. von Bogdandy and J. Bast (eds.), *Principles of European Constitutional Law*, Hart, C.H. Beck and Nomos, 2010, pp. 20-23.

⁴ Kochenov, 'The enforcement...'; Fumagalli, 'Articolo 2...'; von Bogdandy, 'Founding Principles...'; A. von Bogdandy, 'Common Principles for a Plurality of Orders: A Study on Public Authority in the European Legal Area', *IJCL*, Vol. 12(4), 2014, p. 997.

⁵ [Commission communication](#) on Article 7 TEU: Respect for and promotion of the values on which the Union is based, COM(2003)0606 final, 15 October 2003, p. 5.

⁶ [European Parliament resolution of 12 September 2018](#) on a proposal calling on the Council to determine, pursuant to Article 7(1) of the Treaty on European Union, the existence of a clear risk of a serious breach by Hungary of the values on which the Union is founded, P8_TA(2018)0340, para. C.

⁷ GC judgment of 27 September 2018, *Abdelaziz Ezz*, [T-288/15](#), paras. 57-58.

⁸ See for instance ECJ [Opinion 2/13](#), of 18 December 2014, *EU accession to ECHR*, paras. 167-168.

of law' value,⁹ Article 10 TEU concretises the value of 'democracy',¹⁰ the provisions of the Charter concretise the values of 'human dignity', 'freedom' and more generally 'human rights',¹¹ etc.). Similarly, the ECJ has not derived from Article 2 TEU any obligations that would be imposed on Member States in purely domestic areas, but has referred to that provision in cases where a certain link with EU law could be established, either because the Member State was implementing EU law¹² or because the ECJ had to determine if the Member State ensured effective legal protection 'in the fields covered by Union law' through the national judiciary, as required under Article 19 (1) TEU.¹³

In addition to the legal nature of EU values, the exact **means the European Union can use to ensure those values are upheld and sanction non-compliance** in Member States has also been subject to debate. As the Treaties contain a specific provision (Article 7 TEU) authorising the EU to respond to value deficiencies identified in a particular Member State, some academics have argued that Article 7 TEU is the only enforcement mechanism for those values, thus excluding the application of any other tool that could help achieve the same goal.¹⁴ Such an understanding of Article 2 TEU would entail that EU institutions would act *ultra vires* if they adopted a supervision mechanism for EU values in Member States other than those already provided for under Article 7 TEU,¹⁵ such as, most notably, the budgetary conditionality mechanism (see Section 5.4. below).

However, many academic commentators and EU institutions, including the ECJ, have adopted a different interpretation of Articles 2 and 7 TEU and their mutual relationship. Highlighting that no provision in the Treaties limits the enforcement of Article 2 TEU values to the specific procedures provided for under Article 7 TEU and stressing that the EU treaties do not exclude Article 2 TEU from the ECJ's jurisdiction or from the European Commission's competence to 'ensure the application of the Treaties' (Article 17 (1) TEU), various academics maintain that Article 7 TEU cannot be considered the only tool available for the EU to enforce respect for the founding values *vis-à-vis* the Member States.¹⁶ **Article 7 TEU mechanisms are to be considered special procedures to deal with breaches of EU values by Member States, but they do not pre-empt the use of other Treaty instruments to ensure that Member States respect those values**, i.e. infringement proceedings (Articles 258

⁹ See for instance ECJ (grand chamber) judgments: of 24 June 2019, *Commission v Poland (retirement age of Supreme Court judges)*, [Case C-619/18](#); of 5 November 2019, *Commission v Poland (retirement age of ordinary judges)*, [Case C-192/18](#); of 27 February 2018, *Associação Sindical dos Juizes Portugueses (ASJP) v Tribunal de Contas*, [Case C-64/16](#).

¹⁰ ECJ (grand chamber) judgment of 19 December 2019, *Junqueras Vies*, [Case C-502/19](#), para. 63.

¹¹ GC judgment of 22 November 2018, *Thabet*, [T-274/16 and T-275/16](#); ECJ judgment of 21 December 2016, *Tele2 Sverige*, [Joined Cases-203/15 and C-698/15](#).

¹² ECJ judgments: of 17 January 2019, *Dzivev*, [Case C-310/16](#); of 25 July 2018, *Celmer*, [Case C-216/18 PPU](#); of 25 July 2018, *ML*, [Case C-220/18 PPU](#).

¹³ *Commission v Poland (retirement age of ordinary judges)*, paras. 101-104; *ASJP*, para. 29.

¹⁴ Spaventa, *The interpretation...*, p. 30. In a similar vein, see: Council of the European Union, Opinion of the Legal Service, [Commission's Communication on a new EU Framework to strengthen the Rule of Law: compatibility with the Treaties](#), 10296/14, 27 May 2014, para. 17. The Council's Legal Service adopted a similar position in relation to the [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, presented by the Commission in May 2018. Although the complete text of the opinion was not published, an analysis can be found in: K. L. Scheppele, L. Pech and R. D. Kelemen, [Never Missing an Opportunity to Miss an Opportunity: The Council Legal Service Opinion on the Commission's EU budget-related rule of law mechanism](#), *Verfassungsblog*, 12 November 2018. For details on the proposal and controversies concerning its legal basis, see below, Section 5.4.

¹⁵ Council of the European Union, Opinion of the Legal Service, [Commission's Communication...](#), para. 24.

¹⁶ Editorial comments, 'Safeguarding EU values in the Member States- Is something finally happening?', *CMLR* 52/2015, pp. 621-622; Carlos Closa, Dimitry Kochenov and Joseph HH Weiler, 'Reinforcing Rule of Law Oversight in the European Union', *EUI WP, RSCAS* 2014/25, pp. 7-13; Scheppele, Pech and Kelemen, 'Never missing...'

to 260 TFEU) or preliminary references (Article 267 TFEU). Furthermore, there is no *lex generalis* – *lex specialis* relationship between Articles 258 to 260, and 267 TFEU, on one hand, and Article 7 TEU, on the other, as they regulate fundamentally different types of procedure, namely direct 'legal routes before' the ECJ as opposed to 'political' ones, as Advocate General Tanchev pointed out in his opinion in the Polish Supreme Court judges case.¹⁷ In addition, none of the abovementioned provisions prevent EU institutions from creating new mechanisms strengthening oversight and scrutiny of Member States' potential breaches of EU values.

On this basis, European Union institutions have created a wide array of mechanisms aiming to monitor, prevent or enforce EU values within Member States in recent years and, as already explained, the ECJ itself has referred directly to Article 2 TEU, together with other Treaty provisions, in various cases (See Annex, Table 1), thus **demonstrating different ways of operationalising and enforcing EU values outside the procedures provided for under Article 7 TEU** and reinforcing the position of those who claim that those mechanisms are not the only ones EU institutions may use to protect the founding values of the Union.

However, further questions arise relating to **scope**, i.e. the types of cases of non-compliance with common values the EU institutions should respond to, and to **procedure**, i.e. the design of the mechanisms the EU should use to prevent and/or sanction violations of those values. What types of breaches of common values should be addressed by the EU institutions – only systemic and persistent ones (within the meaning of Article 7 TEU) or also individual ones? Which procedures should be used to address those breaches? When it comes to **effectiveness**, what type of response to those breaches works best in terms of achieving its declared objectives – legal or political, monitoring, or preventive or sanctions action – or should there always be a multi-faceted answer? With those questions in mind, the present study aims to analyse current and envisaged EU mechanisms to monitor, prevent and enforce common values as regards Member States (see Table 1 below for an initial overview). After a brief discussion of the content of the different values enshrined in Article 2 TEU (Section 2), Section 3 focuses on already existing monitoring and preventive mechanisms, whereas Section 4 pays attention to existing enforcement and sanctions mechanisms for common values. The scope and the procedural aspects defining the mechanisms are analysed together with their actual application as regards Member States and their outcomes. Lastly, Section 5 focuses on recent mechanisms or proposals envisaged to reinforce the existing EU tools to monitor, prevent or impose sanctions on Member States suspected of departing from these EU values.

¹⁷ [Opinion of AG Tanchev](#) in Case C-619/18, para 50.

Table 1– EU mechanisms to monitor, prevent and enforce EU values within Member States

Name of mechanism	Legal basis	Actor triggering the procedure	Scope of application	Decision-maker	Effects
European Semester	121, 148 TFEU	Commission	Fiscal, macro-economic and employment policy of the Member State	Council acting by qualified majority	Country-specific recommendations (CSRs). Lack of compliance with certain CSRs relating to fiscal and macro-economic policy can lead to sanctions, including fines
EU Justice Scoreboard	n/a	Commission	Civil, commercial and administrative justice in the Member State	Commission	Indicators for the efficiency, quality and independence of justice systems; feeds into the European Semester CSRs
Commission rule of law framework	n/a	Commission	'Systemic threat to the rule of law' in a Member State	Commission	Non-binding recommendations
Council's rule of law dialogues	n/a	Council	'Rule of law in the framework of the Treaties'	Council	n/a
Article 7 (1) TEU (preventive arm)	Article 7(1) TEU	Commission, Parliament or 1/3 of Member States	'Clear risk of serious breach' of EU values by a Member State	Council (majority of 4/5) after obtaining the consent of Parliament (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 to that Member State
Preliminary references	Article 267 TFEU	National courts	Doubts, harboured by a national court, concerning the interpretation of any rule of EU law or the validity of an act of secondary EU law	Court of Justice	Legally binding interpretation of EU law, empowering national courts to set aside non-compliant national legislation, possibly interim measures (Article 279 TFEU)
Infringement proceedings	Article 258-260 TFEU	Commission/ another MS	Failure to fulfil an obligation under the Treaties by a Member State	Court of Justice	Legally binding determination of breach of EU law, possibly interim measures (Article 279 TFEU) and financial penalties (Article 260 TFEU)
Article 7(2)-(3) TEU (sanctions mechanism)	Article 7(2)-(3) TEU	Commission or 1/3 of Member States	'Serious and persistent breach' of EU values by a Member State	Step 1: European Council (unanimity) after obtaining the consent of Parliament (2/3 of votes cast, representing the majority of MEPs)	Declaration that there is a 'serious and persistent breach' of EU values by the Member State concerned
				Step 2: Council by reinforced qualified majority (72 % of the Member States representing at least 65 % of the EU's population)	Suspension of certain rights deriving from the application of the Treaties, including voting rights of the Member State concerned in the Council

New or proposed mechanisms					
EU pact on democracy, the rule of law and respect for fundamental rights (DRF)	295 TFEU (interinstitutional agreement)	Panel of independent experts drafts DRF report	Before a threat of a serious breach of EU values occurs, detecting such situations and providing a proper follow-up	Commission (adopts DRF report), European Parliament resolution and Council conclusions	Commission to undertake further monitoring and/ or activate additional procedures (e.g. infringement proceedings and/or Article 7 (1), (2))
Commission rule of law review cycle	Article 17 (1) TEU Commission = guardian of the Treaties	Commission	Addressing threats to the rule of law before a formal response is required	Commission adopts rule of law report	Interparliamentary debates within the European Parliament and discussions within Council
Rule of law conditionality	Article 322(1)(a) TFEU	Commission	Widespread or recurrent deficiency of the rule of law potentially affecting EU financial interests or sound financial management	Council may veto Commission's proposal by a qualified majority vote (QMV) within one month (Parliament's first reading resolution: also Parliament can veto by majority of votes cast	Suspension of payments or the implementation of the legal commitment; termination of the legal commitment; prohibition on entering into new legal commitments; suspension of the approval of one or more programmes or amendment of those programmes; suspension of commitments; reduction of commitments, including through financial corrections or transfers to other spending programmes; reduction of pre-financing; interruption of payment deadlines; suspension of payments

Source: prepared by the authors.

2. The European Union as a community of values



Any analysis of the various mechanisms established by the European Union to monitor, prevent and enforce EU values within the Member States must be preceded by a discussion on the content of Article 2 TEU, the Treaty provision laying down the founding values of the European Union. Adopting the same wording as **Article I(2) of the Treaty establishing a Constitution for Europe**, the provision builds on previous attempts to identify the constitutional core of the European Union through a common set of values that applies both to the European Union and to its Member States.¹⁸ **Article F(1) of the Treaty of Maastricht** already required the Member States to have a democratic system of government, while recognising, at the same

time, that the European Union should respect their national identities. The **Treaty of Amsterdam** went a step further incorporating a list of founding '**principles**', common to the Member States, that included 'liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law' ([Article 6 \(1\) TEU](#)). The **Lisbon Treaty re-termed** what were previously referred to as EU founding principles as EU fundamental **values** and added to their list human dignity, equality and a specific reference to the rights of persons belonging to minorities (Article 2 TEU). At the same time, the explicit obligation of the EU to respect Member States 'national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government' was maintained ([Article 4 \(2\) TEU](#)).

The modification introduced by the Lisbon Treaty, **transforming founding 'principles' into 'values'**, has prompted some discussion as regards the legal significance of such a change. Some academics claim that the change in the terminology used by the Treaties should not be accorded any normative content, and the 'values' mentioned in Article 2 TEU should be simply understood as legally binding principles.¹⁹ Although the use of the notion of 'value' in Article 2 TEU seems to be deliberate and correspond to the use of the same notion in Article 7 TEU, suggesting that the drafters of the treaties attached some legal consequences to that modification, it should be noted that **some other Treaty provisions refer to the same core elements as 'principles'**. In this vein and without aiming to be exhaustive, it should be pointed out that the Preamble to the TEU refers to liberty, democracy, fundamental rights and the rule of law as principles; Article 6 TEU refers to fundamental rights as principles of EU law; Article 9 TEU to the 'principle' of equality and Article 21 TEU to the 'principles' of democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, equality and solidarity that should guide the EU's external action. Similarly, the Preamble to the Charter of Fundamental Rights characterises democracy and the rule of law as 'principles' while referring to human dignity,

¹⁸ See for instance Heads of State or Government of the European Community's nine Member States, Declaration on Europe's Identity, on 14 December 1974, Bulletin of the European Communities No 12, 1973. For more details relating to the history of this provision, see S. Mangiameli, 'Article 2. The homogeneity clause' in H.-J. Blanke and S. Mangiameli (eds.), *The Treaty on the European Union (TEU). A commentary*, Springer, 2013, pp. 109-115.

¹⁹ 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', ECLR, Vol. 6, 2010, p. 366; 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 (eds.), *The Enforcement of EU Law....*, pp. 9-10.

freedom, equality and solidarity as 'values'; Article 14 of the Charter refers to 'democratic principles'; Article 23 to the 'principle' of equality and Article 49 to the principle of legality and proportionality of criminal offences and penalties. In addition, it should be pointed out that the ECJ has yet to explain what are the possible legal differences between 'principles' and 'values' and refers to the elements in Article 2 TEU characterising them sometimes as 'principles'²⁰ and sometimes as 'values'.²¹ Such a lack of consistency questions whether the treaty drafters, first, and the ECJ, now, attach some legal significance to the rewording of principles into values introduced by the Lisbon Treaty.

Table 2 – Main references to values/principles in the Treaties

Treaty of Maastricht	Treaty of Amsterdam	Treaty of Lisbon
<p>Article F TEU:</p> <p>'1. The Union shall respect the national identities of its Member States, whose systems of government are founded on the principles of democracy.</p> <p>2. The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law.'</p>	<p>Article 6 TEU:</p> <p>'1. The Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States.</p> <p>(...) 3. The Union shall respect the national identities of its Member States.'</p>	<p>Article 2 TEU:</p> <p>'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.'</p> <p>Article 4 TEU:</p> <p>'(...) 2. The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. It shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security. In particular, national security remains the sole responsibility of each Member State.</p> <p>3. Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties. (...)'</p> <p>(Similar to Articles I-2 and I-5 of the Treaty establishing a Constitution for Europe)</p>

In a similar vein, it should be pointed out that the understanding and legal consequences attached to the concept of values and to that of principles is not an unproblematic issue. Some academics define values as extra-legal concepts, aspirational ideals pertaining more to the moral or ethical

²⁰ See for instance GC judgment of 26 November 2018, *Schindler*, [T-458/17](#), para. 70, referring to the principle of democracy: 'Regarding the allegations of infringement of the *principle of democracy*, which is set out, inter alia, in the preamble to the EU Treaty, in *Article 2 TEU* and in the preamble to the [CFR], it cannot validly be argued that the action should be found to be admissible on the basis that the contested decision was made in breach of the *principle of democracy*'.

²¹ See for instance *Junqueras Vies*, para. 63, referring to the value of democracy: 'As regards the context, it should be borne in mind, first, that Article 10(1) TEU provides that the functioning of the Union is to be founded on the principle of representative democracy, which gives concrete form to the value of democracy referred to in *Article 2 TEU*'.

world than to the legal one, whereas principles would be characterised by their normative nature.²² Some others question such a clear difference, showing how both terms are sometimes used interchangeably and, therefore, do not deprive values of all possible legal effects.²³ Although the limited scope of the present study prevents us from engaging into an in-depth discussion on differences between the two terms in law and from extracting definitive conclusions on whether the founding elements in Article 2 TEU are to be considered principles or values and what legal consequences should be attached to such characterisation, it is relevant to highlight again that the **ECJ** considers those elements to be **legally binding** and has **concretised their scope** referring to some other Treaty and/or secondary law provisions (see Introduction). However, it is to be noted that those values seem to operate in a different way from some other Treaty provisions, in line with the differences pointed out by academics between 'black-letter rules'²⁴ and principles. The core elements in Article 2 TEU do not seem to be applicable 'in an all-or-nothing fashion',²⁵ but require a weighting and balancing exercise, sometimes between conflicting or interacting elements, as the ECJ case law seems to indicate (e.g. conflicts between different fundamental rights²⁶ or between fundamental rights and the fight against corruption, one of the core elements of the rule of law, as indicated by the ECJ).²⁷

In this sense, the question that arises is how to determine the scope of the obligations that Article 2 TEU imposes on Member States. Some academics assimilate Article 2 TEU to the '**homogeneity clauses**' through which federal constitutions²⁸ assert their supremacy over those of federal entities and delimit their content through common overarching principles.²⁹ According to this reading, Article 2 TEU would not require uniformity as regards the Member States' constitutional structures, but it would impose a common set of standards that would apply both vertically, between the EU level and the Member States level, and horizontally, among the Member States themselves. Other academics contend the possible characterisation of Article 2 TEU as a 'homogeneity clause', pointing out that Member States' constitutional structures differ substantially and that Article 4(2) TEU recognises this diversity, imposing on the EU the obligation to respect the Member States' identities

²² Mangiameli, 'Article 2...', p. 115-119; W. Schroeder, 'The European Union and the Rule of Law – State of Affairs and Ways of Strengthening', in W. Schroeder (ed.), *Strengthening the Rule of Law in Europe: From a Common Concept to Mechanisms of Implementation*, Hart, 2016, pp. 12-14.

²³ G. J. Jacobsohn, 'Constitutional Values and Principles' in M. Rosenfeld and A. Sajó (eds.), *The Oxford Handbook of Comparative Constitutional Law*, OUP, 2012, pp. 777-791.

²⁴ R. Dworkin, *Taking Rights Seriously*, Harvard University Press, 1978, p. 46. Dworkin famously distinguished rules from principles indicating that 'rules are applicable in an all-or-nothing fashion', whereas principles 'state a reason that argue in one direction, but do not necessitate a particular decision' (*ibid.*, p. 25-26). Furthermore, he explained that principles 'conflict and interact with one another, so that each principle that is relevant to a particular legal problem provides a reason arguing in favour of, but does not stipulate, a particular solution', a judge applying principles to a case must 'assess all of the competing and conflicting principles that bear upon it, and to make a resolution of these principles rather than identifying one among other as a 'valid' (*ibid.*, p. 72). R. Alexy (*A Theory of Constitutional Rights*, OUP 2002) has also famously distinguished rules from principles: contesting Dworkin's distinguishing criterion, Alexy considered rules as norms that can only be either fulfilled or not fulfilled, whereas principles would be considered 'optimisation commands', that can be fulfilled to varying degrees and would require that their content be realised to the highest degree possible.

²⁵ Dworkin, *Taking...*, p. 25-26.

²⁶ See for instance *Tele2 Sverige*, especially paras. 92-94, on a conflict between freedom of expression and the right to privacy and the protection of personal data.

²⁷ See for instance GC judgment of 15 September 2016, *Yanukovych*, [T-346/14](#), on a conflict between the fight against corruption and several fundamental rights of the persons affected by the measures adopted to fight it (mainly, rights of the defence, right to property, and right to effective judicial protection).

²⁸ See Article 28 of the German Basic Law or Article 51 of the Swiss Constitution.

²⁹ Mangiameli, 'Article 2...', pp. 139-145.

as expressed in their fundamental political and constitutional structures.³⁰ In this reading, Article 2 TEU would allow Member States to organise themselves through rather **heterogeneous constitutional designs**, while requiring them to comply with **common minimum standards**,³¹ with 'red lines' that they would not be allowed to cross.³² Without dwelling on those interpretations of Article 2 TEU, the ECJ has defined EU law as a '(...) structured network of principles, rules and mutually interdependent legal relations linking the EU and its Member States, and its Member States with each other (...)', stressing that this legal structure is based on the premise that Member States share Article 2 TEU values.³³ Those values do not seem to impose concrete constitutional or institutional structures on Member States in their areas of competence, as it can be inferred from the ECJ case law,³⁴ but require Member States to comply with certain standards in relation to each of them. Although the specific meaning and scope of each of the values enshrined in Article 2 TEU and the obligations they impose on Member States is not an unproblematic issue, the ECJ case law has sometimes helped to concretise and operationalise them, as we will see below.

Human dignity is the first foundational value of the EU under current Article 2 TEU, although it was not originally on the list of EU foundational principles set out in the Treaty of Amsterdam. Even if there is general agreement on the relevance of human dignity for modern constitutionalism and theories on human rights, this concept is also considered elusive, as its exact meaning depends on our conception of human beings and their relationship to society. Inspired by different moral, philosophical and religious traditions,³⁵ the concept of human dignity leans on the **uniqueness of every human being** and emphasises the **intrinsic worth of all individuals** regardless of whether they belong to specific societal groups or possess certain characteristics. It places human beings at the very centre of societal life and public decisions and requires other individuals and public authorities to acknowledge their inherent worth.³⁶ On this basis, some conceptions of human dignity have drawn a clear line between human dignity and the capacity of men and women for rational thinking, thus stressing the link between dignity and autonomy. In this vein, human beings should be recognised a space for self-determination and self-fulfilment free from any interference. Other conceptions of human dignity have adopted a more communitarian approach, focusing on the material or social conditions that are required to be able to make autonomous choices and that would dignify human existence. And, some others seem to stress the relational component of human dignity associating it with recognition and respect from others and the State, irrespective of the particularities of each human being.³⁷

³⁰ von Bogdandy, 'Founding Principles...', pp. 40-42; Schroeder, 'The European Union...', pp. 9-11.

³¹ Schroeder, 'The European Union...', pp. 9-11.

³² A. von Bogdandy, [Fundamentals on Defending European Values](#), *Verfassungsblog*, 12 November 2019. For a critique see R. D. Kelemen, T. Pavone and C. Emmons, [The Perils of Passivity in the Rule of Law Crisis: A Response to von Bogdandy](#), *Verfassungsblog*, 26 November 2019.

³³ [Opinion 2/13](#), para. 167.

³⁴ *Commission v Poland (retirement age of ordinary judges)*, para. 52: ' (...) as the Republic of Poland and Hungary point out, the organisation of justice in the Member States falls within the competence of those Member States, the fact remains that, when exercising that competence, the Member States are required to comply with their obligations deriving from EU law. (...) '.

³⁵ C. McCrudden, 'Human dignity and judicial interpretation of human rights', *EJIL*, Vol.19(4), 2008, pp. 656-665.

³⁶ See C. Dupré, 'Human dignity in Europe: A Foundational Constitutional Principle', *European Public Law*, Vol. 19(2), 2013, pp. 319-340; C. O'Mahoney, 'There is no such a thing as a right to dignity', *IJCL*, Vol. 10(2), 2012, p. 555; McCrudden, 'Human dignity...', pp. 675-681.

³⁷ For a discussion on the different conceptions of human dignity, see C. McCrudden (ed), *Understanding Human Dignity*, British Academy, 2014; N. Rao, 'Three concepts of dignity in Constitutional Law', *Notre Dame Law Review*, Vol. 86, 2011, p. 183-272; McCrudden, 'Human dignity...', pp. 681-710.

As far as EU law is concerned, **human dignity** is to be understood as a **value** of foundational importance for the EU, but also as a **fundamental right** and the **cornerstone of all rights** enshrined in the Charter of fundamental Rights of the EU ('CFR' or 'Charter'),³⁸ as derived from Article 2 TEU, and the Preamble and Article 1 of the Charter (including the explanations to that provision of the Charter).³⁹ The wording of Article 1 of the Charter does not help much to determine the conception of human dignity that EU law embraces, as it limits itself to recognising the inviolability of human dignity and to acknowledging that it shall be respected and protected. Other references to human dignity in the Charter, namely in relation to the rights of elderly people (Article 25) and to fair and just working conditions (Article 31), seem to draw upon a conception of human dignity that attaches relevance to the material or social conditions that dignify human existence, making autonomous choices possible. Similarly, the case law of the ECJ that links human dignity to decent reception conditions for asylum seekers,⁴⁰ to the material conditions of detention in Member States,⁴¹ to benefits covering minimum subsistence costs⁴² or that justifies the restriction of certain fundamental rights to address individual behaviours that are understood as detrimental to human dignity (sexual harassment),⁴³ lean on the same conception of human dignity. However, the case law of the ECJ also provides examples of the use of human dignity in the context of biotechnological innovations⁴⁴ and, therefore, with the aim to protect individuals from being instrumentalised, and in the context of cases of discrimination,⁴⁵ thus drawing upon conceptions of dignity that attach relevance to recognition and respect for every individual regardless of his or her personal characteristics and choices. Even if the ECJ seems to have a wide understanding of human dignity, it has implicitly acknowledged that Member States do not share the same conception of dignity as regards the exact way in which it has to be protected,⁴⁶ thus posing the question of the standard of protection of human dignity that the EU imposes upon the Member States under Article 2 TEU.

Freedom is the second EU foundational principle enshrined in Article 2 TEU. Again, a thorough analysis of the content of the concept of freedom is far beyond the scope of this paper, as differing conceptions of freedom have been put forward by philosophers,⁴⁷ with some accounts being

³⁸ [OJ C 326, 26.10.2012](#), p. 391–407.

³⁹ C. Dupré, 'Article 1' in S. Peers, T. Herve, J. Kenner (eds.), *EU Charter of Fundamental Rights: A Commentary*, Bloomsbury, 2014, pp. 6–8.

⁴⁰ ECJ (grand chamber) judgment of 12 November 2019, *Haqbin*, C-233/18, para. 46 (unaccompanied minor); ECJ (grand chamber) judgment of 19 March 2019, *Bashar Ibrahim*, Joined Cases C-297/17, C-318/17, C-319/17 and C-438/17, para. 90; ECJ (grand chamber) judgment of 19 March 2019, *Abubacarr Jawo*, C-163/17, para. 90.

⁴¹ ECJ judgment of 25 July 2018, *ML*, C-220/18 PPU, para. 90; ECJ judgment of 15 October 2018, *Dorobantu*, C-128/18, paras. 60–62; ECJ (grand chamber) judgment of 5 April 2016, *Aranyosi and Căldăraru*, Joined Cases C-404/15 and C-659/15 PPU, paras. 85–90.

⁴² ECJ (grand chamber) judgment of 15 September 2015, *Alimanović*, C-67/14, para. 45.

⁴³ ECJ judgment of 4 April 2019, *OZ v European Investment Bank*, Case C-558/17 P, para. 66.

⁴⁴ ECJ judgment of 9 October 2001, *Netherlands v Parliament and Council*, [Case C-377/98](#), paras. 69–81; ECJ (grand chamber) judgment of 18 October 2011, *Brüstle*, [Case C-34/10](#), paras. 32–34.

⁴⁵ ECJ judgment of 30 April 1996, *P v S and Cornwall County Council*, [Case C-13/94](#), para. 22 (sexual identity); ECJ judgment of 2 December 2014, *A., B. and C. v Staatssecretaris van Veiligheid en Justitië*, Joined Cases C-148/13 to C-150/13, para. 65 (sexual orientation). References to human dignity can also be found in the Advocate General's Opinion concerning cases of gender discrimination: Joined Opinion of Advocate General Cosmas, 8 October 1998, *Deutsche Telekom v Schröder*, [Case C-50/96](#), par. 80.

⁴⁶ ECJ judgment of 14 October 2004, *Omega*, [Case C-36/02](#), para. 37.

⁴⁷ For a wider understanding of this concept, see for instance P. Pettit, 'The Instability of Freedom as Non-interference: The Case of Isaiah Berlin', *Ethics*, Vol. 121, 2011, pp. 693–716; Q. Skinner, 'A Third Concept of Liberty', *Proceedings of the British Academy*, Vol. 117, 2002, pp. 237–268; M. Kramer, *The Quality of Freedom*, OUP, 2003; I. Carter, *A Measure of Freedom*, OUP, 1999.

particularly influential in political theory. That would be the case of the well-known Benjamin Constant's dual characterisation of freedom as 'that of the moderns', linked to the recognition of certain fundamental rights (freedom of thought, conscience, religion, rights to property and privacy), and 'that of the ancients', identified with the active and constant participation of individuals in the government of their community.⁴⁸ The also well-known Rousseauian differentiation between 'natural liberty', understood as the unlimited right of individuals to take anything they want to and they can attain, and 'moral liberty', understood as obedience to a law that one prescribes to one-self.⁴⁹ Or the differentiation between negative and positive freedom made famous by Isaiah Berlin, who linked negative liberty to non-interference and the protection of a private sphere from external interferences for every individual, and positive liberty to self-mastery and self-governance.⁵⁰

As far as EU law is concerned, the principle of freedom enshrined in Article 2 TEU could be operationalised by referring to the content of the various **freedoms enshrined in the Charter**, in particular those recognised under Title II (*Freedoms*). The scope of those freedoms has, in some cases, been widely elaborated by the ECJ,⁵¹ which has sometimes referred to some of them in relation to Article 2 TEU values.⁵² However, the scarce references made by the ECJ to the concept of 'freedom' as such suggest a possible broader meaning. References to 'freedom' together with the value of human dignity in cases on gender reassignment seem to lean on a concept of 'freedom' linked to every individual's **autonomy** or free personal development.⁵³ As these cases focus on discrimination based on gender identity, they also seem to reinforce the link between freedom and equality, stressing how the EU understanding of freedom requires its **equal recognition for all individuals**.⁵⁴ Similarly, references to this concept together with democracy seem to draw on conceptions of freedom as self-governance.⁵⁵ However, taking into account the scarcity of ECJ case law relating to this value alone, more clarifications would be needed in order to ascertain whether its content can be distinguished from the content of the various 'freedoms' recognised in the EU Charter.

If human dignity and freedom are complex concepts, the third foundational principle enshrined in Article 2 TEU, **democracy**, also lacks a concrete definition in the Treaties, although the Treaty of Maastricht already indicated that Member States' systems of government had to be democratic (Article F(1) TEU). Democratic institutional designs are constantly evolving and it seems difficult to identify all the possible components of the concept of democracy, apart from the general ideal identifying democratic institutional designs with the rule of the people, that is to say, with a **form of government in which the supreme power is vested in the people**. The origins of democracy are usually traced back to the form of government of the ancient *polis* of Athens, in which citizens participated directly in the public decision-making process giving life to the democratic ideal of 'rule

⁴⁸ B. Constant, 'De la liberté des anciens comparée à celle des modernes' in idem, *Écrits Politiques*, Gallimard, 1997 (speech given in 1819).

⁴⁹ J.-J. Rousseau, *Du contrat social ou Principes du droit politique*, GF Flammarion, 2001 (first published in 1762).

⁵⁰ I. Berlin, *Two Concepts of Liberty*, in *Four Essays on Liberty*, OUP, 1969.

⁵¹ See for instance commentaries on Articles 6 to 19 of the Charter of Fundamental Rights in Peers, Hervey, and Kenner (eds.), *EU Charter...*, *op. cit.*

⁵² See for instance *Tele2 Sverige*, para. 93, linking freedom of expression to the concept of democracy.

⁵³ *P v S and Cornwall County Council*, para. 22.

⁵⁴ In a similar vein, von Bogdandy, 'Founding Principles...', pp. 43-44.

⁵⁵ ECJ (full court) judgment of 10 December 2018, *Wightman*, [C-621/18](#), para. 62.

by the people'.⁵⁶ Current forms of representative democracies draw upon republican ideals of moderate and stable forms of government, producing democratic institutional designs that are legitimised through people's consent as expressed in **regular, fair and free elections**.⁵⁷ Representative democracies can adopt many institutional designs, but the substitution of the people by their elected representatives for the adoption of everyday public decisions and the existence of a series of checks that preserve pluralism and guarantee the interplay between majority and minorities, thus allowing citizens to make a truly free choice when electing those representatives, are features common to all of them.⁵⁸ Apart from the existence of different models of representative democracies, it is important to highlight that **new theories on democracy** are proposing a critical reading of the assumptions on which representative democracy is based, thus suggesting different ways to improve representative institutions. Without attempting to be exhaustive, the present study posits that participatory democracy has advocated for extending citizens' participation beyond elections and offering them other possibilities to determine the content of public decisions.⁵⁹ On a different strand, theories of deliberative democracy focus on the process that leads to the adoption of public decisions and suggest giving deliberation a central place in that process in order to revitalise democracy.⁶⁰

As far as EU law is concerned and setting aside discussions on the Union's so-called 'democratic deficit',⁶¹ it is to be noted that the European Union has clearly adopted a model of **representative democracy**, as recognised under Article 10 (2) TEU and acknowledged by the ECJ.⁶² The Union also recognises a series of democratic principles under Title II TEU as well as relevant fundamental rights that guarantee the EU citizen's right to participate in the democratic life of the Union through various means, including European elections, municipal elections in their place of residence and European citizens' initiatives, for instance (Title V CFR, in particular Articles 39 and 40, and Part II TFEU, in particular Articles 22 and 24). The European Parliament legitimises the exercise of public power by the EU, embodying the ideal of a 'government with the consent of the people', as it is

Democratic principles under Title II TEU

Title II TEU is dedicated to the democratic principles on which the EU is based. Article 10 TEU, included in that Title, affirms:

'1. The functioning of the Union shall be founded on representative democracy.

2. Citizens are directly represented at Union level in the European Parliament.

Member States are represented in the European Council by their Heads of State or Government and in the Council by their governments, themselves democratically accountable either to their national Parliaments, or to their citizens.

3. Every citizen shall have the right to participate in the democratic life of the Union. Decisions shall be taken as openly and as closely as possible to the citizen.

4. Political parties at European level contribute to forming European political awareness and to expressing the will of citizens of the Union.'

⁵⁶ B. Manin, *The principles of representative government*, CUP, 1997, pp. 8-42.

⁵⁷ *Ibid.*, pp. 42-93.

⁵⁸ G. Frankenberg, 'Democracy' in M. Rosenfeld and A. Sajó (eds.), *The Oxford Handbook of Comparative Constitutional Law*, OUP, 2012, pp. 254-255.

⁵⁹ See for instance B. de Sousa Santos (ed.), *Democratizar la democracia. Los caminos de la democracia participativa*, Fondo de Cultura Económica, 2005.

⁶⁰ See for instance J. Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*, Polity Press, 1997.

⁶¹ See for instance K. Laenaerts, 'The principle of democracy in the case law of the European Court of Justice', *ICLQ*, Vol. 62, 2013, pp. 271-315.

⁶² *Junqueras Vies*, para. 63.

elected by the citizens of the EU in regular elections based on universal, free, secret and direct suffrage (Article 1 of the Act concerning the election of the members of the European Parliament by direct universal suffrage).

However, the European Union is based on a **dual legitimacy** that draws not only upon the consent of **EU citizens**, as expressed in European elections, but also on the **will of its democratic Member States**, as expressed mainly in the Council and the European Council.⁶³ In this vein, Article 10 (2) TEU also refers to the European Council, prescribing that their component members, that is to say, the Heads of State or Government of each Member States, are 'democratically accountable either to their national Parliaments, or to their citizens.' This assertion gives a concrete meaning to the general pledge to uphold democracy contained in Article 2 TEU as far as Member States' institutional structures are concerned. Although Member States may make different choices as regards the model of government they implement in the national arena, it seems that the **periodic holding of free and fair elections** to appoint those who are to hold public office is a **minimum requirement** that they need to comply with. However, it is to be noted that the EU Treaties and the ECJ case law link the concept of democracy to some other requirements, at least as regards the Union's institutional choices (including, for example, respect for the European Parliament's prerogatives and independence, for MEPs' prerogatives and immunities, for direct means of participation of citizens in the public arena, or the principle of transparency).⁶⁴ Thus, the question that arises is whether those components (or some of them) would also apply to the Member States under Article 2 TEU.

Equality is one of the EU values that were absent from the list of founding principles enshrined in former Article 6 TEU (Treaty of Amsterdam) and that were introduced in current Article 2 TEU by the Treaty of Lisbon. Considered as a complex and dynamic concept, the philosophical foundations of equality can be also traced back to ancient Greece, where Aristotle famously provided a definition of the concept by affirming that 'things that are alike should be treated alike'.⁶⁵ Modern accounts of equality tend to distinguish between formal equality, forbidding any arbitrary differential treatment among those in a comparable situation (**equality of treatment**), and more substantive approaches that focus on existent inequalities and propose to overcome them by guaranteeing **equality of results** or **equality of opportunities** among different societal groups.⁶⁶ Many international treaties on human rights enshrine the rights to equality and non-discrimination, often including a non-exhaustive list of prohibited grounds of discrimination linked to well-known causes of social and historical stigmatisation (e.g. sex, race, language, religion, political or other opinion, national or social origin, property or birth).⁶⁷

The principle of equality and the prohibition of discrimination is deeply rooted in EU law, both primary and secondary, and in ECJ case law. The **founding Treaties** already prohibited

⁶³ A. von Bogdandy, [The European Lesson for International Democracy. The Significance of Articles 9 to 12 EU Treaty for International Organizations](#), *NYU School of Law JMWP*, Vol. 2(11), especially pp. 9-12.

⁶⁴ For a detailed analysis of the ECJ case law, see Lanaerts, 'The principle...', pp. 271-315.

⁶⁵ Aristotle, *The Politics*, Book III, CUP, 1988.

⁶⁶ S. Fredman, *Discrimination Law*, OUP, 2011, pp. 4-33; J. Clifford, 'Equality' in D. Shelton (ed), *The Oxford Handbook of International Human Rights Law*, OUP, 2013, pp. 420-445.

⁶⁷ See for instance Article 7 of the Universal Declaration of Human Rights, Article 26 of the International Covenant on Civil and Political Rights, Article 2 (2) of the International Covenant on Economic, Social and Cultural Rights, Article 14 of the European Convention on Human Rights, and Protocol 12 to the European Convention on Human Rights. For an analysis of these provisions see, for instance, D. Shiek, L. Waddington and M. Bell, *Cases, Materials and Texts on National, Supranational and International Non-discrimination Law*, Hart, 2007; O. M. Arnardóttir, *Equality and non-discrimination under the European Convention on Human Rights*, Martinus Nijhoff, 2003.

discrimination on the basis of nationality (Article 7 TEEC) and among male and female workers as regards remunerations and employment (Article 119 TEEC). Subsequent Treaty amendments and EU secondary law have enriched the corpus of EU law dedicated to equality and non-discrimination,⁶⁸ while the **ECJ has made the principle of equality one of the fundamental principles of EU law**⁶⁹ and developed a substantial case law proscribing direct and indirect discrimination⁷⁰ and allowing differential treatments if intended to eliminate or reduce actual instances of inequality that may exist in society.⁷¹ The current Treaties consider **equality not only to be an EU value** (Article 2 TEU), but also an **objective** of the Union (Article 3 TEU) and a **fundamental right**. In this vein, the CFR dedicates its Title III (*Equality*) to the right to equality before the law (Article 20), non-discrimination (Article 21), respect for cultural, religious and linguistic diversity (Article 22), equality between men and women (Article 23), and the rights of children (Article 24), the elderly (Article 25) and persons with disabilities (Article 26). Although it is far beyond the scope of this study to analyse in depth the extensive ECJ case law on equality and non-discrimination and the abovementioned EU law provisions, it should be noted that they are said to go **beyond formal conceptions of equality**, also embracing substantive equality dimensions,⁷² and that they can certainly serve as a basis to determine the obligations imposed on Member States under Article 2 TEU.

Article 2 TEU also enshrines the **rule of law** as one of the EU's foundational values. Commonly identified as an ideal seeking to **eradicate arbitrariness** by imposing legal limits upon governmental discretion, the rule of law is not an uncontentious legal concept. **Formal or 'thin' notions of the rule of law** tend to identify it with systems in which **public power is exercised by legal means** and in which law effectively constrains public authorities' discretion. Lon Luvois Fuller famously identified the different elements required for the law to constrain the exercise of public powers effectively: norms should be general, public, prospective and not retroactive, clear, non-contradictory, not requiring the impossible, stable over time, and applied congruently.⁷³ Joseph Raz made a similar account of the qualities norms should have in a legal system based on the rule of law, although he emphasised the need for independent judicial review of every act adopted by public authorities as one of the necessary features of a legal system based on the rule of law.⁷⁴ Substantive or 'thick' accounts add to formal and procedural elements other qualities identifying a legal order as based on the rule of law. Criticising formal conceptions for moral agnosticism that would permit authoritarian regimes to define themselves as systems based on the rule of law, **thick conceptions**

⁶⁸ For an in-depth analysis of these developments, see: L. S. Rossi and F. Casolari (eds), *The Principle of Equality in EU Law*, Springer, 2017; E. Ellis, *EU Anti-Discrimination Law*, OUP, 2005; M. Bell, *Anti-discrimination Law and the European Union*, OUP, 2002.

⁶⁹ See for instance ECJ judgments: of 19 November 1998, SFI, C-85/97; of 20 October 2005, *Commission v Portugal*, Case C-334/03. On this case law see, for instance, T. Tridimas, *The general principles of EU law*, OUP, 2006. pp. 59-136.

⁷⁰ See authors in note 67. Among others, see ECJ judgment of 17 July 2008, *S. Coleman v Attridge Law and Steve Law*, Case C-303/06 (direct discrimination); ECJ judgment of 23 May 1996, *O'Flynn v Adjudication Officer*, Case C-237/94 (indirect discrimination).

⁷¹ See authors in note 67. Among others, see ECJ judgment of 30 September 2010, *Roca Álvarez v Sesa Start España ETT SA*, Case C-104/09.

⁷² See, for instance, M. de Vos, 'The European Court of Justice and the march towards substantive equality in European Union anti-discrimination law', *International Journal of Discrimination and the Law*, Vol. 20(1), 2020, pp. 62-87; E. C. Cuenca, 'La Igualdad De Género en el Tribunal Europeo de Derechos Humanos: Un reconocimiento tardío con relación al Tribunal de Justicia de la Unión Europea', *Revista Española de Derecho Constitucional*, Vol. 104, 2015, pp. 297-328; C. McCrudden, 'The New Concept of Equality', *ERA-Forum*, Vol. 4(3), 2003, pp. 9-29.

⁷³ L. Luvois Fuller, *The Morality of Law*, Yale University Press, 1973.

⁷⁴ J. Raz, *The Authority of Law. Essays on Law and Morality*, OUP, 1979, pp. 214-218.

of the rule of law tend to focus on the content of the law and incorporate elements of substantive justice, linking the rule of law with democratic requirements and respect for fundamental rights.⁷⁵ However, as pointed out by several authors, a clear-cut distinction between both conceptions can seem difficult, as formal accounts of the rule of law usually have substantive connotations (e.g. requiring independent and effective judicial review of acts of authorities) and thick accounts do incorporate formal requirements.⁷⁶

As far as the European Union is concerned, some academics have pointed out that the fact that Article 2 TEU distinguishes the rule of law from some other foundational principles, such as democracy and respect for human rights, might lead to the conclusion that the EU has adopted a thin/formal conception of the rule of law.⁷⁷ Other academics contend that a correct reading of that provision and an analysis of ECJ case law strongly emphasises the **interdependency of all EU foundational values**, thus suggesting that all EU values should 'be construed in the light of each other'.⁷⁸ In this vein, it is to be noted that the ECJ has expressly featured the **EU as a 'community based on the rule of law'**⁷⁹ and has operationalised this concept through its case law⁸⁰ identifying it with the principles of **legality**,⁸¹ **legal certainty**,⁸² **prohibition of arbitrary exercise of power by the executive**,⁸³ **effective judicial review by independent and impartial judges**,⁸⁴ **including in the light of fundamental rights**⁸⁵ and the **principle of equality before the law**.⁸⁶ In identifying these core components of the rule of law, the ECJ seems to have paid particular attention to European Court of Human Rights case law and the work of the European Commission for Democracy through Law of the Council of Europe (Venice Commission), the latter having identified a non-exhaustive list of core components of the rule of law in a report on the rule of law adopted in 2011⁸⁷ and in its 2016 rule of law checklist.⁸⁸ The elements listed in the Venice Commission's report and checklist are virtually identical to those identified by the ECJ in its case law and do not seem to differ much from the definitions of the 'rule of law' adopted by the European Commission in its communications on the topic, although the communication adopted by the Commission in

⁷⁵ R. Dworkin, *A Matter of Principle*, Harvard University Press, 1985, pp. 11-18; E. Díaz García, *Estado de Derecho y sociedad democrática*, Taurus, 2010.

⁷⁶ P. Craig, 'Formal and substantive conceptions of the rule of law: an analytical framework', *Public Law* 1997, pp. 467-487; Brian Z. Tamanaha, *On the Rule of Law: History, Politics Theory*, Cambridge University Press 2004, p. 92; Laurent Pech, '[The Rule of Law as a Constitutional Principle of the European Union](#)', *NYU School of Law JMWP*, Vol. 4(9), p. 23.

⁷⁷ A. von Bogdandy and M. Ioannidis, 'Systemic deficiency in the rule of law: what it is, what had been done, what can be done?', *CMLR*, Vol. 51, 2014, p. 63.

⁷⁸ 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', *ECLR*, Vol. 6(3), 2010, p. 368.

⁷⁹ ECJ judgment of the Court of 23 April 1986, *Les Verts*, [294/83](#), esp.in particular para. 23.

⁸⁰ For an analysis of the ECJ case law on the rule of law, see J. Grogan and L. Pech, '[Meaning and Scope of the EU Rule of Law](#)', RECONNECT Working Paper Deliverable 7.2, June 2020.

⁸¹ *Dzivev*, para. 34.

⁸² GC judgment of 3 May 2016, *Post Bank Iran*, [T-68/14](#), par. 95.

⁸³ *Ibid.*, paras. 90-96.

⁸⁴ *ASJP*.

⁸⁵ ECJ (grand chamber) judgment of 3 September 2008, *Kadi*, [Joined Cases C-402/05 P and C-415/05 P](#), para. 316.

⁸⁶ ECJ judgment of 30 January 2019, *Stavytskyi*, [Case T-290/17](#), paras. 68, 72.

⁸⁷ Venice Commission, [Report on the rule of law](#), adopted by the Venice Commission at its 86th plenary session (Venice, 25-26 March 2011), CDL-AD(2011)003rev.

⁸⁸ Venice Commission, [Rule of law checklist](#), adopted by the Venice Commission at its 106th Plenary Session (Venice, 11-12 March 2016), CDL-AD (2016) 007.

April 2019 included a specific reference (not included in prior communications) to the principle of separation of powers.⁸⁹ Although neither the ECJ's case law nor the Venice Commission have identified the principle of separation of powers as one of the core elements of the rule of law, this principle can be partially identified with the requirement that judges be independent, which is to be found in the ECJ and Venice Commission accounts on the rule of law.

Table 3 – Non-exhaustive core elements of the rule of law

ECJ	Venice Commission	European Commission
<p>The case law of the Court of Justice and of the European Court of Human Rights, and the work of the Council of Europe, through the European Commission for Democracy through Law, provide a non-exhaustive list of principles and standards that may fall within the concept of the rule of law. That list includes the principles of: <i>legality</i>, <i>legal certainty</i> and the <i>prohibition on arbitrary exercise of power by the executive</i>; <i>independent and impartial courts</i>; <i>effective judicial review</i>, extending to respect for <i>fundamental rights</i>, and <i>equality before the law</i> (see, in that regard, the rule of law checklist adopted by the European Commission for Democracy through Law at its 106th plenary session (Venice, 11-12 March 2016).</p> <p>General Court, Judgment 15 September 2016, <i>Yanukovich v Council</i>, T-348/14, para. 99</p>	<p>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 (materieller Rechtsstaatsbegriff). These are: (1) <i>Legality</i>, including a transparent, accountable and democratic process for enacting law (2) <i>Legal certainty</i> (3) <i>Prohibition of arbitrariness</i> (4) <i>Access to justice before independent and impartial courts</i>, including judicial review of administrative acts (5) <i>Respect for human rights</i> (6) <i>Non-discrimination and equality before the law</i>.</p> <p>Venice Commission, Report on the rule of law, adopted by the Venice Commission at its 86th plenary session (Venice, 25-26 March 2011), para. 41.</p>	<p>The rule of law is enshrined in Article 2 of the Treaty on European Union as one of the founding values of the Union. 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 <i>legality</i>, implying a transparent, accountable, democratic and pluralistic process for enacting laws; <i>legal certainty</i>; <i>prohibiting the arbitrary exercise of executive power</i>; <i>effective judicial protection by independent and impartial courts</i>, <i>effective judicial review</i> including respect for fundamental rights; <i>separation of powers</i>; and <i>equality before the law</i> (...).</p> <p>Communication from the Commission to the European Parliament, the European Council and the Council Further strengthening the rule of law within the Union – State of play and possible next steps (COM(2019)163 final), p. 1</p>

Finally, Article 2 TEU recognises respect for **fundamental rights**, including the rights of persons belonging to minorities, as one of the founding values of the EU. Considering that fundamental rights have been recognised as general principles of EU law by the ECJ since the late 1960s⁹⁰ and that they acquired further visibility with the drafting of the CFR and its inclusion in the EU legal order with the same legal value as the Treaties (Article 6 (1) TEU), it comes as no surprise that the EU gives such a prominent role in its constitutional structure to the protection of fundamental rights. In this vein, the reference to fundamental rights made by Article 2 TEU can certainly be operationalised by reference to the provisions of the **Charter**. However, it should be noted that **Article 2 TEU** is commonly interpreted as **imposing obligations on Member States even in purely domestic**

⁸⁹ Commission communication: [Further strengthening the rule of law within the Union – State of play and possible next steps](#) (COM(2019)163 final), p. 1, and compare to Commission communication: [A new EU Framework to strengthen the Rule of Law](#), COM/2014/0158 final, p. 4

⁹⁰ ECJ judgment of 12 November 1969, *Stauder*, [29/69](#).

matters, whereas Articles 51 and 53 CFR were carefully drafted to limit the scope of application of the Charter to Member States when 'they are **implementing EU law**' (Article 51 CFR) and to ensure that nothing in the Charter restricted or adversely affected fundamental rights as enshrined in 'the Member States' constitutions', among other instruments (Article 53). The implications of those provisions as regards the balance between the EU and Member States' legal orders on fundamental rights issues is still a very much debated issue,⁹¹ and the case law of the ECJ on the two provisions has not ended the controversies surrounding their interpretation.⁹² Notwithstanding, the ECJ has indicated that the fundamental rights recognised by the Charter bind Member States 'in all situations governed by EU law',⁹³ but not in purely internal situations.⁹⁴ Therefore, the question that arises is whether the reference to fundamental rights included in Article 2 TEU would impose specific obligations on Member States even in situations purely governed by national law. In this vein, some authors have suggested interpreting **Article 2 TEU** as imposing on **Member States** an obligation **to respect** the '**essence of the fundamental rights**' enshrined in the Charter, in line with the concept already used by Article 52 (1) CFR and several Member States' constitutions to differentiate between the essential content of a right and additional or peripheral content.⁹⁵ This possibility has not yet been addressed by the ECJ, but the case law of the Court has frequently made references to the Charter together with Article 2 TEU (See Annex, Table 1), thus showing how the Charter concretises and operationalises the general reference to fundamental rights included in that provision.

⁹¹ Groussot, Pech and Pertursson, 'The Reach of EU Fundamental Rights on Member State Action after Lisbon' in de Vries, Bernitz and Weatherhill (eds), *The Protection of Fundamental Rights in the EU after Lisbon*, Hart 2013, pp. 97-118; P. Carozza, 'The Member States' in S. Peers and A. Ward (eds.), *The EU Charter of fundamental rights*, Hart, 2004, pp. 35-58; R. Alonso García, 'Las cláusulas horizontales de la Carta de derechos fundamentales de la Unión Europea' in E. García De Enterría and R. Alonso García (eds.), *La encrucijada constitucional de la Unión Europea*, Civitas, Colegio Libre de Eméritos 2002, pp. 151-181; L. F.M. Besselink, 'The Member States, the National Constitutions and the Scope of the Charter', *Maastricht Journal of European and Comparative Law*, Vol. 8(1), 2001, pp. 68-79; J. Bering Liisberg, 'Does the EU Charter of Fundamental Rights Threaten the Supremacy of Community Law?', NYU School of Law *JMWP*, Vol. 4(01).

⁹² Spaventa, [The interpretation...](#); D. Sarmiento, 'Who's afraid of the Charter? The Court of Justice, national courts and the new framework of fundamental rights protection in Europe', *CMLR*, Vol. 50(5), 2013, pp. 1267-1304; E. Hancox, 'The meaning of "implementing" EU law under Article 51(1) of the Charter: Åkerberg Fransson', *CMLR*, Vol. 50(5), 2013, pp. 1411-1431; J.H. Reestman and L. Besselink, 'After Åkerberg Fransson and Melloni', *ECLR*, Vol. 9(2), 2013, pp 169-175.

⁹³ ECJ (grand chamber) judgment of 19 November 2019, *A.K. v Krajowa Rada Sądownictwa*, [Joined Cases C-585/18, C-624/18 and C-625/18](#), para. 78; ECJ (grand chamber) judgment of 26 February 2013, *Åkerberg Fransson*, [Case C-617/10](#), especially para. 19.

⁹⁴ ECJ order of 15 May 2019, *AQ and ZQ v Corte dei Conti and Others*, [Joined Cases C-789/18 and C-790/18](#), especially paras. 27-30.

⁹⁵ A. von Bogdandy, C. Antpöhler, J. Dickschen, S. Hentrei, M. Kottmann and M. Smrkolj, 'A European response to domestic constitutional crisis: Advancing the Reverse-Solange Doctrine' in A. von Bogdandy and P. Sonnevend, *Constitutional Crisis in the European Constitutional Area. Theory, Law and Politics in Hungary and Romania*, C.H.Beck-Hart-Nomos, 2015, pp. 243-246.

3. Monitoring and preventive mechanisms



Moving on from the above discussion of the interpretation of Article 2 TEU and the values enshrined therein, this section analyses the mechanisms available to protect those values, starting with **monitoring and prevention**, aiming either to assess the situation in Member States as regards compliance with EU values or address possible threats to EU values before they become a reality. As is well known, **Article 7 (1) TEU** is the only mechanism provided for by the EU Treaties explicitly aiming to prevent serious breaches of EU values and was only **introduced by the Treaty of Nice in 2001**. However, since the provision's inclusion in the Treaties, the EU institutions have created a wide array of mechanisms to monitor and prevent breaches of EU

values.⁹⁶ The first of those tools, the **cooperation and verification mechanism**, was established in 2007 to assess the progress made by **Bulgaria and Romania** since their accession to the EU in specific areas linked to the rule of law (judicial reform, corruption and – for Bulgaria only – organised crime). With a very limited scope – only applicable to two Member States and specific areas – this was probably the first mechanism created by the EU institutions to monitor EU values in the Member States. However, as concerns surrounding shortcomings as regards compliance with EU values in certain Member States grew⁹⁷ and the existing mechanisms to address deficiencies regarding those values (i.e. Article 7 TEU and infringement procedures) were considered either unusable or ineffective, the Commission and the Council decided to add to this first tool other mechanisms, to be applicable to any Member State.⁹⁸

Before the creation of a series of new mechanisms between 2012 and 2014, the European Parliament,⁹⁹ various Member States¹⁰⁰ and the Council¹⁰¹ had been calling on the Commission to

⁹⁶ For an account of all of them, see the recent paper by L. Pech, [The Rule of Law in the EU: The Evolution of the Treaty Framework and Rule of Law Toolbox](#), Reconnect Working Paper, No 7, March 2020.

⁹⁷ See Viviane Reding, [The EU and the Rule of Law – What Next?](#), Speech/13/677, 2013.

⁹⁸ See for instance Commission communication: [A new EU Framework...](#), pp. 5-6, where the Commission takes the view that infringement proceedings (Article 258-260 TFEU, analysed in Section 4.2) are important tools to address rule of law concerns when they constitute a breach of a specific provision of EU law, but not helpful to address more systemic problems falling outside the scope of EU law. Similarly, it states that Article 7 TEU procedures are too demanding from the point of view of the substantive threshold required for their activation and from the point of view of the majorities required in the Council or the European Council to make a determination under Articles 7 (1) or (2) TEU.

⁹⁹ Before the adoption of the Commission communication, the European Parliament called for a new mechanism in various resolutions and reports: resolution of 27 February 2014 on the situation of fundamental rights in the European Union (2012) ([2013/2078\(INI\)](#)); resolution of 3 July 2013 on the situation of fundamental rights: standards and practices in Hungary (pursuant to the resolution of 16 February 2012) (2012/2130(INI)).

¹⁰⁰ [Final Report of the Future of Europe Group](#) of the foreign ministers of Austria, Belgium, Denmark, France, Italy, Germany, Luxembourg, the Netherlands, Poland, Portugal and Spain, 17 September 2012; letter addressed to Mr Barroso by the foreign affairs ministers of Denmark, Finland, Germany and the Netherlands, on 6 March 2013, partially accessible in O. De Schutter, [The EU Fundamental Rights Agency: Its Past And Possible Future](#), CRIDHO Working Paper, No. 3, 2018, p. 15.

¹⁰¹ [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](#), 6 June 2013. The possible creation of such a mechanism

set up a **new and more effective mechanism** to protect EU values within Member States. Parliament expressed its preference for a monitoring tool that would apply to all Member States, to be developed with the expertise of independent high-level experts, to involve all EU institutions, and to include an early warning tool.¹⁰² The Council was more vague and called generally on the Commission to take forward the debate on the possible need for 'a collaborative and systematic method'¹⁰³ to address rule of law shortcomings in Member States. With this discussion ongoing, the European Commission decided to launch its **Justice Scoreboard in 2013**, monitoring the national judiciaries and feeding into the **European Semester**, a tool that at first was envisaged purely for economic policy coordination, but has since also addressed issues related to corruption and the functioning of justice systems, in recognition of their impact on economic performance. A year later, **in 2014, the European Commission established its rule of law framework**, a preventive mechanism designed to fill the gap between political persuasion and the possible application of what the President of the Commission described as the 'nuclear option' of Article 7 TEU procedures.¹⁰⁴ A couple of months after the Commission set up its rule of law framework, **the Council decided to create** its own tool and engage in **annual dialogues on the rule of law**.

The creation of all those new mechanisms to monitor and prevent EU values deficiencies in Member States **did not exhaust the discussion about the adequacy of the EU toolbox to address EU values deficiencies in Member States**, as new proposals have been put forward since 2016 in order to reinforce the existing mechanisms. Although the scope and main features of these recent proposals are analysed below (in Section 5), an assessment of the existing mechanisms and how they have been used to address concerns regarding EU values in Member States seems necessary before analysing the adequacy of possible future tools.

3.1. The European Semester: An EU values monitoring tool?

In response to the 2008 financial and economic crisis, and as a means to secure macro-economic stability, the European Union introduced the so-called 'European semester', codified in Regulation No 1175/2011.¹⁰⁵ The European Semester is a **monitoring and enforcement mechanism** that entails a process of socio-economic policy coordination that lasts from November until July each year. During this period, Member States discuss their economic reforms and budget plans before adopting them, while the European institutions monitor progress and address recommendations at specific times throughout the year.¹⁰⁶ The Semester consists of three main elements: fiscal surveillance (stability and growth pact)¹⁰⁷, surveillance of macroeconomic policies (macroeconomic

and its contours was further debated in a number of Council meetings, see Council, [3251st Council meeting](#), General Affairs, Brussels, 25 June 2013.

¹⁰² European Parliament, Resolution of 27 February 2014 on the situation of fundamental rights in the European Union (2012) ([2013/2078\(INI\)](#)), paras. 9-14.

¹⁰³ [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](#), 6 June 2013, p. 4.

¹⁰⁴ President of the European Commission, José Manuel Durão Barroso, [State of the Union address 2013](#), 11 September 2013.

¹⁰⁵ Regulation (EU) No 1176/2011 of the European Parliament and of the Council of 16 November 2011 on the prevention and correction of macroeconomic imbalances, OJ L 306/25 of 23 November 2011.

¹⁰⁶ A. Delivorias and C. Scheinert, [Introduction to the European Semester. Coordinating and monitoring economic and fiscal policies in the EU](#), EPRS, PE 644.214, December 2019, executive summary.

¹⁰⁷ European Commission, [Stability and growth pact](#).

imbalance procedure)¹⁰⁸ and coordination of economic and employment policies.¹⁰⁹ While there are **elements** of 'hard' coordination in the stability and growth pact and macroeconomic imbalance procedures, which **can lead to sanctions, substantial parts are no more than a 'soft governance' tool**.¹¹⁰ Although the Semester focuses mainly on socio-economic policies, it has been **increasingly used** by the Commission as a means **to comment on rule of law developments** from the perspective of how they impact upon macro-economic stability and growth, as it will be discussed further below.

3.1.1. The scope of application: When has the European Semester process been used for ensuring compliance with EU values?

As indicated above, the European Semester process has been used by the Commission to comment on relevant rule of law developments in a number of EU Member States. In its 2020 country reports, the Commission commented on specific concerns regarding the independence and integrity of the justice system in **Slovakia**,¹¹¹ the risk of a serious breach of the rule of law, with potentially negative consequences for investors' trust in **Poland**,¹¹² persistent concerns over judicial independence that may impact the business environment and corruption in **Hungary**¹¹³ and the **Maltese** citizenship and residence schemes and related risk of corruption.¹¹⁴ This development is not new, as the Commission integrated concerns relating to the functioning of Member States' justice systems and the quality and transparency of Member States' administrations in its monitoring exercise under the European Semester long before. In its 2013 annual growth survey, launching the European Semester for 2013, the Commission clearly identified the quality, independence and efficiency of national judicial systems and the modernisation of the national administrations as one of the priorities of the Semester.¹¹⁵ Some months later, the Commission's first annual Justice Scoreboard (see Section 3.2), feeding into the European Semester for 2013, was published¹¹⁶ and 10 of the Commission's proposals for country specific recommendations, presented to the Council that year, highlighted specific concerns relating to national judiciaries and/or national administrations.¹¹⁷

¹⁰⁸ European Commission, [Macroeconomic imbalance procedure](#).

¹⁰⁹ *Ibid.*

¹¹⁰ Delivorias and Scheinert, 'Introduction...', executive summary.

¹¹¹ Commission staff working document, Country report Slovakia 2020, [SWD\(2020\) 524 final](#) of 26 February 2020, p. 50.

¹¹² Commission staff working document, Country report Poland 2020, [SWD\(2020\) 520 final](#) of 26 February 2020, p. 36.

¹¹³ Commission staff working document, Country report Hungary 2019, [SWD\(2020\) 516 final](#) of 26 February 2020, p. 45.

¹¹⁴ Commission staff working document, Country report Malta 2020, [SWD\(2020\) 517 final](#) of 26 February, 2020, p. 42.

¹¹⁵ European Commission, Annual Growth Survey 2013, 28 November 2012, [COM\(2012\) 750 final](#), Chapter 5.

¹¹⁶ European Commission, Communication from the Commission to the European Parliament, the Council, the European Central Bank, the European Economic and Social Committee and the Committee of the Regions, The EU Justice Scoreboard. A tool to promote effective justice and growth, 27 March 2013, [COM\(2013\) 160 final](#).

¹¹⁷ In 2013, 10 of the proposals for country specific recommendations presented by the Commission contained references to the national judicial system, see European Commission, Recommendation for a Council Recommendation on Bulgaria's 2013 national reform programme and delivering a Council opinion on Bulgaria's convergence programme for 2012-2016, COM/2013/0352 final; European Commission, Recommendation for a Council Recommendation on Hungary's 2013 national reform programme and delivering a Council opinion on Hungary's convergence programme for 2012-2016, COM/2013/0367 final; Recommendation for a Council Recommendation on Italy's 2013 national reform programme and delivering a Council opinion on Italy's stability programme for 2012-2017, COM/2013/0362 final; Recommendation for a Council Recommendation on Latvia's 2013 national reform programme and delivering a Council opinion on Latvia's convergence programme for 2012-2016, COM/2013/0364 final; Recommendation for a Council Recommendation on Malta's 2013 national reform programme and delivering a Council opinion on Malta's stability programme for 2012-2016, COM/2013/0368 final; Recommendation for a Council Recommendation on Poland's 2013 national reform programme and delivering a

Rule of law related aspects incorporated in the European Semester

In its 2020 European Semester: Assessment of progress on structural reforms, prevention and correction of macroeconomic imbalances, and results of in-depth reviews under Regulation (EU) No 1176(2011) ([COM \(2020\) 150 final](#)), p. 4, the Commission affirmed:

'Good governance, effective institutions, independent and efficient justice systems, quality public administrations, effective insolvency frameworks, are important determinants of a Member State's business environment and can have an impact on investment decisions. Robust anticorruption frameworks can also help to preserve the proper functioning of the internal market. Insights into the institutional and administrative performance of the Member States, including those related to the rule of law, which could create macroeconomic risks if unresolved, will therefore continue feeding into the European Semester and inform the macroeconomic assessment.'

Though weakening the language, the country-specific recommendations adopted by the Council on the basis of the Commission's monitoring exercise generally take up the concerns expressed by the Commission in its country reports.¹¹⁸ In this regard, Pech suggests 'the European Semester's **untapped potential for a more critical assessment of national developments** in the light of Article 2 TEU values'.¹¹⁹

Indeed, the Commission appears keen to explore this potential further. In its 2020 *chapeau* communication accompanying the country reports, it explicitly refers to the **risks that rule of law deficits may pose to the business environment, investment, and the functioning of the single market**, thereby justifying the continued inclusion of rule of law monitoring as part of the

European Semester, even if the Commission is now engaged in a broader monitoring exercise under its **annual rule of law report** (see Section 5.2.1).¹²⁰ In any case, the Commission does not seem to be willing to extend the scope of its monitoring exercise under the European Semester to all EU values, but to focus on specific components of the rule of law, namely 'good governance, effective institutions, independent and efficient justice systems, quality public administrations, effective insolvency frameworks' and the Member States' anticorruption frameworks.

3.1.2. The procedure: How does the European Semester work?

As already indicated, the European Semester is a monitoring and enforcement mechanism in which the European Commission and the Council play a major role in assessing Member States' social and economic policies, possibly imposing sanctions on non-compliant Member States. The Semester officially begins every November with the publication of the annual growth survey, recently

Council opinion on Poland's convergence programme for 2012-2016, COM/2013/0371 final; Recommendation for a Council Recommendation on Romania's 2013 national reform programme and delivering a Council opinion on Romania's convergence programme for 2012-2016, COM/2013/0373 final; Recommendation for a Council Recommendation on Slovakia's 2013 national reform programme and delivering a Council opinion on Slovakia's stability programme for 2012-2016, COM/2013/0375 final; Recommendation for a Council Recommendation on Slovenia's 2013 national reform programme and delivering a Council opinion on Slovenia's stability programme for 2012-2016, COM/2013/0374 final; Recommendation for a Council Recommendation on Spain's 2013 national reform programme and delivering a Council opinion on Spain's stability programme for 2012-2016, COM/2013/0359 final.

¹¹⁸ Council recommendation of 9 July 2019 on the national reform programme of Slovakia [2019] OJ 301 p. 148, recommendation 4; Council recommendation of 9 July 2019 on the national reform programme of Poland [2019] OJ 301 p. 123, recommendation 3; Council recommendation of 9 July 2019 on the 2019 national reform programme of Hungary [2019] OJ 301, p. 101, recommendation 4.

¹¹⁹ Pech, 'The Rule of Law...', Section 3.4.1.

¹²⁰ European Commission, 2020 European Semester: Assessment of progress on structural reforms, prevention and correction of macroeconomic imbalances, and results of in-depth reviews under Regulation (EU) No 1176(2011) COM(2020) 150 final of 25 February 2020, p. 4.

renamed the annual sustainable growth strategy.¹²¹ This is the **Commission's** main tool for expressing which, in its view, should be the economic and social priorities for the EU for the year ahead.¹²² On the same day, the **alert mechanism report** is issued. The alert mechanism report uses a **scoreboard of selected social and economic indicators**,¹²³ plus a wider set of auxiliary indicators and additional relevant information, to screen Member State signs of potential economic imbalances. It identifies those Member States for which an analysis in the form of an in-depth review may be useful.¹²⁴

Another 'milestone' of the European Semester is in February, when the **Commission** publishes country reports and (when required) in depth reviews for the Member States. These **country reports** cover all areas of macroeconomic or social importance and take stock of each country's budgetary situation. This **includes rule of law developments, notably the effectiveness of the justice system and the fight against corruption** in the Member States. Country reports also assess the progress made by each EU country in assessing the issues identified in the previous year's EU country-specific recommendation.¹²⁵ Failure to implement the recommendations can result in further procedural steps under the relevant EU law and ultimately in **sanctions**, including fines,¹²⁶ under the stability and growth pact¹²⁷ and macroeconomic imbalance procedure.¹²⁸

In April, the Member States publish their stability or convergence programmes detailing the specific policies each country will implement to boost jobs and growth and prevent/correct imbalances, and their concrete plans to ensure compliance with the EU's outstanding country-specific recommendation and fiscal rules.¹²⁹ In view of the coronavirus pandemic, for 2020 these programmes have been streamlined and called national reform programmes.¹³⁰

In May comes another milestone, with the publication of the **country-specific recommendations prepared by the European Commission**.¹³¹ The recommendations are discussed by the governments in Council, endorsed by EU leaders at a summit in June and formally **adopted by the Council** in its economic and financial affairs configuration in July.¹³² The 'European' Semester, is then followed by a 'National' Semester, where Member States incorporate what has been discussed and recommended at European level into their national draft budgets, which are then debated and adopted during the autumn.¹³³

¹²¹ European Commission, [Annual Sustainable Growth Strategy 2020](#), COM(2019) 650 final of 17 December 2019.

¹²² Delivorias and Scheinert, 'Introduction...', section 2.2; European Commission, [The autumn package explained](#).

¹²³ European Commission, [Macroeconomic imbalance procedure scoreboard](#).

¹²⁴ *Ibid.*

¹²⁵ Delivorias and Scheinert, 'Introduction...', Section 2.4.; European Commission, [European semester timeline, the analysis phase](#).

¹²⁶ J. Angerer and M. Thomson, [The legal nature of Country-Specific Recommendations](#), DG IPOL at a glance, PE 528.767, September 2019.

¹²⁷ European Commission, [Stability and growth pact](#).

¹²⁸ European Commission, [Macroeconomic imbalance procedure](#).

¹²⁹ Delivorias and Scheinert, 'Introduction...', Section 2.5.

¹³⁰ European Commission, [2020 European Semester: National Reform Programmes and Stability/Convergence Programmes](#).

¹³¹ European Commission, 2020 European Semester: Country-specific recommendations, COM(2020) 500 final of 20 May 2020; Delivorias and Scheinert, 'Introduction...', Section 2.6.

¹³² European Commission, European semester timeline, [EU country-specific recommendations](#).

¹³³ Delivorias and Scheinert, 'Introduction...', Executive summary.

3.1.3. The European Semester: Does it help ensure effective compliance with EU values?

In answering the question whether the European Semester helps ensure effective compliance with EU values, a number of considerations have to be taken into account. First, in line with the general context of the Semester, the Commission's methodology for drafting country reports and country-specific recommendations generally has **business interests** in mind.¹³⁴ Second, there is a **lack of inter-institutional balance** in the Semester process given the minor role of the European Parliament and the limited capacity of national parliaments to get involved in the discussion.¹³⁵ Third, the **Council can adopt country-specific recommendations by qualified majority** in accordance with Article 121(6) TFEU and Article 9(2) of the stability and growth pact Regulation No 1175/2011.¹³⁶ Therefore, it is easier to adopt such recommendations than it is, for instance, to address recommendations under Article 7(1) TEU and/or establish 'a clear risk of a serious breach' by a Member State of EU values under the same Treaty provision. In this latter situation, a majority of four fifths of the Member States as well as the prior consent of the European Parliament by 2/3 of votes cast, representing the majority of Members of Parliament, are required. Yet, there have been multiple instances where the **Council's country-specific recommendations have watered down the Commission's recommendations**, which is in line with an intergovernmental mind set in which Member States hesitate to criticise their peers.¹³⁷ And fourth, the mere fact of having an inter-institutional monitoring process in place is not sufficient per se to ensure implementation of the country-specific recommendations, particularly in areas related to public administration, such as the justice system and the fight against corruption, as testified by a study looking at the implementation of the 2018 country-specific recommendations and the follow-up in the 2019 country-specific recommendations.¹³⁸ In general, there are indications that **the degree of implementation has worsened in recent years**.¹³⁹

3.2. The EU justice scoreboard: Monitoring the national judiciaries

As indicated above, since the European Semester 2013, the **performance of national judicial systems** constitutes one of the priorities in the **European Semester**.¹⁴⁰ This has taken the form of a 'Justice Scoreboard', a monitoring tool of the Member States' judiciaries that allows the European Commission to assess yearly the effectiveness of the national judicial systems since 2013, when the

¹³⁴ S. Carrera, E. Guild, N. Hernanz, [The Triangular Relationship between Fundamental Rights, Democracy and the Rule of Law in the EU. Towards an EU Copenhagen Mechanism](#), CEPS, 2013, p. 11.

¹³⁵ Delivorias and Scheinert, *op. cit.*, p. 21.

¹³⁶ Regulation (EU) No 1176/2011 of the European Parliament and of the Council of 16 November 2011 on the prevention and correction of macroeconomic imbalances.

¹³⁷ Delivorias and Scheinert, *op. cit.*, section 3.1.

¹³⁸ J. Angerer, M. Ciucci, M. Sakudo, M. Thomson, [Country-Specific Recommendations for 2018 and 2019. A tabular comparison and an overview of implementation](#), DG IPOL study, PE 634.401, 2019, p. 81 (Hungary- 'Reinforce the anti-corruption framework, strengthen prosecutorial efforts' – no progress), p. 86 (Malta – 'No significant steps have been taken to strengthen the anti-corruption framework'), p. 97 (Poland, 'No progress observed in ensuring effective public and social consultations in the legislative process'), pp. 116-117 (Slovakia, limited progress in tackling corruption and improving the effectiveness of the judicial system).

¹³⁹ Delivorias and Scheinert, 'Introduction...', Section 3.2, p. 24.

¹⁴⁰ European Commission, Annual Growth Survey 2013, 28 November 2012, [COM\(2012\) 750 final](#), Chapter 5.

first EU Justice Scoreboard was published.¹⁴¹ The Justice Scoreboard focuses on the efficiency, quality and independence of the national judiciaries and limits its scope to **civil, commercial and administrative justice**. The aim is to achieve **more effective justice systems** leading to **a more investment-, business- and citizen-friendly environment**.¹⁴²

3.2.1. The EU Justice Scoreboard: Scope of application and procedure

The Justice Scoreboard provides an **annual assessment** of Member States' justice systems based on three types of parameters (benchmarks) that are understood – by the European Commission – to define the effectiveness of a given judicial system. In the 2020 Justice Scoreboard, the benchmarks analysed were the following:

- 1 **efficiency** (caseload, length of proceedings, clearance rate – number of resolved cases over number of incoming cases, pending cases);
- 2 **quality** (accessibility of courts, resources of the judiciary, existence of tools to assess courts' activities and of quality standards for court activities); and
- 3 **independence** (perceived judicial independence and structural independence, relating for example to the appointment and selection of judges, the power of the bodies tasked with safeguarding the independence of the judiciary, etc.).

In developing the Justice Scoreboard, particularly in the areas of efficiency and quality, the EU has built primarily on work done by the Council of Europe's Commission for the Efficiency of Justice (CEPEJ).¹⁴³ The Justice Scoreboard **does not provide for any coercive action** or sanctions for poor performance against the parameters. Rather, reforms are incentivised through EU funding.¹⁴⁴

The Justice Scoreboard has **close connections with the monitoring of EU values**. Although criminal justice and fundamental rights are not formally within the scope of the Justice Scoreboard, in recent years it has discussed relevant indicators on money laundering,¹⁴⁵ the organisation of prosecution services,¹⁴⁶ the use of structural funds for justice reforms,¹⁴⁷ the appointment and dismissal of national prosecutors¹⁴⁸ and the authorities involved in disciplinary proceedings regarding judges.¹⁴⁹ In any case, most of the elements assessed can be linked to one of the core elements of the rule of law, effective judicial review by independent and impartial judges, making the Justice Scoreboard a monitoring tool of at least one of the EU values enshrined in Article 2 TEU.

¹⁴¹ European Commission, The EU Justice Scoreboard – A tool to promote effective justice and growth, [COM\(2013\) 160 final](#), March 2013.

¹⁴² European Commission, [EU Justice Scoreboard](#), Luxembourg: Publications Office of the European Union, 2020, p. 2.

¹⁴³ Council of Europe, CEPEJ, <https://www.cepej-collect.coe.int/>.

¹⁴⁴ W. van Ballegooij and T. Evas, [An EU mechanism on democracy, the rule of law and fundamental rights: European Added Value Assessment accompanying the Parliament's Legislative Initiative Report](#), EPRS, PE 579.328, 2016; Annex II: [Assessing the need and possibilities for the establishment of an EU scoreboard on democracy, the rule of law and fundamental rights](#) (by P. Bárd *et al.*), p. 27.

¹⁴⁵ European Commission, 2017 EU Justice Scoreboard, [COM \(2017\) 167](#) of 10 April 2017.

¹⁴⁶ European Commission, The 2018 EU Justice Scoreboard, [COM\(2018\) 364](#) of 26 May 2018.

¹⁴⁷ *Ibid.*

¹⁴⁸ European Commission, The 2019 EU Justice Scoreboard, [COM \(2019\) 198](#) of 26 April 2019.

¹⁴⁹ *Ibid.*

3.2.2. The EU Justice Scoreboard: Does it help ensure effective compliance with EU values?

In assessing the contribution of the Justice Scoreboard towards ensuring effective compliance with EU values, the following points deserve consideration. First, it is to be noted that some authors have criticised its methodology, notably the lack of a qualitative contextual assessment of compliance with specific indicators. In particular, they point out that the Scoreboard is 'incapable of catching the most atrocious violations: it **does not sufficiently detect internal linkages**, thus it examines individual elements but **fails to supply a qualitative assessment of the whole**'.¹⁵⁰ Also, as Strelkov indicates 'it has not helped engage actors in the debate about the optimal solutions for judicial reform within the EU'.¹⁵¹ Similarly, the lack of possible sanctions for poor performance with the Justice Scoreboard's indicators casts doubt on its effectiveness in protecting EU values.

However, the **development of new indicators**, notably regarding judicial independence, has made the Justice Scoreboard **increasingly relevant to what are growing threats to the rule of law in certain Member States**.¹⁵² In this vein, it is to be noted that, in 2019, the Justice Scoreboard data regarding the **appointment of judges-members of councils for the judiciary** (see table below, as updated in the 2020 Justice Scoreboard) were cited for the first time by an Advocate General to the ECJ in the A.K. case regarding judicial independence in Poland, thus showing the potential of this tool to contribute to more effective compliance with EU values by Member States and how different mechanisms to protect EU values intersect with each other.¹⁵³ Similarly, it can be argued that the potential of this monitoring tool **could be strengthened if it were to be placed in the context of other monitoring and enforcement mechanisms** encompassing democracy and fundamental rights, including their outcomes as regards all Member States. In this vein, the European Commission initiative aiming to incorporate the Justice Scoreboard in its annual report on the rule of law is to be welcomed.¹⁵⁴ Similarly, the European Parliament's calls to **expand the scope** of the Justice Scoreboard to **criminal justice**, in the form of a separate Justice Scoreboard in criminal matters,¹⁵⁵ and for it to be included in an overall monitoring mechanism on democracy, the rule of law and fundamental rights, could also enhance the effectiveness of this monitoring tool.¹⁵⁶

¹⁵⁰ van Ballegooij and Evas, op. cit; Annex II, p. 27; K. L. Scheppele, 'The Rule of Law and the Frankenstate: Why Governance Checklists Do Not Work', *Governance*, Vol. 4, 2013, pp. 559-562.

¹⁵¹ A. Strelkov, 'EU Justice Scoreboard: a new policy tool for "deepening" European integration?', *JCES*, Vol. 27(1), 2019, p. 23.

¹⁵² Cf. Pech, 'The Rule of Law...', Section 3.4.1.

¹⁵³ [Opinion AG Tanchev](#) in *AK v Krajowa Rada Sądownictwa*, footnote 96: 'I note that, according to the 2019 EU Justice Scoreboard, of the 20 Member States surveyed, Poland is the only Member State where appointment of the judicial members of the judicial council is proposed not exclusively by judges and appointed by the Parliament'. See Commission communication, The 2019 EU Justice Scoreboard, COM(2019) 198 final, 26 April 2019, Figure 54, pp. 55 and 62. See also 2017 OSCE Final Opinion on Poland, footnote 4, points 43 to 46.

¹⁵⁴ Commission communication, Strengthening the rule of law within the Union, A blueprint for action, [COM \(2019\) 343](#), 17 July 2019; see infra Section 5.2.

¹⁵⁵ European Parliament resolution of 29 May 2018 on the 2017 EU Justice Scoreboard (2018/2009(INI)) [P8_TA\(2018\)0216](#), para 5: 'Emphasises that the establishment of a separate Justice Scoreboard in criminal matters will make a fundamental contribution to creating a common understanding of EU legislation in the field of criminal law among judges and prosecutors, thus strengthening mutual trust'.

¹⁵⁶ 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\(INL\)](#)); see infra Section 5.1.

Figure 1 – Appointment of judges-members of councils for the judiciary: involvement of the judiciary

	BE	BG	DK	IE	EL	ES	FR	HR	IT	LV	LT	HU	MT	NL	PL	PT	RO	SI	SK
Proposed by judges (but not exclusively) and appointed by parliament															●				
Proposed by judges & appointed by the parliament						●													
Proposed and selected/elected by judges with formal invitation by the parliament/executive (no discretion over candidates)			●											●			●		
Proposed and selected/elected by judges	●	●		●	●		●	●	●	●	●	●	●			●		●	●
	BE	BG	DK	IE	EL	ES	FR	HR	IT	LV	LT	HU	MT	NL	PL	PT	RO	SI	SK

Data source: European Commission, [The 2020 EU Justice Scoreboard](#), p. 47.

3.3. The European Commission's rule of law framework

The European Commission established its **rule of law framework** at nearly the same time as it developed the two monitoring tools already analysed, the European Semester and the EU Justice Scoreboard. Although the proposed purpose of this mechanism was not to monitor the situation as regards compliance with EU values – or certain EU values – in the Member States, but to address systemic threats to those values before they materialise. Following this logic, the framework was created by a communication adopted on 11 March 2014¹⁵⁷ as a **preventive mechanism**. Thus, the rule of law framework was created to be triggered only if and when a **generalised threat to the rule of law in a particular Member State** needed to be addressed. The mechanism is also characterised by the leading role assumed by the Commission and by the inexistent role played by the ECJ, as no annulment actions can be initiated against the Commission's Rule of Law opinions and/or recommendations by the Member State concerned. Instead, the whole procedure seems to be designed to **try to secure cooperation** with the national authorities via a **structured dialogue**.¹⁵⁸ As will be further analysed below, the Commission's rule of law framework was activated for the first – and only – time with regard to Poland on 13 January 2016, following the crisis that ensued after disputed judicial appointments to the Polish Constitutional Court in 2015. The Commission adopted its first recommendation addressed to **Poland** on the basis of that procedure on 27 July 2016.¹⁵⁹ Parliament has called on the Commission to launch the procedure with regard to **Hungary**¹⁶⁰ and **Malta**.¹⁶¹ However, the framework has not been triggered in relation to any other country.

¹⁵⁷ Commission, Communication from the Commission to the European Parliament and the Council, A new EU Framework to strengthen the Rule of Law, COM (2014) 158 final, 11 March 2014.

¹⁵⁸ C. Closa, 'Reinforcing EU monitoring of the rule of law: normative arguments, institutional proposals and the procedural limitations' in C. Closa and D. Kochenov (eds.), *Reinforcing rule of law oversight in the European Union*, CUP, 2016, pp. 26-28.

¹⁵⁹ [Commission Recommendation](#) (EU) 2016/1374 of 27 July 2016 regarding the rule of law in Poland.

¹⁶⁰ European Parliament resolution of 16 December 2015 on the situation in Hungary: follow-up to the European Parliament Resolution of 10 June 2015 ([2015/2935\(RSP\)](#)), para. 8.

¹⁶¹ European Parliament resolution of 28 March 2019 on the situation of the rule of law and the fight against corruption in the EU, specifically in Malta and Slovakia ([2018/2965\(RSP\)](#)), para. 49.

3.3.1. The scope of application: What threats to EU values trigger the mechanism?

Box 1 – The Polish case: activating the rule of law framework

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](#).

1) Recommendation [2016/1374](#) focused on: a) alleged irregularities concerning the appointment of certain judges of the Polish Constitutional Court (PCC) and the lack of implementation of PCC judgments of 3 and 9 December 2015; b) the lack of official publication or implementation of the PCC judgment of 9 March 2016; c) the effective functioning of the PCC and the alleged lack of effectiveness of constitutional review of new legislation, in view of the Constitutional Court Act of 22 July 2016.

2) Recommendation [2016/146](#) focused on all the concerns pointed out in the prior recommendation, plus the rules applicable to the selection of candidates for the post of PCC President and Vice-President and the potentially unlawful appointment of an acting PCC President.

3) Recommendation [2017/1520](#) focused on the alleged lack of an independent and legitimate constitutional review (based on the concerns pointed out in the previous recommendations) and on modifications introduced by a number of laws (mainly, the law on the National School of Judiciary and Public Prosecution, the law on Ordinary Courts Organisation, the law on the National Council of the Judiciary and the law on the Supreme Court) possibly affecting the independence of the Polish judiciary.

4) Recommendation [2018/103](#) focused on the Supreme Court law of 8 December 2017 and the law amending the law on the National Council for the Judiciary of 8 December 2017, which sparked concerns in relation to the independence of the Polish judiciary.

From its inception, the Commission's rule of law framework was clearly shaped as a **preventive mechanism** aiming to address systemic situations threatening one of the EU values enshrined in Article 2 TEU, the **rule of law**. Because of its preventive nature, the framework was designed to act prior to and complement both Article 7 TEU procedures, thus preventing the emergence of a systemic threat to the rule of law in a 'Member State that could develop into a "clear risk of a serious breach" within the meaning of Article 7 TEU'. The framework was designed to be a '**pre-Article 7 TEU tool**', a new preventive step prior to the possible application of the preventive arm of Article 7 TEU. The decision made by Commission to activate this mechanism as regards Poland on 13 January 2016, just some months after the controversies regarding some appointments to the Polish Constitutional Court and changes to its functioning had occurred, reinforce the establishment of this tool as a pre-Article 7 TEU tool. In January 2016, it would probably have been difficult to affirm that the conditions for triggering Article 7 (1) TEU were met in the case of Poland, at least in the light of the rule of law threat that would evolve substantially later on, as indicated by the Commission in its four recommendations on Poland

(see Box1). Nevertheless, the Commission activated the framework aiming to prevent the situation that would later justify its decision to trigger Article 7 (1) TEU against that Member State.

As regards the EU values protected under the mechanism, the Commission has emphasised from the outset that the framework aims to address **rule of law threats** and not threats involving any other of the EU values enshrined in Article 2 TEU. Although the 2014 Commission's communication pointed out the interrelation between democracy, fundamental rights and the rule of law, it justified its option to focus only on the rule of law by highlighting its relevance to the effective application of EU law: respect for the rule of law was defined as a prerequisite for the protection of all EU values and all rights derived from EU law. The Commission even identified the principles that would be

included in its definition of the rule of law, as already explained under Section 2 of this study.¹⁶² However, the framework can only be triggered in relation to threats to the rule of law of a **systemic nature** and not as regards individual breaches of fundamental rights. In addition to that, for the Commission to activate the framework, **national authorities must be incapable or unwilling to address the threats** to the rule of law. Therefore, the role of the Commission was framed from the beginning as subsidiary and always dependent on the Member State authorities' willingness and capacity to address the shortcomings. Again, the only example that there is of application of the Commission's rule of law framework sheds some light on the understanding of the commented substantive requirements by the Commission. In its four recommendations regarding Poland, the Commission decided to focus on changes introduced by the legislative branch with regard to the functioning of the national judiciary, including the Constitutional Court, and that can be characterised as having been intentionally introduced by the national authorities, as the Commission itself has recognised.¹⁶³ Similarly, it is clear that the Commission maintains a narrow understanding of the substantive scope of the framework, focusing its attention mainly on rule of law shortcomings, especially those linked to the independence and impartiality of the judiciary (see Box 1), although they can also be linked to some other EU values (i.e. the fundamental right to an effective remedy and the principle of the separation of powers).

3.3.2. The procedure: What type of mechanism is the Commission's rule of law framework?

From a procedural point of view, the Commission's rule of law framework was designed as a tool to address threats to the rule of law through a '**structured dialogue**' that allows the Commission to address recommendations to the Member State failing to uphold EU values after an assessment of the situation. The flexibility of the tool and the **wide margin for manoeuvre left to the Commission** are defining features of the framework.

As indicated above, the only EU institution formally engaging in a possible dialogue with the Member State concerned under the framework is the Commission itself, although it is committed to updating the Council and Parliament regularly on progress made and to relying when needed on the external expertise of other EU bodies, such as the EU Agency on Fundamental Rights, or non-EU bodies, such as the Council of Europe/Venice Commission or European judicial networks. In this vein, the mechanism differs from other EU rule of law mechanisms of a preventive nature, notably Article 7 (1) TEU, which may have similar outcomes (i.e. the possibility to address recommendations to a Member State), but require the participation of the Council and the Parliament in the decision-making process. Within the framework, the Commission can autonomously decide to activate the procedure, pursue or stop the procedure at any point in time and engage with the national authorities through a variety of means, in line with the wide margin for manoeuvre that the

¹⁶² Commission communication to the European Parliament and the Council, A new EU Framework to strengthen the Rule of Law, COM (2014) 158 final, 11 March 2014, p. 4.

¹⁶³ European Commission, Reasoned proposal in accordance with article 7(1) TEU regarding the rule of law in Poland, 20 December 2017, [COM\(2017\) 835 final](#), para. 173, affirming that: 'The Commission observes that within a period of two years more than 13 consecutive laws have been adopted affecting the entire structure of the justice system in Poland: the Constitutional Tribunal, the Supreme Court, the ordinary courts, the national Council for the Judiciary, the prosecution service and the National School of Judiciary. The common pattern of all these legislative changes is that the executive or legislative powers have been systematically enabled to interfere significantly with the composition, the powers, the administration and the functioning of these authorities and bodies. The legislative changes and their combined effects put at serious risk the independence of the judiciary and the separation of powers in Poland which are key components of the rule of law (...)'.

Commission enjoys under the administrative part of infringement procedures, as will later be explained under Section 4.2 of this study. The fact that the Court of Justice has no jurisdiction to control how and when the procedure is applied adds to that wide margin of manoeuvre left to the Commission. In this vein, the framework seems to be based on the idea that flexible mechanisms allowing the Commission to engage with and persuade non-compliant Member States secure better compliance compared with the use of coercive enforcement mechanisms.¹⁶⁴

As outlined in the Commission's 2014 communication, structured dialogue within the framework consists of **three possible stages** (see Figure 2 below): a) an **assessment stage**, in which the Commission collects information and evaluates it in order to determine whether there is a threat to the rule of law in a Member State and, in the case of a positive answer, decides to send a 'rule of law opinion' to the Member State concerned and give it the possibility to respond; b) a second stage in which the Commission might address a '**rule of law recommendation**' with specific indications on how to resolve the situation within a prescribed deadline to the Member State concerned if it has not properly redressed the situation before; and c) a **follow-up stage**, in which the implementation of the recommendation is monitored by the Commission. This stage may potentially be followed by the activation of Article 7 TEU and/or Article 258 TFEU infringement actions if the Commission considers that the Member State has not properly remedied the situation.

However, the Commission remains always the master of the procedure: there is no obligation for it to follow through all the stages of the procedure even if the Member State concerned has done nothing to redress the situation; there are **no clear time-limits** for the different stages of the procedure (the Commission may impose deadlines on the Member State, but no time constraints are imposed on the Commission's actions/decisions) and, therefore, the Commission seems to be **free to extend any of the stages**, for example, by sending several recommendations (as opposed to just one) to the Member State; and most of the **communication** between the Member State concerned and the Commission remains **non-public**, as the Commission announces only the launch of the procedure and the sending of its 'rule of law opinion' (the content is released only at the request of an EU citizen),¹⁶⁵ **publishing just the recommendations** addressed to the Member State.

The Commission's application of the rule of law framework to Poland shows the flexibility of the tool: the Commission announced its decision to launch the procedure on 13 January 2016 only,¹⁶⁶ and its adoption of a rule of law opinion on 1 June 2016.¹⁶⁷ It published its first recommendation addressed to Poland with a detailed account of all the shortcomings identified on 27 July 2016 (see Box 1). Although the Commission invited the Polish authorities to address its recommendations within three months from the notification of that first recommendation, once that deadline expired the Commission did not take any immediate decision under Article 7 TEU, but instead addressed three new recommendations to the Polish authorities on 21 December 2016, 26 July 2017 and 20 December 2017 (see Box 1). In these recommendations new problems were identified in addition to those already identified in the first one and new deadlines to address the situation were set (2 months in the 21 December 2016 recommendation, 1 month in the 26 July 2017 recommendation

¹⁶⁴ On these points see C. Closa, 'The politics of guarding the Treaties: Commission scrutiny of rule of law compliance', *JEPP*, Vol. 6, 2019, pp. 696-716.

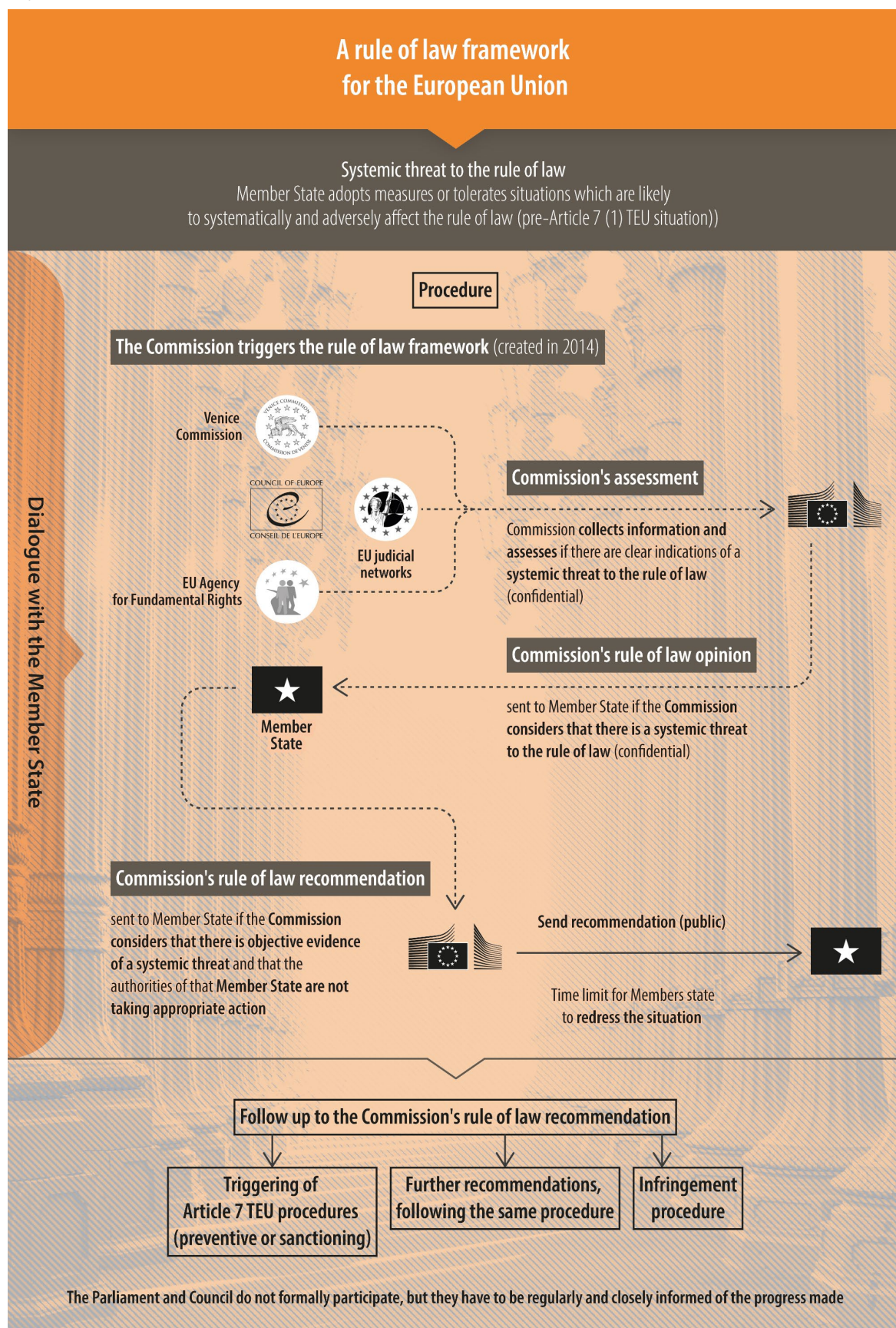
¹⁶⁵ The Commission's rule of law opinion on Poland was only made available to the public when the first recommendation addressed to Poland was published. For a detailed explanation see L. Pech, '[Commission Opinion of 1 June 2016 regarding the Rule of Law in Poland: Full text now available](#)', EU Blog Analysis, 19 August 2016.

¹⁶⁶ European Commission, [Rule of law in Poland: Commission starts dialogue](#), Press Corner, 13 January 2016.

¹⁶⁷ European Commission, [Commission Opinion on the Rule of Law in Poland and the Rule of Law Framework: Questions & Answers](#), Press Corner, 1 June 2016.

and, 3 months in the 20 December 2017 recommendation). The Commission only decided to trigger an Article 7 (1) TEU procedure when publishing its fourth rule of law recommendation on 20 December 2017. In addition, the continuous exchange of views between the national authorities and the Commission during the application of the framework was never published, although the Commission's recommendations make a detailed account of those exchanges (see all the recommendations cited in Box 1).

Figure 2 – The Commission's rule of law framework



Source: EPRS.

3.3.3. Application of the rule of law framework: The effectiveness question

As indicated above, the Commission's rule of law framework has been applied only in relation to Poland, following the measures adopted by Polish authorities at the end of 2015 as regards the Constitutional Court, although the Commission later expanded its concerns to other measures affecting the Ordinary Courts, the Supreme Courts and the National Council of the Judiciary. Application of the framework enabled the Commission and the Polish authorities to **exchange their points of view** on different questions. However, the effectiveness of the process is not obvious. In the Commission's view, the Polish authorities showed through various means their unwillingness to engage in a true dialogue.¹⁶⁸ In addition, according to the Commission, the Polish authorities **persistently refused to implement the changes** recommended in its first, second, and third recommendations.¹⁶⁹ As explained in more detail under Section 3.6.3, the situation does not differ in relation to the fourth recommendation, issued at the same time as the Commission decided to trigger Article 7 (1) TEU in relation to Poland. Similarly, according to the Parliamentary Assembly of the Council of Europe, Poland has not implemented recommendations of the European Commission for Democracy through Law (Venice Commission) and other bodies of the Council of Europe raising substantially the same concerns as the Commission highlights in its recommendations.¹⁷⁰ In fact, the Commission has recognised that Polish authorities disagree with its assessment of the measures adopted¹⁷¹ and the Polish government has expressed this disagreement, not least in an extensive white paper¹⁷² in which it justified the measures adopted and explained the reasons behind them, including its willingness to reinforce the independence of the Polish judiciary.

Although it is difficult to assess the effectiveness of the Commission's rule of law framework on the basis of the Polish case only, the apparent ineffectiveness of this mechanism may be seen as a consequence of the **limits of discursive tools that rely exclusively on voluntary compliance** when it comes to addressing systemic deficiencies relating to the rule of law in Member States. In this vein, it should be noted that some authors have argued that dialogic tools based on voluntary compliance may not produce the desired outcomes in relation to shortcomings that are characterised by a non-collaborative attitude of the authorities with whom the EU institutions are seeking to embark in a constructive dialogue, at least if they are not to be followed by the use of credible enforcement tools.¹⁷³

3.4. The Council's dialogues on the rule of law

In addition to the development of the European Justice Scoreboard, feeding into the European Semester, and the creation of the Commission's rule of law framework, the early 2010s saw the development of yet another EU tool to protect Article 2 TEU values, although in this case the leading

¹⁶⁸ For example, interview with Timmermans: 'Poland should be a leader in Europe – but it needs to cooperate', [Euractiv, 22 May 2017](#).

¹⁶⁹ European Commission, [Reasoned proposal](#) in accordance with Article 7(1) of the Treaty on European Union regarding the rule of law in Poland, COM(2017) 835 final, 20 December 2017, paras. 40-41 and 62.

¹⁷⁰ See recently, Parliamentary Assembly of the Council of Europe, [Report of the Committee on the Honouring of Obligations and Commitments by Member States of the Council of Europe \(Monitoring Committee\)](#), 28 January 2020 (4th Sitting). All Venice Commission opinions on Poland can be found [here](#).

¹⁷¹ European Commission, [Reasoned proposal](#) in accordance with Article 7(1) of the Treaty on European Union regarding the rule of law in Poland, COM(2017) 835 final, 20 December 2017, paras. 40-41 and 62.

¹⁷² [White Paper on the Reform of the Polish Judiciary](#) (March 2018).

¹⁷³ D. Kochenov and L. Pech, 'Better Late than Never? On the European Commission's Rule of Law Framework and its First Activation', *JCMS*, Vol. 54(5), 2016, pp. 1066-1067.

role was assumed by the Council. On 16 December 2014, the Council established an **annual dialogue among all Member States to promote and safeguard the rule of law** in the Treaties' framework. The mechanism, put in place some months after the adoption by the Commission of its rule of law framework, has been seen by some authors as a reaction to the Commission's move.¹⁷⁴ Following the opinion of the Council's Legal Service, that had criticised the Commission's Framework for an alleged lack of legal basis in the Treaties and had proposed that the Member States adopt a peer-review mechanism through an intergovernmental agreement supplementing the existing Treaty framework,¹⁷⁵ the Council decided to establish an annual dialogue on the rule of law that would take place in the General Affairs Council with the participation of all the Member States and in respect of certain principles: **objectivity, non-discrimination and equal treatment** of all Member States; a **non-partisan and evidence-based approach**; respect for the **principle of conferred competences and of national identities** of Member States; and complementarity in relation to the existing mechanisms to protect EU values in Member States.¹⁷⁶ Although the conclusions establishing this mechanism were vague and left many questions open (for instance, scope of the exercise, procedure to be followed, possible outcomes and ways to coordinate with existing mechanisms), it was clear that the dialogue would involve only the Member States (**peer to peer**) and that it would **not be considered a monitoring exercise**, as nothing in the conclusions adopted by the Council suggested that the Member States would get involved in any sort of review procedure.¹⁷⁷ The conclusions of the Council stressed on several occasions the need to promote a culture of respect for the rule of law, suggesting that 'promotion of EU values' was the main aim of this mechanism. On those premises, there have been four annual dialogues on the rule of law since this tool began to be used by the Council and two different evaluations of the mechanism, one in 2016,¹⁷⁸ under the Slovak presidency, and the other one in 2019,¹⁷⁹ under the Finnish presidency. As it will be discussed under Section 5.3, the Finnish presidency suggested some changes to improve the dialogues' current format.

¹⁷⁴ C. Closa, 'The politics...', pp. 28-35. See also Council, [Summary on the evaluation of the rule of law dialogue among all Member States within the Council](#), 14565/16, 17 November 2016, suggesting that the Member States would be willing to consider the possibility of turning the dialogue into an annual peer review exercise by the end of 2019.

¹⁷⁵ Council of the European Union, Opinion of the Legal Service, [Commission's Communication...](#). For a critique of this legal opinion, see the authors cited in footnote 14 and A. von Bogdandy, C. Antpoehler and M. Ioannidis, '[A New Page in Protecting European Constitutional Values: How to best use the new EU Rule of Law Framework vis-a-vis Poland](#)', *Verfassungsblog*, 24 January 2016.

¹⁷⁶ [Conclusions of the Council of the European Union and the Member States meeting within the Council on ensuring respect for the rule of law](#), General Affairs Council, 16 December 2014, 17014/14.

¹⁷⁷ C. Closa, 'The politics...', op. cit, p. 33; P. Oliver and J. Stefanelli, 'Strengthening the Rule of Law in the EU: The Council's Inaction', *JCMS*, Vol. 54(5), 2016, p. 1079.

¹⁷⁸ Presidency summary, Summary on the evaluation of the rule of law dialogue among all Member States within the Council, 17 November 2016, [14565/16](#).

¹⁷⁹ Presidency conclusions, 19 November 2019, Evaluation of the annual rule of law dialogue, [14173/19](#), discussed in the Council's General Affairs meeting of 19 November 2019, [14270/1/19 REV 1](#).

3.4.1. The scope of the dialogues: What EU values does this mechanism promote?

The first distinguishing feature of the Council's annual rule of law dialogue is that it is not meant to be a mechanism that can be triggered under a specific set of limited circumstances as is the case for the preventive mechanisms analysed in this Section – the Commission's rule of law framework and Article 7 (1) TEU). On the contrary, the Council's annual rule of law dialogue was framed from the outset as a **permanent promoting tool** to be used every year, without the need for a concrete event

triggering the procedure. Although the Council's conclusions establishing the dialogues pointed to the possibility of having **thematic debates**, thus suggesting that each annual dialogue could also be further reaching, the four past annual debates have focused on specific topics and have not tried to engage in an overall discussion on the rule of law situation in the Member States. In fact, no distinctions seem to have drawn between Member States on the basis of their situation as regards compliance with EU values.

The initial conclusions setting up the tool suggested that only rule of law-related questions would be dealt by in the Council's dialogues, discarding some other matters linked to the other EU values enshrined in Article 2 TEU. However, annual rule of law dialogues have embraced a wider scope, including questions that can be linked to some other EU values, especially respect for **fundamental rights and democracy**. In this vein, different dialogues have focused on freedom of expression and information, fundamental rights that are essential in a well-functioning democracy (2015, 2017), and some

Box 2 – Council's annual rule of law dialogues: scope

Under its annual rule of law dialogues, Council has focused on the following topics:

- [17 November 2015](#), under the Luxembourg Presidency – Preventing and combating anti-Semitic and anti-Muslim hatred/ rule of law in the digital era (with a [focus on](#) freedom of expression, internet governance, data protection and cybersecurity);
- [24 May 2016](#), under the Netherlands presidency – Migratory flows and EU fundamental values (with a focus on [migrant integration and EU fundamental values](#));
- [17 November 2016](#) under the Slovak presidency – first evaluation of the dialogues;
- [17 October 2017](#), under the Estonian presidency – Media pluralism and the rule of law in the digital era ([focusing on](#) how to ensure pluralistic, independent and quality information);
- [12 November 2018](#), under the Austrian presidency – Trust in public institutions and the rule of law (with a [focus on](#) the reasons for low levels of trust and developing strategies to promote citizens' trust);
- [19 November 2019](#) under the Finnish presidency – second evaluation of the dialogues.

other fundamental rights issues, e.g. migrant integration or religious communities' rights (2015, 2016), as specified in Box 2. The choice of themes seems to follow a random pattern with every presidency of the Council organising the dialogue on the basis of its own priorities and preferences, although the summary of the 2016 evaluation of the dialogues suggested that presidencies should chose the topics on the basis of a report made by the Commission or the EU Agency for Fundamental Rights.¹⁸⁰

¹⁸⁰ Presidency summary, Summary on the evaluation of the rule of law dialogue among all Member States within the Council, 17 November 2016, [14565/16](#), p. 3.

3.4.2. Procedures and outcomes: How effective have the Council's dialogues been?

Although publicly available information on the procedure followed by the Council in its annual dialogues on the rule of law is scarce, the few documents accessible provide some interesting insights. Annual rule of law dialogues are **prepared by the presidency** of the Council, which has a leading role in choosing the topic and ensuring that all the principles established by the Council are respected throughout the procedure. The annual dialogues tend to take place at the end of the year and they are preceded by the **choice of the topic by the presidency**; the holding of accompanying events, usually organised by the presidency; the drafting of a discussion paper or a non-paper by the presidency on the selected topic that is sent to all national delegations for the preparation of the dialogue;¹⁸¹ and a COREPER session preparing the final discussion at Council level.¹⁸² The Commission and the Director of the EU Agency for Fundamental Rights do participate in the Council's annual dialogues, with either one or the other introducing the debate before the national delegations take the floor. To animate the discussion, some presidencies have decided to send specific questions linked to the topic chosen to the national delegations before the dialogue,¹⁸³ while some others have encouraged national delegations to share examples of best practice and challenges encountered at the national level in relation to respect for the rule of law, as well as the approach taken to respond to such challenges.¹⁸⁴ Therefore, the dialogues have been framed as a very flexible tool, permitting all Member States to participate in thematic discussions and they are clearly dependent on each presidency's capacity and ability to organise them.

After the annual dialogue, the **presidency draws up conclusions**¹⁸⁵ that are forwarded to the relevant Council's preparatory bodies for further consideration. However, it is **unclear if there is any follow up**. Both the 2016 and the 2019 reviews of the annual dialogues have pointed out the importance of strengthening the follow up,¹⁸⁶ thus suggesting that the dialogues are not sufficiently results-oriented. In fact, the conclusions drafted by the presidencies do not indicate possible deficiencies/challenges encountered in particular Member States, as they are drafted in a very

¹⁸¹ See: Presidency, Ensuring the respect for the rule of law – Dialogue and exchange of views, 9 November 2015, [13744/15](#); Presidency, Presidency non-paper for the Council (General Affairs) on 24 May 2016 – Rule of law dialogue, 13 May 2017, [8774/16](#); Presidency, Presidency non-paper for the Council (General Affairs) on 17 October 2017 – Annual rule of law dialogue, 29 September 2017, [12671/17](#); Presidency, Presidency non-paper for the Council (General Affairs) on 12 November 2018 – Annual rule of law dialogue, 5 November 2018, [13591/18](#).

¹⁸² The details of the working method can be traced through either the presidency conclusions made public after the annual dialogues (Presidency conclusions after the annual rule of law dialogue on the topic 'Media pluralism and the rule of law in the digital age', 24 October 2017, [13609/17](#); Presidency conclusions following the annual rule of law dialogue 2018 on the topic 'Trust in public institutions and the rule of law', 23 November 2018, [14678/18](#)) or the presidency discussion papers, sent to the national delegations before the annual dialogue (Ensuring the respect for the rule of law – Dialogue and exchange of views, 9 November 2015, [13744/15](#); Presidency non-paper for the Council (General Affairs) on 24 May 2016 – Rule of law dialogue, 13 May 2017, [8774/16](#)).

¹⁸³ See Presidency non-paper for the Council (General Affairs) on 24 May 2016 – Rule of law dialogue, 13 May 2017, [8774/16](#); Presidency non-paper for the Council (General Affairs) on 17 October 2017 – Annual rule of law dialogue, 29 September 2017, [12671/17](#); Presidency non-paper for the Council (General Affairs) on 12 November 2018 – Annual rule of law dialogue, 5 November 2018, [13591/18](#).

¹⁸⁴ Presidency, Ensuring the respect for the rule of law – Dialogue and exchange of views, 9 November 2015, [13744/15](#).

¹⁸⁵ See: Presidency conclusions after the annual rule of law dialogue on the topic 'Media pluralism and the rule of law in the digital age', 24 October 2017, [13609/17](#); Presidency conclusions following the annual rule of law dialogue 2018 on the topic 'Trust in public institutions and the rule of law', 23 November 2018, [14678/18](#).

¹⁸⁶ Presidency summary, Summary on the evaluation of the rule of law dialogue among all Member States within the Council, 17 November 2016, [14565/16](#), p. 2; Presidency conclusions, [Evaluation of the annual rule of law dialogue](#), 14173/19, 19 November 2019, para. 7.

general way, limiting themselves to taking account of the general discussions and common conclusions, without mentioning any specific Member State.

Therefore, it is **very difficult to assess the effectiveness of the annual dialogues** in fostering the modification of the measures adopted by Member States that may disrespect EU values and in aligning them to the best practices possibly presented by other Member States during the dialogues. To answer this question, a detailed analysis of the content of the dialogues and the measures adopted afterwards by Member States disrespecting EU values would be needed. As the exact content of the dialogues has never been published, any thorough examination is currently impossible. The Council itself considered the dialogues a useful tool during the 2019 review of the mechanism, without explaining the reasons behind such a conclusion.¹⁸⁷ Apart from that, it can be highlighted that as the Council's annual dialogues are **not linked to any enforcement tool, not even to Article 7 TEU procedures**, their capacity to prevent or remedy possible shortcomings seems completely dependent on national authorities' willingness and good faith. Such a conclusion leads back to the debates on the effectiveness of mechanisms based on voluntary compliance for addressing systemic situations that have been deliberately created by the same authorities that are asked to reverse the situation, as discussed under Sections 3.1. and 3.4 of this study. Nevertheless, this tool **could be made more constructive if designed as a genuine peer-review exercise**, as suggested by some authors,¹⁸⁸ as discussed by the Council itself in the 2019 evaluation of the mechanism, and as will be further analysed under Section 5.3 of this study.

3.5. Article 7(1) TEU: The preventive arm

Positioned alongside the monitoring and preventive mechanisms established by EU institutions to address EU values deficiencies in the Member States in the early 2010s, Article 7(1) TEU is the only preventive mechanism aiming to address systemic threats to EU values provided for by the Treaties. In fact, **Article 7 TEU** provides for two different mechanisms, **preventive and sanctions**, to protect EU founding values in cases of qualified violations by a Member State. The current wording of the provision is quite recent, as it was not until the Amsterdam Treaty that the Member States decided to introduce the sanctions mechanism (Article F(1) TEU), with the preventive mechanism being added with the Treaty of Nice (Article 7 (1) TEU), following the Haider Affair.¹⁸⁹ As discussed below, the mechanism provided for under Article 7(1) TEU can be triggered only in cases of qualified risks of breaches of EU founding values. This mechanism differs from other EU tools designed to protect those values, not only on account of its **preventive and political nature**, but also owing to the fact that it aims to address situations of a **systemic** nature and not merely individual situations. As regards its application to specific Member States, it should be noted that to date the mechanism has been triggered twice; the first time in respect of Poland, by the European Commission, and the second time, in respect of Hungary, by the European Parliament (see more details in Section 3.5.4 below).

¹⁸⁷ Presidency conclusions, [Evaluation of the annual rule of law dialogue](#), 14173/19, 19 November 2019, para. 5.

¹⁸⁸ L. Pech and D. Kochenov, [Strengthening the Rule of Law Within the European Union: Diagnoses, Recommendations, and What to Avoid](#), Reconnect Policy Brief, June 2019, p. 4.

¹⁸⁹ After the 1999 Austrian parliamentary elections, the then 14 Member States decided to impose sanctions on that Member State when the extreme-right political Austrian Freedom Party (FPÖ) (under the leadership of Jörg Haider) became part of a coalition government led by Chancellor Wolfgang Schüssel, from the Austrian People's Party (ÖVP). On the Haider Affair, see for instance Wojciech Sadurski, 'Adding Bite to a Bark: The Story of Article 7, EU enlargement and Jörg Haider', *Columbia Journal of European Law*, Vol. 16, 2010, pp. 396-409.

Box 3 – Scope of the European Commission's reasoned proposal on Poland

The European Commission's reasoned proposal on the determination of a clear risk of a serious breach by the Republic of Poland of the rule of law ([COM/2017/0835 final – 2017/0360 \(NLE\)](#)) specified five issues raising concern:

- (1) the lack of an independent and legitimate constitutional review;
- (2) the adoption by the Polish Parliament of new legislation relating to the Polish judiciary which raises grave concerns as regards judicial independence and increases significantly the systemic threat to the rule of law in Poland:
 - (a) the law on the Supreme Court; approved by the Senate on 15 December 2017.
 - (b) the law amending the 'Law on Ordinary Courts Organisation', published in the Polish Official Journal on 28 July 2017 and in force since 12 August 2017;
 - (c) the law amending the law on the National Council for the Judiciary and certain other laws ('Law on the National Council for the Judiciary'); approved by the Senate on 15 December 2017; and
 - (d) the law amending the law on the National School of Judiciary and Public Prosecution, the law on Ordinary Courts Organisation and certain other laws ('law on the National School of Judiciary'); published in the Polish Official Journal on 13 June 2017 and in force since 20 June 2017.

3.5.1. Scope of application of Article 7(1) TEU: What risks of breaches of EU values are required to cross the activation threshold?

The mechanism provided for under Article 7(1) TEU can be activated when there is a 'clear risk of a serious breach' of the founding values enshrined in Article 2 TEU by a Member State. From a substantive point of view, the first element of note is that this mechanism and its sanctions counterpart (see Section 4.3 below) are commonly described as **horizontal mechanisms** that apply to all areas of activity of Member States, including those in the purely domestic realm. The European Commission¹⁹⁰ has adopted this interpretation of Article 7 TEU and a number of experts¹⁹¹ support it in the understanding that the provision must be blind with regard to the usual distribution of competences between the EU and its Member States, as it seeks to protect the common constitutional core of the EU and the shared values underlying its whole legal order. In this sense, it has been pointed out that it would make no sense and would probably be untenable for a Member State to respect the founding values in areas of EU competence and act contrary to those values in the purely domestic realm.¹⁹² This reading of Article 7 TEU was adopted in the two on-going procedures against Poland and Hungary, as the European Commission did not comment on this question in its reasoned proposal triggering the mechanism in relation to Poland,¹⁹³ and the European Parliament expressly highlighted that 'the Union can assess the existence of a clear risk of

¹⁹⁰ [Communication from the Commission to the Council and the European Parliament on Article 7 of the Treaty on European Union – Respect for and promotion of the values on which the Union is based](#), COM/2003/0606 final, 15 October 2003, p. 5.

¹⁹¹ In this sense, see L. Besselink, 'The Bite, the Bark and the Howl. Article 7 TEU and the Rule of law Initiatives' in Jakab and Kochenov, *The enforcement...*, pp. 141-143; D. Kochenov, 'Busting the myths nuclear: A commentary on Article 7 TEU', *EUI WP Law*, No 10, 2017, p. 7.

¹⁹² [Commission Communication on Article 7 TEU...](#), p. 5.

¹⁹³ European Commission, Reasoned proposal in accordance with Article 7(1) of the Treaty on European Union for a Council Decision on the determination of a clear risk of a serious breach by the Republic of Poland of the rule of law, [COM\(2017\) 835 final](#), 20 December 2017.

a serious breach of the common values in areas falling under Member States' competences' under Article 7 TEU in its resolution activating the mechanism in relation to Hungary.¹⁹⁴

As it has already been highlighted, Article 7(1) TEU provides for a mechanism of a **preventive nature**. The drafting process of the provision clearly supports that conclusion, as the mechanism was designed to supplement the sanctions mechanism provided for under Article 7(2) TEU. This followed suggestions voiced ahead of the 2000 inter-governmental conference, at which the Treaty of Nice was drafted,¹⁹⁵ and it was agreed by a majority of the national delegations within the inter-governmental conference.¹⁹⁶ As a result, the procedure can be activated when there is a '**clear risk of breach**' – not an actual breach – of one or more of the EU's founding values by a Member State. From a substantive point of view that would, in principle, mean that the mechanism is to be used **before the actual breach of founding values occurs**, the aim being to prevent such a violation.¹⁹⁷ As the Commission put it in 2003, the mechanism should remain in the 'realm of the potential', 'sending a warning signal to the offending Member State before the risk materialises'.¹⁹⁸ However, as the risk needs to be clear, 'purely contingent risks' would not be enough to trigger the procedure.¹⁹⁹

Again, the **two on-going procedures initiated against Poland and Hungary** provide useful information as regards the understanding of the preventive nature of Article 7(1) TEU by EU institutions. Both procedures were triggered in relation to a series of acts, decisions and/or legal and constitutional changes that had already occurred or were already in force when Article 7(1) TEU was triggered. However, both the European Parliament and the Commission indicated that, taken together, all those facts and legal changes showed a '**pattern**'²⁰⁰ or a '**trend**'²⁰¹ that represented a **systemic threat either to all EU values or to some of them**. Focusing on 13 legislative changes affecting the Polish judiciary adopted over a period of two years, the Commission was especially clear in stating that: 'The **legislative changes and their combined effects** put at serious risk the independence of the judiciary and the separation of powers in Poland which are key components of the rule of law'.²⁰²

¹⁹⁴ 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\(INL\)](#)), para. C.

¹⁹⁵ Report by M. Ahtisaari, J. Frowein and M. Oreja, adopted in Paris on 8 September 2000, para. 117, receiving a mandate from the 14 Member States that decided to impose sanctions on Austria on the 31 January 2000: <https://www2.ohchr.org/english/bodies/hrc/docs/ngos/HOSI-1.pdf>.

¹⁹⁶ See Conference of the representatives of the governments of the Member States, Presidency, IGC 2000: Article 7 of the TEU, CONFER 4785/00, 18 October 2000 (<https://data.consilium.europa.eu/doc/document/ST-4785-2000-INIT/en/pdf>).

¹⁹⁷ In this sense, see Besselink, 'The Bite, the Bark ...', p. 129.

¹⁹⁸ Communication from the Commission to the Council and the European Parliament on Article 7 of the Treaty on European Union – Respect for and promotion of the values on which the Union is based, [COM\(2003\)0606 final](#), 15 October 2003, p. 7.

¹⁹⁹ *Ibid.*

²⁰⁰ European Commission, Reasoned Proposal in accordance with Article 7(1) of the Treaty on European Union for a Council Decision on the determination of a clear risk of a serious breach by the Republic of Poland of the rule of law, [COM\(2017\) 835 final](#), 20 December 2017, para. 173.

²⁰¹ 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\(INL\)](#)), para. 2.

²⁰² Commission, Reasoned Proposal... in, [COM\(2017\) 835 final](#), para. 173.

Box 4– Scope of the European Parliament's reasoned proposal on Hungary

Parliament's [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, contains a detailed annex divided into twelve different headings and building on different sources. The annex highlights Parliament's concerns as regards:

- the endangerment of the principle of separation of powers as a result of the adoption of the current constitution; the constitutional and legal changes affecting the competences and the election of judges of the Constitutional Court; the extensive use of direct democracy instruments by the Hungarian government, including consultations allegedly containing incorrect or misleading information, inducing hatred against migrants or targeting the EU; the conduct of the national elections and electoral reforms, especially as regards the delimitation of constituencies;
- the constitutional and legal reforms allegedly endangering the independence of the judiciary and the prosecution service (e.g. the establishment of new rules relating to the retirement of judges or the allegedly extensive powers granted to the President of the National Judicial Office);
- the shortcomings of national rules dealing with conflicts of interest by the Members of the national Parliament; the Hungarian government's poor record in relation to government effectiveness and corruption;
- the legal framework relating to secret surveillance for national security purposes allegedly allowing for mass interception of communications and containing insufficient safeguards against arbitrary interference with the right to privacy;
- changes introduced in media legislation allegedly hindering freedom of expression and information;
- legal changes affecting foreign universities and academic freedom;
- legal reforms modifying the criteria for the recognition of churches and allegedly affecting freedom of religion;
- the political discourse stigmatising NGOs and the legal changes adversely affecting their activities (e.g. imposing restrictions to those perceiving foreign funding or imposing criminal penalties for those facilitating illegal immigration);
- deficiencies concerning the protection of women's and LGBTI persons rights in a national context characterised by Parliament as embracing a conservative form of family and gender and LGBTI people stereotypes;
- widespread discrimination of Roma people and the recrudescence of xenophobia and racism;
- disrespect of fundamental rights of migrants and asylum seekers (e.g. arbitrary deprivation of liberty, violent pushbacks, inadequate treatment of migrant children).
- Hungary's poor record in relation to socio-economic rights (e.g. criminalisation of homelessness, limitations imposed on the right to strike, poor social assistance and social security benefits).

In this vein, the positions of the European Parliament and the Commission seem to suggest that a 'clear risk' of breach of EU values might come, in some cases, not from a single event clearly putting those values at risk, but from a series of events that, read together, may reach that threshold. However, considering that all the **concerns** highlighted by the Parliament and the Commission regarding Poland and Hungary had already occurred in the past (see Boxes 3 and 4), it could be argued that the situation on the ground in both countries had **already reached the threshold for activating Article 7(2) TEU** – 'serious and persistent breach' – and could no longer be considered a mere threat to EU values.²⁰³

This matter leads on to the final element characterising Article 7(1) TEU procedures from a substantive point of view. According to the Treaties, the risk that allows those procedures to be triggered must be of a '**serious breach**' of EU values. This requirement is common to both the preventive and the sanctions procedures under Article 7 TEU, although in the latter case there should be a breach of EU values – not a risk of breach – and the breach should be both serious and

²⁰³ In a similar vein, see Pech and Kochenow, '[Strengthening the Rule of Law...](#)', p. 7.

persistent, as will be explored further in Section 4.3.1. The requirement that breaches of EU values are '**serious**' raises questions relating to the degree of gravity of the breaches – or risk of breaches – that Article 7 TEU procedures aim to address. It is apparent that 'simple breaches' of EU values would not attain the minimum level of gravity needed to trigger the procedure. The European Commission pointed out in its 2003 Communication on Article 7 TEU that the procedures contained in that provision were not designed to remedy individual breaches of EU values, but are to be considered 'last resort' tools aiming to address '**systematic**' violations.²⁰⁴ Similarly, the Commission proposed to determine the seriousness of the breach – or risk of breach – taking into account two other criteria: the **purpose and the results of the breach**. The Commission gave several examples, explaining that the seriousness of the breach – or risk of breach – could be measured taking into account whether it affected vulnerable groups (purpose) or several EU values (results).²⁰⁵

Although in a completely different area, the ECJ (General Court) case law provides some insight into how the criterion referring to the seriousness of the breach of EU values, which allows the triggering of Article 7 TEU procedures, could be interpreted. In a series of cases concerning the annulment of Council decisions freezing the funds and/or assets of persons subject to investigations in third countries for misappropriation of public funds, the General Court indicated that any act classifiable as misappropriation of public funds committed in a third country could not justify EU action with the objective of consolidating and supporting the rule of law in that country under common foreign and security policy.²⁰⁶ EU action would be justified only in qualified situations, in those that are serious enough 'to **undermine the legal and institutional foundations**' of that country.²⁰⁷ Although this case law focuses on EU action to protect the rule of law in third countries, it might be an interesting avenue to explore for the application of Article 7 TEU procedures to Member States, as it seems to point to the structural nature of the breaches that would justify EU action. On this note, it should be noted that academics have long discussed the criteria that should be taken into account when defining the seriousness of the breach of EU values needed to trigger Article 7 TEU procedures. Although various positions have been put forward, a consensus seems to have been reached around the idea of limiting the activation of Article 7 TEU to shortcomings of a **structural nature** that have implications so profound that **national institutions themselves are either unable or unwilling to address the situation**.²⁰⁸ However worrying a situation might be, if a given Member State's institutional framework is able to respond to the threat, the EU should refrain from taking action.

²⁰⁴ Commission Communication on Article 7 TEU..., [COM\(2003\)0606 final](#), p. 7.

²⁰⁵ *Ibid.*, p. 8

²⁰⁶ See for instance GC judgments: of 21 February 2018, Klyuyev, Case T-731/15; of 15 September 2016, *Yanukovych Case T-348/14*.

²⁰⁷ *Yanukovych*, para. 102: "Consequently, that criterion must be interpreted as meaning that it does not concern, in abstract terms, any act classifiable as misappropriation of public funds, but rather that it concerns the misappropriation of public funds or assets which, **having regard to the amount or the type of funds or assets misappropriated or to the context** in which the offence took place, are, at the very least, **such as to undermine the legal and institutional foundations of Ukraine**, and in particular the principles of legality, the prohibition of arbitrary exercise of power by the executive, effective judicial review and equality before the law and, ultimately, undermining respect for the rule of law in that country".

²⁰⁸ See J.-W. Müller, 'Should the EU Protect Democracy and the Rule of Law inside Member States', *ELJ*, Vol. 21(2), 2015, pp. 151-156; C. Closa and D. Kochenov, "Reinforcement of the rule of law oversight in the European Union: key options" in Werner Schroeder (ed.), *Strengthening the Rule of Law in Europe: From a Common Concept to Mechanisms of Implementation*, Bloomsbury 2016, pp. 175-177; Kochenov, 'The enforcement...', p. 9-10; Armin von Bogdandy and Michael Ioannidis, "Systemic deficiency in the rule of law: what it is, what had been done, what can be done?", *CMLR*, Vol. 51, 2014, pp. 65-83.

The two on-going procedures triggered against **Poland and Hungary** are an example of how the Commission and the Parliament understand the **'seriousness' of a risk of breach of EU values** that can trigger Article 7(1) TEU procedures. The Parliament resolution on Hungary points out deficiencies that concern several EU founding values, namely democracy, the rule of law, equality and respect for fundamental rights, including the rights of minorities (see Box 4). By contrast, the Commission's reasoned proposal on Poland focuses only on measures concerning the independence of the judiciary, thus **singling out the rule of law as a key founding value of the EU** (see Box 3). The European Parliament has however called several times for the scope of the assessment in relation to Poland to be extended to alleged violations of fundamental rights – for instance, in its 2020 resolution on the 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, approved by the Plenary on 17 September 2020.²⁰⁹ In both cases, the EU institutions seem to take the position that the Article 7(1) TEU procedure is meant to be activated only when structural deficiencies affecting one or several EU founding values can be detected in a context where national authorities are either responsible for these deficiencies and unwilling to address them or unable to do so. In the cases of Poland and Hungary, the issues identified by the Commission and the Parliament arguably reflect the deliberate intent of national authorities rather than an inability to address them, as the Commission expressly suggested in relation to Poland.

3.5.2. The procedure: What type of mechanism does Article 7(1) TEU provide for?

As indicated above, Article 7(1) TEU contains a preventive mechanism that is meant to be applied when there is a 'clear risk of a serious breach' of EU values by a Member State. However, this mechanism is not only characterised by its preventive nature, but it has also been described as a highly political tool, taking into account the **prevalent role assumed by the Council** and the **limited jurisdiction of the ECJ** over its application (see Figure 3).²¹⁰ This specific feature of the mechanism, that is common to its sanctions counterpart (Article 7(2)-(3) TEU), has been criticised by some authors for giving decision-making powers to partisan actors rather than to impartial institutions.²¹¹

From a procedural point of view, the preventive mechanism under Article 7(1) TEU is not as burdensome as its sanctions counterpart, making this instrument more moderate and realistic.²¹² Nevertheless, the procedure is highly political in terms of its main actors: the mechanism can be **triggered by one-third of the Member States, the European Parliament or the Commission**. In order to initiate it, those actors need to submit a reasoned proposal to the Council, a requirement

²⁰⁹ European Parliament resolution of 17 September 2020 on the proposal for a Council decision on the determination of a clear risk of a serious breach by the Republic of Poland of the rule of law (COM(2017) 835 – 2017/0360R(NLE)), par. 4, in which it shows its concerns for the limited scope of the reasoned proposal triggering Article 7 (1) TEU adopted by the Commission and calls for it to include concerns relating to the value of democracy and respect for fundamental rights. See, also prior resolutions, such as the European Parliament resolution of 16 January 2020 on ongoing hearings under Article 7(1) of the TEU regarding Poland and Hungary ([2020/2513\(RSP\)](#)).

²¹⁰ Communication from the Commission to the Council and the European Parliament on [Article 7 of the Treaty on European Union – Respect for and promotion of the values on which the Union is based](#), COM/2003/0606 final, 15 October 2003, p. 6.

²¹¹ J.-W. Müller, 'Militant democracy and constitutional identity', in G. Jacobson and M. Schor (eds.), *Comparative Constitutional Theory*, Edward Elgar Publishing, 2015, p. 431; B. de Witte and G. N. Toggenburg, 'Human Rights and Membership of the European Union', in S. Peers and A. Ward: *The EU Charter of fundamental rights*, Hart, 2004, pp. 72-73.

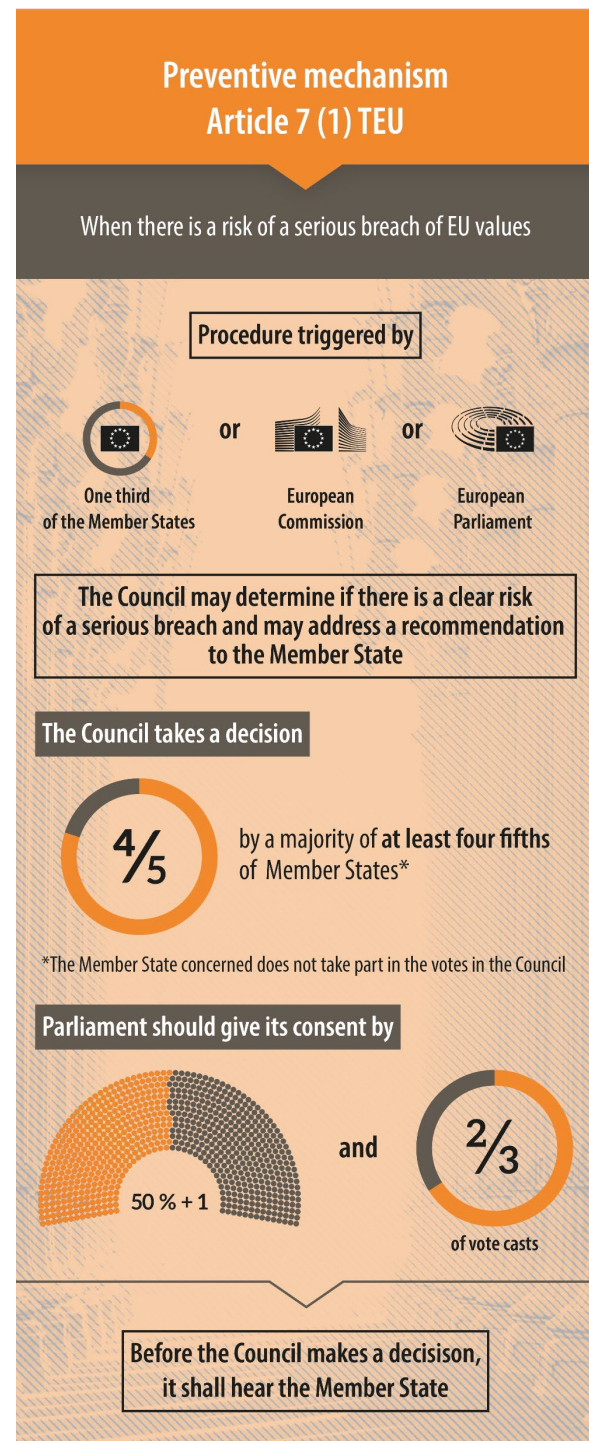
²¹² W. Sadurski, 'Guest Editorial. That *other* anniversary', *ECLR*, Vol. 13, 2017, pp. 420-421.

that implies monitoring the situation in the concerned Member State and presenting the Council with all the relevant data needed to ascertain whether the situation deserves EU's action. Although this requirement limits the discretion of the actor triggering the procedure, there is clearly no obligation to initiate an Article 7(1) TEU procedure when there is a 'clear risk of a serious breach' of EU values by a Member State, leaving a wide margin of appreciation to the political actors competent to activate the mechanism.²¹³

After **hearing the Member State concerned**, the **Council** – with the consent of Parliament, as will be explained below – may **decide** on the possible adoption of a decision determining whether there is a '**clear risk of a serious breach**' of EU values. The Council may also issue **recommendations** following the same procedure, although the effectiveness of the mechanism has been questioned on account of the absence of any enforcement instrument in relation to possible Council recommendations.²¹⁴ Again, there seems to be no legal obligation for the Council to determine that there is a 'clear risk of a serious breach' of EU values by a Member State when certain conditions are met. Neither Article 7(1) TEU, nor the Council's Rules of Procedure or the standard modalities for Article 7(1) TEU hearings,²¹⁵ adopted on 9 July 2019 by the Council, specify any deadline for the Council to discuss or vote the proposal triggering an Article 7(1) TEU procedure or to hold the required hearing with the concerned Member State. The timing of the procedure is, therefore, left to the political discretion of the Council.

Similarly, it is interesting to point out that **meetings in the Council** to deliberate and decide on proposals triggering Article 7(1) TEU procedures **are not public** (Articles 7 and 8 of Council's Rules of Procedure),²¹⁶ as the Presidency

Figure 3 – Article 7(1) TEU mechanism (preventive arm)



Source: EPRS.

²¹³ In this sense, see; GC order of 23 January 2019, *MLPS*, [T-304/18](#), para. 16.

²¹⁴ de Witte and Toggenburg, 'Human Rights and', p. 72.

²¹⁵ Council Decision, [Standard modalities for Article 7\(1\) TEU hearings](#), adopted on 9 July 2019, 10641/2/19.

²¹⁶ Council Decision, [Council's Rules of Procedure](#), 1 December 2009, 2009/937/EU (modified in several occasions).

commits only to present procedural conclusions, but not a substantive assessment of the issues discussed (paras. 10-11, 16-17, 22-23 of the Standard modalities for Article 7 (1) TEU hearings). Moreover, the participation of **the European Parliament** in Article 7(1) TEU hearings before the Council **is not envisaged**, not even when it is the actor triggering the procedure. The Standard modalities for Article 7 (1) TEU hearings do provide for those hearings to start with a presentation of the proposal to apply that mechanism to a Member State during a maximum of 20 minutes by the actor triggering the procedure, but only if it is either one-third of the Member States (one Member State will represent all the Member States triggering the procedure) or the Commission. If Parliament has activated the procedure, as was indeed the case in relation to Hungary, the hearing will start with a report presented by the Presidency of its contacts with the European Parliament in relation to the procedure (para. 11, Standard modalities for Article 7(1) TEU hearings). This difference might be explained by the position presented orally by the Council's Legal Service on the matter, according to which Parliament could not be heard in Council's meetings before Hungary's Article 7(1) TEU procedure first hearing.²¹⁷ Parliament has already criticised what it perceives to be a procedural deficiency, also raising doubts in relation to what it describes as the irregular, non-structured and non-transparent nature of the hearings on Hungary and Poland under the on-going Article 7(1) TEU procedures.²¹⁸ In any case, it seems clear that the Council has been granted wide discretion in relation to the procedural rules to respect when deciding on an Article 7(1) TEU procedure.

As far as majorities are concerned, the **Council decides by a qualified majority of four-fifths of its members** in relation to the determination of the existence of a 'clear risk of a serious breach' of EU values and the possible recommendations to be addressed to the Member State. As the **Member State concerned cannot vote** and is not counted in the calculations to determine whether the threshold has been attained (Article 354(1) TFEU), the question that arises is how to apply this rule if different Article 7(1) TEU procedures have been initiated in relation to several Member States. Although the answer to this question is clearly more relevant under the sanctions mechanism, where unanimity is required at European Council level, some authors have already pointed out that a strict interpretation of this rule would deprive Article 7 TEU – especially the sanctions mechanism – of its *effet utile*, as Member States suspected of failing to adhere to EU values would be given the right to block the application of the provision to other Member States.²¹⁹ Therefore, scholars have suggested an interpretation according to which the Treaties implicitly authorise the exclusion of several Member States from voting in the context of Article 7 TEU procedures and especially in the context of the sanctions mechanism.²²⁰

²¹⁷ Although the content of opinion is not accessible, it has been commented and also criticised by: M. Michelot, '[The "Article 7" proceedings against Poland and Hungary: what concrete effects?](#)', Blog post, *Notre Europe*. Institut Jacques Delors, April 2019, p. 3; L. Pech, D. Kochenov and S. Platon, '[The European Parliament Sidelined. On the Council's distorted reading of Article 7\(1\) TEU](#)', *VerfBlog*, 8 December 2019.

²¹⁸ European Parliament resolution on ongoing hearings under Article 7(1) of the TEU regarding Poland and Hungary, 16 January 2020 ([2020/2513\(RSP\)](#)).

²¹⁹ See L. Pech and K. L. Scheppele, 'Illiberalism Within: Rule of Law Backsliding in the EU', *Cambridge Yearbook of European Legal Studies*, Vol. 19, 2017, p. 29; D. Kochenov, 'Article 7: A commentary on a much talked-about "dead" provision', University of Groningen Faculty of Law Research Paper Series, No. 21/2019, p. 21.

²²⁰ *Ibid.*

Before deciding, the Council needs to receive **consent from Parliament** by a qualified majority of **two-thirds of the votes cast, representing an absolute majority of all Members** (Article 354(4) TFEU). Again, as it has happened in relation to the threshold to be attained in the Council, the interpretation of this voting requirement has been fraught with uncertainty due to doubts concerning how to count abstentions. Ahead of the European Parliament's vote on the [resolution](#) initiating Article 7(1) TEU procedure against Hungary, the Parliament's Legal Service took the view that abstentions should not prevent Parliament from reaching the required majority of two-thirds of the votes cast as the Treaties are silent in relation to the question and Parliament's Rules of Procedure²²¹ generally exclude abstentions when determining whether a certain majority has been met.²²² The ECJ may soon clarify the interpretation of the voting requirement within the European Parliament as Hungary brought an action against Parliament taking the view that abstentions should be counted and explaining that the threshold required by the Treaties would have not been met if they had been taken into account.²²³

Box 5 – On-going Article 7(1) TEU procedures: stages in the procedure

Article 7(1) TEU has only been triggered on two occasions, against Poland and against Hungary, and both procedures are currently on-going.

Poland: On 20 December 2017, the Commission triggered the Article 7(1) TEU procedure for the first time, submitting a [reasoned proposal](#) for a decision of the Council on the determination of a clear risk of a serious breach of the rule of law by Poland (procedure [2017/0360 \(NLE\)](#)), simultaneously issuing detailed recommendations to Poland ([Commission Recommendation \(EU\) 2018/103](#)). The triggering of the procedure was preceded by three detailed recommendations adopted by the Commission under its [Rule of Law Framework](#) ([2016/1374](#), [2016/146](#) and [2017/1520](#)). The Council has analysed the Polish situation in a number of meetings, holding three formal hearings on 26 June 2018, 18 September 2018 and 11 December 2018. The Council is due to analyse the situation in Poland again during its [22 September 2020](#) meeting.

Hungary: On 12 September 2018, the European Parliament [triggered](#) the same procedure against Hungary (rapporteur: Judith Sargentini, the Netherlands, Greens/EFA, procedure [2017/2131\(INL\)](#)). Parliament's resolution on Hungary was adopted with 448 to 197 out of 693 MEPs votes in favour and 48 abstentions and it was preceded by numerous others adopted by the European Parliament between [March 2011](#) and [May 2017](#) ([10 March 2011](#); [16 February 2012](#); [3 July 2013](#); [10 June 2015](#); [16 December 2015](#); [17 May 2017](#)). However it was not preceded by any assessment of the situation or recommendations made by the Commission under the [rule of law framework](#). The Council has analysed the Hungarian situation in various meetings, holding two formal hearings on 16 September 2019 and 10 December 2019. The Council is due to analyse the situation in Hungary at its 22 September 2020 meeting.

The primarily political nature of the mechanism in Article 7(1) TEU is clearly derived from the central role attributed to the Council and the limited jurisdiction of the ECJ. During the inter-governmental conference that introduced the sanctions mechanism in the Treaties, the involvement of the ECJ in Article 7 TEU procedures establishing that a breach of EU values had taken place was discussed.²²⁴ The proposal was ultimately rejected and the Member States, acting through the Council or the European Council, remained the masters of the decisions taken under Article 7 TEU procedures. As a result, decisions adopted under both Article 7 TEU procedures can be submitted to the scrutiny of the Court only at the request of the Member State concerned and **only in relation to the**

²²¹ [Rule 187 \(3\)](#).

²²² The European Parliament Legal Service note is not public, but its content was disclosed by Judith Mischk, '[Orbán says Hungary considering legal actions against EU](#)', *Politico*, 14 September 2018.

²²³ Case [C-650/18 Hungary v Parliament](#), pending.

²²⁴ See Chapter I of the Progress report on the Intergovernmental Conference, presented by the Presidency to the European Council, CONF 3860/1/96 REV 1, 17 June 1996.

procedural – but not the substantive – requirements set out in Article 7 TEU (Article 269 TFEU), thus clearly limiting the capacity of the Court to review decisions adopted under both procedures.

3.5.3. Application of Article 7(1) TEU: The effectiveness question

Although the procedures against Poland and Hungary were launched respectively in December 2017 and September 2018, no decision has yet been made in relation to either country and the effects of triggering of this mechanism have been, to date, rather doubtful with regard to the situation on the ground. The Council has discussed the **Polish** situation several times and **three hearings** were held on 26 June 2018, 18 September 2018 and more recently on 11 December 2018, the latest one focusing on seven major topics:²²⁵ the early retirement of Supreme Court judges; the replacement of the members of the National Council of Judiciary by members elected by judges from among themselves and by members elected by the Parliament from among judges put forward by 25 judges or a group of 2 000 citizens; the impact of the retirement regime upon the independence of ordinary judges; the new disciplinary regime and the newly created Disciplinary Chamber of the Supreme Court; the 'extraordinary appeal' procedure allowing a new Extraordinary Control Chamber to undo final judicial decisions even after many years in cases of serious breaches of fundamental rights; the situation of court presidents as affected by the dismissal and appointment regime; the question of regularising the composition of the Constitutional Court and publishing the judgments from 2016. The Council has discussed the situation in **Hungary** in several meetings and the Hungarian government has been heard by the Council also on several occasions: it presented a written contribution to the procedure in the General Affairs Council meeting of 12 November 2018; a **first formal hearing** took place in the General Affairs Council meeting of 16 September 2019²²⁶ and a **second one** in the General Affairs Council meeting of 10 December 2019.²²⁷ However, the Council has not yet adopted any substantive decision in relation to the procedures and no decision is expected in the near future, thus raising the question of the effectiveness of this tool.

As regards the situation in both countries, it is **difficult to ascertain whether the triggering of the Article 7(1) TEU procedure has had any discernible effect in relation to the most controversial measures adopted by both Member States**. The Commission has been updating the Council regularly on the situation in Poland, noting that key concerns identified in the Commission's reasoned proposal have remained unaddressed.²²⁸ None of the major Polish laws listed in the Commission's reasoned proposal has been repealed or significantly amended to address the concerns highlighted by the Commission, except for the measures adopted to implement the decisions made by the ECJ in the context of specific infringement procedures initiated against Poland (see Section 4.2.3). The European Parliament²²⁹ and also non-EU institutions, such as the

²²⁵ Presidency, Rule of law in Poland/ Article 7(1) TEU reasoned proposal- Hearing of Poland on 11 December 2018, 27 November 2018, [14621/18](#).

²²⁶ General Secretariat of the Council, Values of the Union – Hungary – Article 7(1) TEU Reasoned Proposal – Report on the hearing held by the Council on 16 September 2019, 19 September 2019, [12345/19](#).

²²⁷ Outcome of the Council Meeting, 3739th Council meeting, General Affairs, 10 December 2019, [14959/19](#).

²²⁸ See for instance Outcome of the Council Meeting, 3614th Council meeting, General Affairs, 17 April 2018, [8046/18](#).

²²⁹ European Parliament resolution of 17 September 2020 on the proposal for a Council decision on the determination of a clear risk of a serious breach by the Republic of Poland of the rule of law (COM(2017)0835 – 2017/0360R(NLE)); European Parliament resolution of 16 January 2020 on ongoing hearings under Article 7(1) of the TEU regarding Poland and Hungary ([2020/2513\(RSP\)](#)).

Parliamentary Assembly of the Council of Europe²³⁰ or the Venice Commission²³¹ have recently referred to the situation in Poland, raising concerns similar to those raised in the Commission's initial reasoned proposal triggering Article 7(1) TEU in relation to Poland. As regards Hungary, the assessment is even more challenging, as the Hungarian authorities have implemented ECJ judgments in infringement procedures linked to EU values violations, although in a way that gave rise to controversy (see Section 4.2.3) and have also taken a step back in relation to some of the measures they intended to adopt, as it has been highlighted by the European Parliament itself²³² and the Venice Commission.²³³ However, the situation in the country remains cause for concern for the European Parliament,²³⁴ which has recently indicated that the situation is continuing to deteriorate on the ground. Similarly, the situation in Hungary is being closely monitored by the EU institutions,²³⁵ other international organisations²³⁶ and experts,²³⁷ especially due to the measures adopted by Hungarian authorities to deal with the Covid-19 pandemic in the country,²³⁸ once again raising the question of the effectiveness of the Article 7(1) TEU procedure as a preventive tool to safeguard EU values.

²³⁰ See recently, Parliamentary Assembly of the Council of Europe, [Report of the Committee on the Honouring of Obligations and Commitments by Member States of the Council of Europe \(Monitoring Committee\)](#), 28 January 2020 (4th Sitting).

²³¹ Venice Commission, Poland – Urgent Joint Opinion on the amendments to the Law on organisation on the Common Courts, the Law on the Supreme Court and other Laws, 16 January 2020, [CDL-PI\(2020\)002-e](#). All Venice Commission opinions on Poland can be found [here](#).

²³² 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\(INL\)](#)).

²³³ Among others, see: Venice Commission, Opinion On Act CII Of 2011 On The Constitutional Court Of Hungary, adopted by the Venice Commission at its 91st plenary session (Venice, 15-16 June 2012), noting how the Hungarian authorities had taken on board some of the prior recommendations made by the Commission in relation to the new legal framework applicable to the national Constitutional Court. All Venice Commission opinions on Hungary can be found [here](#).

²³⁴ European Parliament resolution of 16 January 2020 on ongoing hearings under Article 7(1) of the TEU regarding Poland and Hungary ([2020/2513\(RSP\)](#)); European Parliament resolution of 17 April 2020 on EU coordinated action to combat the COVID-19 pandemic and its consequences ([2020/2616\(RSP\)](#)), paras. 46-48.

²³⁵ See European Parliament resolution of 17 April 2020 cited in the prior note, as well as declarations of the Commission on the national emergency measures taken in response to Covid-19 by Hungary in '[At this stage, Hungarian emergency law does not violate European law, confirms Commission](#)', Agence Europe, Brussels, 29 April 2020.

²³⁶ See [Letter sent from the Secretary General of the Council of Europe to Viktor Orbán, Prime Minister of Hungary](#), on 24 March 2020.

²³⁷ See for instance P; Bárd and S; Carrera, 'Showing true illiberal colours – Rule of law vs Orbán's pandemic politics', CEPS, Policy Insights, No 10, 2020; K. Kovács, 'Hungary's Orbánistan: [A Complete Arsenal of Emergency Powers](#)', *VerfBlog*, 6 April 2020.

²³⁸ *Ibid.*

4. Enforcement mechanisms



Having analysed the existing monitoring and preventive tools available to address EU values deficiencies in Member States, this section turns to the enforcement tools EU institutions may resort to in order to address violations of those values. At first sight, **Article 7(2) and (3) TEU** provides for the only tool available under the Treaties to enforce EU values as regards Member States. However, general EU law enforcement tools, such as **infringement procedures and preliminary references, have been used to address specific instances of non-compliance with EU values** by Member States, especially since the ECJ began to refer to Article 2 TEU in its case law, demonstrating different ways to operationalise the

values enshrined therein (see Annex, Table 1). As will be explained further below, these enforcement tools do not aim to tackle the same type of EU values shortcomings, as Article 7(2)-(3) TEU only apply in cases of 'serious and persistent' breaches of EU values by a Member State, and preliminary references and infringement procedures do not seem to be applicable, at least in principle, to violations of such a systemic nature.

4.1 Preliminary references

The origins of the preliminary reference procedure can be traced back to Article 41 of the Treaty establishing the European Coal and Steel Community, (the Treaty of Paris)²³⁹ which provided for a narrowly defined scope of jurisdiction: regarding only the validity of acts of the High Authority and Council if raised before national courts, and it did not yet entail an interpretation of EU law, not to mention judicial review of national measures. When the Treaty of Rome was being prepared, Michel Gaudet, one of the drafters of that Treaty and head of the High Authority's legal service, wished to frame the preliminary reference as a 'true system of judicial review' giving the ECJ 'exclusive competence to interpret European law in all cases where it played a role before national courts.'²⁴⁰ However, this option was rejected and the current model, initially enshrined in Article 177 TEEC, was eventually chosen.²⁴¹

The wording of Article 177 TEEC has been essentially taken over by the current Article 267 TFEU, with an extension of the acts subject to the control of the ECJ, as the Court can now rule on the validity and interpretation of acts of 'bodies, office or agencies of the EU' – and not only of the EU institutions. In this vein, the main aim of the preliminary rulings procedure, as indicated in the official recommendations issued by the ECJ, is to 'ensure the **uniform interpretation and application of [EU] law** within the European Union, by offering the courts and tribunals of the Member States a

²³⁹ Article 41 [Treaty of Paris](#): 'The Court shall have sole jurisdiction to give preliminary rulings on the validity of acts of the High Authority and of the Council where such validity is in issue in proceedings brought before a national court or tribunal'.

²⁴⁰ M. Rasmussen, 'Revolutionizing European law: A history of the *Van Gend en Loos* judgment', *IJCL*, Vol.12(1), 2014, p. 145.

²⁴¹ *Ibid.*

means of bringing before the [ECJ] (...) questions concerning the interpretation of EU law or the validity of acts adopted by the institutions, bodies, offices or agencies of the Union.²⁴² This section will enquire whether, as part of the task of ensuring that 'uniform interpretation and application' of EU law, the ECJ can also contribute to the enforcement of EU values, as enshrined in Article 2 TEU, vis-à-vis the Member States of the Union, and if so how. In this context it should be underlined that in contrast to the action for failure to fulfil Union obligations (infringement procedure), provided for in Articles 258-260 TFEU (and discussed in Section 4.2 below), the procedure provided for in Article 267 TFEU is **not designed as an enforcement procedure but**, as indicated above, as a mechanism **ensuring the homogeneity of legal interpretation** as regards the norms of EU law in its judicial application by national courts. It is about ensuring that courts and other bodies in the Member States have the same understanding of the norms of EU law, both primary and secondary.

However, preliminary references have been often used by the ECJ to rule on the **conformity of national law with EU law**, since the landmark case of *Van Gend en Loos*,²⁴³ in which the majority of the ECJ decided to rule on the compatibility of Dutch law with the Treaties on the understanding that such a question pertained to the interpretation of Community law, rather than its application,²⁴⁴ thus expanding the scope of the procedure as envisaged by the drafters of the Treaty and the Member States.²⁴⁵ Koen Lenaerts, now President of the ECJ, wrote explicitly that in that judgment the ECJ '**widened the scope of the preliminary reference procedure**' reaching the 'practical outcome as the one that would be obtained through a direct invalidation of Member State law'.²⁴⁶ As a result, preliminary references are currently used by the ECJ not only to ensure uniform interpretation and application of EU law, including Article 2 TEU values, but also to point out **possible discrepancies between national and EU law**, including in relation to those values, as will be explained below.

4.1.1. Scope of application: When may national courts resort to Article 267 TFEU in the context of breaches of Article 2 TEU values?

The preliminary reference procedure has a **very strictly determined scope of application**. It is not sufficient for a national court that considers that one or more of the values enshrined in Article 2 TEU has been breached by the national authorities (e.g. government, parliament, public administration) to trigger Article 267 TFEU. This point can be illustrated by the recent ECJ judgment in the *Miasto Łowicz* case,²⁴⁷ in which two Polish courts submitted references asking for interpretation of Article 19(1) TEU in the context of disciplinary proceedings triggered on the basis of the new national legal framework on the disciplinary regime applicable to judges established by Polish authorities (i.e. in the context of the value – 'rule of law', as enshrined in Article 2 TEU). The ECJ rejected the reference as lying outside the scope of Article 267 TFEU and reiterated the **conditions for bringing such a reference** by a national Court in the following terms:

²⁴² [Recommendations](#) to national courts and tribunals, in relation to the initiation of preliminary ruling proceedings (2016/C 439/01).

²⁴³ ECJ judgment of 5.2.1963, *Van Gend en Loos*, Case 26/62,

²⁴⁴ *Ibid.*, [report](#), p. 11.

²⁴⁵ R. Dehousse, *The European Court of Justice*, MacMillan 1998, p. 30.

²⁴⁶ K. Lenaerts, 'Constitutionalism and the Many Faces of Federalism', *American Journal of Comparative Law*, Vol. 38(2), 1990, p. 256. Emphasis added.

²⁴⁷ ECJ judgment of 26 March 2020, *Miasto Łowicz*, [C-558/18 and C-563/18](#).

- 'the question referred for a preliminary ruling must be **'necessary'** to enable the referring court to 'give judgment' in the case before it' (para. 45);
- the procedure does not serve to give **'advisory opinions on general or hypothetical questions'** to be delivered but rather that it is necessary for the effective resolution of a dispute' pending before the national court (para. 44);
- the national judge 'is not empowered to bring a matter before the Court by way of a request for a preliminary ruling unless a case is **pending** before it in which it is called upon to give a decision which is capable of taking account of the preliminary ruling' (para. 46);
- the preliminary reference procedure must be differentiated from the action for failure to fulfil obligations (Articles 258-260 TFEU) –as in the latter the ECJ 'must ascertain whether the national measure or practice challenged by the Commission or another Member State, contravenes EU law in general, without there being any need for there to be a relevant dispute before the national courts, the Court's function in proceedings for a preliminary ruling is, by contrast, to help the referring court to resolve the **specific dispute** pending before that court' (para. 47);
- as a consequence, there must be 'a **connecting factor** between that dispute and the provisions of EU law whose interpretation is sought, by virtue of which that interpretation is objectively required for the decision to be taken by the referring court' (para. 48).

Box 6 – Examples of cases in which the ECJ has referred explicitly to Article 2 TEU in preliminary references concerning the application of the European arrest warrant:

- **Judgment of 15 November 2019, *Dorobantu***, C-128/18, referring court from Germany – Detention conditions in the issuing Member State of a European Arrest Warrant (Hungary).
- **Judgment of 6 December 2018, *IK***, [C-551/18 PPU](#), referring court from Belgium – Effects of the failure of the judicial authority issuing a European arrest warrant (Belgium authorities) to communicate to the executing judicial authority (the Netherlands authorities) the existence of an additional sentence imposed on the person concerned.
- **Judgment of 19 September 2019, *RO***, C-327/18 PPU, referring court from Ireland – Effects of the notification by a Member State of its intention to withdraw from the European Union (UK) as regards the European arrest warrants issued by the authorities of that Member State.
- **Judgment of 25 July 2018, *ML***, [C-220/18 PPU](#), referring court from Germany – Detention conditions in the issuing Member State of a European arrest warrant (Hungary).
- **Judgment of 25 July 2018, *Celmer***, [C-216/18 PPU](#), referring court from Ireland – Independence and impartiality of the judiciary in the issuing Member State of a European arrest warrant (Poland).
- **Judgment of 5 April 2016, *Aranyosi and Căldăraru***, [C-404/15 and C-659/15 PPU](#) – Detention conditions in the issuing Member State of an European arrest warrant (Hungary and Romania).

In the case at hand, the ECJ found that there was no substantive connection between the cases pending before the national judges, on one hand, and EU law, in particular Article 19(1) TEU, on the other (para. 49). Although it was true that disciplinary proceedings had been opened against the referring judges on account of allegedly improper use of Article 267 TFEU, the Court noted that the proceedings had been closed and no misconduct was found (para. 54).

Even if the admissibility criteria of preliminary references restrict the use of this mechanism as a tool to enforce EU values, it is to be noted that the **values enshrined in Article 2 TEU**

have been the object of preliminary references in various cases (see Annex, Tables 1 and 2). In many of these cases, the ECJ finds norms of national law or their judicial application as being in breach of EU law. In some of these cases, the **ECJ has expressly referred to Article 2 TEU**, together

with some other Treaty or secondary EU law provisions, to ground its decision (see Annex, Table 1), whereas in some others, the ECJ does not explicitly mention Article 2 TEU, although a clear link to one or several of the values mentioned therein can be established (see Annex, Table 2, for a non-exhaustive list of relevant cases). The ECJ thereby grants legal protection to the common values of the Union.

These cases originated from many EU Member States, which clearly shows that **the preliminary reference procedure can be used** to address EU values deficiencies that are not necessarily 'systemic' (as required by Article 7 TEU), but can arise **in individual**, sometimes even isolated **cases**. For instance, in the *Tele2 Sverige* case the ECJ upheld the value of human rights (right to privacy) in Sweden,²⁴⁸ and in the *Achatzi* case the value of human rights (religious freedom) in Austria, where only Christians could enjoy a holiday on Good Friday.²⁴⁹ A large proportion of values-related case-law is concerned with asylum law. For instance, in the recent *Jawo* case,²⁵⁰ the ECJ interpreted the Dublin III regulation to the effect that Article 4 of the Charter of Fundamental Rights precludes the transfer of an applicant for international protection to the Member State which, in accordance with Dublin III, is normally responsible for examining his application for international protection, where, in the event of such protection being granted in that Member State, the applicant would be exposed to a substantial risk of suffering inhuman or degrading treatment on account of the living conditions that he or she could be expected to encounter. The reference was brought by a German court, which had doubts about the living conditions for refugees in Italy where Mr Jawo was to be deported.

The *Jawo* case illustrates the **cross-border aspect of the preliminary ruling mechanism** as an instrument for upholding Article 2 TEU values: national courts, whenever facing a cross-border situation involving the duty to deport or extradite a person to another EU Member State may enquire about the state of EU values, such as human rights or the rule of law, in that specific Member State. The German-Italian case of *Jawo* is not isolated, mention can be made of the German-Romanian case of *Dorobantu*,²⁵¹ where a German court, requested to surrender Mr Dorobantu to Romania, had doubts about the compatibility of prison conditions in the latter Member State with the Charter of Fundamental Rights, or the well-known *Celmer* case concerning an Irish court's doubts as to whether a Polish citizen would be judged by an independent and impartial tribunal, which is a prerequisite for a fair trial, if surrendered to Poland in the context of the Commission's investigation into the alleged rule of law deficiencies in that country.²⁵²

4.1.2. The procedure: How do preliminary references work?

The mechanism of the preliminary reference procedure involves, as its main actors, two courts – the national court referring the question, and the ECJ providing an answer. Therefore, this mechanism can be featured as an **exclusively judicial tool**, through which only courts (national and European) cooperate to ensure correct interpretation and application of EU law, including Article 2 TEU values. In addition, Member States and the EU institutions are entitled to submit their observations regarding the interpretation of EU law that is to be provided to the national court.

The response provided by the ECJ is **binding on the national court** with regard to the interpretation of EU law contained in it. However, as Takis Tridimas has noted, the formulation of

²⁴⁸ *Tele2 Sverige*.

²⁴⁹ ECJ judgment of 22 January 2019, *Cresco Investigation v Achatzi*, Case C-193/17.

²⁵⁰ ECJ (grand chamber) judgment of 19 March 2019, *Abubacarr Jawo*, [C-163/17](#).

²⁵¹ *Dorobantu*.

²⁵² *Celmer*.

the ECJ's response can actually leave the national court with more or less discretion: he distinguishes between 'outcome cases', where the national court has no margin for manoeuvre, 'guidance cases', where the national court receives guidelines on how to decide the case, and 'deference cases', where the guidance is so vague that in fact it remains at the discretion of the national court how to apply EU law to the case at hand.²⁵³

4.1.3. The effectiveness of the preliminary reference procedure as a mechanism for upholding EU values

Against the backdrop of the various mechanisms discussed in the present study, the preliminary reference procedure seems to be a **highly effective mechanism for upholding the EU values** enshrined in Article 2 TEU, thanks to the legally binding effects of the ECJ judgment, which actually go beyond the case at hand. As indicated by Morten Broberg, ECJ rulings in preliminary references are declaratory in nature, as they explain the correct interpretation of existing EU law, but they do bind Member States and not only the Member State from which the preliminary reference came, but all Member States, as they are given **general validity and binding force throughout the EU**.²⁵⁴

According to the same author, this *erga omnes* effect of preliminary rulings means 'that when interpreting EU law, all national courts are obliged to apply not only the operative part of a preliminary ruling, but also its ratio. This obligation applies to all national courts regardless of whether they sit as courts of last instance'.²⁵⁵ Therefore, the legal force of a judgment given under Article 267 TFEU, from the perspective of the Member State's duty to implement it, is no different from the force of a judgment given under Article 258 TFEU.

In terms of legal effects, the effectiveness of the preliminary reference procedure is therefore comparable to that of infringement proceedings or other mechanisms producing legally binding effects. On the other hand, even if the interpretation of EU law given in an infringement case is considered authoritative across the Union, its operative part mentions only the Member State concerned, whereas **the preliminary ruling judgment, in its operative part, provides for an abstract and general interpretation of EU law**. This could be considered *per se* an additional strength of the Article 267 TFEU procedure in terms of addressing EU values in a global manner. It could also however contribute to reducing the mechanism's immediate effectiveness, especially if the operative part is formulated in an open-ended manner.

The overview of recent cases concerning EU values in which the ECJ provided binding guidance to national courts (see Annex, Tables 1 and 2) indicates that the mechanism can be deployed in order

Binding nature of ECJ rulings in preliminary references

As indicated by the ECJ ([judgment of 21.6.2007](#), Joined Cases C-231/06 to C-233/06, *Emilienne Jonkman*, para 41), national authorities need to comply with ECJ rulings in preliminary references:

*Following a judgment given by the Court on an order for reference from which it is apparent that the national legislation is incompatible with Community law, it is for the authorities of the Member State concerned to take the general or particular measures necessary to ensure that Community law is complied with, **by ensuring in particular that national law is changed so as to comply with Community law as soon as possible and that the rights which individuals derive from Community law are given full effect.***

²⁵³ T. Tridimas, 'Constitutional review of member state action: The virtues and vices of an incomplete jurisdiction', *IJCL*, Vol. 9, 2011, p. 739.

²⁵⁴ M. Broberg, 'Preliminary References as a Means for Enforcing EU Law' in Jakab and Kochenov (eds.), *The enforcement...*, p. 107.

²⁵⁵ *Ibid.*

to uphold a broad array of EU values, including human dignity, human rights, non-discrimination, rights of minorities, and the rule of law. In order to assess the effectiveness of Article 267 TFEU in comparison to other mechanisms aimed at safeguarding EU values within the Member States it is necessary to point out the **main differences between the preliminary ruling mechanism and the other mechanisms** discussed in this study. They are as follows:

- 1 The preliminary ruling mechanism produces **binding legal effects** on the national court that asked the question, on all courts and bodies of that Member State and, as far as it contains a general and abstract interpretation of EU law – upon all courts and authorities across the EU; this is similar to infringement proceedings, but different from the monitoring and preventive mechanisms discussed in Section 3 above.
- 2 Although the non-implementation of a judgment rendered under Article 267 TFEU is not sanctionable directly within that procedure, **it can be sanctioned through the infringement procedure** (see Section 4.2 below); this is similar to the infringement procedure, but in contrast with the monitoring and preventive mechanisms discussed above;
- 3 The mechanism **can be triggered only by a national court**, but not by the EU institutions – in contrast to Article 7 TEU or Article 258 TEU.
- 4 The mechanism can be deployed to safeguard the observance of **EU values only in areas covered by EU law**, as its aim is to provide an interpretation of EU law; it cannot, therefore, address all questions that can be addressed through Article 7 TEU or the monitoring and preventive procedures analysed.
- 5 For the mechanism to be triggered there must be a **concrete case** pending, in contrast to other mechanisms discussed in this study, which can be triggered in the abstract.

Box 7 – The *AK v Krajowa Rada Sądownictwa* judgment and national follow-up

The question of independence and impartiality of the Polish Supreme Court's Disciplinary Chamber (IDSN) can serve as a **case study** concerning the effectiveness of the preliminary ruling as a mechanism to police observance of EU values within Member States. Doubts concerning the independence of the IDSN arose owing to the fact that it was formed from scratch in 2018 and its judges were appointed by the new National Council of the Judiciary (KRS), whose judicial members had been elected by the Polish Parliament from among judges, but not, as before, by other judges. The question of the independence and impartiality of the IDSN has been addressed through various mechanisms (rule of law framework, Article 7(1) TEU procedure, infringement procedures), and through a preliminary reference procedure (Joined Cases C-585/18, C-624/18 and C-625/18 *AK v Krajowa Rada Sądownictwa*), which was initiated by a number of Polish judges questioning the legality of the new KRS, and the independence of the IDSN. In its [judgment of 19 November 2019](#) in *AK*, the ECJ left it to the referring court – the Polish Supreme Court's Labour Chamber – to decide whether judges appointed by the reformed KRS, including the judges of the newly created Disciplinary Chamber of the Supreme Court, are independent. The ECJ did not decide by itself whether the Polish Supreme Court's Disciplinary Chamber is independent, but gave the national courts the following **guidance**, indicating that a court is not independent if: 'the objective circumstances in which that court was formed, its characteristics and the means by which its members have been appointed are capable of giving rise to **legitimate doubts, in the minds of subjects of the law, as to the imperviousness of that court to external factors**, in particular, as to the direct or indirect influence of the legislature and the executive and its neutrality with respect to the interests before it and, thus, may **lead to that court not being seen to be independent or impartial** with the consequence of prejudicing the trust which justice in a democratic society must inspire in subjects of the law'. The ECJ made explicit reference to the European Court of Human Rights case law on the independence and impartiality of the judiciary (see paras. 127-151 of the ECJ judgment) which provides for a combined, objective and subjective test.

The national follow-up to the *AK* judgment includes a number of decisions by various courts, painting a **complex picture**. The referring court (Labour Chamber), upon receiving the ECJ's answer, [ruled on 5 December 2019](#) that the **IDSN 'is not a court** within the meaning of Article 47 CFR and Article 6 of the Convention and Article 45(1) of the Constitution'. On 8 January 2020 the Supreme Court Extraordinary Review and Public Affairs Chamber [ruled](#) that the *AK* judgment should be applied as requiring proof of the lack of independence with regard to **individual judges** (rather than to a chamber in its entirety). On 23 January 2020, three chambers of the Supreme Court (civil, criminal, labour) [ruled](#) that if a judge appointed by the reformed KRS sits on a Supreme Court panel, that **panel is ipso facto inappropriately formed**, allowing the judgment to be quashed; if such a judge sits on a common court panel, such a panel *may be* unduly formed 'if the defective appointment causes, under specific circumstances, a breach of the standards of independence'. The resolution of 23 January 2020 was challenged by the prime minister before the Polish Constitutional Court (PCC). On 20 April 2020 the PCC [found](#) that the resolution is a general and abstract normative act, and therefore subject to constitutional review, ruling that it is **unconstitutional** as it infringes upon the presidential prerogative to appoint judges. On 21 April 2020 the PCC [ruled](#) that the Supreme Court is not entitled to modify the rules on the structure of the judiciary through a creative interpretation of the legislation, and may not question the validity of judicial appointments made by the president. As regards administrative courts, the Supreme Administrative Court [ruled on 5 February 2020](#) that the mere fact that a judge was appointed upon recommendation of the reformed KRS **is not sufficient** to exclude him from a panel if there are no doubts as to his independence.

The Disciplinary Chamber has also been the subject of an **infringement case** brought by the Commission against Poland (Case [C-791/19](#), action brought on 25 October 2019). In that case, the ECJ [granted interim measures](#) requiring that the Chamber suspend its activity as regards the disciplinary responsibility of judges. The operation of the Disciplinary Chamber [has been suspended](#) as regards the disciplinary responsibility of judges, but it apparently continues to operate as regards other types of case (waiver of judicial immunity, disciplinary responsibility of the members of other legal professions).

4.2 Infringement procedures

If preliminary references were not (initially) designed as actions allowing the ECJ to assess the compatibility of national law with EU obligations, that is clearly one of the goals of infringement procedures. Articles 258-259 TFEU empower the Commission and Member States to initiate an **infringement procedure against a Member State that has failed to fulfil a legal obligation**

under the Treaties, although the possible triggering of that procedure by a Member State has rarely been used.²⁵⁶ Infringement procedures exist since the dawn of the European Communities and were visibly strengthened with the possible imposition of financial sanctions by the ECJ under Article 260 TFEU since the Maastricht Treaty. They figure high among the best known and tested **enforcement mechanisms** of EU law. As a **legal procedure**, in which the ECJ steps in at the last stage to determine whether a Member State is violating EU law, infringement procedures may help to depoliticise current debates on the shortcomings relating to EU values in certain Member States. They may also bolster compliance, as the ECJ decisions adopted throughout the proceeding are **legally binding** on the Member State concerned, similar to preliminary references rulings, and any refusal to implement the Court's judgement or a possible order indicating interim measures can be followed by the imposition of a **financial sanction** under Article 260 TFEU or Article 279 TFEU²⁵⁷ respectively. This latter is a clear deterrent for any non-compliant Member State.

Although infringement procedures are a useful tool for ensuring Member States' compliance with EU law, the Commission has frequently taken the view that they are not the best tools to address systemic deficiencies relating to EU values. In its [2014 communication](#) establishing the rule of law framework, the Commission affirmed that infringement procedures could be used to address 'certain rule of law concerns', but could be used 'only where these concerns constitute, at the same time, a breach of a specific provision of EU law', thus suggesting that infringement procedures were not suitable for addressing systemic deficiencies relating to EU values in a Member State, even less if the shortcomings felt outside the scope of EU competences. The Commission seems to have moved partially from that position, as will later be explained, but there are still on-going discussions relating to the usability and adequacy of such a tool to enforce Article 2 TEU values.

Generalised and persistent infringements of EU law can be addressed through Articles 258-260 TFEU

As Advocate General Geelhoed opined in *Commission v Ireland* (Opinion of 23 September 2004, [C-494/01](#), para. 55), several elements need to be proved by the Commission to establish a general infringement of EU law, according to ECJ case law:

'In order to be able to establish a general infringement of the (...) directive on the basis of the factual situations raised in complaints to the Commission, (...) it would be necessary to discern **elements common** to these complaints which are indicative of a **persistent** underlying practice. It would have to be demonstrated that the existence of the factual situations which are the subject of the various complaints, given their **number and nature**, can only be explained by a **pattern of non-observance of Community law obligations** on a larger scale. In such a situation, taken together and seen in context, the various instances complained of **cannot be regarded as mere isolated incidents**, they are symptomatic of a policy or (administrative) practice which does not comply with the obligations resting on the Member States.'

Thus, Advocate General Geelhoed summarised that (para. 115):

'In discussing the notion of a general and structural infringement (...) there are **three dimensions** to such an infringement: **dimensions of scale, time and seriousness**.'

In this vein, some authors have questioned the **Commission's capacity to swiftly detect and establish the cases of infringement and to take the Member States concerned to the ECJ**

²⁵⁶ D. Kochenov, 'Biting Intergovernmentalism: The Case for the Reinvention of Article 259 TFEU to Make It a Viable Rule of Law Enforcement Tool', *NYU School of Law JMWP*, Vol. 11, 2015, p. 5.

²⁵⁷ In relation to the possible imposition of periodic penalty payments upon a Member State if it fails to comply with the interim measures ordered, see ECJ (grand chamber) order of 20 November 2017, *Commission v Poland (Białowieża forest)*, [C-441/17 R](#), paras. 89-119.

through infringement procedures, either for lack of resources or for a deliberate policy of prosecuting infringements selectively.²⁵⁸ Other authors point out that infringement procedures may not be an effective tool to address systemic deficiencies relating to EU values as they may be too slow, due to the overall design of Articles 258-260 TFEU,²⁵⁹ and they may only address the situation partially, focusing on individual violations of EU law and disregarding the pattern of generalised shortcomings lying underneath.²⁶⁰ In this vein, possible recourse to ECJ case law on **'general and persistent' or 'structural and general' infringements** has been proposed as a way of departing from particular infringements of specific EU law provisions with a EU values dimension and addressing the 'big picture', that is to say, the structural deficiencies relating to those values in a Member State.²⁶¹ Similarly, a more targeted use of the possibility to request the ECJ to determine the case under the **expedited procedure** provided for in Article 23a of the Statute of the ECJ and Article 133 of the Rules of Procedure of the Court has been proposed to avoid excessive delays in deciding on infringement procedures addressing shortcomings linked to Article 2 TEU values.²⁶² A more frequent use of the possibility to request the ECJ to order **interim measures** to the concerned Member State under Article 279 TFEU has also been proposed to avoid possible serious and irreparable harm while the ECJ is deciding on the substance of the case.²⁶³ Although the Commission is frequently criticised for not using all these possibilities to their full potential,²⁶⁴ it has already resorted to infringement procedures to address shortcomings as regards EU values in Member States, as will be seen in the following sections.

4.2.1. Scope of application: Are infringement procedures an adequate tool to address systemic breaches of EU values?

Article 258 TFEU empowers the Commission to initiate an infringement procedure against a Member State when it has failed 'to fulfil an obligation under the Treaties'. Thus, infringement procedures do not aim to *prevent* violations of EU law as **they can only intervene once a violation has taken place** (*ex post*). The subject matter of infringement procedures has been widely defined by the Treaties and ECJ case law: as such, any infringement of a EU law provision (primary or secondary law) allows the Commission to initiate the procedure, no matter whether it is caused by

²⁵⁸ M. Blauberger and R. D. Kelemen, 'Can courts rescue national democracy? Judicial safeguards against democratic backsliding in the EU', *Journal of European Public Policy*, Vol. 24(3), 2017, pp. 323-324; P. Wennerås, 'Making effective use of Article 260 TFEU' in Jakab and Kochenov (eds.), *op. cit.*, 2017, p. 80.

²⁵⁹ P. Wennerås, *op. cit.*, 2017, p. 80.

²⁶⁰ K. L. Scheppele, 'Enforcing the basic principles of EU law through systemic infringement procedures' in Closa and Kochenov (eds.), *op. cit.*, 2016, pp. 110-111.

²⁶¹ *Ibid.*, pp. 105-132; M. Schmidt and P. Bogdanowicz, 'The infringement procedure in the rule of law crisis: how to make effective use of Article 258 TFEU', *CMLR*, Vol. 55, 2018, pp. 1061-1100; L. W. Gormley, 'Infringement proceedings', in Jakab and Kochenov (eds.), *The enforcement...*, pp. 65-78.

²⁶² Among others, see Pech and Kochenov, 'Strengthening...', *op. cit.*, p. 5.

²⁶³ *Ibid.*, p. 5; O. De Schutter, [Infringement Proceedings as a Tool for the Enforcement of Fundamental Rights in the European Union](#), *Open Society Foundations*, October 2017, p. 16-17.

²⁶⁴ Among others, see: P. Wennerås, 'A new dawn for Commission enforcement under Articles 226 and 228 EC: general and persistent (GAP) infringements, lump sums and penalty payments', *CMLR* 43/2006, pp. 31-32; Scheppele, 'Enforcing...', pp. 108-113.

Box 8 – Infringement procedures against Hungary on violations relating to Article 2 TEU values (completed and on-going)

The ECJ has **already decided** several infringement procedures against Hungary:

- Judgment 6 November 2012, Case [C-286/12](#) – National legislation **lowering the age-limit for compulsory retirement applicable to judges**, prosecutors and notaries
- Judgment 8 April 2014, [Case C-288/12](#) – National legislation prematurely bringing to an end the term served by the **Data Protection Commissioner**
- Judgment 2 April 2020, [Case C-718/17](#) – Failure to indicate the **number of asylum applicants who can be relocated** to its territory
- Judgment 18 June 2020, [Case C-78/18](#) – National legislation imposing specific obligations on **civil organisations receiving foreign financial support**

Several other infringement procedures against that Hungary are still **pending** before the ECJ:

- Case [C-66/18](#), action brought on 1 February 2018 – National **legislation on higher education**
- Case [C-808/18](#), action brought on 21 December 2018 – **Asylum procedure and detention of asylum seekers in transit zones**
- Case [C-821/19](#), action brought on 8 November 2019 – **Criminalisation of support to asylum applicants** and limitation of the **right to access** asylum procedures.

Infringement procedures in the **pre-litigation stage** against that Member State:

- [20192193](#) – **Non-provision of food** to persons held in **transit zones** – Reasoned opinion of 10 October 2019.

(For further details on the cases, see Annex, Table 2)

action or inaction of a Member State, no matter what the reasons (if any) behind the Member States' action/ inaction, no matter whether there is fault, guilt or liability of the concerned Member State or whether the infringement is relatively irrelevant or limited in its scope.²⁶⁵

Similarly, the author of the infringement has also been defined broadly by the ECJ, therefore allowing the Commission to initiate proceedings against a Member State independently of the nature of the public entity breaching EU law: a Member State will respond for actions or inactions contradicting EU law no matter if the author of the infringement is the executive,²⁶⁶ the legislature,²⁶⁷ the judiciary – including High or Supreme Courts²⁶⁸ – or an autonomous body,²⁶⁹ and regardless of whether the authority that committed the alleged breach belongs to the central government, or regional or local entities in decentralised states.²⁷⁰ The ECJ has even ruled against a Member State in cases of infringement by private entities when their actions can be imputed to the Member State.²⁷¹

Under this wide understanding of the scope of infringement procedures, the Commission can decide to initiate them

not only when a Member State enacts a national legal act²⁷² or decides not to repeal a legal act that contradicts EU law,²⁷³ but also when national authorities breach EU law at the implementation stage,

²⁶⁵ L. Prete, *Infringement proceedings in EU law*, Wolters Kluwer, 2017, Ch. 2.

²⁶⁶ ECJ judgment of 2 April 2020, *Commission v Hungary, Poland and Czech Republic*, C-718/17, [C-715/17](#) and C-719/17.

²⁶⁷ ECJ judgment of 5 May 1970, *Commission v Belgium*, Case [77/69](#), para. 15

²⁶⁸ See ECJ judgments: of October 2018, *Commission v France*, [C-416/17](#) (Conseil d'Etat); of 12 November 2009, *Commission v Spain*, [C-154/08](#) (Supreme Court).

²⁶⁹ For instance ECJ judgment of 26 June 2001, *Commission v Italy*, [C-212/99](#) (public universities).

²⁷⁰ See for instance ECJ judgments: of 25 February 2016, *Commission v Spain*, [C-454/14](#); of 19 December 2012, *Commission v Italy*, [Case C-68/11](#).

²⁷¹ See for instance ECJ judgment of 24 November 1992, *Commission v Ireland*, [C-249/81](#), esp. paras. 10-15.

²⁷² See for instance ECJ judgment of 18 June 2020, *Commission v Hungary*, [C-78/18](#).

²⁷³ See for instance ECJ judgment of 21 January 2016, *Commission v Cyprus*, [C-515/14](#).

either in individual cases or in a more generalised fashion, i.e. through general and consistent administrative practices.²⁷⁴ Therefore, the Commission can pursue not only individual, but also **'generalised and persistent',²⁷⁵ infringements of EU law** under Article 258 TFEU, although it has been frequently criticised for focusing too much on individual and concrete incidents instead of building larger cases of infringement that could potentially prove the existence of more structural violations of EU law.²⁷⁶

In fact, that seems to have been the approach taken by the Commission, for example, as regards the infringement procedures opened against Hungary and Poland for the shortcomings identified by the European Parliament and the Commission itself in their respective Article 7(1) TEU reasoned proposals (see Section 3.5.2). As such, in 2012, the European Commission decided to refer Hungary to the ECJ through two different actions in relation to the national legislation lowering the retirement age of judges, prosecutors and notaries and the legislation prematurely bringing to an end the term in office of the National Data Protection Commissioner (see Box 8). More recently, the Commission has decided to initiate four different infringement procedures against Hungary in relation to alleged violations of EU migration and asylum law; another procedure concerning the national legislation imposing obligations of registration, declaration, transparency and publicity on NGOs receiving foreign financial support; and a final one relating to the national legislation imposing on foreign higher education institutions certain obligations to carry on teaching activities in the territory of Hungary (see Box 8). These infringement procedures are at different stages with two of them having already been decided by the ECJ (C-718/17, C-78/18), three still pending in front of the ECJ (C-66/18, C-808/18 and C-821/19) and the one relating to the non-provision of food to persons held in the Hungarian transit zones at the border with Serbia still in the pre-litigation stage (see Box 8).

Similarly, the **Commission has also decided to initiate different procedures** in relation to some of the threats to judicial independence that were identified in its own reasoned proposal triggering Article 7(1) TEU in relation to Poland instead of trying to show a more generalised pattern through a single procedure. Therefore, it has initiated four different actions in relation to multiple acts modifying the legal framework applicable to the Polish

Box 9 – Infringement procedures against Poland on violations relating to Article 2 TEU values (completed and on-going)

The ECJ has **already decided** several infringement procedures against Poland:

- Judgment of 24 June 2019, [Case C-619/18](#) – **Lowering of the retirement age of Supreme Court judges** and granting the power to extend, at his discretion, the period in office of those judges to the President of Poland
- Judgment 5 November 2019, [Case C-192/18](#) – **Differentiated pension ages** for male and female judges and **discretionary power of the Minister of Justice to extend the length of service** for individual judges

Another infringement procedure against Poland is still **pending**:

- Case [C-791/19](#), action brought on 25 October 2019 – **New disciplinary regime for judges** (interim measures introduced by [ECJ order of 8 April 2020](#))

Infringement procedure in the **pre-litigation stage** against Poland:

- [20202182](#) - **Act amending the Law on the common judiciary** of 20 December 2019 – Letter of Formal Notice of 29 April 2020.

(For further details on the cases, see Annex, Table 1)

²⁷⁴ Prete, *Infringement...*, Chapter 2.04.

²⁷⁵ See for instance ECJ judgment of 25 April 2005, *Commission v Ireland*, [C-494/01](#), in particular para. 127.

²⁷⁶ Wennerås, 'A new dawn...', p. 32.

judiciary which, in its view, threaten its independence as confirmed for the moment by two different ECJ judgments (see Box 9). The third of those cases, concerning the disciplinary regime for judges established in 2018, is still pending before the Court.²⁷⁷ And, a fourth procedure has recently been initiated in relation to the new Polish law on the judiciary, adopted on 20 December 2019 and expanding the disciplinary offences that can be imposed on Polish judges to include, among others, assessing the power to adjudicate cases by other national judges and referring cases to the ECJ on those questions. This procedure is still in the administrative (pre-litigation) stage and has not yet reached the Court.

Even if the Commission seems reluctant to bundle related complaints of infringement connected to EU values, thus trying to build up a single case that could show a possible generalised pattern, as proposed by some scholars,²⁷⁸ it is to be noted that the **ECJ is already using infringement procedures to enforce Article 2 TEU values**. Although the Commission has not relied only on Article 2 TEU to found an infringement action against a Member State and the ECJ has not decided any action for failure to act against a Member State based only on that same provision, the ECJ has already decided several infringement procedures against Member States making an express

reference to Article 2 TEU, together with some other Treaties or secondary EU law provisions. Following its line of reasoning in the ***Associação Sindical dos Juizes Portugueses* case** (see Box 10), the ECJ has already decided two infringement actions against Poland, namely, the case concerning the lowering of the retirement age of the Supreme Court judges ([C-619/18](#)) and the case relating to the establishment of differentiated pension ages for male and female ordinary judges ([C-192/18](#)) making a **clear link between the second subparagraph of Article 19(1) TEU and Article 2 TEU**. According to the ECJ, Article 19(1) TEU gives 'concrete expression to the value of the rule of law stated' in Article 2 TEU, as it imposes on Member States the obligation to 'provide remedies sufficient to ensure effective legal protection in the fields covered by Union law' and the rule of law requires the existence of effective judicial review. For the ECJ, the independent and impartiality of the judiciary is an essential element of the right to fair trial and is key to guarantee effective judicial protection in

Box 10 – Associação Sindical dos Juizes Portugueses case

In the landmark ***Associação Sindical dos Juizes Portugueses* case** ([Case C-64/16](#)), a professional association of Portuguese judges brought an administrative action before the Supreme Administrative Court of Portugal seeking annulment of administrative measures reducing judicial salaries at the Court of Auditors. The claimants argued that the salary-reduction measures infringed the principle of judicial independence enshrined in Article 19(1) TEU and Article 47 of the Charter of fundamental rights. The Supreme Administrative Court submitted a preliminary reference to the ECJ seeking to ascertain whether Article 19(1) TEU and Article 47 of the Charter precluded measures to reduce remuneration that are applied to the judiciary in Portugal, where they are imposed unilaterally and on an ongoing basis by other constitutional authorities and bodies. In its Judgment of 27 February 2018, the ECJ pointed out that:

'Article 19 TEU (...) gives concrete expression to the value of the rule of law stated in Article 2 TEU' (para. 32) adding that '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' (para. 42).

However, because salary reduction measures were not targeted at judges, but applied horizontally to public officials, the ECJ considered that they did not impair the independence of the members of the *Tribunal de Contas* (Court of Auditors) (para. 51).

²⁷⁷ Although the main procedure is still pending, the ECJ adopted interim measures in its Order of 8 April 2020 *Commission v Poland*, [Case C-791/19](#) R.

²⁷⁸ See Scheppele, 'Enforcing...'.

the fields covered by EU law. Thus, both ECJ judgments derive from Article 19 (1) TEU, read in connection with Article 2 TEU, certain obligations to ensure **the independence and impartiality of the national judiciaries that are imposed on Member States**. Similarly, the ECJ also referred to Article 2 TEU and the value of respect for the rule of law enshrined therein to ground its judgment on the infringement action initiated by the Commission against Germany for its decision to vote against the European Union position – laid down in Council Decision 2014/699/EU – at the 25th session of the Intergovernmental Organisation for International Carriage by Rail (OTIF) Revision Committee. In this case, the **ECJ linked the value of the rule of law with the effective implementation of Council decisions**, and justified its ruling concerning the admissibility of the action pointing out that deciding otherwise would be detrimental to the binding nature of those decisions.

In addition to the infringement cases in which the ECJ has expressly referred to Article 2 TEU, the subject matter of certain infringement procedures can be linked to one or several EU values even if the Commission or the ECJ do not expressly refer to that provision in their decisions on the matter, thus showing an **indirect way through which infringement procedures can help enforce EU values**. For example, in none of the infringement procedures decided against Hungary for the shortcomings identified by the European Parliament in its resolution triggering Article 7 TEU, has the ECJ made an express reference to Article 2 TEU (see Annex, Table 3). In some of these cases, the Commission grounded the action (C-66/18, C-808/18) on several Treaty or Charter provisions (see Annex, Table 3), and the ECJ itself has recently decided the case concerning the Hungarian law imposing certain obligations on civil organisations (NGOs) receiving foreign financial support (C-78/18) on the free movement of capital (Article 63 TFEU), and on the rights to respect for private life, protection of personal data and freedom of association (Articles 7, 8 and 12 of the Charter). Although the link to the human rights referred to in Article 2 TEU as one of the EU values can be easily made, that provision is not expressly mentioned, neither by the Commission nor by the ECJ. Similarly, infringement procedures initiated against other Member State can be linked to one or more EU values even if no express recourse to those provisions is made. Infringement procedures concerning the inadequate (or non-) implementation of EU law provisions on migration, asylum or equality can be sometimes framed as violations of human rights and infringement procedures concerning the non- or inadequate transposition of EU law on anti-money laundering can be linked to respect for the rule of law, just to give some examples (see Annex, Table 3, for a non-exhaustive list of other examples). Therefore, it is clear that infringement procedures can and have been used by the Commission and the ECJ to enforce Article 2 TEU values, though sometimes in the absence of express reference to that provision.

4.2.2. Procedure: How does the mechanism provided for under Articles 258-260 TFEU work?

From a formal point of view, infringement procedures can be described as a **multi-stage enforcement tool**, in which the **Commission** assumes a major role in the first, pre-judicial stage, before the procedure enters the second, judicial stage, in which the **ECJ** determines whether the Member State has failed to fulfil its obligations under the Treaties. The first administrative stage and, before it, the informal contacts between the Commission and Member States, provide ample space for interaction between national authorities and the Commission with the aim of discussing and

possibly finding a way to address the infringement before the action is filed.²⁷⁹ If voluntary compliance is not achieved at the **informal stage** and the Commission is not convinced by the arguments brought forward by the Member State to justify its conduct, the Commission may decide to launch the administrative phase of the procedure by sending a **letter of formal notice** to the Member State concerned. If the Commission considers the Member State's reply to be unsatisfactory, it may issue a **reasoned opinion**. The latter frames the subject matter of a possible judicial action before the ECJ. However, before the case reaches the judicial stage, the Member State is again allowed to reply to the reasoned opinion and, if it agrees with the Commission, comply with its demands within the deadline set in the reasoned opinion.

The Commission is not legally obliged to initiate an infringement procedure, nor to continue it to its final stages, thus enjoying a great deal of discretion in the management of infringement procedures until there is an ECJ decision on the case.²⁸⁰ In fact, some actions are even withdrawn by the Commission during the judicial stage.²⁸¹ The same discretion applies to the delimitation of the subject-matter of a possible infringement procedure: as long as the Commission seeks to establish a failure to fulfil an obligation under the Treaties, it can strategically decide the type of infringements to which it will dedicate more time and resources and how it will try to frame the case legally.²⁸² In this vein, in 2017 the Commission expressed its intention to make a more **strategic use of infringement procedures**, prioritising the cases 'that reveal systemic weaknesses which undermine the functioning of the EU's institutional framework',²⁸³ an intention that was reiterated more recently in the July 2019 communication on strengthening the rule of law within the Union.²⁸⁴

²⁷⁹ Melanie Smith, 'The Evolution of Infringement and Sanction Procedures: Of Pilots, Diversions, Collisions, and Circling', in Damian Chalmers and Anthony Arnall (eds.), *The Oxford Handbook of European Union Law*, OUP 2015, pp. 350-375.

²⁸⁰ ECJ judgment 19 May 2009, *Commission v Italy*, [Case C-531/06](#), paras. 23-24.

²⁸¹ For example, the Commission withdrew 9 cases from the ECJ in 2019 before the latter handed down its ruling as the Member States concerned took the necessary measures to comply with EU law, as the Commission itself explained in its report [Monitoring the application of Union law. 2019 Annual Report. Part I: general statistical overview](#), July 2020, p. 23.

²⁸² Case C-531/06, paras. 23-24.

²⁸³ Commission communication on [EU law: Better results through better application](#), 2017/C 18/02, 19 January 2017, para. 3.

²⁸⁴ Commission communication on Strengthening the rule of law within the Union: A blueprint for action, COM(2019) 343 final, 17 July 2019, p. 14.

Similarly, the Treaties do not establish clear deadlines for each step of the administrative procedure, giving the Commission ample discretion to adjust those deadlines to possible negotiations ongoing with the Member State. Thus, the **Commission enjoys a wide margin of manoeuvre to determine the deadlines** to be respected by national authorities for replying to the letter of formal notice and the reasoned opinion and for putting an end to the alleged breach of EU law, although the ECJ has required the Commission to be reasonable in its dealings with national administrations, taking into account the circumstances of the case, when determining those deadlines.²⁸⁵ Furthermore, the Commission is free to decide when to send the letter of formal notice and the reasoned opinion to the Member State, as well as when to refer the case to the Court, thus being able to speed up or slow down the procedure as it sees fit. Although again, the ECJ has tried to put some limits on the Commission's discretion to extend the pre-litigation stage of the procedure stating that an action brought under Article 258 TFEU can be declared inadmissible if the unreasonably short duration of the administrative stage made it more difficult for the Member State to refute the Commission's arguments, thus infringing the state's rights of defence.²⁸⁶

The Treaties frame the first pre-judicial stage of infringement procedures very broadly, giving the Commission a wide margin of manoeuvre to try to convince the Member State concerned to comply with its demands voluntarily. In fact, the Commission has itself pointed out that **'statistics confirm that Member States make serious efforts to settle their infringements' before the ECJ hands down its ruling.**²⁸⁷ As such, for example, in 2019, the Commission closed 604 infringement procedures after sending a letter of formal notice, 160 procedures after sending reasoned opinions and 13 after deciding to refer the case to the ECJ. In that same year, only 31 infringement actions were submitted by the Commission to the ECJ under Article 258 TFEU, although a total of 1 564 infringement procedures remained opened at the end of the year.²⁸⁸

A more strategic use of infringement procedures by the Commission

The Commission has expressed its intention to make strategic use of infringement procedures (Commission, communication on [EU law: Better results through better application](#), 2017/C 18/02, 19 January 2017, para. 3.). In this vein:

'The Commission will therefore give high priority to infringements that reveal **systemic weaknesses** which undermine the **functioning of the EU's institutional framework**. This applies in particular to infringements which affect the capacity of **national judicial systems** to contribute to the effective enforcement of EU law. The Commission will therefore pursue rigorously all cases of national rules or general practices which impede the procedure for preliminary rulings by the Court of Justice, or where national law prevents the national courts from acknowledging the primacy of EU law. It will also pursue cases in which national law provides no effective redress procedures for a breach of EU law or otherwise prevents national judicial systems from ensuring that EU law is applied effectively in accordance with the requirements of the **rule of law and Article 47 of the Charter on Fundamental Rights of the EU**.

'Beyond these cases, the Commission attaches importance to ensuring that national legislation complies with EU law since incorrect national legislation systematically undermines citizens' ability to assert their rights including their **fundamental rights**, and to draw fully the benefits from EU legislation. The Commission will also pay particular attention to cases showing a **persistent failure** by a Member State to apply EU law correctly.'

²⁸⁵ Gormley, 'Infringement...', pp. 67-68.

²⁸⁶ *Ibid.*, p. 69.

²⁸⁷ Commission, [Monitoring the application of Union law. 2019 Annual Report. Part I: general statistical overview](#), 2020, p. 23.

²⁸⁸ *Ibid.* and p. 22.

If many infringement procedures seem to be settled during the pre-litigation state, it is to be noted that the analysis of this stage provides only half of the picture of what infringement procedures truly are, as if the pre-litigation stage does not lead to the Member State's voluntary compliance with the Commission's demands, the latter may decide to **refer the case to the ECJ under Article 258 TFEU**. In that case, it would be for the Court to decide whether the Member State has failed to fulfil its obligations under the Treaties, with such a conclusion being binding on the Member State concerned. As the EU had no means to enforce the ECJ's decisions directly and had to rely on compliance by national authorities, infringement procedures were strengthened with the Maastricht Treaty reform. The reform introduced the **threat of possible financial sanctions** for those Member States that did not implement a judgment of the Court, declaring that they had failed to fulfil an obligation imposed by EU law (Article 260 TFEU).

Sanctions can be imposed only after a second judicial procedure, that is to say, once the Court has rendered a first judgment declaring that a failure to fulfil obligations has occurred, the Commission must issue a second reasoned opinion explaining how the Member State has not complied with the first judgment of the Court, and allow the Member State a reasonable period of time to comply with it (Article 260 (2) TFEU).²⁸⁹ Only after all those steps, is the Commission allowed to refer the issue back to the Court, specifying the lump sum or penalty payment it considers appropriate to be paid by the Member State concerned under the circumstances. A fast-track procedure to be applied in cases where the Member State concerned has failed to fulfil its obligation to notify measures transposing a directive was introduced by the Lisbon Treaty (Article 260 (3) TFEU), thus adding to the possible deterrent effect of financial sanctions. This provision can be relevant for the enforcement of EU values if they are given effect in a directive.

If the Court finds that the infringement persists and that it is appropriate to impose a financial sanction, it will do so using several criteria to determine the amount of the sum due, including the seriousness of the infringement,²⁹⁰ a criterion that could be especially relevant in cases of breaches of EU values.²⁹¹ Financial sanctions can take the form of **periodic penalties**, imposed if the infringement still persists when the Court examines the case and aiming to ensure compliance, and/or **lump sums**, imposed regardless of whether the infringement still persists and aiming to prevent future similar infringements.²⁹² The amounts imposed by the Court can be high, therefore acting as an effective deterrent for non-compliant Member States.²⁹³ However, some scholars have pointed out that they are often not paid, because Member States tend to comply with EU obligations before financial sanctions are due.²⁹⁴ Although this paper cannot analyse all infringement procedures linked to EU values and determine whether the Commission has made effective use of the possibility offered by Article 260 (2) TFEU, it is to be noted that the Commission has not yet used this possibility against Poland or Hungary in the context of the infringement procedures initiated against those Member States on various counts treated by the Commission itself and the European Parliament as breaches of EU values in the two on-going Article 7 (1) TEU procedures. This may be

²⁸⁹ For a detailed analysis, see: P. Wennerås, 'Sanctions against Member States: alive, but not kicking', *CMLR* 49/2012, pp. 145-176.

²⁹⁰ *Ibid.* For the guidelines for calculating lump sums and penalty payments used by the Commission, see: Commission communication, Application of Article 228 of the EC Treaty, [SEC/2005/1658](#), as updated for the last time by Commission communication, Updating of data used to calculate lump sum and penalty payments to be proposed by the Commission to the Court of Justice of the European Union in infringement proceedings, [2019/C 309/01](#).

²⁹¹ Schmidt and Bogdanowicz, *op. cit.*, pp. 1074-1075.

²⁹² Wennerås, 'Making effective...', pp. 89-96.

²⁹³ *Ibid.*, p. 91, 93.

²⁹⁴ B. Jack, 'Article 260(2) TFEU: An Effective Judicial Procedure for the Enforcement of Judgments?', *ELJ* 19/2013, pp. 404-421.

seen as a first sign of the effectiveness of this tool in ensuring compliance with EU values by Member States, although a more thorough analysis would be needed.

4.2.3. Application of Articles 258-260 TFEU: The effectiveness question

Although a complete overview of the effectiveness of infringement procedures to handle breaches of EU law is far beyond the scope of this study, some aspects of this mechanism indicate that it can be a valuable tool to address EU values shortcomings in Member States. In this vein, it is to be noted that the **Commission has generally been successful in convincing the ECJ of the existence of a violation of EU law** in infringement actions (see Table 4) and this success also translates into infringement cases linked to EU values, as the results of the infringement procedures listed in the Annex (Tables 1 and 3) show. In some of these cases, namely the two already decided against Poland, the Court has even highlighted the specific dimension of the infringement, touching upon one of the values enshrined in Article 2 TEU.

Table 4 – Judgments concerning infringement procedures: outcome (2015-2019)

	2015		2016		2017		2018		2019	
	Infringement declared	Dismissed	Infringement declared	Dismissed	Infringement declared	Dismissed	Infringement declared	Dismissed	Infringement declared	Dismissed
Belgium	2		1		1		2		1	
Bulgaria	2		1		1		1			
Czech Republic			1				2			1
Denmark	1							1		
Germany	3		1		4		2	1	3	
Estonia										
Ireland		1			1		1		2	
Greece	3		4		5		4		2	
Spain			3		2		3		1	1
France	4		1				1		1	
Croatia									1	
Italy	2		1				2		5	1
Cyprus			1							
Latvia	1								1	
Lithuania										
Luxembourg	2		1		1					
Hungary			1		1		1		1	
Malta				1			1			
Netherlands			1	1					1	
Austria				1			1	1	1	
Poland	3	1	2				4		3	
Portugal			6		2				1	
Romania			1				1			
Slovenia	1				1		1			
Slovakia		2					1			
Finland										
Sweden	1									
United Kingdom	1	1	1	1	1		2		1	
TOTAL	26	5	27	4	20		30	3	25	3

Source: ECJ, [Annual Report 2019. Judicial Activity](#), Luxembourg, 2020, p. 170.

In addition, some of the infringement procedures linked to EU values show how the expedited procedure, provided for in Article 23a of the Statute of the ECJ and Article 133 of the Rules of Procedure of the Court, can be used to avoid excessive delays in deciding on the substance of the case, and how more frequent use of the possibility to ask the ECJ to order interim measures under Article 279 TFEU can also be used to prevent possible serious and irreparable harm while the ECJ lays down its judgment. Although requests for the application of the **expedited procedure in infringement actions** are quite rare and the ECJ does not grant them often (for example, in 2019, only three requests were made for the use of the expedited procedure in direct actions before the ECJ, including infringement procedures),²⁹⁵ the Court did make use of the possibility to speed up the judicial stage of the procedure by using the expedited procedure in the cases opened against Hungary for lowering the retirement age applicable to national judges (C-286/12) and for certain restrictions limiting the rights of asylum seekers (C-808/18), and in the case concerning the lowering of the retirement age of the judges of the Polish Supreme Court (C-619/18) (see Annex, Tables 1 and 3, for further details).²⁹⁶ While the average duration of direct actions, including infringement actions, before the ECJ has ranged from 17 to 20 months in recent years (2015-2019),²⁹⁷ use of the expedited procedure enabled the ECJ to decide the abovementioned cases against Poland and Hungary in five to eight months, thus speeding up the procedure substantially. Similarly, although applications for **interim measures** are rare and the ECJ does not always grant them (see Table 5), the ECJ has granted interim measures in two of the infringement cases initiated against Poland in cases concerning judicial independence (lowering of the retirement age of Supreme Court judges – [C-619/18](#) – and new disciplinary regime for judges – C-791/19, thus trying to prevent possible irreparable prejudice (see Annex, Tables 1 and 3 for further details).

²⁹⁵ See, ECJ, [Annual Report 2019. Judicial Activity](#), Luxembourg 2020, p. 175.

²⁹⁶ The Commission also asked the ECJ to apply the expedited procedure in the case of the disciplinary regime applicable to judges (C-791/19), but the ECJ decided to reject the request owing to the sensitivity and complexity of the legal questions analysed, and to grant interim measures in order to avoid possible irreparable harm. See ECJ, Order of 8 April 2020, *Commission v Poland*, [C-791/19 R](#), paras. 99-102.

²⁹⁷ [Annual Report 2019...](#), p. 172.

Table 5 – Proceedings for interim measures (2015–2019)

Applications for interim measures¹

	2015	2016	2017	2018	2019	TOTAL
Agriculture		1			1	2
Competition	2			1	3	6
Environment		1	1			2
Industrial policy			1			1
Law governing the institutions				2		2
Principles of EU law				1		1
Public procurement			1			1
Registration, evaluation, authorisation and restriction of chemicals (REACH Regulation)					1	1
Research and technological development and space		1				1
State aid				2	1	3
TOTAL	2	3	3	6	6	20

Applications for interim measures — outcome²

	2015	2016	2017	2018	2019	TOTAL
Granted		2	1	5	1	9
Not granted		3		3	4	10
Decision pending	2		2		1	5
TOTAL	2	5	3	8	6	24

¹ The figures mentioned in this table refer to the number of requests made during the year in question, irrespective of the year in which the relevant case was brought.

² The figures mentioned in this table refer to the number of decisions taken, during the year in question, concerning an application for interim measures, irrespective of the year in which such an application was made.

Source: ECJ, [Annual Report 2019. Judicial Activity](#), Luxembourg, 2020, p. 177.

Although interim measures and the expedited procedure have been used in some infringement cases linked to violation of EU values, it is to be noted that **delays in taking the cases to the ECJ** and limited use of the abovementioned tools have rendered or **might render some of the judgments of the Court declaring a failure to fulfil a Member State's obligations moot**, as they are given after the contested national measures are no longer in force, or after the initial reasons for bringing the case have disappeared. That is certainly the case, for example, of the infringement actions brought on December 2017 against Hungary, Poland and the Czech Republic for their failure to indicate the number of asylum applicants who could be relocated to their territory under the temporary relocation scheme created to help Greece and Italy to deal with the increasing numbers of asylum seekers arriving on their shores from 2015 to 2017 (Council Decision (EU) 2015/1523 and Council Decision (EU) 2015/1601). Although the ECJ indicated in its ruling of 2 April 2020 that the

three Member States had not complied with their obligations under EU law,²⁹⁸ it is not certain that the judgment will help to reverse the situation created by the Hungarian, Polish and Czech governments, as the decisions they did not comply with have not been in force since September 2017. A similar assertion can probably be made in relation to some other infringement procedures cited in the Annex (Tables 1 and 3) of this study, as for example, the one initiated against Hungary for the national law imposing on foreign higher education institutions the obligation to comply with certain obligations to carry on teaching activities on Hungarian territory. As Advocate General Kokott explained in her opinion in the case, the national law challenged by the infringement procedure had a clear impact only on the activities of the Central European University (CEU), which was the only foreign higher education carrying out activities in Hungary that could not meet the requirements imposed by the Hungarian Law on higher education, and had to cease its activities in the country, opening a new campus in Vienna.²⁹⁹ Considering the current situation, the future judgment of the ECJ might not **change the situation on the ground** substantially even if it concludes that Hungary did not comply with its obligations under EU law.

Finally, measuring the effectiveness of infringement procedures for addressing EU values shortcomings in Member States by trying to evaluate if they were able to **reverse the original situation** created by the infringement seems a difficult task. Taking the Polish and Hungarian cases as examples once more, it is to be noted that both the Hungarian and the Polish authorities reacted to the Court's rulings in the infringement procedures initiated against them for EU values-related breaches, although some experts have expressed doubts as to whether they have complied (or will comply) fully with the ECJ's decisions.³⁰⁰ For example, following the ECJ's judgment in the early retirement case ([C-286/12](#)), the Hungarian legislature adopted Act XX of 2013 on Legal Amendments Concerning the Upper Age Limit to be Applied in Certain Justice Related Legal Relationships, providing for a gradual reduction of the judicial retirement age over 10 years to 65 years and setting up the criteria for reinstatement or compensation of the judges affected by the initial measure. However, as the compensation was beneficial for many judges and most of their positions had already been filled in the meantime, most judges did not ask for reinstatement, but to be compensated, and the International Bar Association [reported](#) that 173 of the 229 judges did not return, and only 4 of the 17 court presidents removed returned to their prior positions. Although the Commission [praised](#) the Hungarian government for implementing the Court of Justice's decision, some scholars³⁰¹ and the [European Parliament](#) itself criticised the measures as they were far from returning the approximately 10 % of the most senior Hungarian judges affected to their prior posts. In the Data Protection Commissioner case ([Case C-288/12](#)), the situation was similar, as Hungary paid the agreed sum of compensation, but the Commissioner was not reinstated to his previous post, which had disappeared with the creation of the National Authority for Data Protection and Freedom of Information.³⁰²

As concerns Poland, for example, when the ECJ introduced interim measures in the case relating to the lowering of the retirement age of Polish Supreme Court judges (Case C-619/18),³⁰³ the Polish

²⁹⁸ ECJ judgment of 2 April 2020, *Commission v Hungary, Poland and Czech Republic*, Joined Cases C-718/17, [C-715/17](#) and C-719/17.

²⁹⁹ Opinion of AG Kokott delivered on 5 March 2020, *Commission v Hungary*, [Case C-66/18](#), paras. 1-6.

³⁰⁰ See for instance Scheppele, 'Enforcing...', pp. 109-110; A. Batory, 'Defying the Commission: Creative Compliance and respect for the Rule of Law in the EU', *Public Administration*, Vol. 94(3), 2016, p. 693.

³⁰¹ Scheppele, 'Enforcing...', pp. 109-110; Batory, 'Defying...', p. 693.

³⁰² Batory, 'Defying...', p. 693.

³⁰³ [ECJ order](#) of 17.12.2018, Case C-619/18 R.

legislature adopted an act of Parliament on 21 November 2018,³⁰⁴ reinstating the judges in question, but it did so on the authority of the Polish legislature. The ECJ 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 posts 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 had failed to fulfil its obligations under the second subparagraph of Article 19(1) TEU. However, by that time, the old system had already been reinstated.

Another example relating Poland can be found in the ECJ's judgment relating to the lowering of the retirement age of ordinary Polish judges (C-192/18), which was concerned with regulations existing in Polish law between 2017 and 2018. Regarding those regulations, the Court 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 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. Following the judgment, the Polish Ministry of Foreign Affairs indicated in an official statement³⁰⁵ that the judgment was concerned with legislation no longer in force, as Poland had addressed the Commission's demands by adopting Act of 12 April 2018, repealing the distinctions between men and women relating to the retirement age of judges of the ordinary Polish courts and public prosecutors in Poland. Furthermore, following the amendments introduced by the Act of 12 April 2018, Article 69(1b) of the Law on the ordinary courts henceforth provides that it falls to the National Council of the Judiciary (KRS) and no longer to the Minister for Justice to authorise judges of the ordinary Polish courts to continue to carry out their duties beyond the age of 65. By virtue of those amendments, the KRS is also called upon to adopt its decisions in that regard in the light of criteria that differ from those that applied hitherto as regards decisions of the Minister for Justice (judgment, paras. 42-44). Nonetheless, the Commission maintained its action and the Court ruled against Poland, indicating however that its judgment did not refer to the amendments introduced by the Act of 12 April 2018 (para. 45). As a result, the ECJ's judgment was based on the state of Polish law at the moment when the period laid down by the Commission in its reasoned opinion expired (para. 46), showing how an infringement action can lead to legal changes in the Member State concerned even earlier than the actual judgment of the ECJ is issued.

The examples presented above indicate that infringement procedures are a highly effective tool in the hands of the European Commission, as they seem to suggest that national governments are cautious when deciding on how to react to an ECJ ruling concluding that they failed to fulfil their obligations under EU law. The question that remains is whether **infringement procedures could be used in a more effective way** to address EU values breaches by prioritising that sort of infringement, exploring the possibility to launch **systemic infringement procedures** against non-compliant Member States on the basis of Article 2 TEU or related Treaty provisions (for example, Article 4 (3) TEU or Article 19 TEU), and by making more targeted use of the possibility to ask the ECJ

³⁰⁴ [Act of 21 November 2018](#) amending the Supreme Court Act (*Dziennik Ustaw* item 2507).

³⁰⁵ [Stanowisko Ministerstwa Spraw Zagranicznych RP w związku z wyrokiem TSUE w sprawie C-192/18 Komisja przeciwko Polsce](#) [Position of the Ministry of Foreign Affairs of the Republic of Poland in Connection with CJEU Judgment in Case C-192/18 *Commission v Poland*], 5 November 2019.

to order **interim measures** and apply the **expedited procedure**, as various academics have already proposed.³⁰⁶

4.3 Article 7(2) and (3) TEU: The sanctions arm

Article 7(2)-(3) TEU provides for the only enforcement tool clearly designed by the Treaties to deal with systemic breaches of EU values in Member States. This sanctions mechanism was **introduced by the Amsterdam Treaty**, some years before the Nice Treaty introduced its preventive counterpart (current Article 7(1) TEU). Although the Treaties already mentioned the European project's attachment to the rule of law, democracy and fundamental rights³⁰⁷ and proposals to include a sanctions mechanism for Member States disrespectful of those core principles had already been made,³⁰⁸ it was not until the mid-1990s that discussions on the need to establish a mechanism that would allow the EU to respond to undemocratic actions by Member States materialised in a reform of the Treaties arising from the move of the EU project towards a more political entity and the prospect of the EU's enlargement towards the East.³⁰⁹

As a result, the Reflection Group established by the European Council to pave the way for the 1996 inter-governmental conference proposed including in the Treaties the express obligation upon current and future Member States to uphold fundamental rights and a mechanism that would allow the EU to impose sanctions on any Member State that committed a serious breach of fundamental rights or basic democratic principles.³¹⁰ The Reflection Group's suggestion was transformed into a more concrete proposal by the Austrian and Italian delegations during the 1996 inter-governmental conference³¹¹ and Articles F and F.1 were ultimately introduced in the modified Treaty on European Union. Those provisions envisaged a sanctions mechanism that already contained the main features of the tool provided for under current Article 7(2)-(3) TEU: a mechanism that would only apply under the **most extraordinary circumstances ('serious and persistent breach' of EU values)** and with a **clear political cut**, as all important decisions were left to Member States, either through the Council or the European Council, with little participation from other EU institutions, especially the ECJ.

³⁰⁶ See authors cited in footnote 258 and O. De Schutter, *Infringement Proceedings as a Tool for the Enforcement of Fundamental Rights in the European Union*, Open Society Foundations, October 2017, pp. 65-67; Pech and Kochenov, 'Strengthening...', *op. cit.*, pp. 5-6.

³⁰⁷ See the [Preamble](#) of the Single European Act and the [Preamble and Art. F](#) of the Treaty on the European Union as adopted in 1992.

³⁰⁸ Articles 4 (4) and 44 of the [draft Treaty establishing the European Union](#), adopted by the European Parliament on 14 February 1984, and that already proposed a sanctions mechanism to be applied to Member States seriously and persistently violating democratic principles or fundamental rights. For more details, see D. Kochenov, 'Article 7: A commentary on a much talked-about "dead" provision', *University of Groningen Faculty of Law Research Paper Series*, No 21, 2019, pp. 10-11.

³⁰⁹ In this sense, see Sadurski, 'Adding Bite...', p. 386; G. de Búrca, 'Beyond the Charter: how enlargement has enlarged the human rights policy of the European Union', *Fordham International Law Journal*, Vol. 27, 2004, p. 696; B. de Witte and G. N. Toggenburg, 'Human Rights and Membership of the European Union', in Peers and Ward, *The EU Charter...*, *op. cit.*, p. 70.

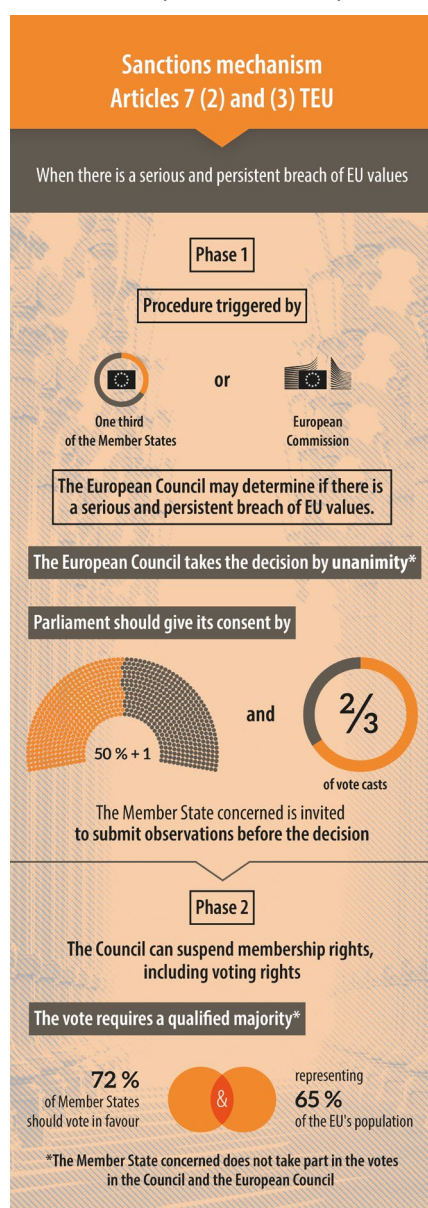
³¹⁰ Reflection Group Report, 8 December 1995, SN 520/95 (REFLEX 21), pp. 11-12.

³¹¹ See Article O bis of the Austrian and Italian proposal in Conference of the representatives of the governments of the Member States, Cover Note, Fundamental rights, CONF 3940/96, LIMITE, 3 October 1996.

4.3.1. Scope of the mechanism: What breaches of EU values may be addressed through Article 7(2) and (3) TEU?

As already explained under Section 3.6.1 of this study, the two arms of Article 7 TEU share some common features as regards the types of breach of EU values that allow the triggering of both procedures: a) they are **horizontal mechanisms** that apply in all areas of Member States' activity, including those beyond the EU's competences; and, b) only **'serious' breaches of EU values** allow for the activation of both mechanisms. However, the sanctions mechanism may only be triggered if the **breach is persistent** and is, therefore, qualified by its prolongation in time. In addition, Article 7(2)-(3) TEU provides for a mechanism that is no longer preventive and therefore

Figure 4 – Article 7(2) and (3) TEU mechanism (sanctions arm)



Source: EPRS.

presupposes the materialisation, the **actual existence, of a qualified breach of EU values**. This mechanism has never been used and therefore it is difficult to ascertain how the EU institutions understand the substantive requirements for opening up this procedure. However, the use of the preventive mechanism in Article 7(1) TEU suggests that the sanctions mechanism would not be triggered easily and, that the EU institutions might try to resort to that preventive mechanism and exhaust all possibilities of political dialogue with a recalcitrant Member State before considering making use of the sanctions mechanism provided for in Article 7(2)-(3) TEU.

4.3.2. Procedure: How does the Article 7(2)-(3) TEU mechanism work?

The mechanism provided for in Article 7(2)-(3) TEU is characterised by its political and enforcement nature. The **political character** of the mechanism draws on the prevalent role assumed by the Council and the European Council, even clearer than under the Article 7(1) TEU preventive mechanism, and on the limited role that the other EU institutions, including the ECJ, have in its application.

The sanctions mechanism provided for under Article 7(2)-(3) TEU is divided into **two distinct phases**, in which the role assumed by either the Council or the European Council is key. During the **first phase**, the **European Council** may decide if there is a **'serious and persistent breach' of EU values** by a Member State by unanimity. The involvement of the European Council, requiring unanimity, makes it extraordinarily difficult to satisfy the procedural threshold imposed by this mechanism. The European Council decides without the vote of the Member State concerned, but the Treaties are silent on the voting rights of other Member States

simultaneously subject to the same procedure or to an Article 7(1) TEU procedure (Article 354(1) TFEU), raising the same concerns already highlighted in the analysis of the preventive mechanism. Abstentions do not prevent unanimity from being reached in the European Council. In this first phase, involvement of the Commission is limited to triggering the procedure, and involvement of **Parliament** is limited to **giving its consent to the decision made by the European Council** by the same majority as for the preventive mechanism (Article 7(2) TFEU). Although during the inter-governmental conference leading to the adoption of the Amsterdam Treaty the possibility of giving Parliament the prerogative to trigger the procedure was discussed,³¹² it was ultimately rejected with the Commission and one-third of the Member States being the only actors that can currently activate this mechanism.

The adoption of a decision by the European Council opens up the **second phase of the procedure** (Article 7(3) TEU), in which **the Member State concerned may have certain membership rights suspended, including its voting rights in Council**, by way of sanction. In this phase, the **Council** is the only institution to intervene, as neither the Commission nor the European Parliament participate in the procedure. Again, during the intergovernmental conference leading to the adoption of the Amsterdam Treaty, it was proposed to give Parliament and the Commission a more prominent role in this second stage of the procedure, with the Council deciding on the possible imposition of sanctions on a recommendation from the Commission and after Parliament's consent.³¹³ However, the proposal was discarded and Council was given a wide discretion as it has to determine on its own if and what sanctions should be imposed. The Council decides by a qualified majority, excluding the Member State concerned from the adoption of the decision. However, the reinforced qualified majority is applicable to this procedure, thus requiring the support of at least 72 % of the Member States representing at least 65 % of the EU's population (Article 354, in conjunction with [Article 238\(3\)\(b\) TFEU](#)). If the situation in the Member State changes, the Council may decide by the same majority to alter or revoke its previous decision (Article 7(4) TEU).

The political nature of this mechanism also derives from the **limited role assumed by the ECJ**, which can only scrutinise decisions adopted under Article 7(2)-(3) TEU at the request of the Member State concerned and only in relation to the procedural – but not the substantive – requirements set out in those provisions ([Article 269 TFEU](#)), as already explained under Section 3.6.2 of this study.

The mechanism analysed can also be described as an **enforcement tool**, as the Member States to which it is applied may have a **sanction** imposed upon them. The Treaties do not include an exhaustive list of possible sanctions to be imposed, referring explicitly only to the possible suspension of the voting rights of the Member State in the Council. The **expulsion of the Member State from the Union is excluded** as a possible sanction as it is commonly understood that a Member State can only leave the Union through the procedure provided for under Article 50 TEU.³¹⁴ Similarly, **complete suspension of membership rights** amounting to a *de facto* expulsion of the Member State has also been **excluded** by some academics, taking the view that Article 7(3) TEU only refers to the suspension of 'certain' – and thus not all – membership rights.³¹⁵ The sanctions to be

³¹² See Article O bis of the Austrian and Italian proposal in Conference of the representatives of the governments of the Member States, cover note, Fundamental rights, CONF 3940/96, LIMITE, 3 October 1996.

³¹³ *Ibid.*

³¹⁴ Besselink, 'The Bite...', p. 130.

³¹⁵ M. Bonelli, 'A Federal turn? The European Union's response to Constitutional Crisis in the Member States', *Perspectives on Federalism*, Vol. 10(1), 2018, p. 55.

imposed can be of an economic or a non-economic nature,³¹⁶ permitting the EU to isolate the backsliding Member State,³¹⁷ but **not a direct intervention in national affairs** in the way 'federal execution' or 'federal coercion' clauses do in some decentralised States' constitutions.³¹⁸ When deciding on the possible suspension of rights of a Member State, 'the Council shall take into account the possible consequences of such a suspension on the rights and obligations of natural and legal persons', a requirement that seeks to avoid the possible consequences of sanctions under Article 7 (3) TEU for EU citizens and businesses³¹⁹. In any case, the decision taken by the Council would affect only the rights of the Member State, as its obligations under EU law would not be altered.

4.3.3. Possible application of Article 7(2) and (3) TEU: The effectiveness question

The sanctions mechanism under **Articles 7(2) and (3) TEU has never yet been used**, making it very difficult to determine its effectiveness. However, some lessons might be learnt from the current application of Article 7(1) TEU to Poland and Hungary. The triggering of Article 7(1) TEU procedures in relation to those two countries has not yet led to the adoption of any decision on the matter by the Council. Taking into account that the **procedural requirements** under Article 7(2)-(3) TEU are more **burdensome** than under Article 7(1) TEU, with the European Council being required to decide by unanimity in the first stage of the procedure, it might be concluded that it would probably be more difficult for the European Council to decide on the possible application of Article 7(2) TEU – a necessary step that opens up the possibility to impose sanctions on a Member State under Article 7(3) TEU – thus questioning the usability of this mechanism. This conclusion is even more clear if two Member States are subject to the same procedure at the same time and decide to veto any possible decision under Article 7(2) TEU concerning the other Member State, as it would be impossible to match the unanimity requirement.³²⁰ However, it should be pointed out that if unanimity in the European Council could be reached, this tool could be **more powerful** and thus have a greater impact on the situation in the Member State concerned. In this vein, it should be noted that Article 7(1) TEU provides for a preventive mechanism only, giving the Council the option to address recommendations to the Member State in question. On the contrary, Article 7(3) TEU **enables the Council to impose major sanctions** on the Member State concerned and those sanctions **could be a powerful tool**, helping to reverse the situation on the ground.

³¹⁶ Kochenov, 'Busting the myths nuclear...', p.10.

³¹⁷ Bonelli, 'A Federal turn? ...', pp. 55-56; Müller, 'Should the EU Protect...', p. 144.

³¹⁸ For instance, see Article 37 of the [Basic Law for the Federal Republic of Germany](#), or Article 155 of the [Spanish Constitution](#).

³¹⁹ Bonelli, *op. cit.*, p. 55-56.

³²⁰ See, Pech and Scheppele, *op. cit.*, p. 35.

5. Way forward: New mechanisms to reinforce the EU toolbox to protect EU values?



All the **currently existing EU mechanisms** to monitor or prevent violations of EU values and/or remedy them **have their relative strengths and weaknesses**. The institutional designs of Article 7 TEU procedures and the lack of willingness among Member States to actively confront one of their peers has so far rendered them ineffective, a conclusion that can also be applied to the Council's annual dialogues on the rule of law. Similarly, the Commission's rule of law framework has shown its limits when it comes to addressing systemic deficiencies relating to the rule of law in Member States, a conclusion that can also be extended to the EU Justice Scoreboard, as it is a tool based on dialogue and voluntary compliance, which seems insufficient to

address shortcoming in relation to EU values in Member States unwilling to uphold them. The European Semester may result in sanctions and fines based on non-compliance with certain country-specific recommendations. However, recommendations relating to corruption and the state of the justice system are not backed up by such sanctions and fines. Among enforcement tools, infringement proceedings have so far been used to address specific violations of EU values, but have yet to show their effectiveness in addressing more systemic situations. A similar conclusion can also be reached as regards preliminary references, although in the case of this procedure effectiveness is also dependant on the capacity, knowledge and actual independence of national judges, who are the only ones competent to refer them to the ECJ.

Taking stock of the weaknesses and strengths of these tools and their effectiveness, **EU institutions have proposed new mechanisms in recent years** aiming to monitor and prevent violations of EU values or enforce them. Since 2016, Parliament has called repeatedly for an EU 'pact' on democracy, the rule of law and fundamental rights (DRF) that would entail the preparation of an annual DRF report by a panel of independent experts, to be adopted by the Commission, and then culminating in a DRF policy cycle involving the European Parliament, national parliaments and the Council. It would be based on an interinstitutional agreement among EU institutions. Although the Commission did not follow the proposal initially, it began a consultation process in April 2019 aiming to evaluate the EU's current mechanisms to monitor and enforce EU values and reinforce them. As a result, it has proposed to establish a narrower annual rule of law review cycle culminating in an annual rule of law report. In 2019, the Council also reviewed its annual dialogues on the rule of law and the Presidency proposed to reframe them and coordinate them with the newly established rule of law review cycle created by the Commission. Apart from those initiatives, it should be noted that, in 2018, the European Commission put forward a proposal for a regulation on the protection of the EU's budget in case of generalised deficiencies as regards the rule of law in Member States, that is still to be adopted by the co-legislators. The following sections will analyse in depth all these initiatives, highlighting the differences among them and their added value compared with the currently existing tools.

5.1. European Parliament pact on democracy, the rule of law and fundamental rights

Parliament has called repeatedly³²¹ for an EU 'pact' on DRF, most recently in January 2020.³²² A further legislative own-initiative building on the approach proposed by Parliament's 2016 legislative own-initiative resolution is currently being considered and due to be voted upon during the plenary session of 5-8 October 2020 (rapporteur: Michal Šimečka, Renew/Slovakia).³²³ Its impacts and European added value will be discussed in a forthcoming EPRS publication.³²⁴

The pact originally proposed by Parliament's 2016 legislative own-initiative resolution³²⁵ would entail the establishment of a **comprehensive EU mechanism for DRF, integrating, aligning and complementing existing mechanisms**, including the European Semester aimed at coordinating the economic policies of the Member States (discussed in Section 3.1), the EU Justice Scoreboard (discussed in Section 3.2) and the cooperation and verification mechanism, applicable only to Bulgaria and Romania, the Commission's rule of law framework (discussed in Section 3.3.) and the Council's annual dialogues on the rule of law (discussed in Section 3.4.).

As regards the legal basis, an **interinstitutional agreement** based on Article 295 TFEU is Parliament's preferred option, acknowledging that the institutions have to act within the limits of the powers conferred on them by the Treaties.³²⁶ Here it should be underlined that the **Parliament has its own competences to monitor compliance with EU values**, in order for it to effectively exercise its right to trigger the Article 7(1) TEU procedure, when necessary.³²⁷ Initially, the European Commission rejected most of Parliament's recommendations, doubting their technical and legal feasibility.³²⁸ However, in 2019 the **Commission** published a consultation,³²⁹ followed by

³²¹ 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\(INL\)](#)); 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\(RSP\)](#)), P8_TA(2018)0456.

³²² European Parliament resolution of 16 January 2020 on ongoing hearings under Article 7(1) of the TEU regarding Poland and Hungary ([2020/2513\(RSP\)](#)), para. 5.

³²³ Draft report on the establishment of an EU Mechanism on Democracy, the Rule of Law and Fundamental Rights ([2020/2072\(INL\)](#)) Rapporteur: Michal Šimečka, [PE653.810v01-00](#) of 1 July 2020; [European Parliament press release, European values: towards a permanent monitoring mechanism against backsliding](#), 22 September 2020.

³²⁴ W. van Ballegooij and C. Navarra, An EU mechanism on democracy, the rule of law and fundamental rights, European added value assessment, EPRS, forthcoming.

³²⁵ 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\(INL\)](#)).

³²⁶ See footnote 332, Annex, preamble point 9: 'Whereas, in accordance with Article 295 TFEU, the present inter-institutional agreement lays down arrangements only for the European Parliament, the Council and the Commission to facilitate their cooperation and, in accordance with Article 13 (2) TEU, those Institutions shall act within the limits of the powers conferred on them by the Treaties, and in conformity with the procedures, conditions and objectives set out in them; whereas this inter-institutional agreement is without prejudice to the prerogatives of the Court of Justice of the EU in the authentic interpretation of Union law'.

³²⁷ As indeed it has done in the case of Hungary (discussed in Section 3.5).

³²⁸ Follow up to the Parliament resolution on the establishment of an EU mechanism on democracy, the rule of law and fundamental rights, adopted by the Commission on 17 January 2017, [SP\(2017\)16](#).

³²⁹ Commission communication, Further strengthening the Rule of Law within the Union, State of play and possible next steps, [COM \(2019\)163](#) of 3 April 2019, and [Stakeholder contributions](#), 17 July 2019.

communication proposing a 'blueprint for action',³³⁰ entailing a 'rule of law review cycle'³³¹ culminating in an '**annual rule of law report**'³³² covering all Member States. Subsequently, Commission President Ursula von der Leyen has tasked Věra Jourová, Vice-President for Values and Transparency, and Didier Reynders, Commissioner for Justice, with the development of a 'comprehensive European rule of law mechanism', including an 'annual rule of law report monitoring the situation in every Member State'. The Commission intends to publish its **first report in September 2020**.³³³

This chapter and the following one **compare the monitoring mechanism proposed by Parliament with the one on which the Commission has begun work**,³³⁴ taking a close look at **scope** and **procedure**. The chapter first discusses Parliament's 2016 legislative own-initiative resolution and pact on DRF³³⁵ and the accompanying European added value assessment.³³⁶ Second, it looks at the Commission's annual rule of law report. Subsequently, **four key differences** between the Parliament and Commission approaches are unpacked. As neither the Commission's review cycle, nor Parliament's DRF proposal have resulted in a monitoring report so far, only **tentative conclusions will be drawn as regards their relative effectiveness in achieving compliance with EU values**.

5.1.1. Scope of application: Which breaches of EU values would be covered by Parliament's DRF pact?

As indicated in Parliament's resolution calling on the Commission to establish an EU pact on democracy, the rule of law and fundamental rights, the monitoring exercise under the pact should focus on the following aspects covering **democracy, the rule of law and fundamental rights**, thus clearly extending the areas of evaluation analysed by the Commission under the EU Justice Scoreboard, the European Semester and the envisaged rule of law annual report (focusing mainly on rule of law related issues and excluding human rights and democracy):

'the separation of powers; the impartial nature of the State; the reversibility of political decisions after elections; the existence of institutional checks and balances which ensure that the impartiality of the State is not called into question; the permanence of the State and institutions, based on the immutability of the constitution; the freedom and pluralism of the media; freedom of expression and freedom of assembly; promotion of civic space and effective mechanisms for civil dialogue; the right

³³⁰ Commission communication, Strengthening the rule of law within the Union, A blueprint for action, [COM \(2019\) 343](#), 17 July 2019.

³³¹ [COM \(2019\) 343](#), p. 9.

³³² [COM \(2019\) 343](#), p. 11.

³³³ European Commission, adjusted Commission work programme 2020, [COM \(2020\) 440, 27 May 2020: Annex I](#), p. 5.

³³⁴ For a more extensive comparison see W. van Ballegooij, [European added value of an EU mechanism on Democracy, the Rule of Law and Fundamental rights, preliminary assessment](#), EPRS, European Parliament, April 2020; Parliament's proposals for a DRF policy cycle within EU institutions are beyond the scope of this study, see: 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\(INL\)](#)), Annex, Articles 11 and 12; and W. van Ballegooij and T. Evas, [An EU mechanism on democracy, the rule of law and fundamental rights: European Added Value Assessment accompanying the legislative initiative report](#), EPRS, European Parliament, 2016, Section 2.2.

³³⁵ See footnote 332.

³³⁶ W. Van Ballegooij and T. Evas, [An EU mechanism on democracy, the rule of law and fundamental rights: European Added Value Assessment accompanying the legislative initiative report](#), EPRS, European Parliament, 2016; L. Pech *et al.*, [Annex I - An EU mechanism on democracy the rule of law and fundamental rights](#); P. Bárd *et al.*, [Annex II – Assessing the need and possibilities for the establishment of an EU scoreboard on democracy, the rule of law and fundamental rights](#).

*to active and passive democratic participation in elections and participatory democracy; integrity and absence of corruption; transparency and accountability; legality; legal certainty; the prevention of abuse or misuse of powers; equality before the law and non-discrimination; access to justice: independence and impartiality, fair trial, constitutional justice, where applicable, an independent legal profession; particular challenges to the rule of law: corruption, conflict of interest, collection of personal data and surveillance; Titles I to VI of the Charter of Fundamental Rights of the European Union; and the ECHR and the protocols thereto.*³³⁷

It should be noted that, as discussed in Section 2, the specific **meaning and scope of these values and the obligations they impose on Member States is not easy to define**. Furthermore, a **list of objective indicators is not readily available for all the values** mentioned in Article 2 TEU. However, a number of (international) benchmarks have been provided, including by the Venice Commission rule of law checklist.³³⁸ At the same time **it should be pointed out that these values are in a triangular relationship,**³³⁹ **reinforcing each other and together safeguarding the constitutional core of the EU and its Member States**. As the European Network of National Human Rights Institutions points out 'a strong regime of rule of law is vital to the protection of human rights, and the rule of law can only be fully realised in an environment that protects human rights'.³⁴⁰

5.1.2. DRF pact procedure

The **pact** (depicted in Figure 5 below) has been clearly designed as a monitoring tool and therefore, **it seeks to intervene even before a (threat of) a serious breach of EU values occurs**, proposing the systematic and annual evaluation of the situation in all Member States independently of whether or not there are concerns regarding possible breaches of those values in any Member State. It is therefore designed to **detect such situations**. In addition, it **covers potential follow up**, covering a wide range of options from enhanced monitoring to triggering the Article 7 TEU procedures. It has two **core elements**:

- 1 an annual European report on the DRF situation in Member States (**annual DRF report**), with country-specific recommendations drawn up by the Commission in consultation with a panel of independent experts; and
- 2 an **EU DRF policy cycle**, involving EU institutions and national parliaments, including a DRF policy cycle within the institutions of the Union.³⁴¹

The European Parliament's proposal envisages the preparation of an annual report on the DRF situation in all Member States, with country-specific recommendations. However, in terms of sources and methods for this annual DRF report, beyond the lack of comprehensive data of sufficient quality, there are clearly differences in standards, sources, data-handling methods and interpretation of the various international and EU tools to be covered. They are so different in nature and fundamentals that they require a **tedious methodological exercise** in order to make them

³³⁷ Supra footnote 332, Annex, Article 7.

³³⁸ Venice Commission's rule of law checklist; [Rule of Law Checklist](#), adopted by the Venice Commission at its 106th Plenary Session (Venice, 11-12 March 2016); European Commission.

³³⁹ S. Carrera, E. Guild, N. Hernanz, [The Triangular Relationship between Fundamental Rights, Democracy and the Rule of Law in the EU, Towards an EU Copenhagen Mechanism](#), CEPS, 2013.

³⁴⁰ ENNHRI, [The rule of law in the European Union, Reports from National Human Rights Institutions](#), 11 May 2020, executive summary, p. 4.

³⁴¹ See footnote 332, Annex, article 2.

comparable, and to allow for meaningful conclusions and findings.³⁴² Here Parliament's legislative own-initiative proposal points to the contribution of the EU Fundamental Rights Information System (EFRIS) developed by the Fundamental Rights Agency. This tool is based on existing sources of information and evaluations of instruments already in place in this field and it could help in conducting this exercise.³⁴³ The annual DRF report should however also be based on a **contextual analysis**, through a combination of dialogue, monitoring, benchmarking and evaluation exercises with various actors and methods.³⁴⁴ In this regard, Parliament calls for the Commission to draw up the annual DRF report including the country-specific recommendations in consultation with a **panel of independent experts**.³⁴⁵ This idea is inspired by the EU Network of Independent Experts on Fundamental Rights, active between 2002 and 2006,³⁴⁶ and the Council of Europe's Venice Commission.³⁴⁷ Such a panel has also been referred to as a 'Copenhagen Commission', with reference to the criteria to judge whether a country is democratic enough to begin the process of accession to the EU.³⁴⁸

Parliament envisages each Member State's national parliament nominating an **independent expert**, who would be a qualified constitutional court or supreme court judge not currently in active service. Ten further experts would be appointed by the European Parliament based on a list of individuals nominated by relevant international organisations, civil society and professional associations.³⁴⁹ However, some authors have discussed an alternative proposal in accordance with which the DRF expert panel would be directly responsible for drafting the annual DRF report.³⁵⁰ The Fundamental Rights Agency could potentially also play a larger role in DRF monitoring, either within its current mandate,³⁵¹ or subject to a revision of its mandate in accordance with Article 352 TFEU, which does however require unanimity among Member States.³⁵²

³⁴² van Ballegooij and Evas, 'An EU mechanism', Annex II, Section 4.4.

³⁴³ See footnote 331, Annex, article 6.

³⁴⁴ van Ballegooij and Evas, 'An EU mechanism', Annex II, Section 4.

³⁴⁵ See footnote 332, Annex, Articles 4 and 8.

³⁴⁶ See O. de Schutter, [The implementation of the Charter of Fundamental Rights in the EU institutional framework, Research paper for the Policy Department for Citizens' Rights and Constitutional Affairs](#), European Parliament, 2016, p. 25.

³⁴⁷ 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)), [P7_TA\(2013\)0315](#), paras. 76, 79-81; European Commission for Democracy through Law ([Venice Commission](#)).

³⁴⁸ J.-W. Müller, [Protecting Democracy and the Rule of Law inside the EU, or: Why Europe Needs a Copenhagen Commission](#), *Verfassungsblog*, 13 March 2013.

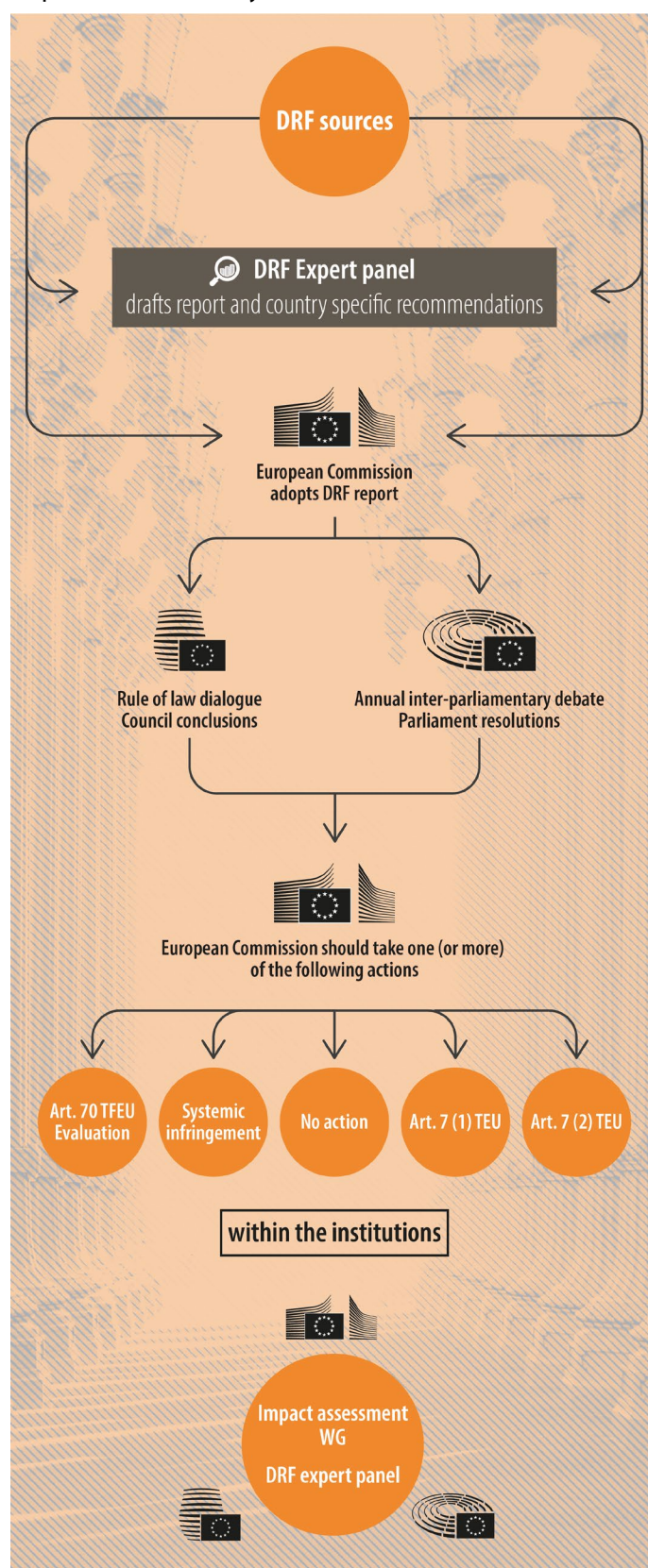
³⁴⁹ *Ibid.*, Annex, article 8.1. See also Parliament's idea to create a panel of independent experts on the rule of law and EU financial rules, to assist the Commission when implementing the rule of law conditionality (see below, Section 5.4).

³⁵⁰ van Ballegooij and Evas, 'An EU mechanism', Annex II, Section 4.8.

³⁵¹ FRA [opinion on the development of an integrated tool of objective fundamental rights indicators able to measure compliance with the shared values listed in Article 2 TEU based on existing sources of information](#), April 2016.

³⁵² Which requires unanimity; De Schutter argues the FRA could contribute towards the monitoring of EU values even without a change in its mandate; O. de Schutter, [Strengthening the Fundamental Rights Agency, the Revision of the Fundamental Rights Agency Regulation](#), DG IPOL, European Parliament, June 2020, Sections 3.3.2. and 3.3.3.

Figure 5 – EU pact on democracy, the rule of law and fundamental rights (DRF)



Source: EPRS.

Box 11 – Parliament's further activities in the area of EU values

In addition to making proposals to establish an EU pact on democracy, the rule of law and fundamental rights, **Parliament has used its competences to develop a broad range of activities in the area of EU values.** Without aiming to be exhaustive, it should be pointed out that Parliament has made use of its **power to trigger Article 7(1) TEU** in the case of Hungary (European Parliament resolution of 12 September 2018, [2017/2131\(INL\)](#), see Section 3.5 for more detail), and has raised concerns as regards compliance with fundamental rights in certain Member States and the Union in its **annual reports on the situation of fundamental rights in the European Union** (most recently from [2017](#) and [2016](#)). Similarly, Parliament has adopted several **resolutions pointing out concerns as regards compliance with EU values** in different Member States, most recently:

- **Czech Republic:** Resolution of 19 June 2020 on the reopening of the investigation against the Prime Minister of the Czech Republic on the misuse of EU funds and potential conflicts of interest ([2019/2987\(RSP\)](#)); Resolution of 13 December 2018 on conflicts of interest and the protection of the EU budget in the Czech Republic ([2018/2975\(RSP\)](#))
- **Hungary:** Resolution of 16 January 2020 on ongoing hearings under Article 7(1) of the TEU regarding Poland and Hungary ([2020/2513\(RSP\)](#))
- **Malta:** Resolution of 18 December 2019 on the rule of law in Malta following the recent revelations surrounding the murder of Daphne Caruana Galizia ([2019/2954\(RSP\)](#)); Resolution of 28 March 2019 on the Situation of the rule of law and the fight against corruption in the EU, specifically in Malta and Slovakia ([2018/2965\(RSP\)](#)).
- **Poland:** Resolution of 16 January 2020 on ongoing hearings under Article 7(1) of the TEU regarding Poland and Hungary ([2020/2513\(RSP\)](#)); Resolution of 14 November 2019 on the criminalisation of sexual education in Poland ([2019/2891\(RSP\)](#))
- **Romania:** Resolution of 13 November 2018 on the rule of law in Romania ([2018/2844\(RSP\)](#))
- **Slovakia:** Resolution of 28 March 2019 on the Situation of the rule of law and the fight against corruption in the EU, specifically in Malta and Slovakia ([2018/2965\(RSP\)](#)); Resolution of 19 April 2018 on protection of investigative journalists in Europe: the case of Slovak journalist Ján Kuciak and Martina Kušnírová ([2018/2628\(RSP\)](#))

According to Parliament's proposal, the adoption of the annual DRF report by the Commission would initiate **an inter-parliamentary debate and a debate in Council** aimed at addressing the result of the report and the country specific recommendations. The inter-parliamentary debate would result in the adoption of a **resolution by Parliament**, whereas the **Council** debate would result in **conclusions**.³⁵³ The debate should be part of a multi-annual structured dialogue between the European Parliament, national parliaments, the Commission and the Council. It would involve civil society, the EU's Fundamental Rights Agency and the Council of Europe.³⁵⁴ The Council debate, building on its rule of law dialogue (see Section 5.3.), would result in conclusions, inviting national parliaments to provide a response to the DRF European report, proposals or reforms.³⁵⁵ Based on the annual DRF report, the **Commission** could decide to launch a '**systemic infringement**' action under Article 2 TEU and Article 258 TFEU, (as explained under Section 4.2 of this study) or could also decide to submit a proposal for a **peer evaluation** of the implementation by Member States of Union policies in the area of freedom, security and justice, under Article 70 TFEU.³⁵⁶

The Parliament resolution envisages **four scenarios** for action based on the annual DRF report:

³⁵³ See footnote 332, Annex, article 10.

³⁵⁴ *Ibid.*

³⁵⁵ *Ibid.*

³⁵⁶ Article 70 TFEU: 'Without prejudice to Articles 258, 259 and 260, the Council may, on a proposal from the Commission, adopt measures laying down the arrangements whereby Member States, in collaboration with the Commission, conduct objective and impartial evaluation of the implementation of the Union policies referred to in this Title by Member States' authorities, in particular in order to facilitate full application of the principle of mutual recognition. The European Parliament and national Parliaments shall be informed of the content and results of the evaluation'; footnote 332, Annex, article 10.

- 1 If a Member State is compliant with all the aspects related to democracy, the rule of law and fundamental rights, **no further action** will be necessary.³⁵⁷
- 2 If a Member State falls short on one or more DRF aspects listed in article 7 of Parliament's recommendations, the Commission will start a **dialogue** with that Member State without delay, taking into account the country specific recommendations.³⁵⁸
- 3 If the country specific recommendations on a Member State include the assessment by the expert panel that there is a **clear risk of a serious breach** of the values referred to in Article 2 TEU and that there are sufficient grounds for invocation of **Article 7(1) TEU**, the Commission, the Council and the European Parliament will each discuss the matter and take a reasoned decision, which will be made public.³⁵⁹
- 4 If the country specific recommendations on a Member State include the assessment by the DRF expert panel that there is a **serious and persistent breach** of the values referred to in Article 2 TEU and that there are sufficient grounds for the invocation of Article 7(2), TEU, the Commission, the Council and the European Parliament will each discuss the matter without delay and take a reasoned decision, which will be made public.³⁶⁰

5.2. European Commission's rule of law review cycle

The European Commission initially rejected Parliament's proposal to establish a new monitoring tool of all Member States as regards compliance with EU values.³⁶¹ However, in 2019, it launched a more limited monitoring tool, that would include a yearly assessment of all Member States, but limited to certain components of the rule of law; the first edition is due in September 2020.³⁶²

5.2.1. Scope of application: What EU values are evaluated under the Commission's rule of law review cycle?

As indicated in the Commission's communication on strengthening the rule of law within the Union, its **rule of law review cycle** is aimed at **identifying threats to the rule of law before adopting any formal response to those threats**. Those possible responses would include the triggering of the rule of law framework, infringement procedures and/or Article 7 TEU, thus featuring this new tool as a monitoring tool to be applied before any preventive or enforcement tool of EU values in order to obtain the information needed to decide on how to proceed. As the Commission itself indicated:

*'the EU has a legitimate role to play in supporting national authorities and ensuring that negative developments are addressed at an early stage. The role of the EU institutions should be to facilitate cooperation and dialogue in order to prevent problems from reaching the point where a formal response is required under the rule of law framework, by infringement procedures or by actions under Article 7 of the Treaty on European Union'.*³⁶³

³⁵⁷ See footnote 332, Annex, article 10.1.

³⁵⁸ *Ibid.*, Annex, article 10.2

³⁵⁹ *Ibid.*, Annex, article 10.2.1.

³⁶⁰ *Ibid.*, Annex, article 10.3.

³⁶¹ Follow up to the Parliament resolution on the establishment of an EU mechanism on democracy, the rule of law and fundamental rights, adopted by the Commission on 17 January 2017, [SP\(2017\)16](#).

³⁶² [COM \(2019\) 343](#), p. 11.

³⁶³ [COM \(2019\) 343](#), p. 9.

In terms of its **scope**, the first edition of the Commission's rule of law report will cover 'significant developments' in Member States, both positive and negative, within four areas. Its scope is limited to the '**rule of law**', thereby excluding elements of democracy and fundamental rights covered by Parliament's proposed monitoring tool. It is not clear at the moment what the term 'significant developments' means, though major legislative reforms and practical challenges will certainly be covered.

The four areas that would be covered by the Commission's report are:³⁶⁴

➤ Justice systems, and in particular their independence, quality and efficiency³⁶⁵

Independence includes: the **appointment and selection of judges and prosecutors**; the **irremovability** of judges, including transfers of judges and dismissal; the **promotion** of judges and prosecutors; the **allocation of cases** in courts; independence (including composition and nomination of members), and powers of the **body tasked with safeguarding the independence** of the judiciary; **accountability** of judges and prosecutors, including the disciplinary regime and ethical rules; remuneration or bonuses for judges and prosecutors; independence or autonomy of the prosecution service; independence of the bar (chamber/association of lawyers); and **significant developments** capable of affecting the perception that the general public has of the independence of the judiciary.

Quality of justice includes: **accessibility** of courts (e.g. court fees, legal aid); **resources** of the judiciary (human and financial); use of **assessment tools** and standards (e.g. ICT systems for case management, court statistics, monitoring, evaluation and surveys among court users or legal professionals).

Efficiency of the justice system includes the length of proceedings and the enforcement of judgments.

➤ The anti-corruption framework

This refers to: the **institutional framework's capacity to fight corruption** (prevention, investigation and prosecution), notably that of authorities (e.g. national agencies, bodies) in charge of prevention, detection, investigation and prosecution of corruption; resources allocated (human, financial, legal, and practical resources as relevant); **prevention**; the integrity framework: asset disclosure rules, lobbying, revolving doors and general **transparency** of public decision-making (including public access to information); **rules on preventing conflicts of interests** in the public sector; measures in place to ensure **whistle-blower protection** and encourage reporting of corruption; **sectors with a high risk of corruption** in a Member State and relevant measures taken or envisaged to prevent corruption in these sectors (e.g. public procurement, healthcare, other); any **other relevant measures** to prevent corruption in public and private sectors; repressive measures; **criminalisation of corruption** and related offences; application of sanctions (criminal and non-criminal) for corruption offences (including for legal persons); potential **obstacles to investigation and prosecution** of high-level and complex corruption cases (e.g. political immunity regulation).

³⁶⁴ European Commission, [Annual Rule of Law Report-Stakeholder consultation](#).

³⁶⁵ This goes beyond the Justice Scoreboard discussed in Section 3.2., as it relies on more sources and will lead to a qualitative assessment.

➤ Certain issues relating to **media pluralism**

These issues refer to **media regulatory authorities and bodies**; independence, enforcement powers and adequacy of resources of media authorities and bodies; conditions and procedures for the appointment and dismissal of the head or members of the collegiate body of media authorities and bodies; **transparency of media ownership and government interference**; the transparent allocation of state advertising (including any rules regulating the matter); public information campaigns on rule of law issues (e.g. on judges and prosecutors, journalists, civil society); rules governing transparency of media ownership framework for **journalists' protection**; rules and practices guaranteeing journalist's independence and safety and protecting journalistic and other media activity from interference by state authorities; **law enforcement capacity to ensure journalists' safety** and to investigate attacks on journalists; **access to information and public documents**.

➤ Other institutional issues relating to checks and balances

This area covers the **process for preparing and enacting laws**; stakeholders or public consultations (in particular consultation of the judiciary on judicial reforms), **transparency of the legislative process**, rules and use of fast-track procedures and **emergency procedures** (for example, the percentage of decisions adopted through emergency/urgent procedure compared to the total number of decisions adopted); regime for **constitutional review** of laws; independent authorities; independence, capacity and powers of **national human rights institutions**, ombudsman institutions and equality bodies; accessibility and **judicial review** of administrative decisions; modalities of publication of administrative decisions and scope of judicial review; **implementation by the public administration** and state institutions of final court decisions.

5.2.2. Procedure: How is the rule of law review cycle applied?

The Commission's rule of law review cycle is a **yearly monitoring tool** in which the **Commission** is the main actor assessing the situation in the Member States as regards the above-mentioned criteria. In terms of standards to be applied, the assessment will be based on requirements and well-established European standards, including relevant obligations under EU law and ECJ case law, European Court of Human Rights case law and Council of Europe standards.³⁶⁶ The report will provide a **qualitative assessment** in the light of these standards and it will focus on a synthesis of significant developments introduced by a brief factual description of the legal and institutional framework relevant for each pillar. Furthermore, it will present both **challenges and positive aspects, including good practices**. Moreover, the Commission indicates that there will be a qualitative assessment of **all Member States**, 'while remaining proportionate to the situation and developments in full respect of the principle of equality of Member States'.³⁶⁷ In practice, this means that reports on Member States facing several rule of law challenges might be longer. Finally, it will

³⁶⁶ Venice Commission's rule of law checklist; [Rule of Law Checklist](#), adopted by the Venice Commission at its 106th Plenary Session (Venice, 11-12 March 2016); European Commission, European Rule of Law mechanism: Methodology for the preparation of the Annual Rule of Law Report, Ares(2020)1737645 - 24 March 2020.

³⁶⁷ European Commission, European Rule of Law mechanism: Methodology for the preparation of the Annual Rule of Law Report, Ares(2020)1737645 - 24 March 2020.

be based on a close dialogue with Member States, country visits, on stakeholders' contributions and on all other relevant sources. The reports and materials used will be referenced in the report.³⁶⁸

Beyond sources of information such as **EFRIS**, during the preparation of its rule of law report the Commission has **consulted international organisations** and **professional associations**.³⁶⁹ It has furthermore relied on a **network of contact points** on the rule of law nominated by their Member States for exchange of information and dialogue.³⁷⁰ The input received from Member States on the state of play in the four focus areas will be published on the Commission's website, with the agreement of the Member States. In addition to that, the Commission relies on a **targeted stakeholder consultation**, which was open for contributions until 4 May 2020. Stakeholders were asked to highlight significant developments horizontally at EU level (concerning several or all EU Member States), and/or at Member State level, focusing primarily on developments since January 2019. The inputs received by stakeholders will be published on the Commission website, for those stakeholders who agree to such publication. The Commission has also conducted virtual country visits. Prior to the publication of the rule of law report in September, Member States will be given the opportunity to comment on the analytical parts of the report concerning their country-specific assessment.

Although the Commission has not gone into extensive detail as regards the exact response **Parliament and Council** should give to the annual rule of law report,³⁷¹ both institutions **are encouraged to follow up on the rule of law report in their discussions**. The European Parliament and national parliaments are also encouraged to develop **inter-parliamentary cooperation** and dialogue on rule of law issues, an element also included in Parliament's legislative own-initiative resolution.³⁷² As explained in Section 5.3, the Presidency of the Council has proposed to base the Council's annual dialogues on the rule of law on the Commission's annual report, although it is still unclear what could be the scope, outcomes and possible follow-ups of those discussions in the Council.³⁷³

5.2.3. Four key differences between the Parliament and Commission initiatives and their impact on effectiveness in achieving compliance with EU values

The **four key differences** between the Parliament and the Commission initiatives relate to the **legal basis** chosen to found the monitoring exercise envisaged, the **scope** of that monitoring exercise, the **actors** involved, and possible **follow-up** action.

³⁶⁸ *Ibid.*

³⁶⁹ [COM \(2019\) 343](#), p. 11.

³⁷⁰ *Ibid.*

³⁷¹ Commission communication, Strengthening the rule of law within the Union, A blueprint for action, [COM \(2019\) 343](#), 17 July 2019.

³⁷² European Commission, European Rule of Law mechanism: Methodology for the preparation of the Annual Rule of Law Report, Ares(2020)1737645 - 24/03/2020.

³⁷³ Presidency conclusions – Evaluation of the annual rule of law dialogue, [Council doc. 14173/19](#) of 19 November 2019, point 11: 'we call upon the Commission to closely involve the Member States while preparing its rule of law report and to publish this report well in advance of the Council's annual rule of law dialogue to be held in the General Affairs Council in the autumn, in order to allow Member States to make further observations and to enable proper preparations to be made for the dialogue'.

Table 6 – Monitoring EU values: Four key differences between the mechanism proposed by the Parliament and the mechanism adopted by the Commission

	European Parliament	European Commission
Legal basis	Article 295 – Treaty on the Functioning of the European Union (TFEU) (interinstitutional agreement)	Commission monitoring as 'Guardian of the Treaties' as per Article 17(1) TEU
What is assessed?	Democracy, rule of law, fundamental rights	Rule of law (separate reports on democracy and fundamental rights)
Who assesses?	Panel of independent experts	Commission
What follow-up?	EU policy cycle for DRF; Commission to undertake further monitoring and/or activate additional procedures (e.g. Article 7(1) TEU procedure or Article 258 TFEU procedure)	Interparliamentary debates within the European Parliament and discussions within Council

Source: Author's own summary.

First, there is **no interinstitutional agreement underpinning the Commission exercise**. Such an agreement would be an appropriate way to ensure legal certainty³⁷⁴ and coordination between the Commission, Parliament and Council, notably as regards the **scope, methodology and follow-up** to their monitoring exercises. In particular, within the context of an interinstitutional agreement, cooperation could be organised in terms of programming and regular exchanges with the aim of achieving a **common understanding among the EU institutions on the methodologies used to assess compliance with democracy, the rule of law and fundamental rights**. At the same time, the model chosen by the European Commission resembles the Economic Semester, in which Parliament plays a minor role and Council is criticised for watering down many of the Commission's recommendations,³⁷⁵ though in the Semester it is the Council that has the final say, whereas it will be the Commission writing the rule of law report.

Second, **Parliament envisaged a broader scope** for the monitoring exercise, also taking on board possible threats to democracy and fundamental rights, whereas the Commission envisages focusing only on certain components of the rule of law. However the Commission produces an annual report on the application of the Charter of Fundamental Rights.³⁷⁶ The Commission's 2020 work programme, meanwhile, announces a European democracy action plan, the aim of which will be to counter disinformation and to adapt to evolving threats and manipulations, as well as to support free and independent media.³⁷⁷ These therefore remain, stand-alone publications that only partially cover the aspects identified by Parliament. Also Parliament's approach takes into account the link between all EU values, as illustrated by two examples concerning the **Roma and mass surveillance** (see Box 12). What they show is that democracy, the rule of law and fundamental rights need to be deployed together.

³⁷⁴ W. van Ballegooij, [European added value of an EU mechanism on Democracy, the Rule of Law and Fundamental rights, preliminary assessment](#), EPRS, April 2020, p. 4.

³⁷⁵ Delivorias and Scheinert, [Introduction...](#), Section 3.1.

³⁷⁶ European Commission, [Annual Reports on the application of the Charter](#).

³⁷⁷ [COM \(2020\) 37](#), p.8.

Box 12 – Examples showing how EU values are interlinked

1: Protection of minorities – the situation of the Roma

The Roma community is still subject to [anti-Gypsyism](#), including institutional forms of discrimination and forced evictions and expulsions. As a recent [European implementation assessment](#) on national Roma integration strategies (NRIS) concludes: 'to succeed, Roma inclusion actions in all policy areas must be linked to common values and include awareness raising among the general public'. A [CEPS study](#) conducted for Parliament's policy department challenges the premise that the situation of Roma should be addressed as an 'integration' challenge to be tackled via socio-economic policies, and not as historically-rooted 'antigypsyism' to be tackled via rule of law and transitional justice measures. It therefore calls for a '[mechanism](#) that could capture and prevent or remedy institutional forms of discrimination, such as for example, high-level politicians spreading hate-speech towards Roma and other ethnic, linguistic and religious minorities, or the misuse of EU funds allocated for Roma integration'.

2: Mass surveillance

The [mass surveillance](#) of EU-citizens by intelligence services has been extensively discussed in a number of Parliament resolutions following the [LIBE committee inquiry](#) into the matter. Concerns in this respect relate not only to lack of control and effective oversight over intelligence services, but also to threats to the rule of law, not least by the violation of the professional confidentiality of lawyers and a number of fundamental rights infringements, including of the freedom of expression and the rights to privacy and data protection. As a [2014 Parliament resolution](#) stated: 'privacy is not a luxury right, but is the foundation stone of a free and democratic society'.

Third, the **Commission remains opposed to the involvement of a panel of independent experts** as proposed by the European Parliament in 2016, citing concerns relating to 'legitimacy, balance of inputs and the accountability of results'.³⁷⁸ The main point seems to be that the Commission deems the involvement of such a panel to be incompatible with its role as 'Guardian of the Treaties'.³⁷⁹ On the other hand, the strong involvement of national contact points has been criticised by *Pech et al.* This partially raises the risk that 'rule of law-deficient Member States designate a contact point that has been politically captured'.³⁸⁰ An important question to be considered here is not only *who* should contribute to the monitoring. Rather **it is also about how monitoring is done**. In particular the analysis needs to be **scientifically robust** and provide an **independent, impartial and holistic assessment**, in the sense that information is triangulated to provide a proper context of

individual violations, both within the Member State concerned and as regards transnational connections and implications. The **involvement of academic experts**, in particular in devising the methodology and providing a contextual analysis, could **ensure that these criteria are met**.

Fourth, Parliament envisaged the **publication** of the **full report**, including contributions by Member States and country-specific recommendations, and for it to form the basis for **Council conclusions** and the adoption of a **Parliament resolution** following an interparliamentary debate. This could then lead to a call on the **Commission to take action** ranging from enhanced monitoring and the launch of infringement proceedings, to triggering a DRF dialogue or procedures to enforce EU values under Articles 7(1) and 7(2) TEU. However, as has been learned from the lack of compliance with country-specific recommendations made in the context of the European Semester in relation

³⁷⁸ Footnote 332, Annex, Article 7; [COM \(2019\) 343](#), p. 12.

³⁷⁹ Article 17(1) TEU; Article 258 TFEU.

³⁸⁰ L. Pech *et al.*, [The Commission's Rule of Law Blueprint for Action: A Missed Opportunity to Fully Confront Legal Hooliganism](#), Reconnect blog, 4 September 2019.

to corruption and the functioning of the justice systems,³⁸¹ **recommendations that are not backed up by the threat of sanctions are not going to lead to a more effective enforcement of EU values.** The Commission's approach, bearing in mind its prerogatives, does not take up Parliament's recommendations. It rather encourages interparliamentary debates within Parliament and Council. However, this stance does raise questions as to **how coherence between the various elements of the EU toolbox to monitor and enforce compliance with EU values will be ensured.** In particular, it is not clear what, if anything, will be done with the outcome of the discussions in the Council, European Parliament and national parliaments. It is not clear how these discussions will influence the drafting of the second annual rule of law report, the launch of specific evaluations, such as the one provided for under Article 70 TFEU, or specific funding, including in the parallel proposal on the protection of the Union's budget in case of generalised deficiencies as regards the rule of law, discussed in Section 5.4. below.

A final assessment of the comparative effectiveness of the two mechanisms can only be made once the Commission's report is out, taking into account the recommendations made in Parliament's new legislative own-initiative report. The 2016 European added value assessment (EAVA) supporting Parliament's legislative own-initiative proposal concluded that the DRF pact proposed by Parliament would clarify the scope for EU action and the division of labour among the EU institutions in the area of monitoring of compliance with and the subsequent enforcement of EU values. It argued that this could be done at relatively low cost, particularly if the right synergies were found with international organisations. At the same time, it would have significant benefits: notably it would foster mutual trust, put the material conditions in place for the effective exercise of fundamental rights, attract more investment and provide for higher welfare standards.³⁸²

5.3. Council's reviewed dialogues on the rule of law: A periodic peer review exercise?

While the Commission embarked on the exercise of reviewing its rule of law framework, as explained under Section 5.2, the Council also began a review of its annual dialogues on the rule of law. The reviewing exercise started during the 2019 Finnish Presidency on the basis of a discussion paper and a questionnaire sent to the national delegations on 27 September 2019³⁸³ and ended with the adoption of Presidency conclusions³⁸⁴ that were only supported (or not objected to) by 26 Member States. Adopted in the middle of discussions among Member States on setting up a periodic peer review mechanism on the rule of law based on the proposal presented by Belgium, Germany and the Netherlands on the margins of the 29 March 2019 meeting of the General Affairs Council,³⁸⁵ the Finnish Presidency conclusions proposed to **strengthen the Council's annual dialogues** by transforming them into a **'yearly stocktaking exercise concerning the state of play and key developments as regards the rule of law'** in the Member States and the Union as a whole. Along similar lines, the current **German Presidency of the Council** has proposed to coordinate the

³⁸¹ J. Angerer, M. Ciucci, M. Sakudo, M. Thomson, [Country-Specific Recommendations for 2018 and 2019. A tabular comparison and an overview of implementation](#), DG IPOL study, PE 634.401, 2019; see Section 3.1.

³⁸² Van Ballegooij and Evas, 'An EU mechanism', Chapter 3.; W. van Ballegooij, [European added value of an EU mechanism on Democracy, the Rule of Law and Fundamental rights, preliminary assessment](#), EPRS, April 2020.

³⁸³ Presidency, [Questionnaire for the Member States on the review of the Council's annual rule of law dialogue](#), 27 September 2019, 12584/19.

³⁸⁴ Presidency conclusions, [Evaluation of the annual rule of law dialogue](#), 19 November 2019, 14173/19.

³⁸⁵ Kingdom of Belgium, Foreign Affairs, [Fundamental values check-up: let's intensify our dialogue!](#), 21 March 2019.

Council's annual rule of law dialogues with the Commission's rule of law report, holding two separate discussions on the content of the report within the Council.³⁸⁶

5.3.1. Scope of the new dialogues: What EU values would be monitored through this mechanism?

According to the Finnish Presidency conclusions and the programme presented by the German Presidency, the Council's annual dialogues would take place every autumn and would **make use of the Commission's annual rule of law report**, thus creating synergies between the Commission's annual monitoring exercise and the dialogues among Member States. The dialogues would then move from the thematic debates on specific topics that they currently are to a **more comprehensive debate on the actual situation of the Member States and the EU** as regards compliance with EU values. However, if Council's dialogues limit their scope to the issues analysed by the Commission in its annual rule of law report, the picture may be a limited one, as the Commission plans to focus its annual report only on rule of law-related questions, as explained under Section 5.2.1. In principle, the Council could decide to widen the scope of its dialogues to elements not analysed in the Commission's annual dialogue or could also decide to hold an annual dialogue to discuss the Commission's report in addition to thematic dialogues to discuss some other topics. The Finnish Presidency conclusions encourage specialised Council configurations to organise more in-depth debates on specific issues. However, it has still to be seen if future Council presidencies decide to hold those thematic debates or extend the scope of the Council's dialogues to topics not analysed by the Commission in its report through other possible means.

5.3.2. Procedure and possible outcomes of the Council's future annual dialogues

As regards the procedure to be followed by the Council, there are many questions that have not yet been answered. The Finnish Presidency proposed that the Council would meet **every autumn** in its General Affairs configuration after the presentation of the Commission's annual report and that the Commission's report would be used to frame the debate.³⁸⁷ The German Presidency has concretised this further, indicating that **two discussions will be held**: an annual one on the report as a whole and its horizontal aspects and, a half-yearly one on the first country-specific chapters of the report, so that all Member States in turn will be covered.³⁸⁸ Preparations for the annual dialogue would not only be based on the Commission's report, as the Finnish Presidency conclusions also encouraged the Council's presidency in charge of the dialogue to organise more interactive exchanges (for example, seminars with stakeholders). The Finnish Presidency conclusions and the German Presidency programme have also indicated that the dialogue should be **constructive and inclusive**, at the same time as **comprehensive, genuine and interactive**, thus allowing exchanges on positive, but also negative, trends among national delegations.

However, many questions remain unanswered: we do not know how the discussions will actually take place, on which issues they will focus, what possibilities will be offered to Member States to expose their points of view or ask questions to other Member States, whether the discussions will be made available to the public or what will be the outcomes of the exercise, especially in terms of follow-up to possible conclusions relating to specific Member States and deficiencies. All these

³⁸⁶ Programme for Germany's Presidency of the Council of the European Union, [Together for Europe's recovery](#), p. 18.

³⁸⁷ Presidency conclusions, [Evaluation...](#), p. 2.

³⁸⁸ Programme for Germany's Presidency..., p. 18.

questions are relevant and might transform the current Council's dialogues into a **proper peer-review mechanism**, especially if the debate is structured in a way that allows national delegations to review the situation in every country, conclusions on the state of play and possible shortcomings are made public and a proper follow-up to those conclusions is provided. As these questions are still to be decided, a proper assessment of these renewed Council's annual dialogues will have to wait.

5.4. The proposed rule-of-law budgetary conditionality (financial sanctions mechanism)

As analysed in the previous subsections, most of the new mechanisms proposed by EU institutions to strengthen the EU toolbox to address EU values shortcomings in the Member States are of a monitoring nature, aimed at improving assessment of the situation on the ground. However, as part of the preparation of the 2021-2027 multiannual financial framework,³⁸⁹ the European Commission proposed to strengthen current mechanisms with a new enforcement tool that would link EU funding with respect for the rule of law. To this end, on 3 May 2018, the **Commission presented a proposal for a regulation that would introduce a general rule-of-law conditionality** into the body of EU financial rules and that would apply in case of systemic breaches of that EU values.³⁹⁰ The Commission based its proposal on Article 322(1)(a) TFEU and Article 106a of the Treaty establishing the European Atomic Energy Community, although some authors³⁹¹ and the Council's Legal Service³⁹² have raised concerns regarding the link between the proposed mechanism and Article 7 TEU.

Conditionalities are not a new mechanism in EU law,³⁹³ and are present especially with regard to accession and to membership in the European monetary union (EMU), being even 'a defining element of the European integration and enlargement process'.³⁹⁴ In fact, as Maria José Rangel de Mesquita noted, 'the new mechanism proposed as part of the 2021-2027 MFF is not as innovative as it may seem at first sight, since it copies a concept adopted within the previous MFF (2014-2020) according to which a proposal of similar measures – linking the effectiveness of European structural and investment (ESI) funds to sound economic governance – was included in the 2013 Regulation on common provisions on structural funds in order to suspend, totally or partially, payments of

³⁸⁹ For a broad analysis of the 2021-2027 MFF, see especially the EPRS in-depth analysis on the topic: M. Parry and M. Sapala, [2021-2027 multiannual financial framework and new own resources: Analysis of the Commission's proposal](#) (PE 625.148, EPRS July 2018).

³⁹⁰ [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, Brussels, 2 May 2018, COM(2018) 324 final, legislative procedure reference: 2018/0136(COD).

³⁹¹ See, M. Rangel de Mesquita, ['European Union values, Rule of Law and the Multiannual Financial Framework 2021-2027'](#), *ERA Forum*, Vol. 19(2), 2018, pp. 290-292

³⁹² The content of the legal opinion was, reported on 29 October 2019 by [Politico](#) and on 31 October 2018 by [Agence Europe](#). On 30 October 2019, Professor Laurent Pech made a [request](#) to the Council to obtain the document, but the Council [refused](#) explaining that 'the legal issues dealt with by the requested document are controversial and the different actors involved in this legislative procedure have expressed divergent positions. As a consequence, the ongoing discussions are very sensitive'. On 10 December 2019, the heading and initial pages of the document were made [available](#), but the essential Section III 'Legal analysis' was deleted entirely. At the time of writing of this Study, the document remains, therefore, unpublished.

³⁹³ G. Halmai, ['The Possibility and Desirability of Rule of Law Conditionality'](#), *Hague Journal on the Rule of Law*, Vol. 11, 2019, p. 172.

³⁹⁴ Heinemann, *op. cit.*, p. 298.

structural funds towards Member States who violated the limits of the 3 % deficit (excessive budgetary deficits)'.³⁹⁵

Existing regulations concerning the EU budget include rules known as '**spending conditionalities**'.³⁹⁶ The rules originated in the 1980s and were first used in the EU's external policies, before being applied to cohesion policy. They are generally defined as a 'condition attached to EU financial benefits with the aim of advancing broader EU policy objectives at the Member State level'.³⁹⁷ The conditions are enshrined in fund-specific regulations and can concern the Member States or final beneficiaries. Some of the conditionalities must be fulfilled before funds are disbursed (**ex ante conditionalities**), others apply in the later stages of the implementation process or are focused on outputs and, if not fulfilled, may lead to a halt in payments (**interim and ex post conditionalities**).³⁹⁸ It is pointed out that 'the existing ex-ante conditionalities applied to European structural and investment funds have already increased the administrative burden on national managing authorities and the Commission itself'.³⁹⁹

So far, rule of law deficiencies have not been addressed explicitly in the framework of spending conditionalities, although some academics claim that Article 142(a) of the Common Provisions Regulation,⁴⁰⁰ which provides that payments of European structural and investment funds may be suspended if, 'there is a serious deficiency in the effective functioning of the management and control system of the operational programme, which has put at risk the Union contribution to the operational programme and for which corrective measures have not been taken', could allegedly be triggered in the case of rule of law deficiencies because, as these authors claim 'a country without the rule of law cannot generate effective management and control systems'.⁴⁰¹

The 2014-2020 programming period saw a **clear shift towards governance by conditionality**, linked to a new results-based approach to EU finances.⁴⁰² Currently, conditionality rules are most present in EU spending on cohesion (European Regional Development Fund, European Social Fund and Cohesion Fund), agriculture and fisheries (European Agricultural Fund for Rural Development and European Maritime and Fisheries Fund) and home affairs (Asylum, Migration and Integration Fund and Internal Security Fund (ISF)).⁴⁰³ However, the use of available provisions and tools has so far been conservative, their design has been criticised by the European Court of Auditors⁴⁰⁴ and

³⁹⁵ M. Rangel de Mesquita, 'European Union values...', pp. 290-291.

³⁹⁶ R. Mańko and M. Sapała, [Protecting the EU budget against generalised rule of law deficiencies](#), EPRS briefing, PE 630.299, 2nd ed., June 2020, p. 3.

³⁹⁷ V. Viță, '[Revisiting the Dominant Discourse on Conditionality in the EU: The Case of EU Spending Conditionality](#)', *Cambridge Yearbook of European Legal Studies*, Vol.19, 2017, pp. 116-143.

³⁹⁸ Mańko and Sapała, 'Protecting...', *ibid.*

³⁹⁹ J. Šelih, I. Bond and C. Dolan, [Can EU funds promote the rule of law in Europe?](#), Centre for European Reform, 2017, p. 13.

⁴⁰⁰ [Regulation \(EU\) No 1303/2013](#) of the European Parliament and of the Council of 17 December 2013 laying down common provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund, the European Agricultural Fund for Rural Development and the European Maritime and Fisheries Fund and laying down general provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund and the European Maritime and Fisheries Fund and repealing Council Regulation (EC) No 1083/2006.

⁴⁰¹ Halmai, 'The Possibility...', p. 187; R. D. Kelemen and K. L. Scheppele, blog post on the [Verfassungsblog](#) (10 September 2018).

⁴⁰² Mańko and Sapała, 'Protecting...', *ibid.*

⁴⁰³ See for instance Article 19 of [Regulation 1303/2013](#).

⁴⁰⁴ [ECA Special report No 15/2017](#): Ex ante conditionalities and performance reserve in Cohesion: innovative but not yet effective instruments.

according to a study for the European Parliament their impact is considered uncertain.⁴⁰⁵ Against this background, the proposed regulation undoubtedly 'is financially – the most powerful, legally – the most challenging, politically – the most important, and constitutionally – **by far the most significant EU conditionality ever proposed** in EU internal policies'.⁴⁰⁶

Notwithstanding this, it is to be noted that, at present (September 2020), the proposal presented by the Commission is **still being considered by the co-legislators**, Parliament has substantively amended the Commission's proposal (see the table below for a first overview) and interinstitutional negotiations have not started,⁴⁰⁷ making it extremely difficult to analyse the rule-of-law conditionality as regards the three questions addressed in the present study (the scope of application, the procedure, and the effectiveness). In particular, given the fact that the measure in question is, practically speaking, without precedent and, additionally, it is not known how it will be shaped at the outcome of the interinstitutional negotiations, the question of *effectiveness* of the tool (Section 5.1.4 below) can be addressed only hypothetically.

The hypothetical nature of the discussions below is strengthened by the fact that in contrast to the other measures discussed in this study, the mechanism addressed in this chapter has not yet been deployed. It is not known, therefore, **when and how it could be triggered**. The rules, as proposed by the Commission, even including the amendments proposed by the Parliament, provide for an extremely broad scope of discretion when implementing them.⁴⁰⁸ As will be shown later in this chapter, there is **no mechanism to allow an automatic calculation of what share of funds allocated to a given Member State would be affected**, neither is the protection of end-beneficiaries automatic. Therefore, it is with this general *caveat* of hypotheticality that the sections that follow should be read.

⁴⁰⁵ V. Viță, [Research for REGI Committee - Conditionalities in Cohesion Policy](#), PE 617. 498, September 2018.

⁴⁰⁶ *Ibid.*, p. 47.

⁴⁰⁷ For a detailed overview of the legislative proceedings, see the two legislative briefings prepared by EPRS: R. Maňko, [Protecting the EU budget against generalised rule of law deficiencies](#) (first edition, November 2018); Maňko and Sapala, *op. cit.* For the most up-to-date yet concise information on the state of play in the legislative file see the EPRS 'legislative train' in question: Karoline Kowald, [MFF – 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](#) (last updated: 4 September 2020).

⁴⁰⁸ M. Blauburger and V. van Hüllen, ['Conditionality of EU funds: an instrument to enforce EU fundamental values?'](#), *Journal of European Integration*, 8 January 2020, DOI:10.1080/07036337.2019.1708337, p. 8.

Table 7 – Overview of the Commission's original proposal and Parliament's legislative resolution (selected aspects)

Subject-matter	Commission original proposal	Parliament's legislative resolution
<i>Decision-making bodies</i>	Commission and Council	Commission, Parliament and Council
<i>Advisory bodies</i>	---	Panel of independent experts appointed by national parliaments and European Parliament
<i>Decision-making procedure</i>	Commission adopts proposal that can be vetoed by Council by reversed qualified majority voting (QMV)	Commission adopts proposal that can be vetoed by Parliament (majority of votes cast) or by Council; Parliament additionally stressed the need to retain the reversed QMV in its resolution on the MFF of 23 July 2020
<i>Protection of end beneficiaries</i>	Obligations vis-à-vis end beneficiaries taken over by Member States	Obligatory transfer of funds to budgetary reserve; possibility of additional sanctions (off-setting of funds) against Member State in case of non-compliance; Parliament stressed the need to protect end beneficiaries in its resolution on the MFF of 23 July 2020

Source: prepared by the author.

5.4.1. Scope of application: When can this mechanism be activated?

The Commission's original proposal limits the scope of application of the mechanism to cases of **generalised deficiencies as regards the rule of law** in Member States, defining the rule of law in article 2(a) as:

'the Union value enshrined in Article 2 [TEU] which includes the principles of legality, implying a transparent, accountable, democratic and pluralistic process for enacting laws; legal certainty; prohibition of arbitrariness of the executive power; effective judicial protection by independent courts, including fundamental rights; separation of powers and equality before the law'.

A general deficiency of the rule of law occurs, according to article 2(b) of the proposal, when there is a *'widespread or recurrent practice or omission, or measure by public authorities which affects the rule of law'*. Article 3(2) lists **three examples of situations where a generalised deficiency may be found**: (a) endangering the independence of judiciary; (b) failing to prevent, correct and sanction arbitrary or unlawful decisions of law enforcement authorities; (c) limiting the availability of legal remedies, non-implementation of judgments, and limiting the effective investigation and prosecution of, and sanctions on breaches of law.

For the sanctions mechanism to be triggered, the generalised deficiency must 'affect or risk affecting the principles of sound financial management or the protection of the financial interests of the Union' (article 3(1)). Examples of such situations include: the proper functioning of the Member State's authorities implementing the Union budget in the context of public procurement, grants, monitoring and controls; the proper functioning of investigation and prosecution services with regard to fraud, corruption and other breaches of EU law relating to the implementation of the budget, effective judicial review with regard to the above actions or omissions by the national authorities; the prevention of and sanctions on fraud, corruption or other budget-related breaches

of EU law; the recovery of funds unduly paid; and effective and timely cooperation with the European Anti-Fraud Office (OLAF) and the European Public Prosecutor Office (EPPO).

In its legislative resolution from April 2019, **Parliament** amended article 2(a), where the rule of law is defined, by including not only reference to Article 2 TEU, but also Article 49 TEU, which lays down the criteria of membership. The **list of key elements of the rule of law is also expanded** to include the principle of non-discrimination, access to justice, and impartiality of courts. A reference to the Charter of Fundamental Rights and international human rights treaties is also added. The notion of a 'generalised deficiency' is defined both in article 2(b) and in the newly added article 2a. The definition in article 2(b) is expanded by adding explicitly reference to the 'principles of sound financial management or the protection of the financial interests of the Union'. **A new, detailed definition of 'generalised deficiencies'** is placed in the newly added article 2a. Drawing on article 3(2)(a)-(c) in the Commission's proposal, it refers to five elements:

- 1 **endangering the independence of judiciary**, including setting any limitations on the ability to exercise judicial functions autonomously by intervening externally in guarantees of independence, by constraining judgment under external order, by arbitrarily revising rules on the appointment or terms of service of judicial personnel, by influencing judicial staff in any way that jeopardises their impartiality or by interfering with the independence of attorneyship;
- 2 **failing to prevent, correct and sanction arbitrary or unlawful decisions by public authorities**, including by law enforcement authorities, withholding financial and human resources affecting their proper functioning or failing to ensure the absence of conflicts of interest;
- 3 **limiting the availability and effectiveness of legal remedies**, including through restrictive procedural rules, lack of implementation of judgments, or limiting the effective investigation, prosecution of or sanctions on breaches of law;
- 4 **endangering the administrative capacity of a Member State to respect the obligations of Union membership**, including the capacity to effectively implement the rules, standards and policies that make up the body of Union law;
- 5 **measures that weaken the protection of the confidential communication between lawyer and client.**

The concept of the risks for the financial interests of the Union (article 3) is expanded. New elements are added to the definition, and in particular 'the proper functioning of the market economy', including 'respecting competition and market forces' (article 3(1)(aa)), as well as 'the proper functioning of the authorities carrying out financial control' (article 3(1)(ab)). Tax fraud is added to article 3(1)(b) and (d), and a separate point addresses 'the prevention and sanctioning of tax evasion and tax competition' (article 3(1)(ea)).

5.4.2. Procedure: The type of mechanism provided for under the proposal

The proposal envisages the creation of a new enforcement tool that would only apply **once – and if – a generalised deficiency regarding the rule of law had already occurred** in a Member State, thus making it possible to impose **sanctions**. From the procedural point of view, there are significant differences between the Commission's initial proposal and Parliament's amendments.

The Commission's original proposal envisages only two institutions involved in the procedure: **the Commission itself and the Council. No role is proposed for the European Parliament, and there is no panel of experts** to be consulted. The procedure is triggered by the Commission, which sends a written notification to the Member State concerned (article 5(1)). The Commission should take into

account decisions of the ECJ, reports of the European Court of Auditors, as well as conclusions and recommendation of 'relevant international organisations' (article 5(2)), presumably the Council of Europe and the Venice Commission, but that is not spelled out explicitly. There is no duty to take into account resolutions of the European Parliament, or opinions prepared by networks, such as the European Judicial Network. The Commission may also request additional information from the Member State concerned (article 5(3)), which the latter is obliged to provide (article 5(4)). The Member State may submit observations, which the Commission must take into consideration (article 5(5)).

Following these preliminary stages of the procedure, the Commission submits a **proposal for an implementing act, providing for sanctions, to the Council** (article 5(6)). The Council may reject the Commission proposal by qualified majority (so-called **reverse qualified majority**) within a month of its adoption by the Commission (article 5(7)). If it is not rejected within that deadline, the decision is deemed to have been adopted. Furthermore, the Council may, by qualified majority, amend the Commission's proposal and adopt the amended text as a decision (article 5(8)). No role, not even consultative, is envisaged for the European Parliament or any other EU institution at this stage.

Despite the **lack of transparency in the Council's proceedings**, academics predict that this part of the proposal might become 'highly contentious among Member State governments during legislative negotiations, in particular given the great substantive discretion the Commission would enjoy'.⁴⁰⁹ Likewise, the '**reverse qualified majority**',⁴¹⁰ which provides for a lower threshold than in ordinary legislative procedure, is **likely to be seen as controversial by the Council** as it 'circumvents the 4/5 and unanimity requirements of Article 7(1) and (2) respectively',⁴¹¹ as Gabor Halmai underlines. Armin von Bogdandy and Justyna Łacny point out that there is no provision for 'reverse QMV' in the Treaties, which, in their view, 'inevitably raises **questions about the legality** of the provisions in the draft Regulation'.⁴¹²

In relation to this question, it is worth drawing attention to the draft conclusions of the Council, presented on 14 February 2020.⁴¹³ In point 24 of that document, it is proposed that the Commission's proposed sanctions would be '**approved by the Council by qualified majority**' (no mention is made of the Parliament and reverse qualified majority is excluded), and in point 25, it is stated that the rule of law conditionality would be 'separate and autonomous from the procedures provided for in the Treaties and complementary to any peer review mechanism decided for the future'. Even though that proposal was not adopted (as there has been no agreement on the MFF at the time of writing), it does give an idea of the direction in which the Council might go.

Finally, it is to be noted that the Commission's initial proposal also provides for a **procedure for lifting the sanctions** (article 6). The sanctioned Member State may submit evidence to the

⁴⁰⁹ *Ibid.*, p. 10.

⁴¹⁰ European Court of Auditors, [Opinion 1/2018](#), para. 15.

⁴¹¹ G. Halmai, 'The Possibility and Desirability of Rule of Law Conditionality', *Hague Journal on the Rule of Law*, Vol. 11, 2019, p. 184.

⁴¹² A. von Bogdandy and J. Łacny, [Suspension of EU Funds for Member States Breaching the Rule of Law – A Dose of Tough Love Needed?](#), Max Planck Institute for Comparative Public Law & International Law (MPIL) Research Paper No 24, 2020, p. 17. They add, however, that a different interpretation is possible if the measure is not treated as a sanction, but as an executive measure, noting that the ECJ's position on reverse QMV in the field of executive measure is unknown as it has not been challenged in the past.

⁴¹³ Council of the European Union, 5846/20, document unofficially available at: https://q8fip1kplyr33r3krz5b97d1-wpengine.netdna-ssl.com/wp-content/uploads/2020/02/SKM_C45820021415200.pdf (accessed: 11 May 2020).

Commission, showing that the general deficiency has been remedied or ceased to exist (Article 6(1)). The Commission then assesses the situation and if indeed it finds that the deficiencies have been removed partially or fully, it submits a decision to the Council lifting the sanctions, partially or fully. No role is envisaged for the European Parliament in this procedure. The only rule that mentions the European Parliament is in article 7, which states that the Commission must inform Parliament of the imposition and lifting of sanctions, but beyond being informed, Parliament has no role to play under the proposal.

Under **Parliament's legislative resolution**, the institution assumes a **greater role in the procedure** and a **panel of independent experts** is created to advise and assist the Commission. As regards Parliament's role, it is to be noted that Parliament has proposed to introduce a new rule (article 5(6a)) providing that at the same time that the Commission adopts a decision, it will have to simultaneously submit to the Parliament and Council a proposal to **transfer to a budgetary reserve the amount equivalent to the proposed sanctions**. This proposal will be considered approved within four weeks from its submission unless Parliament, acting by a majority of votes cast, or Council, acting by qualified majority, decide to amend or reject it (article 5(6b)). The decision imposing sanctions will enter into force if neither the Parliament nor Council reject the transfer proposal within a period of four weeks (article 5(6c)). These new procedural arrangements are a significant modification of the Commission's original proposal. First of all, the **Parliament is treated on an equal footing with Council** and can veto the decision on sanctions acting by majority of votes cast. Secondly, the decision on sanctions is now closely linked, in procedural terms, with the proposal to transfer the value of the sanctions to a budgetary Union reserve (one of the flexibility mechanisms proposed in the 2021-2027 MFF Regulation). In other words, an amount equivalent to the value of the measures adopted would be set aside (similarly to de-committed appropriations, unused margins, unexecuted commitments), considered as a margin left available and could be mobilised for the benefit of final recipients or beneficiaries.

A second major innovation in the Parliament's amendments is the creation of a **panel of independent experts**, written into the newly added article 3a and building on similar proposals made in the context of the DRF pact discussed in Section 5.1. The experts would be drawn from specialists in constitutional law, financial matters and budgetary matters (article 3a(1)). The panel would number a total of **32 members, with 27 members appointed, one each, by national parliaments, and five additional experts appointed by the European Parliament**. The Commission, Council or other EU institutions would not appoint any experts. The panel could also invite observers from 'relevant organisations and networks', including: the European Federation of Academies of Sciences and Humanities, the European Network of National Human Rights Institutions, the bodies of the Council of Europe, the European Commission for the efficiency of justice, the Council of Bars and Law Societies of Europe, the Tax Justice Network, the United Nations, the Organization for Security and Co-operation in Europe and the Organisation for Economic Co-operation and Development (article 3(a)(1) second subparagraph). The panel would have an **advisory role** and would 'assist the Commission in identifying generalised deficiencies' as defined in the regulation (article 3(a)(2) first sub-paragraph). The panel would work on an annual basis, and would rely both on quantitative as well as qualitative data (article 3(a)(2) second sub-paragraph). The panel would have the power to issue an opinion on the state of the rule of law in a given Member State (article 3(a)(4)).

The Commission would have to **take into account any opinions of the Panel** (article 3a(5)), though it seems that it could depart from them as these opinions are not defined as being legally binding.⁴¹⁴ It would also have to inform the Parliament and Council of any notification sent to a Member State. When assessing whether the conditions for triggering the sanctions had been met, the Commission would be under a duty to take into account the opinions of the panel, resolutions of the Parliament and other elements (in the original proposal the Commission was not obliged to take them into account). Furthermore, the Commission would also have to take into account the criteria used in accession negotiations, in particular the chapters on the judiciary, fundamental rights, freedom of security, financial control and taxation, as well as guidelines used in the context of the cooperation and verification mechanism.

Finally, Parliament's amendment to article 6(1) requires that the sanctioned Member State's request to lift the sanctions must be a 'formal notification'. Upon request of the sanctioned Member State or on its own initiative, the Commission may reassess the situation in that Member State (Article 6(2)); the Parliament's amendments make it clear that the Member State's request must trigger that procedure; the Commission must take into account any opinions of the panel, and should, within the indicative deadline of one month, come up with a reassessment. If the Commission's findings are favourable to the Member State in question, it adopts a decision lifting the sanctions, and at the same time submits to the Parliament and Council a proposal to lift the budgetary reserve (both in full or in part). The same procedure as in article 5 applies, meaning that both the Parliament and the Council may block the Commission's decision by a majority of votes cast (Parliament) or qualified majority (Council).

Once the procedure is followed and if a decision is adopted, the Member States concerned can be **sanctioned**. Article 4 of the Commission's proposal provides for a series of sanctions including: suspension of payments or the implementation of the legal commitment or termination of the legal commitment; prohibition on entering into new legal commitments; suspension of the approval of one or more programmes or amendment of such programmes; suspension of commitments; reduction commitments, including through financial corrections or transfers to other – spending programmes; reduction of pre-financing; interruption of payment deadlines; and suspension of payments. Armin von Bogdandy and Justyna Łacny point out that the proposal 'does not establish what these measures should look like or how they would operate in practice',⁴¹⁵ thereby leaving a **legal gap** to be filled in the future. Furthermore, in their view the rule concerning sanctions is not clear and precise, and would not pass the ECJ case-law test for precision of rules imposing sanctions.⁴¹⁶

It should be pointed out that **the list of sanctions is formulated in such a way as to give a great deal of discretion to the Commission**.⁴¹⁷ It can choose which of the sanctions listed in Article 4 to deploy, and to what extent. In its legislative resolution from April 2019, Parliament has not proposed

⁴¹⁴ According to point 12a in the preamble: 'The Commission, when taking a decision about adopting or lifting of possible measures, should take relevant opinions expressed by that panel **into account**.' However, it is not entirely clear, either from article 3a(5) nor from point 12a in the preamble what 'taking into account' means exactly. Given the explicitly **advisory** nature of the panel (highlighted also in point 12a of the preamble), and the fact that '**assists**' the Commission (article 3a(2)), it seems that legally speaking the Commission may depart from the Panel's advice, but has to provide a solid justification for doing so. Otherwise, the regulation states that the Commission is bound by the panel's opinion, but that is patently not the case. Possibly, the Commission's decision could be open to legal challenge for not being sufficiently motivated if it departed from the panel's advice without giving good reasons.

⁴¹⁵ von Bogdandy and Łacny, Suspension..., p. 14.

⁴¹⁶ *Ibid.*, p. 15.

⁴¹⁷ Blauburger and van Hüllen, 'Conditionality...', *op. cit.*, p. 8.

to modify the list of sanctions. Victoria Viță in her study for the European Parliament asserts that: 'the proposal has **significant shortcomings in terms of legal clarity and foreseeability – essential rule of law components** – which mandate that any law providing for penalties (including administrative penalties) must have a sufficient degree of clarity regarding the conduct to be followed and clearly specify the scope of the potential penalty'.⁴¹⁸ Armin von Bogdandy and Justyna Łacny argue that the definition of the rule of deficiency is formulated '**extremely broadly**'⁴¹⁹ which could have adverse consequences on legal certainty.⁴²⁰ They comment that the definition 'might be attacked for not being sufficiently clear and precise' adding that 'In taking actions against Member States for breaching the rule of law, EU institutions **must be careful not to frustrate the rule of law**'⁴²¹ themselves.

Another question is the temporary or durable character of the sanctions, i.e. what happens with the suspended funding if the Member State complies with the Commission's demands at a given time or not. Armin von Bogdandy and Justyna Łacny draw attention, in this context, to the draft MFF Regulation and point out that if the sanctions persist for more than two years, the Member State in question will definitely lose the allocated funding, which will be redistributed among other Member States.⁴²² They point out that addressing rule of law deficiencies may be time consuming and difficult to accomplish within a two-year timeframe, with the result that the 'application of the rule of law conditionality may relatively easily result in the **permanent loss** of EU funds.'⁴²³

A final contentious issue under this proposal has been the **protection of end beneficiaries of EU funds**. In the Commission's original proposal, according to Article 4(2), unless the decision imposing sanctions provides otherwise, the final recipients or beneficiaries of programmes or funds should not be affected. The government entities or Member State in question must make the payments to them, despite the imposition of sanctions. In effect, therefore, the duty to make payments would be transferred from the EU budget to the national budget. However, the proposal does not provide for any mechanisms to actually guarantee the payments to the end beneficiaries should the Member State fail to make them.⁴²⁴ Furthermore, the expression 'Unless the decision adopting the measures provides otherwise' at the beginning of Article 4(2) means that the sanctions decision may state that end beneficiaries will not be protected at all and will lose the funding, becoming effectively penalised for the breaches of the rule of law committed by the Member State. The protection of end beneficiaries is, therefore, conditional (on the Council decision) and limited (no enforcement mechanism provided).

Under Parliament's amendments the protection of end beneficiaries would be **stepped up and made more realistic** through the imposition, upon the Commission, of concrete duties *vis-a-vis* the end beneficiaries or final recipients, including information duties and provision of guidance. Under Article 4(3b), the Commission will have a legal duty to 'ensure that any amount due by government entities or Member States ... is effectively paid to final recipients or beneficiaries'. This is backed by effective additional sanctions against the non-compliant Member State, including the recovery of payments made to governmental bodies that have not made payments to the end beneficiaries or

⁴¹⁸ Viță, *op. cit.*, p. 55.

⁴¹⁹ von Bogdandy and Łacny,

⁴²⁰ *Ibid.*, p. 14.

⁴²¹ *Ibid.*

⁴²² *Ibid.*, pp. 17-18.

⁴²³ *Ibid.*, p. 18.

⁴²⁴ *Ibid.*, p. 18-19.

the transfer of an amount equivalent to that which was not paid to the end beneficiaries to the Union reserve; this money could then 'be mobilised ... for the benefit, to the possible extent, of the final recipients or beneficiaries'. A newly inserted article 7a requires the Commission to report to the Parliament and Council on the application and effectiveness of the regulation, at the latest five years after its entry into force. A newly inserted article 8a requires that the content of the proposed regulation be 'inserted into the Financial Regulation upon its next revision'. Quite apart from the legal rules of the regulation aimed at protecting beneficiaries, Armin von Bogdandy and Justyna Łacny suggest that if an end beneficiary suffers damage as a result of the funds withdrawal, they could claim compensation before national courts on the basis of the ECJ's *Francovich* doctrine on Member State civil liability vis-à-vis individuals for breaches of EU law.⁴²⁵

5.4.3. Potential effectiveness of the rule of law conditionality

Given that the mechanism described in this section is still *in statu nascendi*, and its exact scope and content remain unknown, it is very difficult to make specific predictions as to its effectiveness. To begin with, it is worth referring to the theoretical model describing EU conditionalities, known as the '**external incentives model**' or 'EIM',⁴²⁶ developed some 15 years ago by political scientists Frank Schimmelfennig and Ulrich Sedelmeier. According to this model, EU conditionalities are described as a 'strategy of reinforcement by reward' under which 'the EU pays the reward if the target government complies with the conditions and withholds the reward if it fails to comply'.⁴²⁷ The model Schimmelfennig and Sedelmeier developed deals, therefore, with so-called 'positive conditionality', as opposed to the 'negative conditionality'⁴²⁸ in the Commission's proposal. Nonetheless, it seems that some elements of the EIM model put forward by Schimmelfennig and Sedelmeier could be of interest in the context of predicting the potential effectiveness of the rule-of-law conditionality. In particular, the analytical framework of the EIM model could be inspiring in this context. According to the framework, the following elements are taken into account:⁴²⁹

- **rewards** – 'Conditionality is more likely to be effective the more sizeable the rewards, and the more they are tangible rather than distant'.
- **determinacy** – 'Target governments must know what exactly they need to do to meet the conditions and get the reward. The EU enhances determinacy by specifying the conditions clearly and by giving regular feedback. In addition, determinacy depends on the salience of specific conditions for the EU'.
- **credibility** – 'Credibility refers to both the credibility of the EU's threat to withhold the reward if conditions are not met and the credibility of the EU's promise to pay the reward once they are met. (...) Credibility also depends on the EU's coherence and consistency in applying conditionality'.
- **costs** – This refers to 'the domestic costs of adopting EU rules. For any given size and speed of rewards, determinacy of conditions, and credibility of conditionality, it is the size of domestic adoption costs that determines whether target governments will meet the EU's conditions'.

⁴²⁵ *Ibid.*, p. 21. See ECJ [judgment](#) of 19 November 1991, *Francovich*, C-6/90 and C-9/90.

⁴²⁶ F. Schimmelfennig and U. Sedelmeier, '[Governance by conditionality: EU rule transfer to the candidate countries of Central and Eastern Europe](#)', *Journal of European Public Policy*, Vol.11(4), 2004, pp. 661–679.

⁴²⁷ Schimmelfennig and Sedelmeier, 'Governance by conditionality', *op. cit.*, p. 665.

⁴²⁸ Blauburger and van Hüllen, *op. cit.*, p. 2.

⁴²⁹ F. Schimmelfennig and U. Sedelmeier, 'The Europeanization of Eastern Europe: the external incentives model revisited', *Journal of European Public Policy*, 17 May 2019, [DOI: 10.1080/13501763.2019.1617333](#), p. 4 (all quotes are from p. 4).

Schimmelfennig and Sedelmeier point out that the 'the credibility of the threat of sanctions (...) depends largely on the **autonomy of EU institutions in the imposition of sanctions**',⁴³⁰ which varies depending on the type of mechanism. (They give the example of the high autonomy of the Commission with regard to infringement proceedings, as opposed to the lack of autonomy of EU institutions in the case of the breach of values procedure). Concerning the procedural arrangements of the proposed mechanism, Blauburger and van Hüllen compare it to the breach of values procedure and note that it 'poses much lower decision-making hurdles and, therefore, increases significantly the chances of application of EU measures against violations of EU fundamental values'.⁴³¹ In fact, as they note, the 'reverse-majority rule would set the decision-making threshold even lower than in the ordinary legislative procedure'.⁴³²

Extending the elements to be taken into account in order to assess the effectiveness of the proposed rule of law conditionality, Victoria Viță indicates that it could become an effective tool only if the following conditions are met:

- the **financial leverage** of the EU budget in a given Member State is significant;
- the state concerned has **no alternative financial resources** to substitute for the loss;
- appropriate guarantees are adopted to ensure that a **suspension does not punish innocent EU citizens**;
- there is sufficient **ideological justification and public support** in favour of suspension;
- the **political costs** at the EU level are not higher than the expected benefits of spending withdrawal; and,
- the **potential counter-reaction** to spending cut-off would not go against the very objective of withdrawal.⁴³³

In this perspective, the question of the **protection of end-beneficiaries** becomes crucial. The proposed rule under article 4(2), which provides that the sanctioned government is obliged to make out payments to end-beneficiaries despite the lack of EU funding (which is withdrawn or suspended as a sanction), as the European Court of Auditors observed, does not contain a provision on how this would be ensured. In practice, this would require the Member State concerned to step in and pay for or otherwise ensure the financing of the projects or programmes.⁴³⁴ As Blauburger and van Hüllen point out, there 'may not be sufficient domestic budgetary resources to replace EU funding.

⁴³⁰ Schimmelfennig and Sedelmeier, 'The Europeanization...', *op. cit.*, pp. 6-7.

⁴³¹ Blauburger and van Hüllen, 'Conditionality...', p. 8.

⁴³² *Ibid.*

⁴³³ [Viță, Research for REGI Committee – Conditionalities in Cohesion Policy](#), p. 51.

⁴³⁴ European Court of Auditors, Opinion 1/2018, para. 26.

More importantly, one can easily imagine a situation in which the concerned government would even stop payments entirely and shift the blame to the EU level'.⁴³⁵ This is consistent with the opinion of the European Court of Auditors, which noted that 'payments of national and EU funds may be conditional on the availability of budgetary funding'.⁴³⁶

Similarly, it is important to note that **the severity of sanctions would depend on the degree to which a given country is dependent on EU funds**. Blauburger and van Hüllen point out that the proposal 'may be perceived as **discriminatory** and, therefore, illegitimate as not all EU member states are equally vulnerable, i.e. they depend on EU funds to different degrees'.⁴³⁷ This is because the potential force of the sanctions would 'mainly affect countries which are **net beneficiaries** and which receive significant sums from European structural and investment funds. By contrast, countries which depend on EU money to a lower degree and mainly in areas such as research and innovation **would be less vulnerable since** these EU funds are largely exempted from the Commission's proposal'.⁴³⁸ In this context, it is worth recalling the words of former Commission President, Jean-Claude Juncker who, speaking in January 2017 (1.5 years before the proposal was tabled) warned against financial sanctions potentially 'dividing' the EU which '**would be poison for the continent**'.⁴³⁹ Jasna Šelih, Ian Bond and Carl Dolan warn that: 'Threatening

Box 13 – The proposed rule of law conditionality: A mechanism still *in statu nascendi*

On 3 May 2018, the **Commission presented a proposal for a regulation that would introduce a general rule-of-law conditionality** into the body of EU financial rules, linking EU funding for Member States to respect for the rule of law. The proposal is still being analysed by the co-legislators.

Within **Parliament**, the proposal is being dealt with by two committees – the Committee on Budgets (BUDG) and the Committee on Budgetary Control (CONT). On 3 October 2018, the co-rapporteurs from the two committees presented their draft report on the proposal (C8-0178/2018) and, on 17 December 2018, the committees submitted their joint report (PE 628.374, A8-0469/2018). On 17 January 2019, Parliament adopted a number of amendments to the proposal in plenary, (COM(2018)0324 – C8-0178/2018 – 2018/0136(COD)), 17 January 2019, P8_TA(2019)0038, A8-0469/2018) and referred the matter back to the committees. On 4 April 2019, Parliament then adopted, its first-reading position on the proposal in plenary, (COM(2018)0324 – C8-0178/2018 – 2018/0136(COD)). On 12 November 2019, the BUDG and CONT committees adopted a decision to open interinstitutional negotiations after 1st reading in Parliament, and on 13 November 2019 that decision was announced in plenary (in line with Rule 72).

However, given limited access to the state of play within the **Council**, as of now (September 2020) it is not yet clear when the trilogues will actually start. In December 2019, the European Parliament political group leaders decided to freeze negotiations on legislation related to the new MFF, including the regulation on linking the EU budget and the rule of law, until Council agrees on a full negotiating mandate. On 21 July, EU Heads of State or Government gathered at the European Council, [reached a political agreement](#) on the 2021-2027 MFF, opening the way to negotiations between Parliament, whose consent is required for the adoption of the MFF, and Council. The introduction of the rule of law conditionality was [announced](#), although [commentators](#) point out that the formulation adopted by the Heads of State or Government is open to interpretation. In its [resolution](#) of 23 July 2020, Parliament stated that it did not accept the political agreement on the 2021-2027 MFF as it stood and was 'ready to engage immediately in constructive negotiations with the Council to improve the proposal'. Concerning the conditionality in question, Parliament is demanding that the reversed qualified majority mechanism be retained for its triggering, while also insisting on the need to protect end beneficiaries.

⁴³⁵ Blauburger and van Hüllen, 'Conditionality...', p. 14.

⁴³⁶ European Court of Auditors, Opinion 1/2018, para. 27.

⁴³⁷ Blauburger and van Hüllen, 'Conditionality...', p. 13.

⁴³⁸ *Ibid.*

⁴³⁹ F. Eder, '[Juncker: German plan to link funds and rules would be 'poison'](#)', *Politico* (6 January 2017). See also G. Halmai, 'The Possibility and Desirability...', p. 183; Šelih, Bond and Dolan, Can EU funds..., p. 13.

sanctions in the form of reduced structural and investment funding from the EU for countries that are turning their back on European values would be a **blunt economic instrument**'.⁴⁴⁰ They also draw attention to the fact that, on one hand, suspending EU funding 'may inadvertently harm specific groups of citizens in the target country, particularly those already living in regions significantly poorer than the EU average' which, in their view, 'could **lead to heightened levels of euroscepticism** and increase support for governments even when they violate rule of law standards', although 'if the Commission communicated the reasons and justification for potential suspension to the citizens carefully, such sanctions could also lead to increased **popular pressure for positive democratic reforms**'.⁴⁴¹

Likewise, the question of which level of government is penalised (central v regional) is equally important, as Iain Begg points out.⁴⁴² The European Court of Auditors expressly recommends 'that the legislative bodies set **clear and specific criteria** (...) for determining the extent of measures, either in the proposed regulation or in possible implementing rules'.⁴⁴³ In the latter context of crucial importance is the role of the Council and the exact majority it will need to block the Commission's proposal. Under the Commission's original proposal the Council could block the Commission's decision imposing sanctions by qualified majority within a month of its adoption by the Commission (article 5(7)), whereas under the Parliament's legislative resolution the Commission's proposal is to be considered approved within four weeks from its submission unless the Parliament, acting by majority of votes cast, or Council, acting by qualified majority, decide to amend or reject it (article 5(6b)). This means that the decision imposing sanctions will enter into force if neither the Parliament nor Council reject the transfer proposal within the period of four weeks (article 5(6c)). The Parliament's amendments, by involving additionally the Parliament itself as a decision-maker, and by introducing the panel of independent experts, seem to go into the direction of strengthening the factor of autonomy. Nonetheless, the element of indeterminacy (lack of precise rules on which sanctions should be imposed and in what amount) could, under the Schimmelfennig-Sedelmeier model, contribute to a weakening of the mechanism's effectiveness. This is because the Member State government not complying with EU's rule-of-law requirements would not be able to assess the actual gravity of the sanctions until they were actually tabled.

Friedrich Heinemann believes that the mechanism would be more effective if the Commission were not made responsible for its deployment, arguing that the Commission is too much a politicised institution to be trustworthy as the body administering the sanctions, especially given that it has '**a notoriously poor performance in applying conditionality** both to the Cohesion Fund and the Stability and Growth Pact'.⁴⁴⁴ As a consequence, Heinemann proposed that 'a less politicised and more neutral institution than the Commission would be highly desirable as the arbiter of rule-of-law conditionality'.⁴⁴⁵ In this vein, Blauburger and van Hüllen point out that the proposed regulation 'promises little improvement regarding procedural legitimacy, overall coherence and targetedness (...)'.⁴⁴⁶

⁴⁴⁰ Šelih, Bond and Dolan, *Can EU funds...*, p. 14.

⁴⁴¹ *Ibid.*, p. 12.

⁴⁴² Begg, *op. cit.*, p. 5.

⁴⁴³ European Court of Auditors, Opinion 1/2018, para. 23, Recommendation 1.

⁴⁴⁴ Heinemann, *op. cit.*, p. 300.

⁴⁴⁵ Heinemann, *op. cit.*, p. 300.

⁴⁴⁶ Blauburger and van Hüllen, 'Conditionality...', p. 11. In a similar vein, see Georgiev, *op. cit.*, p. 122.

All in all, the proposed rule-of-law conditionality, if adopted, would be a complex legal tool, whose deployment in practice would undoubtedly be challenging. It is not known how the tool will be eventually shaped, and whether it will be ever deployed, nonetheless some preliminary conclusions can be drawn on the basis of the existing texts (Commission proposal and Parliament's legislative resolution). First of all, a characteristic feature of the mechanism is the **broad discretion of the Commission**, which can hardly be said to be mitigated by the proposed panel of independent experts or the veto powers vested in the Council and Parliament. Ultimately, given the **reverse qualified majority** mechanism present in the texts that are currently on the table (and that enjoys Parliament's support),⁴⁴⁷ means that the Commission will enjoy a considerably greater power in adopting the measures than is the case with ordinary legislative proceedings. Secondly, a key issue is the **protection of end beneficiaries**, which is closely connected to the identity of the ultimate addressees of the sanctions (government accused of flouting the rule of law, or citizens at large). The importance of this aspect was emphasised by Parliament in its resolution of 23 July 2020.⁴⁴⁸ Thirdly, the effectiveness of the mechanism will, most probably, also depend on its **legitimacy**, which can be perceived from various angles – the procedure in which the sanctions are adopted, the perceived fairness of the measures (countries more dependent on EU funding would be more affected), and the democratic factor (involvement of the European Parliament as real decision-maker on an equal footing with the Council). At this stage it is not known how this new mechanism will be shaped, and the political agreement reached by European Council on 21 July 2020 'may be open to interpretation'.⁴⁴⁹ However, it seems that its effectiveness will depend largely not only on its intrinsic features, such as the mechanism ensuring its democratic and juridical legitimacy, or the protection of end beneficiaries, but also on its perception in the Member State(s) affected by the sanctions. As Victoria Viță warns in her study for the European Parliament, 'it is critical that its future legal framework translate in an effective and workable instrument on the ground. A badly designed or unworkable rule of law conditionality risks having tremendous legal, constitutional, political and reputational repercussions for the EU, that would be infinitely corrosive for the EU's commitment to the rule of law principles and should be avoided at all cost, in the current state of the Union'.

⁴⁴⁷ [Resolution](#) of 23 July 2020, para. 9.

⁴⁴⁸ *Ibid.*

⁴⁴⁹ A. D'Alfonso, [Future financing of the Union: MFF, Own Resources and Next Generation EU](#), EPRS, European Parliament, p. 1.

6. Conclusions

Article 2 TEU lays down the founding values of the European Union, referring *inter alia* to the rule of law, democracy and respect for fundamental rights. Although the normative character of EU values and the scope of the obligations imposed upon the Member States by virtue of Article 2 has been subject to discussion, recent ECJ judgments confirm that those values bind the Union, its institutions as well as the Member States. Stressing the **binding nature and enforceability of EU founding values**, Article 7 TEU provides for two specific mechanisms (preventive and sanctions) to enforce those values in cases of systemic violations by a Member State. In addition to those well-known tools, preliminary rulings and infringement procedures have also been used in recent years to address concerns regarding compliance with EU values in the Member States and the European institutions have created a wide array of mechanisms to monitor, prevent and enforce those values. Between 2012 and 2014, EU institutions created several monitoring and preventive mechanisms to protect common values within Member States, namely, the **Justice Scoreboard**, feeding into the **European Semester**, the **rule of law framework** and the **annual dialogues on the rule of law**. However, the application of those tools to different Member States has shown their weaknesses and strengths and has encouraged European institutions to embark on a process of evaluation, leading to the proposal of new tools to reinforce the EU toolbox to monitor, prevent and enforce common values. In line with prior proposals, the European Parliament has suggested establishing an **EU pact on democracy, the rule of law and fundamental rights** (2016), while the Commission has launched a more narrow monitoring exercise of all Member States through its new **rule of law policy cycle** (2019), and the Council has decided to reframe its **annual dialogues on the rule of law** (2019). Together with all these new (or renewed) mechanisms, the Commission presented a proposal to cut **EU funding** to Member States in cases of generalised deficiencies as regards the rule of law (2018).

For the time being, the EU institutions have created only **two tools to monitor** EU values, the **European Semester** and the **EU Justice Scoreboard**, to which will soon be added the new **annual rule of law report**, recently launched by the Commission (2019) and expected to produce its first outcomes in September this year with the publication of the first rule of law report prepared by the Commission. Although with significant differences among them, this study shows that all these monitoring tools are characterised by the **willingness to understand what is the situation on the ground** in all Member States, and whether possible further measures are needed; by the **strong role assumed by the Commission**; and by their **limited scope**, as they focus on certain components only of the rule of law.

First, the **European Semester** (in place since 2011) is a monitoring (but also an enforcement) mechanism that entails a process of socio-economic policy coordination. It has also been used by the Commission to comment on rule of law developments in the Member States. It has been affirmed that there is **'untapped potential' for a more critical assessment of national developments** in the light of Article 2 EU values, especially taking into account that the Council, when adopting **country-specific recommendations**, votes **by qualified majority**. However, the **limited scope** (focusing only on specific questions linked to the rule of law, corruption and the functioning of justice systems) and **business approach** of the Semester should not be overlooked, making this mechanism of limited value in detecting EU values-related shortcomings in Member States. Since 2013, the functioning of the national judiciaries constitutes one of the priorities in the European Semester, taking the form of a **'Justice Scoreboard'**. The Justice Scoreboard's indicators have **become increasingly relevant to rule of law-related concerns in certain Member States**.

However, this tool **falls short of giving a comprehensive picture of the situation** in the Member States as regards compliance with EU values, as it focuses only on selected indicators relating to the independence, quality and efficacy of the judiciary and it has been criticised because it **does not do enough to detect internal linkages between the elements assessed**, failing to supply a qualitative assessment of the whole picture. Furthermore, it is **currently limited to civil, commercial and administrative justice** and the possible inclusion of criminal law is hampered due to an apparent lack of available comparative data.

Taking stock of the limited scope and weakness of these tools, the European Parliament has called repeatedly since 2016 for an **EU pact on democracy, the rule of law and fundamental rights** on the basis of an **interinstitutional agreement**, that would include a yearly assessment of the situation in Member States as regards **all EU values**, involving a **panel of independent experts** and with a **follow-up** in which all EU institutions would be involved. However, this proposal has yet to be taken up in full and the European Commission has proposed instead to engage in a **more narrow rule of law review cycle**, through which an **annual rule of law report** analysing the situation in all Member States will be elaborated. Although the first rule of law report is expected in September and it is therefore too soon to draw conclusions on the initiative adopted by the Commission, it is to be noted that the Commission has engaged in a **monitoring exercise that would again give a partial picture** of the situation in Member States as regards compliance with EU values, as it will focus on four specific issues only (independence, quality and efficiency of the judiciary, the anti-corruption framework, certain issues related to media pluralism and some institutional issues related to checks and balances). Similarly, it is to be noted that the **Commission does not attribute a clear role to other EU institutions in its rule of law review cycle, does not clearly identify any possible follow-up measures, and does not plan to involve a panel of independent experts** in the process, thus running the **risk of overlooking the wider context** within which threats to the rule of law may occur. In this vein, the question that arises is whether this new partial monitoring tool would give EU institutions a clearer picture of the situation in Member States as regards compliance with EU values, and if it would allow possible violations to be addressed in a more systematic fashion, for instance through infringement proceedings and/or the triggering of the Article 7 TEU procedures.

In addition to the abovementioned monitoring tools, the EU institutions have access to **two preventive tools**, the one provided for under **Article 7(1) TEU** and the **rule of law framework**, created by the Commission in 2014. Although the scope of application and procedure to be followed when applying these two mechanisms differ, both mechanisms aim to address threats to Article 2 TEU values before they materialise. As is well-known, Article 7(1) TEU can be triggered in cases of a 'clear risk of serious breaches' of EU values and the procedure designed by the Treaties is primarily political in nature, as the ECJ's jurisdiction is limited to procedural issues only, and it is for the Council to decide, by a qualified majority of four-fifths of its members, whether there is a 'clear risk of a serious breach' of EU values by a Member State and whether there is a need to issue recommendations to that country. For its part, the Commission's **rule of law framework** was designed to address systemic threats to the rule of law in the Member States before they reach the level of gravity that would trigger the Article 7(1) TEU procedure. The framework is shaped as a structured dialogue between the Member State concerned and the Commission, with no formal intervention of the other EU institutions. It allows the Commission to address recommendations to the Member State in question after an assessment of the situation (rule of law opinion, rule of law recommendation, follow-up), and the procedure to be followed is very flexible thus giving the Commission **ample room for manoeuvre** to adapt it to the circumstances at it sees fit.

Both mechanisms have been triggered in recent years as regards certain Member States. Article 7 (1) TEU has been triggered in relation to Poland and Hungary, whereas the framework has only been launched as regards Poland. However, these tools have yet to yield tangible results. The **Council has not yet adopted any decisions in relation to the two on-going Article 7(1) TEU** procedures, raising questions as to the effectiveness of this mechanism, especially given the setting in which decisions would have to be taken (by peers). In a similar vein, the effectiveness of this mechanism can also be questioned considering that the only possible outcomes, even if the Council decided to act, is the determination that there is a 'clear risk of a serious breach' of EU values in a Member State and the possible issuing of recommendations addressed to the Member State in question. Therefore, the question that arises is whether the Member State concerned would act to address the concerns raised by its peers (in the Council), especially if there is no clear threat of the subsequent use of enforcement tools in case of non-compliance. Similarly, the **Commission addressed four recommendations** to Poland under the rule of law framework, but decided to trigger Article 7(1) TEU in December 2017 due to the apparent unwillingness of the Polish authorities to comply with its recommendations, thus showing the limits of a dialogue-based mechanism based on voluntary compliance to address EU values concerns, at least when the Member State is unwilling to comply and there is no clear threat of the subsequent use of enforcement tools for cases of non-compliance.

Alongside the monitoring and preventive tools already discussed, the Treaties provide for various tools that can be used to **enforce EU values** as regards Member States. The best known is provided for in **Article 7(2)-(3) TEU**, which establishes a sanctions mechanism to enforce EU values in Member States that was designed from the outset as a last resort tool only applicable to cases of 'serious and persistent breaches' of EU values by Member States. Taking into account the extraordinary situations to which the procedure applies, the first question is whether the tool aims at all at addressing the situation in the Member State concerned or rather at 'alienating' that Member State, thus avoiding the possible undesirable effects of having a Member State disrespectful of the founding values for the rest of the EU. Apart from that major question, it is to be noted that the procedure provided for under Article 7(2)-(3) TEU is **extremely onerous**, far more than the one provided for under Article 7(1) TEU, thus raising the question of whether it is usable in practice, especially taking into account that a unanimous decision of the European Council declaring that a Member State has seriously and persistently breached EU values is needed to effectively impose sanctions on that Member State.

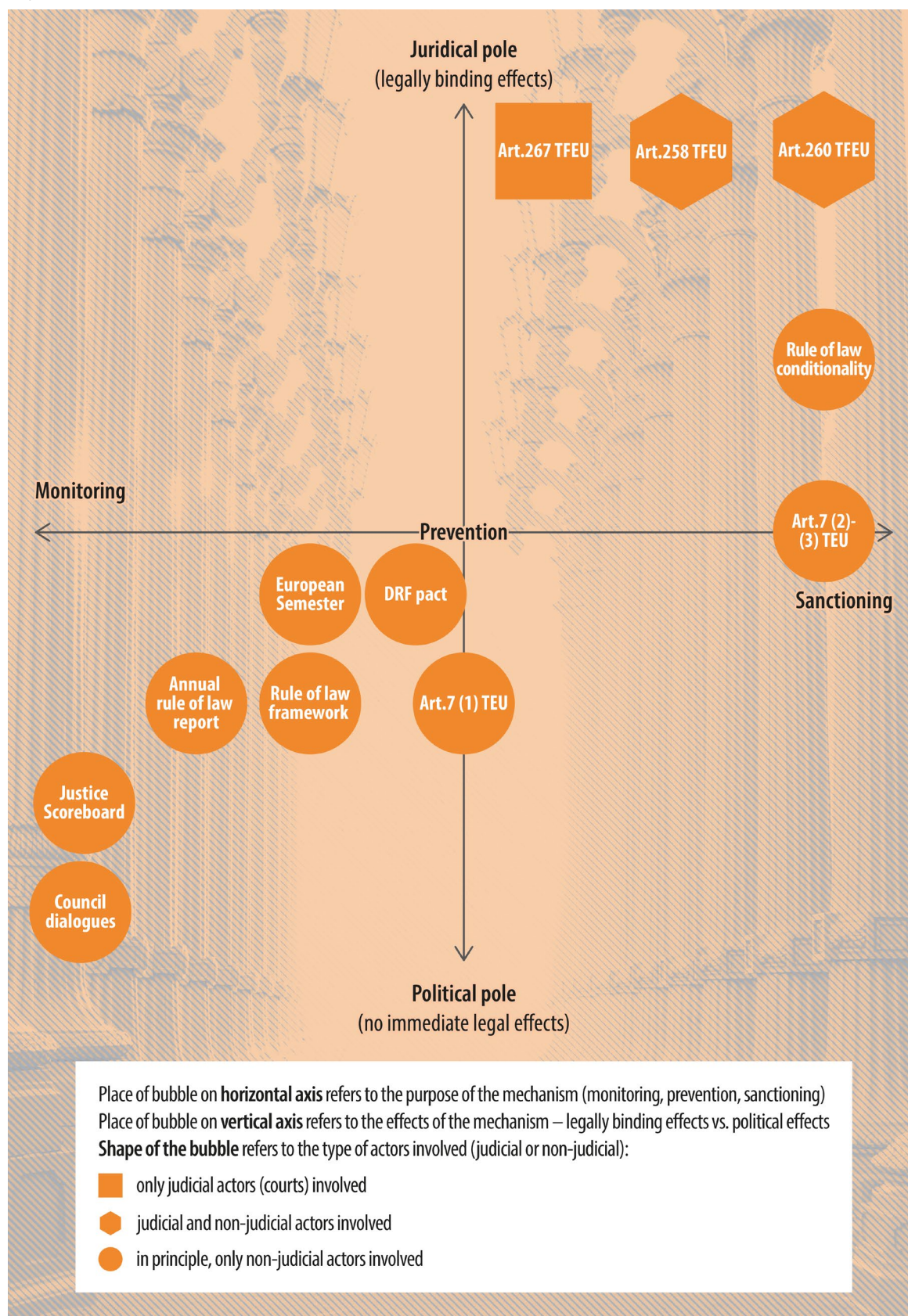
In addition to the last resort tool provided for under Article 7(2)-(3) TEU, the EU Treaties also provide for judicial mechanisms that can be used to uphold EU values. The **preliminary reference procedure**, provided for under Article 267 TFEU, has been used by the ECJ as an instrument to enforce EU values as regards Member States, and the Court has not hesitated in analysing possible contradictions between national legislation and those EU values through preliminary references, although not always referring directly to Article 2 TEU but to other Treaties or secondary law provisions concretising those values. This mechanism is **highly juridical**, as it is triggered by a national court that suspects a breach of EU values in the relevant national legislation or regulation and seeks an interpretation of norms of EU law enshrining those values (e.g. Article 19 TEU, Article 47 CFR) in a way allowing the national rules to be evaluated in the light of those norms (and therefore, in the light of those values). For the procedure to be triggered, the national court must need this interpretation in order to decide a real dispute before it: abstract and hypothetical analyses of EU law cannot be pursued under Article 267 TFEU. Once the ECJ provides an interpretation of EU law, it is up to the national court to make a final evaluation and deduce the appropriate legal consequences, as well as for all national authorities, including the legislature and executive, to comply with the ECJ judgment. Concerning effectiveness, it should be underlined that the ECJ's

preliminary references are considered as **legally binding *erga omnes***, i.e. **also outside the scope of the proceedings in which they were sought in the first place**. However, the effectiveness of the procedure ultimately depends on the national follow-up which includes not only the specific court which posed the question, but also other courts, the legislature, and the executive.

Infringement procedures, provided for under Articles 258-260 TFEU, are a general enforcement tool for EU law, but have also been used to enforce EU values. Featured as a multi-stage mechanism, with an initial, **administrative stage**, and a second, **judicial stage**, infringement procedures only move to the judicial stage if the administrative stage has not been successful, and the Commission (or, possibly, a Member State under Article 259 TFEU) decides to refer the case to the ECJ. If that is the case, the ECJ will decide on the matter, declaring **whether indeed the Member State in question has failed to fulfil its obligations arising from Union law**. Although the first stage of the procedure is not of a judicial nature, as there is no intervention from the ECJ, and the Commission may decide on the case taking into account many different considerations, including political ones, the final stage of the procedure takes place before the ECJ, which will ultimately decide if the Member State has infringed EU law. Therefore, the final outcome binds the Member State in question and provides, at the same time, a generally binding interpretation of EU law. Furthermore, **if the Member State concerned does not implement the ECJ's decisions**, Article 260 TFEU can be activated and the **ECJ can itself impose financial sanctions** on the Member State in question, thus incentivising compliance. Although infringement procedures can be burdensome and lengthy, and the ECJ has not yet found a Member State to be failing to fulfil its obligations on the sole basis of Article 2 TEU, **the mechanism can be deployed to uphold EU values such as the rule of law**, as the ECJ has clearly indicated, for example, in the recent rulings concerning the independence of the judiciary in Poland.

In addition to those enforcement tools, it is to be noted that in 2018 the Commission proposed to include a new enforcement tool in the EU toolbox to address EU values shortcomings in Member States, known as **rule of law budgetary conditionality**. If Parliament's amendments to the Commission proposal are taken on board, this mechanism would be triggered by the European Commission, upon recommendation of a panel of experts, with the consent of the European Parliament and of the Council (the Commission's original version surprisingly excluded the Parliament and experts from the process). The breaches of EU values covered by this mechanism would include only the rule of law, and only insofar as the breach would have a direct or indirect impact upon EU finances and their management at Member State level. The sanctions envisaged by the mechanism would affect both existing and future EU funding for a given Member State, especially structural funds. They would hit not only the Member State concerned, but also, at least to an extent, the end-beneficiaries, as the mechanisms proposed to protect them do not seem to be bullet-proof and absolute. It is difficult to make an *a priori* **evaluation** of the effectiveness of a proposed mechanism. Although the financial implications could be a powerful deterrent for Member States disregarding the rule of law, academics have already raised concerns, especially as regards the way sanctions would be perceived by the public in the Member State in question. The fear has been voiced that citizens could perceive such sanctions as an external pressure or even a penalty, aimed at forcing them to change their political preferences and vote for other parties, ultimately having the opposite to the desired effect.

Figure 6– EU mechanisms to monitor, prevent and enforce EU values



Source: EPRS.

This overview of all existing and proposed EU mechanisms to uphold Article 2 TEU values in Member States shows a clear tendency of EU institutions to invest in **monitoring and preventive tools** rather than in enforcement mechanisms, at least when it comes to addressing systemic deficiencies as regards those values. Most of the existing and proposed mechanisms can be considered monitoring or preventive tools, aimed at either evaluating the situation in Member States or at addressing threats before they become a systemic reality. Although those mechanisms seem necessary, as they may provide the information needed to ground further action and may bolster voluntary compliance, **their effectiveness depends on many different factors**, including the existence of a credible threat of triggering enforcement tools in cases of non-compliance. In this respect, it is to be noted that apart from the possibility of resorting to infringement procedures and preliminary references, the only tool for enforcing EU values currently provided for in EU law for cases of systemic shortcomings in relation to EU values is the sanctions arm in Article 7(2)-(3) TEU. Taking into account the harsh substantive and procedural requirements attached to the procedure, the question is whether it can be used as a credible enforcement tool to bolster voluntary compliance under all the other mechanisms. On this note, the rule of law budgetary conditionality may be a solution, especially if it is ultimately drafted as a less burdensome enforcement tool that could incentivise compliance with one Article 2 TEU value at least, namely, the rule of law.

Annex

ANNEX TABLE 1 – CASES IN WHICH THE COURT OF JUSTICE OF THE EU HAS REFERRED EXPRESSLY TO ARTICLE 2 TEU (completed and on-going)^{1 2}

Date of judgment, case number(s), case name	Type of procedure	Norms of EU law interpreted/violated	Topic	Article 2 TEU founding EU value referred to	Interim measures and/or expedited or urgent procedure
On-going, C-791/19 <i>Commission v Poland</i>	Infringement procedure	Art. 19(1) TEU, Art. 267 TFEU	New disciplinary regime for judges	Rule of law	2020.4.8 /Requested by Commission, but denied
2020.7.9; C-272/19 ; VQ	Preliminary reference (Germany)	Art. 47 CFR, Art. 19(1) TEU, Art. 267 TFEU, Article 2, 3, 4, 15 of Regulation 2016/679	Protection of natural persons with regard to the processing of personal data and characteristics of a body making a reference under Art. 267 TFEU, especially as regards its independence	Rule of law	No/no
2019.12.19; C-418/18 P <i>Puppinck et al. v Commission</i>	Action for annulment (appeal)	Art. 10(1), 17 TEU; Arts. 10 and 11 Reg. 211/2011	Communication from Commission setting out its conclusions and the reasons for not taking the action requested in a European citizens' initiative	Democracy	No/no
2019.12.19; Case C-502/19 <i>Oriol Junqueras Vies</i>	Preliminary reference (Spain)	Art. 10(1) TEU	Immunities enjoyed by MEPs (EU elections)	Democracy	No/ 2019.7.19
2019.11.19; C-585/18, C-624/18, C-625/18 <i>A.K. v Krajowa Rada Sądownictwa</i>	Preliminary reference (Poland)	Art. 47 CFR, Art. 19(1) TEU; Art. 9(1) Dir. 2000/78	Lowering of the retirement age of Supreme Court judges; independence and impartiality of the Disciplinary Chamber of the Supreme Court	Rule of law	No/ 2018.11.26
2019.11.5; C-192/18 ; <i>Commission v Poland (Independence of ordinary courts)</i>	Infringement procedure	Art. 19 (1) TEU; Art. 157 TFEU; Arts. 5(a) and 9(1)(f) of Directive 2006/54/EC	Differentiated pension ages for male and female judges and discretionary power of the Minister of Justice to extend the length of service for individual judges	Rule of law	No/no
2019.10.15, C-128/18 <i>Dorobantu</i>	Preliminary reference (Germany)	Art. 4 of the CFR; Art. 1(3) FD 2002/584/JHA	Detention conditions in the issuing MS of a European Arrest Warrant (Hungary) that may be contrary to the prohibition of inhuman and degrading treatment and grounds for non-execution.	Fundamental rights	No/no

¹ Up to date as of 20 September 2020.² The table only includes cases in which the ECJ has made express reference to Art. 2 TEU. References to other Treaty provisions or to former Art. 6 TEU (Treaty of Amsterdam) are not included.

2019.09.24 T-391/17 <i>Romania v Commission</i>	Action for annulment	Art.3 (3), 4 (2), 5 (2), 10 (3), 11 (4), 13 (2) TEU; Art. 24 (1), 296 (2) TFEU Art. 4(2), 4(3), 10(1)(c) Regulation (UE) No 211/2011	Communication from the Commission partially registering a European citizens' initiative focusing on rights of minorities and diversity in the EU and powers of the Commission (legislative initiative)	Fundamental rights	Rejected on 2017.11.13 / no
2019.04.30 Opinion 1/17	Opinion pursuant to Art. 218(11) TFEU	Art. 20, 21 (2), 47 CFR Art. 1, 3 (5), 5, 19 TEU Art. 18, 101, 102, 267 TFEU	Compatibility of the Comprehensive Economic and Trade Agreement between Canada, of the one part, and the European Union and its MSs, of the other part (CETA) with EU primary law, especially compatibility of the creation of a court responsible for the interpretation of that treaty with the principle of autonomy of EU law, of equal treatment of Canadian and European investors, and the right to access an independent court	Rule of law	No/no
2019.3.27, C-620/16 <i>Commission v Germany</i>	Infringement procedure	Art. 4(3) TEU	Vote by Germany against the Union position laid down in Decision 2014/699/EU at the 25th session of the Intergovernmental Organisation for International Carriage by Rail (OTIF) Revision Committee (binding force of Council Decisions adopted under Art. 218(9) TFEU)	Rule of law	No/no
2019.3.19 C-297/17 , C-318/17 , C-319/17 and C-438/17 <i>Bashar Ibrahim v Germany</i>	Preliminary reference (Germany)	Art. 4 CFR, Art. 33(2)(a) and 52 of Directive 2013/32	Inadmissibility of an asylum claim in a MS because of the prior granting of subsidiary protection in another MS (Bulgaria and Poland) and systemic flaws in the asylum procedure in that other MS and living conditions of those granted subsidiary protection in that other MS that may violate the right to human dignity and the prohibition of inhuman and degrading treatment	Fundamental rights	No/ 2017.7.14
2019.3.19 C-163/17 <i>Abubacarr Jawo v Germany</i>	Preliminary reference (Germany)	Art. 4 CFR; Arts. 27(1) and 29(2) of Regulation (EU) No 604/2013	Obligation to transfer an applicant for international protection to the MS responsible for processing his application under the Dublin III Regulation (Italy) and living conditions of beneficiaries of international protection in that MS that may violate the right to human dignity and prohibition of inhuman and degrading treatment	Fundamental rights	No/Rejected on 2017.4.24

2019.07.9 T-253/18 <i>VY v European Commission</i>	Action for annulment	Art. 21 CFR Art. 3 TEU and Art. 296 TFEU; Art. 1 quinquies, 7, 25 and 90 Staff Regulations	Rejection of an application to become head of unit in one of the delegations of the European Commission: procedure followed, obligation to give reasons for the decision and gender discrimination	Equality (between men and women)	No/no
2019.06.24 C-619/18 <i>Commission v Poland (Independence of the Supreme Court)</i>	Infringement procedure	Art. 49 TEU Art. 19 (1) TEU	Lowering of the retirement age of Supreme Court judges (Independence and impartiality of the judiciary)	Rule of law	2018.10.19 , provisionally adopted by the Vice-President, 2018.12.17 , adopted by the Grand Chamber (rectified in 2019.07.02)/ 2018.11.15
2019.05.23 T-107/17 <i>Steinhoff et al. v ECB</i>	Action for damages		ECB non-contractually liability for the financial losses allegedly suffered by private investors as a result of the restructuring of the its public debt by Greece (right to property)	Fundamental rights	No/no
2019.01.30 T-290/17 <i>Stavytskyi v Council</i>	Action for annulment	Art. 41(2)(c), 47, 48(1), 49(1), and 50 CFR and Preamble Art. 6(1), 21(2)(b), 29, 40 and 49 TEU and Preamble Art. 215, 296 TFEU	Freezing of funds and economic resources of the former Minister for Energy and the Coal Industry of Ukraine (fight against corruption)	Rule of law	No/no
2019.01.17 C-310/16 <i>Dzivev</i>	Preliminary reference (Bulgaria)	Arts. 7, 47, 52 (1) CFR; Art. 325(1) TFEU; Art. 1(1)(b), Art. 2(1) PIF Convention	Exclusion of evidence obtained through an interception of telecommunications initiated on the basis of authorisations granted by a court lacking jurisdiction in a criminal proceeding instigated for VAT offences (principle of legality, rights to private life and fair trial)	Rule of law, fundamental rights	No/no
2018.12.10 C-621/18 <i>Wightman et al. v Secretary of State for Exiting the EU</i>	Preliminary reference (United Kingdom)	Preamble to the TEU, Art. 50 TEU.	Right of unilateral revocation of the notification made by a MS of its intention to withdraw from the European Union	Liberty and democracy	No/ 2018.10.19
2018.12.6 C-551/18 <i>PPU IK</i>	Preliminary reference (Belgium)	Art. 8(1)(f) of Council Framework Decision 2002/584/JHA	Effects of the failure of the judicial authority issuing a European arrest warrant (Belgium authorities) to communicate to the executing judicial authority (the Netherlands authorities) the existence of an additional sentence imposed on the person concerned (right to liberty and security)	Fundamental rights	No/no

2018.11.26 T-458/17 <i>Shindler v Council</i>	Action for annulment	Art. 47 CFR Art. 4(3), 19(1) and 50 TEU Art. 218(3), (4) and (11) TFEU	Validity of the Council Decision authorising the opening of negotiations with the United Kingdom with a view to conclude the withdrawal agreement and effects of the national legislation depriving UK citizens living abroad (15 years rule) of their right to vote in the withdrawal referendum and the national legislative elections (right to vote in national elections).	Democracy	No/no
2018.11.8 T-550/17 <i>Troszczynski v Parliament</i>	Action for annulment	Arts. 47 and 48 CFR; Arts. 7-9 of Protocol 7; Art. 340 TFEU; Art. 2, 3, 5, 6, 9 and 150 Rules of Procedure of European Parliament	Decision of the European Parliament to waive a MEP's immunity and damages for moral damages (freedom of expression of MEPs)	Fundamental rights	No/no
2018.11.22 T-274/16 and T-275/16 <i>Thabet et al. v Council</i>	Action for annulment	Art. 16, 17, 41(2)(c), 47, 48 CFR Art. 3 (5), 6, 21, 23, 24, 29, TEU Art. 296 TFEU Art. 1(4) of Common Position 2001/931 Art. 2(1) of Regulation No 270/2011 Art. 1(1) of Decision 2011/172	Freezing of funds and economic resources of persons having been identified as responsible for misappropriation of Egyptian State funds and respect of fundamental rights guaranteed by the Charter EU (rights to a fair trial, defence, presumption of innocence, property and to one's reputation)	Fundamental rights	No/no
2018.10.25 T-286/15 <i>KF v SatCen</i>	Actions for annulment and damages	Art. 41, 47 CFR; Art. 19, 21, 23, 24, 28 TEU; Art. 256, 257, 263, 265, 266, 268, 270, 272, 275, 277, 288, 340 TFEU; Art. 6 decision, on the privileges and immunities of EU Institute for Security Studies and SatCen; Art. 7(6)(e), 8(3) and (5) of Decision 2014/401; Art. 2 (6), 27 (2), 27, 28, 90 of the SatCen Staff Regulations and Annex IX	Decisions relating to the initiation of disciplinary proceedings against the applicant, suspension and removal of the applicant from her position in the SatCen and jurisdiction of the EU judicature in the field of the CFSP (effective judicial review)	Equality and rule of law	No/no

2018.09.27 T-288/15 <i>Abdelaziz Ezz et al. v Council</i>	Action for annulment	Art. 47, 48 CFR; Art. 3 (5), 6, 21, 23, 24, 215 TEU; Art. 29, 114 TFEU; Art. 2(1) of Regulation No 270/2011; Art. 1(1), 2 (3), 5 of Decision 2011/172	Freezing of funds of people designated as subject to judicial proceedings by the Egyptian authorities in respect of the misappropriation of state funds and respect for their fundamental rights (right to a fair trial, presumption of innocence and right of defence)	Fundamental rights	No/no
2018.09.19 C-327/18 PPU <i>RO</i>	Preliminary reference (Ireland)	Art. 50 TEU	Effects of the notification by a MS of its intention to withdraw from the European Union (UK) as regards the European Arrest Warrants issued by the authorities of that MS (right to liberty and security)	Fundamental rights	No/no
2018.07.25 C-220/18 PPU <i>ML</i>	Preliminary reference (Germany)	Art. 4 CFR; Art. 1(3), Art. 5 and Art. 6(1) FD 2002/584/JHA	Detention conditions in the issuing MS of a European Arrest Warrant (Hungary) that may be contrary to the prohibition of inhuman or degrading treatment and grounds for non-execution.	Fundamental rights	No/ 2018.4.17
2018.07.25 C-216/18 PPU <i>Artur Celmer</i>	Preliminary reference (Ireland)	Art. 47 CFR; Art. 7 (1) TEU; Art. 1(3) FD 2002/584/JHA	Independence and impartiality of the judiciary in the issuing MS of a European Arrest Warrant (Poland) and grounds for non-execution	Rule of law	No/ 2018.4.12
2018.06.19 T-86/17 <i>Le Pen v Parliament</i>	Action for annulment	Art. 41, 47 CFR; Art. 10 TEU, Art. 296 TFEU, Art. 2, 25 EP Rules of Procedure, Art. 5 (1), 9 (4), 10 (2), 11 (4), reg. no 883/2013; Art. 2, 9, 12 ter (1), 17 (1), 20, 21, 60 MEP Statute, Art. 127, 131 RAA, Art. 33, 43 (a), 62 (1), 68, 72 MEP Statute implementing decision	Allowances and expenses of MEPs, especially those for hiring accredited assistants, and recovery of amounts unduly paid (financial independence and exercise of the parliamentary mandate of MEPs)	Democracy	Interim measures rejected in 2017.04.6/ no
2018.05.16 T-626/16 <i>Troszczynski v Parliament</i>	Action for annulment	Art. 41, 47 CFR; Art. 10 TEU, Art. 296 TFEU, Art. 2, 25 EP Rules of Procedure; Art. 5 (1), 9 (4), 10 (2), 11 (4), Regulation no 883/2013; Art. 2, 9, 12 ter (1), 17 (1), 20, 21, 60 MEPS Statute; Art. 127, 131 RAA; Art. 33, 43 (a), 62 (1), 68, 72 MEP Statute implementing decision	Allowances and expenses of MEPs, especially those for hiring accredited assistants, and recovery of amounts unduly paid (financial independence and exercise of the parliamentary mandate of MEPs)	Democracy	Interim measures rejected in 2017.02.16

2018.05.2 C-331/16 and C-366/16 <i>K. v Staatssecretaris van Veiligheid en Justitie</i>	Preliminary reference (Belgium)	Art. 3 TEU; Arts. 16, 27(2), 28 (1), 28 (2) 28(3)(a) dir. 2004/38/EC; Art. 12(2) dir. 2011/95/EU	Right to move and reside freely within the territory of the MSs and expulsion from a MS of a European Union citizen or a third-country national family member of such a citizen who was excluded from the refugee status under Art. 1 F of the Geneva Convention.	All EU values	No/no
2018.04.23 T-561/14 <i>European Citizens' Initiative One of Us, v Commission</i>	Action for annulment	Art. 44 CFR; Art. 11(4), 17 TEU; Art. 24, 225, 227, 241, 289, 296 TFEU; Art. 4-11 of Regulation (EU) No 211/2011; Art. 6(2)(c) dir. 98/44	Decision of the Commission not to take the actions requested by a European Citizens' Initiative focusing on the protection of the dignity, the right to life and of the integrity of every human being from conception and conditions for registration	All EU values	No/no
2018.03.22 T-242/16 <i>Stavrytskyi v Council</i>	Action for annulment	Arts. 41 (2) (c), 47, 48 (1), 49 (1), 51 (1) CFR and Preamble; Arts. 6 (1), 21, 29, 40, 49 TEU and Preamble; Art. 3-6, 215, , 277, 296 TFEU	Freezing of funds and economic resources of the former Minister for Energy and the Coal Industry of Ukraine for being subject to investigation in Ukraine for involvement in crimes in connection with the embezzlement of Ukrainian State funds and their illegal transfer outside Ukraine (fight against corruption)	Rule of law	No/no
2018.03.7 T-624/16 <i>Gollnisch v Parliament</i>	Action for annulment	Art. 41, 47 CFR; Art. 10 TEU; Art. 296 TFEU; Art. 2, 25 EP RoP; Art. 5 (1), 9 (4), 10 (2), 11 (4), Reg. no 883/2013' Art. 2, 9, 12 ter (1), 17 (1), 20, 21, 60 MEP Statute; Art. 127, 131 RAA; Art. 33, 43 (a), 62 (1), 68, 72 MEP Statute Impl. Dec.	Allowances and expenses of MEPs, especially those for hiring accredited assistants, and recovery of amounts unduly paid (financial independence and exercise of the parliamentary mandate of MEPs)	Democracy	Interim measures rejected in 2017.02.16
2018.02.21 T-731/15 <i>Klyuyev v Council</i>	Action for annulment	Art. 17, 41 (2) (c), 47, 51 (1), 52 (1) CFR and Preamble; Art. 6 (1), 21, 29, 49 TEU and Preamble; Art. 215, , 277, 280, 288, 296 TFEU; Art. 2(2) and (3), 5 (3) of Decision 2014/119; Art. 14(2)-(4) reg 208/2014	Freezing of funds of person subject to criminal proceedings in Ukraine for involvement in the misappropriation of public funds or assets (fight against corruption)	Rule of law	No/no
2018.03.15 T-1/17 <i>La Mafra Franchises v EUIPO</i>	Action for annulment	Arts. 2, 3, 6 CFR; Art. 83 TFEU; Art. 7(1)(f), 52(1)(a) reg. 207/2009	Registering of a EU trademark evoking a criminal organisation known worldwide	Human dignity, freedom	No/no

2018.03.6 C-284/16 <i>Slovakia v Achmea</i>	Preliminary reference (Germany)	Arts. 267 and 344 TFEU	Bilateral investment treaties between two MS (autonomy and effectiveness of EU law and judicial protection of rights of individuals under EU law)	Rule of law	No/no
2018.02.27 C-64/16 <i>Associação Sindical dos Juizes Portugueses v Tribunal de Contas</i>	Preliminary reference (Portugal)	Art. 19(1) TEU	Reduction of remuneration in the national public administration, including the judiciary, as a consequence of budgetary austerity measures (Independence of the judiciary)	Rule of law	No/no
2017.11.29 T-634/16 <i>Montel v Parliament</i>	Action for annulment and damages	Art. 48 CFR; Art. 10 TEU; Art. 296 TFEU; Art. 2, 25, 222 EP RoP; Art. 71 (3) reg. 1605/2002; Art. 2, 9, 21 MEP Statute; Art. 33, 38, 43, 62 (1), 67, 68, 72 MEP Statute impl. Dec.	Allowances and expenses of MEPs, especially those for hiring accredited assistants, and recovery of amounts unduly paid (financial independence and exercise of the parliamentary mandate of MEPs)	Democracy	No/ no
2017.11.29 T-633/16 <i>Bilde v Parliament</i>	Action for annulment and damages	Art. 48 CFR; Art. 10 TEU; Art. 296 TFEU; Art. 2, 25, 222 EP RoP; Art. 71 (3) reg. 1605/2002; Art. 2, 9, 21 MEP Statute; Art. 33, 38, 43, 62 (1), 67, 68, 72 MEP Statute impl.dec.	Allowances and expenses of MEPs, especially those for hiring accredited assistants, and recovery of amounts unduly paid (financial independence and exercise of the parliamentary mandate of MEPs)	Democracy	No/ no
2017.11.8 T-245/15 <i>Klymenko v Council</i>	Action for annulment	Art. 17, 41 (2) (c), 47, 48 (1), 49 (1), and 51, 52 CFR and Preamble; Art. 6 (1), 21 (2) (b), 29, and 49 TEU and Preamble; Art. 215, 296 TFEU; Art. 14 reg. 208/2014; Art. 4(3) dir. 2017/1371; Art. 1(1), 2(2) and (3), 5 dec. 2014/119	Freezing of funds of the former Minister of Revenues and Charges as a person subject to investigation in Ukraine for involvement in crimes in connection with the embezzlement of Ukrainian State funds and their illegal transfer outside Ukraine (fight against corruption)	Rule of law	No/ no
2017.05.10 T-754/14 <i>Effer v Commission</i>	Action for annulment	Art. 11(4) TEU; Arts. 207, 218, 288-292 TFEU; Art. 2(1), 4(2)(b), 10(1)(c), 11 reg. 211/2011	Refusal of the European Commission to register a European citizen's initiative asking the Commission to recommend that the Council cancel the negotiating mandate for the TTIP with the USA and not conclude CETA	Democracy	Interim measures rejected on 2016.05.23 and in appeal on 2016.09.29 / no
2017.3.28 Case C-72/15 <i>Rosneft v HM Treasury</i>	Preliminary reference (England & Wales)	Art. 47 CFR; Arts. 19, 24 and 40 TEU; Art. 267, 275 TFEU; rticles 3 and 3a, Art. 4(3) and (4), Art. 5(2)(b) to (d) and (3), 8(1) and Art. 11 of,	Validity of certain provisions of Council Decision 2014/512/CFSP and validity and interpretation of Council Regulation No 833/2014- jurisdiction of the ECJ over acts adopted in the field of CFSP (effective judicial protection) and respect of the	Rule of law	No/no

			and Annexes II and VI to, Council Regulation (EU) No 833/2014 Art. 1(2)(b) to (d) and (3), and Art. 7 of, and Annex III to, Decision 2014/512	principles of legal certainty and <i>nulla poena sine lege certa</i>		
2016.12.21 C-203/15 and C-698/15 <i>Tele2 Sverige</i>	Preliminary reference (Sweden)		Arts. 7, 8 and 11 and Art. 52(1) CFR; Article 15(1) dir. 2002/58/EC	National legislation providing for general and indiscriminate retention of all traffic and location data of all subscribers and registered users relating to all means of electronic communication for the purpose of fighting crime and respect for fundamental rights, including respect for private life, protection of personal data and freedom of expression	Human rights	No/no
2016.09.15 T-340/14 <i>Klyuyev v Council</i>	Action for annulment		Art. 41, 47 CFR and Preamble; Art. 21, 29, 49 TEU and Preamble; Art. 215, 296 TFEU; Art. 1(1), 5 of Decision 2014/119	Freezing of funds of the former Head of Administration of President of Ukraine as a person subject to investigation in Ukraine for involvement in crimes in connection with the embezzlement of Ukrainian State funds and their illegal transfer outside Ukraine (fight against corruption)	Rule of law	No/no
2016.09.15 T-348/14 <i>Yanukovych v Council</i>	Action for annulment		Art. 41 (2) (c), 47 CFR and Preamble; Art. 21 (2) (b), 29, 49 TEU and Preamble; Art. 215, 263, 275, 296 TFEU; Art. 1(1), 5 of Decision 2014/119	Freezing of funds of the former President of Ukraine as a person subject to investigation in Ukraine for involvement in crimes in connection with the embezzlement of Ukrainian State funds and their illegal transfer outside Ukraine (fight against corruption)	Rule of law	No/no
2016.09.15 T-346/14 <i>Yanukovych v Council</i>	Action for annulment		Art. 41 (2) (c), 47 CFR and Preamble; Art. 21, 29, 49 TEU and Preamble; Art. 215, 263, 275, 296 TFEU; Art. 1(1), 5 of Decision 2014/119	Freezing of funds of the former President of Ukraine as a person subject to investigation in Ukraine for involvement in crimes in connection with the embezzlement of Ukrainian State funds and their illegal transfer outside Ukraine (fight against corruption)	Rule of law	No/no
2016.7.19 C-455/14 P <i>H. v Council, Commission, and EUPM</i>	Actions for annulment and damages (appeal)		Art. 19, 21, 23, 24, 28, 43 (2) TEU; Art. 270, 275 TFEU; Art. 92 Staff Regulations; Art. 5, 6, 7, 8 (2), 9 dec. 2009/906	Decision to redeploy an individual from the EUPM in Sarajevo to the Banja Luka regional office in the same mission - jurisdiction of the ECJ in the field of CFSP (effective judicial protection)	Equality and rule of law	No/no
2016.05.10 T-529/13 <i>Izsdák et al. v Commission</i>	Action for annulment		Art. 21 (1), 22, 41 (1), 51 (1) CFR; Art. 3, 6 (1) TEU; Art. 4 (2), 6 (c), 19, 167, 174-178	Decision of the Commission refusing the registration of a European Citizen's Initiative	Fundamental rights	No/no

2016.05.3 T-68/14 <i>Post Bank Iran v Council</i>	Action for annulment	TFEU; Art. 4, 10(1)(c) reg. 211/2011 and Annex II; Art. 3 reg. 1059/2003; Art. 121(4) reg. 1303/2013 Art. 17, 47, 52 CFR; Art. 21, 23, 24, 26, 29, 31 TEU; Art. 215, 275, 291 TFEU; Art. 23(2) and 46(2), 291(2) reg. 267/2012; Art. 20(1) dec. 2010/413	Freezing of funds of an Iranian bank facilitating nuclear proliferation-related business and respect of EU values and fundamental rights (principle of legal certainty, right to property and freedom to trade)	Rule of law and fundamental rights	No/no
2016.05.3 T-63/14 <i>Iran Insurance Company v Council</i>	Action for annulment	Art. 17, 47, 52 CFR; Art. 21, 23, 24, 26, 29, 31 TEU; Art. 215, 275, 291 TFEU; Art. 23(2) and 46(2), 291(2) reg. 267/2012; Art. 20(1) dec. 2010/413	Freezing of funds of an Iranian insurance company that had insured the purchase of various items that could be used in nuclear programmes and respect of EU values and fundamental rights (principle of legal certainty, right to property and freedom to trade)	Rule of law and fundamental rights	No/no
2016.04.5 C-404/15 and C-659/15 PPU <i>Aranyosi and Căldăraru</i>	Preliminary reference (Germany)	Art. 4 CFR; Art. 1(3), 5, 6(1) and 7 of Council Framework Decision 2002/584/JHA	Grounds for refusal to execute a European Arrest Warrant if detention conditions in the issuing MS (Hungary and Romania) are incompatible with prohibition of inhuman and degrading treatment.	Human rights	No/ Urgent procedure in 2015.08.04
2015.09.4 T-577/12 <i>National Iranian Oil Company v Council</i>	Action for annulment	Art. 17, 47, 52 CFR; Art. 21, 23, 24, 26, 29, 31, 40 TEU; Art. 215, 275, 291, 296 TFEU; Art. 23(2), 45, 46(2) reg. 267/2012; art. 20(1) dec. 2010/413	Freezing of funds of several Iranian oil companies supporting the Iranian government and legal basis for adopting the decision, principle of legal certainty, rule of law and fundamental rights (right to property, fair trial, right to defence and good administration)	Rule of law, fundamental rights	No/no
2014.12.18 Opinion 2/13 <i>EU Accession to ECHR</i>	Opinion pursuant to Art. 218(11) TFEU	Art. 6 (2) TEU; Art. 53 CFR, Art. 267, 344 TFEU; Protocol (No 8) on EU accession to ECHR	Compatibility of draft international agreement providing for EU accession to ECHR with EU Treaties	Fundamental rights, rule of law	No/no
2013.02.17 T-346/11 and T-347/11 <i>Gollnisch v Parliament</i>	Action for annulment and compensation	Art. 11, 41(2)(a) CFR; Art. 6 TEU; Art. 296 TFEU; Art. 8-9 Protocol on EU Privileges and Immunities	Decision to waive an MEP's immunity and not to defend it in relation to a complaint alleging incitement to racial hatred (freedom of expression of MEPs)	Fundamental rights	Interim measures rejected on 2011.09.30 and in appeal on 2012.3.29 .
2011.09.6 C-163/10 <i>Patriciello</i>	Preliminary reference (Italy)	Art. 8 Protocol on EU Privileges and Immunities	Decision of the EP to defend the immunity of MEP subject to criminal proceeding in MS for wrongfully accusing of illegal conduct an officer of the municipal police of that MS; scope of MEPs' parliamentary immunity	Fundamental rights; democracy	No/no

ANNEX TABLE 2 – RECENT EXAMPLES OF RELEVANT PRELIMINARY REFERENCE PROCEDURES WITH AN EU VALUES COMPONENT, BUT WITH NO EXPLICIT REFERENCE TO ARTICLE 2 TEU³

Date of judgment, case number, case name	MS ⁴	Primary EU law interpreted	Subject matter	EU value at stake	ECJ's findings ⁵
2020.07.16 (Grand Chamber) C-311/18 Schrems	IE	Art. 7, 8, 47 CFR	Data protection, privacy and effective remedy	Fundamental rights	Data subjects whose personal data are transferred to a third country pursuant to standard data protection clauses must be afforded a level of protection essentially equivalent to that guaranteed by the GDPR, read in the light of the CFR, the Privacy Shield Decision (Commission Implementing Decision (EU) 2016/1250) is invalid
2020.06.25 (1st Chamber) C-762/18 and C-37/19 Varhoven Kasatsionen Sad and Iccrea Banca	BG & IT	Art. 31 CFR	Paid annual leave (fair and just working conditions)	Fundamental rights	National case-law limiting the right to paid annual leave (Bulgaria) or compensation in lieu of such leave (Italy) in the case of persons unlawfully dismissed and later reinstated violates Article 31 CFR and the Working Time Directive (2003/88)
2020.05.14 (Grand Chamber) C-924/19 PPU , C-925/19 PPU Országos Idegenrendészeti Főigazgatóság	HU	Art. 18 CFR Art. 47 CFR	Asylum procedure	Fundamental rights and rule of law	Incompatibility of Hungarian asylum law with EU law
2020.03.19 (1st Chamber) C-564/18 Bevándorlási és Menekültügyi Hivatal	HU	Art. 47 CFR	International protection	Rule of law	Incompatibility of Hungarian asylum law with EU law
2019.12.19 (Grand Chamber) C-725/18 Deutsche Umwelthilfe	DE	Art. 6, 47, 52(1) CFR	Regional authorities persistently refused to comply with judicial decision enjoining them to perform a clear, precise and unconditional obligation flowing from EU law	Rule of law and fundamental rights	National court may impose coercive detention on recalcitrant officials if there is legal basis in national law.

³ Up to date as of 20 September 2020. The cases were selected as follows: all cases decided between 1.1.2016 and 20.9.2020, for which the ECJ decided to publish a press release (thereby highlighting their importance) were analysed with regard to their subject-matter in order to detect cases that were concerned with the protection of EU values, as enshrined in Article 2 TEU, and specifically defined in the Charter of Fundamental Rights and the Treaties. The cases in which Article 2 TEU was explicitly invoked are to be found in Table 1 above.

⁴ 'MS' = Member State of the court that submitted the preliminary reference.

⁵ The incompatibility of a specific rule of national law is explicit in the motives of the case, and implicit in the operative part where the content of the national law is referred to generically ('national law' without specifying a concrete law). However, the national court is, in such a case, obviously bound to set aside the concrete national law that would have been otherwise applicable.

2019.12.12 (5th Chamber) C-519/18 <i>Bevándorlási és Menekültügyi Hivatal</i>	HU	CFR (no Art. mentioned)	Prerequisites for exercising the right to family reunification in the case of refugees (right to family life)	Fundamental rights	National law in principle compatible with EU law
2019.11.12 (Grand Chamber) C-233/18 <i>Haqbin</i>	BE	Art. 1, 24 CFR	Serious breach of the rules of the accommodation centres as well as seriously violent behaviour of an applicant for international protection	Human dignity	Belgian law allowing to withdraw housing, clothing or food as a sanction is incompatible with EU law if it would deprive applicant of his basic needs
2019.07.29 (Grand Chamber) C-556/17 <i>Torubarov</i>	HU	Art. 47 CFR	International protection	Rule of law	National court must set aside national law which allows to overrule court decision by decision of administrative or quasi-judicial body
2019.05.14 (Grand Chamber) C-391/16 C-77/17 C-78/17 Ministerstvo vnitra	CZ	Art. 18 CFR	Refusal to grant or revocation of refugee status in the event of danger to the security or the community of the host MS	Fundamental rights	Directive 2011/95 is compatible with Art. 18 CFR
2019.05.14 (Grand Chamber) C-55/18 Federación de Servicios de Comisiones Obreras	ES	Art. 31(2) CFR	Maximum weekly working time	Fundamental rights	Spanish law that does not require employers to set up a system enabling the duration of time worked each day by each worker to be measured violates EU law
2019.05.08 (1st Chamber) C-24/17 Österreichischer Gewerkschaftsbund	AT	Art. 21 CFR	Discrimination in the field of public sector employment (principle of non-discrimination)	Fundamental rights	Austrian legislation incompatible with EU law
2019.03.19 (4th Chamber) C-557/17; <i>Staatssecretaris van Veiligheid en Justitie v YZ, ZZ and YY</i>	NL	Art. 7 CFR	Withdrawal of residence permit of a member of the family of a third-country national due to fraud (right to family life)	Fundamental rights	Dutch law in conformity with EU law
2019.03.12 (Grand Chamber) C-221/17; Ijebbes	NL	Art. 7, 24 CFR Art. 20 TFEU	Loss of MS nationality and EU citizenship by operation of law	Fundamental rights	Dutch law in conformity with EU law
2019.01.22 Case C-193/17 <i>Cresco Investigation v Achatzi</i>	AT	Art. 21 CFR	MS legislation granting certain employees a day's holiday on Good Friday (religious freedom and principle of non-discrimination)	Fundamental rights	Austrian law discriminates on account of religion
2018.11.06 C-619/16 <i>Kreuziger v Berlin</i>	DE	Art. 31(2) CFR; Art. 7 dir. 2003/88/	Loss of annual leave	Fundamental rights	German law incompatible with EU law

2018.09.13 (2nd Chamber) C-369/17 Ahmed	HU	Art. 17(1)(b) dir. 2011/95	Asylum	Fundamental rights	Hungarian law pursuant to which applicant for subsidiary protection is deemed to have 'committed a serious crime' which may exclude him from protection, where sole criterion is penalty provided for that crime
2018.08.07 C-300/17 Hochtief	HU	Art. 47 CFR Dir. 89/665	Public procurement, action for damages	Rule of law	Hungarian rules on action for damages in public procurement conform with EU law
2018.01.25 C-473/16 Bevándorlási és Állampolgársági Hivatal	HU	Art. 7 CFR	Asylum law (non-discrimination; minority rights)	Fundamental rights	Hungarian law mandating psychological tests to verify if person claiming to be persecuted on account of sexual orientation is really a homosexual incompatible with EU law
2016.03.17 (4th Chamber) C-695/15 PPU Mirza	HU	Art. 3(3) reg. 604/2013; Art. 18(2) reg. 604/2013	Asylum	Fundamental rights	The right to send an applicant for international protection to a safe third country may also be exercised by a MS after that MS has accepted that it is responsible

ANNEX TABLE 3 – EXAMPLES OF RELEVANT INFRINGEMENT PROCEDURES WITH AN EU VALUES COMPONENT, BUT WITH NO EXPLICIT REFERENCE TO ARTICLE 2 TEU (completed and on-going)⁶

Date of judgment, case number, case name	Date of reasoned opinion of Commission/ Date of referral to the ECJ	Norms of EU law interpreted	Subject-matter	EU value at stake	Temporary measures and/or expedited procedure	Ruling
On-going C-808/18 <i>Commission v Hungary</i>	2017.12.8/ 2018.12.1	Arts. 6, 18 and 47 CFR	Asylum procedure and detention of asylum seekers in transit zones	Fundamental rights	No/ Expedited procedure applied	Pending: It is questioned whether a national law imposing on asylum seekers the obligation to apply for asylum in person before the competent asylum authority, and exclusively in the transit zones, excessively limits access to asylum; whether a national law requiring asylum applicants to remain in the transit zones until their application for international protection is dealt with violates the right to liberty; whether the practice of moving irregularly staying third- country nationals to a third country without any procedure respects Directive 2008/115; and whether the national law does correctly implement the EU law provisions requiring certain legal proceedings against decisions refusing international protection to have suspensive effects.
On-going C-66/18 <i>Commission v Hungary</i>	2017.7.14/ 2018.6.1	Arts. 13 and 14(3), 16 CFR Arts. 49, 54, 216(2) TFEU Art. XVII of the General Agreement on Trade in Services (GATS) Art. 16 of Directive 2006/123/EC	National law on higher education (CEU University)	Fundamental rights	No/ no	It is questioned whether a national law imposing on foreign higher education institutions having their seat outside the EEA the obligation to comply with certain obligations to carry on teaching activities leading to a qualification in the territory of Hungary violates Art. XVII of the GATS (prohibition of a less favourable treatment to national providers), the freedoms of establishment and to provide services (namely, Arts. 49 and 56 TFEU and Art. 16 of Directive 2006/123/EC); and some of the fundamental rights enshrined in the CFR (academic freedom, the right to education and the freedom to conduct a business).

⁶ Up to date as of 20 September 2020. The cases were selected as follows: all cases decided between 1.1.2012 and 18.8.2020, for which the ECJ decided to publish a press release (thereby highlighting their importance) were analysed with regard to their subject-matter in order to detect cases that were concerned with the protection of EU values, as enshrined in Art. 2 TEU, and specifically defined in the Charter of Fundamental Rights and the Treaties. The cases in which Art. 2 TEU was explicitly invoked are to be found in Table 1 above.

2020.7.16 C-550/18 <i>Commission v Ireland</i>	2018.3.8/ 2018.7.19	Art. 67(1) Directive 2015/849	Non transposition of Directive on anti-money laundering	Rule of law	No/no	MS has violated Art. 67(1) of Directive 2015/849 by failing to transpose most of its provisions in due time. A lump sum is imposed on the MS under Art. 260(3) TFEU.
2020.7.16 C-549/18 <i>Commission v Romania</i>	2017.12.7/ 2018.8.27	Art. 67(1) Directive 2015/849	Non transposition of Directive on anti-money laundering	Rule of law	No/no	MS has violated Art. 67(1) of Directive 2015/849 by failing to transpose most of its provisions in due time. A lump sum is imposed on the MS under Art. 260(3) TFEU.
2020.6.18 C-78/18 <i>Commission v Hungary</i>	2017.10.5/ 2018.2.6	Arts. 7, 8 and 12 of the CFR; Art. 63 TFEU	National law imposing certain obligations on civil society organisations (NGOs) receiving foreign financial support	Fundamental rights	No/ no	MS has failed to comply with EU law by adopting certain provisions imposing obligations of registration, declaration and publication of certain information on civil society organisations (NGOs) directly or indirectly receiving support from abroad over a certain threshold (free movement of capital, right to private life, protection of personal data and the freedom of association).
2020.4.2 C-718/17, C-715/17 C-719/17 <i>Commission v Poland, Hungary, and Czech Republic</i>	2017.7.26/ 2017.12.22 and 21	Art. 5(2), 5 (4) to (11) of Decisions 2015/1523 and 2015/1601 (Poland and Czech Republic)	Temporary relocation scheme of asylum seekers from Italy and Greece	Fundamental rights	No/ no	MSs has failed to comply with EU law (Council Decision (EU) 2015/1523 and Council Decision (EU) 2015/1601) by failing to indicate at regular intervals an appropriate number of applicants for international protection who could be relocated from Greece and Italy to their countries (see Joined Cases C-643/15 and C-647/15, on the legality of both Council Decisions).
2016.10.11 C-601/14 <i>Commission v Italy</i>	2013.10.18/ 2014.12.22	Art. 12(2) of Council Directive 2004/80/EC	Non- transposition of Directive concerning damages to crime victims	Fundamental rights	No/ no	MS has violated Art. 12(2) of Council Directive 2004/80/EC by failing to adopt all measures needed to guarantee the existence of a damages scheme for victims of all violent intentional crimes in cross border situations.
2016.6.14 C-308/14 <i>Commission v United Kingdom</i>	2011.9.29/ 2014.6.27	Art. 1, 3, 4, 11, 70 of Regulation (EC) No 883/2004 Art. 7, 14 of Directive 2004/38	National legislation under which child benefit and child tax credit are not granted to nationals of other MS who do not have a right of lawful residence	Fundamental rights	No/ no	Action is dismissed
2016.1.21 C-515/14 <i>Commission v Cyprus</i>	2012.3.26/ 2014.11.14	Art. 4(3) TEU Arts. 45, 48 TFEU	National legislation establishing a differential treatment in relation to their pension rights for workers leaving Cyprus in order to work in another	Fundamental rights	No/ no	MS has infringed Art. 4(3) TEU and Arts. 45, 48 TFEU by failing to repeal the national legislation producing the differential treatment.

			MS, or in an EU institution, or in another international organisation and those deciding to work in Cyprus				
2015.9.16 C-361/13 <i>Commission v Slovak Republic</i>	2012.11.22/ 2013.6.26		Art. 3, 7 of Regulation (EC) No 883/2004	National legislation refusing to grant the Christmas bonus recognised to certain beneficiaries of pensions to beneficiaries residing in a MS other than the Slovak Republic	Fundamental rights	No/ no	Action dismissed
2014.4.8 C-288/12 <i>Commission v Hungary</i>	2012.3.7/ 2012.6.8		Art. 28(1) Directive 95/46/EC	National legislation prematurely bringing to an end the term served by the Data Protection Commissioner	Fundamental rights	No/ no	MS contravened the safeguards established to protect the independence of the national supervisory authority for the protection of personal data by prematurely ending its term of office.
2013.7.4 C-312/11 <i>Commission v Italy</i>	2009.10.29/ 2011.6.20		Art. 5 Directive 2000/78/CE	No transposition of the Directive establishing a general framework for equal treatment in employment and occupation as regards persons with disabilities	Fundamental rights	No/ no	National legislation does not provide for an obligation of all employers to make reasonable adjustments for persons with disabilities in the working place, thus violating Art. 5 of Directive 2000/78/CE.
2012.11.6 C-286/12 <i>Commission v Hungary</i>	2012.3.7/ 2012.6.7		Arts. 2 and 6(1) of Council Directive 2000/78/EC of 27 November 2000	National legislation lowering the age-limit for compulsory retirement applicable to judges, prosecutors and notaries from 70 to 62	Rule of law	No/ Yes (2012.7.13)	National scheme providing for the compulsory retirement of judges, prosecutors and notaries when they reach the age of 62 introduces a difference in treatment on grounds of age which is not proportionate as regards the objectives pursued, thus violating EU law
2012.6.14 C-542/09 <i>Commission v The Netherlands</i>	2009.4.15/ 2009.12.18		Art. 21, 45 TFEU Art. 7(2), 12 of Regulation (EEC) No 1612/68 Art. 24 of Directive 2004/38/EC	National legislation requiring that migrant workers and their family members comply with a residence requirement to be eligible to receive funding for higher educational studies pursued outside the Netherlands	Fundamental rights	No/ No	MS has failed to fulfil its obligations under Art. 45 TFEU and Art. 7(2) of Regulation (EEC) No 1612/68 by requiring that migrant workers and their dependent family members comply with a residence requirement to be eligible to receive funding for higher educational studies pursued outside the MS.

2012.4.26 C-508/10 <i>Commission v The Netherlands</i>	2009.3.23/ 2010.10.25	Arts. 4,5,7, 8,14,16 of Directive 2003/109	National legislation requiring third-country nationals and their family members applying for long-term resident status to pay high fees	Fundamental rights	No/ No	MS has failed to fulfil its obligations under Directive 2003/109/EC by requiring third-country nationals and their family members applying for long-term resident status to pay high administrative charges.
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This study analyses the existing and proposed mechanisms available to the institutions of the EU that may be deployed in order to monitor and enforce the observance of EU values by the Member States. More specifically, the study addresses the status and meaning of EU values (Article 2 TEU) and also discusses existing monitoring and preventive mechanisms (European Semester, EU Justice Scoreboard, Commission's rule of law framework, the Council's dialogues on the rule of law, and the preventive arm of Article 7 TEU) and enforcement mechanisms (preliminary reference rulings, infringement procedures and the sanctions arm of Article 7 TEU)). It also analyses a number of proposed mechanisms: the pact on democracy, the rule of law and fundamental rights; rule of law review cycle; reviewed Council dialogues on the rule of law; and the rule of law budgetary conditionality.

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