

# European added value of an EU mechanism on democracy, the rule of law and fundamental rights

## Preliminary assessment

### SUMMARY

The European Parliament is shortly to commence work on a legislative own-initiative report on an EU mechanism on democracy, the rule of law and fundamental rights (DRF) (rapporteur: Michal Šimečka, Renew, Slovakia). A European added value assessment (EAVA) produced by the European Parliamentary Research Service (EPRS) will accompany it. This report follows up on a legislative own-initiative resolution adopted in 2016. In the meantime, the European Commission has begun work on a first annual rule of law report, to be published in September. This briefing provides a preliminary assessment of the European added value of an EU mechanism on DRF, based on the 2016 EAVA, taking into account the Commission's latest activities and proposals.

The Commission has taken a significant step towards Parliament's position by engaging in country-by-country monitoring. A comparison of the main features and methodologies proposed by the two EU institutions reveals four key differences between the approaches of the two institutions however:

First, the Commission's monitoring exercise is not based on an interinstitutional agreement. This could have been a better way to ensure coordination between the institutions, notably as regards the methodology. An interinstitutional agreement would also have the benefit of judicial oversight by the Court of Justice of the European Union (CJEU) over the provisions of such an agreement.

Second, Parliament envisaged a broader thematic scope for the monitoring exercise, focusing not only on rule of law aspects but also on elements of democracy and fundamental rights. Parliament recognises the triangular mutually reinforcing relationship between the aspects, which together safeguard the constitutional core of the EU and its Member States. The benefit here is illustrated by two substantive examples concerning minority protection (Roma) and mass surveillance.

Third, Parliament allocated a key role to a panel of independent experts, meant to ensure the thorough and independent contextual analysis needed to detect patterns in risks and threats undermining EU values. The Commission takes this assessment into its own hands, with a strong role for a network of national contact points.

Fourth, Parliament envisaged that the full report, including country-specific findings and recommendations (CSRs), would be published and lead to Council conclusions and the adoption of a Parliament resolution following an interparliamentary debate. These could require 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) of the Treaty on European Union (TEU). The Commission's approach, having in mind its prerogatives, does not take up those recommendations. It rather encourages interparliamentary

debates within Parliament and discussions within Council. However, this stance does raise questions as to how coherence between the various elements of the EU toolbox to monitor and enforce EU values will be ensured.

Table 1 – Monitoring EU values: Four key differences between Parliament and Commission

Aspect	European Parliament	European Commission
Legal basis	Article 295 – Treaty on the Functioning of the European Union (TFEU) (interinstitutional agreement)	Commission monitoring
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 enforcement action	Interparliamentary debates within the European Parliament and discussions within Council

Source: Author's own summary.

A final assessment can only be made once the Commission's report is available. Parliament could still explore the policy option of launching its own DRF project (or a counter-analysis of the Commission's report), organising (interparliamentary) debates and continuing to visit Member States in which it has identified particular problems. It could still adopt a resolution recommending follow-up action to the Commission, Council and Member States, or trigger such follow-up action itself, including the Article 7(1) TEU procedure, if the conditions to do so are met. Finally, it could continue to insist on an interinstitutional agreement, with working groups on planning and methodology to be established as an intermediate step this year.

## Introduction

As stated in the summary, this briefing provides a preliminary assessment of the European added value of an EU mechanism on DRF. It does so based on a comparison of the main features and methodologies proposed by Parliament and the Commission for monitoring compliance with EU values in the Member States.<sup>1</sup> In doing so, it first discusses Parliament's legislative own-initiative resolution and pact on democracy, the rule of law and fundamental rights and the accompanying EAVA. Second, it looks at the Commission's annual rule of law report. In the third section, four key differences between the Parliament and Commission approaches are unpacked. The fourth section examines the policy options available to Parliament in light of the Commission's activities since adopting its legislative own-initiative in 2016. The scope of this briefing is therefore limited to monitoring, with a focus on a comparison of the two EU institutions' activities. A forthcoming EPRS study will offer a wider perspective analysing all existing EU mechanisms for monitoring and enforcing EU values.

## 1. Parliament's legislative own-initiative resolution: pact on democracy, the rule of law and fundamental rights

In accordance with Article 2 TEU, the Union and its Member States commit to uphold EU values, notably those of democracy, the rule of law and fundamental rights. However, a [European added value assessment](#) (EAVA) produced by EPRS as part of a European Parliament [legislative own-initiative](#) procedure concluded that there is a gap between the proclamation of these rights and values and actual compliance. The root causes of this lack of compliance are to be found in weaknesses in the existing EU legal and policy framework on democracy, the [rule of law](#) and fundamental rights (DRF).

These weaknesses relate, first, to discussions on the scope of EU competence to enforce the rights and values listed in Article 2 TEU, including their exact meaning and connection with the EU Charter of Fundamental Rights,<sup>2</sup> and; second, to the consequent division of monitoring responsibilities between the EU and its Member States, as well as between EU bodies; and third, to the lack of effectiveness of existing EU monitoring and enforcement tools and instruments.<sup>3</sup>

Beyond addressing the specific violation, infringement procedures often do not or rather cannot fully repair the systemic damage done. Preliminary references have the main weakness of having to be made by national judges behaving like EU judges, which, owing to a lack of capacity, knowledge or pressure from the regime, might not materialise in practice. The Article 7(1) TEU procedure has so far only been activated as regards two Member States, and the Article 7(2) TEU procedure has not been put to use so far. However, their institutional design and a lack of willingness among Member States to confront one of their peers actively has rendered them ineffective so far.

To overcome these weaknesses Parliament has called [repeatedly](#) for an EU 'pact' on DRF, most recently in [January 2020](#). The pact proposed in Parliament's legislative own-initiative resolution (depicted in the figure below) would entail the establishment of a comprehensive EU mechanism for DRF, integrating, aligning and complementing existing mechanisms, including the [EU Justice Scoreboard](#), the ['European Semester'](#) aimed at coordinating the economic policies of the Member States and the [Cooperation and Verification Mechanism](#) applicable to Bulgaria and Romania.<sup>4</sup>

The proposed pact has two core elements:

- an annual European report on the state of DRF in Member States with CSRs (annual DRF report) drawn up by the Commission in consultation with a panel of independent experts; and
- an EU policy cycle for DRF, involving EU institutions and national parliaments, including a DRF policy cycle within the institutions of the Union,<sup>5</sup> incorporating the [Commission's Rule of Law Framework](#) and the [Council's Rule of Law Dialogue](#).<sup>6</sup>

### EU competence and legal basis

In accordance with Articles 2, 3(1) and 7 TEU, the EU has the competence to intervene to protect its 'constitutional core', i.e. the values it shares with the Member States.<sup>7</sup> This obligation also extends to matters where Member States act outside the scope of the implementation of EU law.<sup>8</sup> The EU should be able to monitor compliance with EU values in the Member States for it to be able to effectively exercise its competences under Article 7 TEU.<sup>9</sup> In addition, Member States rely on each other's compliance with EU law, rights and values. Therefore, depreciation of EU values in one Member State will have EU-wide effects in many ways, notably undermining the basis for mutual recognition of decisions taken in that Member State in areas such as criminal justice, asylum and EU citizenship. For example, recent CJEU case law has confirmed that judicial cooperation in criminal matters, where individual rights are directly at stake, cannot function when there are serious concerns regarding the independence of judicial authorities.<sup>10</sup> Given the obligation to uphold and promote the values of the Union, as well as the duty of sincere cooperation stemming from the Treaties, each Member State is required to engage actively in the attempts of the Union to restore

adherence to the values in any part of the Union's territory.<sup>11</sup> Furthermore, in accordance with the principle of congruence, the requirements imposed by the EU on candidate countries<sup>12</sup> and third countries must reflect those imposed on its own Member States.

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.<sup>13</sup> One example is the 2016 interinstitutional agreement on better law-making (IIA).<sup>14</sup> The IIA is underpinned by the principle of 'sincere and transparent cooperation', recognising 'joint responsibility in delivering high-quality Union legislation'.<sup>15</sup> These two elements are certainly transposable to upholding EU values. At the same time, the IIA acknowledges the powers of the individual institutions and the procedures laid down in the Treaties.<sup>16</sup> It contains provisions on programming and coordination, including exchanges on best practice and methodologies.<sup>17</sup> These aspects are also transposable to common programming and understanding among the EU institutions on the methodologies used to assess compliance with DRF.

## Subsidiarity and proportionality

The gaps identified in DRF monitoring and enforcement cannot be filled by Member States acting alone. The added value of action at EU level in the shape of an IIA is that responsibility for DRF monitoring and evaluation exercises would be clearly allocated and that coordination between EU institutions could be ensured. In addition, swifter and more effective cooperation among EU institutions and between those institutions and Member States could be achieved in DRF enforcement.<sup>18</sup> The proportionality of EU intervention would be guaranteed through a methodology for the DRF report that should not be unduly burdensome or costly in terms of data collection and reporting requests to Member States. Possibilities to borrow from existing monitoring and evaluation instruments in other international or regional fora should be explored. The process could not, however, be 'contracted out' entirely to third parties, since non-EU actors might fail to take due account of the relevance of these instruments or their links with existing EU law and policies, as well as general principles of EU law. The latter include the principle of mutual recognition of decisions as underlined by the CJEU in its opinion on the draft agreement on EU accession to the European Convention on Human Rights (ECHR).<sup>19</sup>

## Scope, sources and methods

In terms of scope, Parliament calls for the annual report to be prepared with a specific focus on the following aspects covering democracy, the rule of law and fundamental rights:

*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 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.*<sup>20</sup>

In terms of sources and methods, beyond the lack of comprehensive data of sufficient quality, the EAVA pointed out the need to recognise the differences in standards, sources, data-handling methods and interpretation of the various international and EU tools to be covered by the annual DRF report. They are so different in nature and fundamentals that they require a tedious methodological exercise in order to make them comparable, and to allow for meaningful conclusions and findings.<sup>21</sup> The [EU Fundamental Rights Information System](#) (EFRIS) of the

Fundamental Rights Agency, which is based on existing sources of information and evaluations of instruments already in place in this field, could help in conducting this exercise.<sup>22</sup>

## DRF expert panel

The EAVA also highlighted the need for the annual DRF report to be based on a contextual analysis, through a combination of dialogue, monitoring, benchmarking and evaluation exercises with various actors and methods.<sup>23</sup> Here, Parliament calls for the Commission to draw up the annual DRF report including CSRs in consultation with a panel of independent experts (DRF expert panel),<sup>24</sup> inspired by the [EU Network of Independent Experts on Fundamental Rights](#), active between 2002 and 2006.<sup>25</sup> It 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 Parliament based on a list of individuals nominated by relevant international organisations, civil society and professional associations.<sup>26</sup> In this context, the EAVA also discusses an alternative proposal in accordance with which the DRF expert panel would be directly responsible for drafting the annual DRF report.<sup>27</sup>

## Policy cycle

Parliament envisages that 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 CSRs. The inter-parliamentary debate would result in the adoption of a Parliament resolution, whereas the Council debate would result in conclusions.<sup>28</sup> 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 FRA and the Council of Europe.<sup>29</sup> The Council debate, building on its rule of law dialogue, would result in conclusions, inviting national parliaments to provide a response to the DRF European report, proposals or reforms.<sup>30</sup> Based on the annual DRF report, the Commission could decide to launch a 'systemic infringement' action under Article 2 TEU and Article 258 TFEU, which entails bundling several infringement cases together.<sup>31</sup> The Commission could also decide to submit a proposal for an evaluation of the implementation by Member States of Union policies in the area of freedom, security and justice, under Article 70 TFEU.<sup>32</sup>

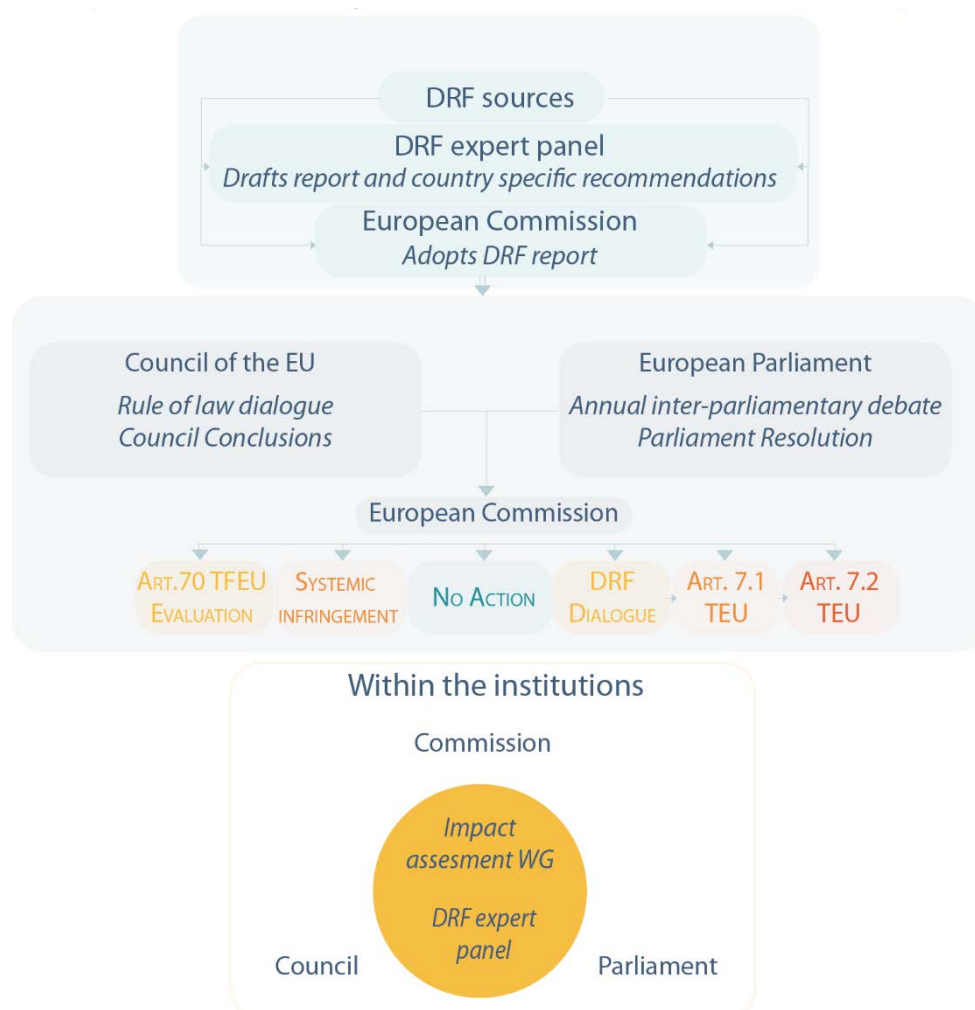
The Parliament resolution envisages four scenarios for action based on the annual DRF report:

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.<sup>33</sup>
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 CSRs.<sup>34</sup>
3. If the CSRs on a Member State include the assessment by the DRF 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.<sup>35</sup>
4. If the CSRs 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), 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.<sup>36</sup>

The EAVA concluded that the pact would further 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.<sup>37</sup> Further benefits will be identified on the basis of ongoing EPRS research into the '[cost of non-Europe](#)' in the area of democracy, the rule of law and fundamental rights.

Figure 1 – EU pact on democracy, the rule of law and fundamental rights (DRF)



Source: W. van Ballegooij and T. Evas, [An EU mechanism on democracy, the rule of law and fundamental rights](#), EPRS, European Parliament, 2016.

## 2. Commission's annual rule of law report

Initially, the European Commission rejected most of Parliament's recommendations, doubting their technical and legal feasibility.<sup>38</sup> However, in 2019 the Commission published a consultation,<sup>39</sup> followed by a 'blueprint for action'<sup>40</sup> announcing a 'rule of law review cycle'<sup>41</sup> culminating in an 'annual rule of law report'<sup>42</sup> covering all Member States. Subsequently, Commission President Ursula von der Leyen has tasked Věra Jourová, Vice-President for Values, 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.<sup>43</sup>

The rule of law report will cover significant developments in Member States, both positive and negative, within four areas.<sup>44</sup>

*Justice systems, and in particular their independence, quality and efficiency*

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 its members), and powers of the body tasked with safeguarding the independence of the judiciary; accountability of judges and prosecutors, including 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); 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).

#### *Certain issues related 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 related 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.

In terms of standards to be applied, the assessment will be based on EU law requirements and well-established European standards, including relevant obligations under EU law and CJEU case law,

European Court of Human Rights case law and Council of Europe standards. A list of relevant standards can also be found in the standards section of the [Venice Commission's Rule of Law Check List](#).<sup>45</sup> The report will provide a qualitative assessment in the light of these standards. The main characteristics of the assessment are that 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, 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. Finally, it will 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.<sup>46</sup>

Beyond sources of information such as [EFRIS](#), during the preparation of its rule of law report the Commission intends to consult international organisations and professional associations.<sup>47</sup> It will furthermore rely on a network of contact points on the rule of law nominated by their Member States for exchange of information and dialogue.<sup>48</sup> The input received from Member States on the state of play in the four focus areas will be published on the Commission's website, where Member States agree. In addition to the input from Member States, the Commission will rely on a [targeted stakeholder consultation](#), which is open for contributions until 4 May. Stakeholders are 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 will also conduct 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. The Commission does not go into extensive detail as regards the exact response Parliament and Council<sup>49</sup> should give to the annual rule of law report. 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.<sup>50</sup>

### 3. Four key differences

The four key differences between the Parliament and Commission approaches relate to the legal instrument chosen, the scope of the monitoring exercise, the actors involved, and follow-up action.

First, there is no IIA underpinning the Commission exercise. This raises issues in terms of the cooperation between Commission, Parliament and Council. This is particularly relevant given a recent situation in which Parliament was not allowed to participate in Council discussions regarding an Article 7(1) TEU procedure it had triggered.<sup>51</sup> Moreover, an interinstitutional agreement would have the benefit of judicial oversight by the CJEU over the provisions of such an agreement. Furthermore, as discussed, within the context of an IIA cooperation could be organised, notably 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 DRF. Finally, 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.<sup>52</sup> At the same time, in the Semester it is the Council that has the final say, whereas it will be the Commission adopting the rule of law report.

Second, Parliament envisaged a broader scope for the monitoring exercise, also taking on board violations of elements of democracy and fundamental rights. In this regard, it should be noted that the Commission also produces an annual report on the application of the Charter of Fundamental Rights.<sup>53</sup> The 2020 work programme also 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.<sup>54</sup> These therefore remain, stand-alone products that only



partially cover the aspects identified by Parliament. The benefit of Parliament's approach is illustrated by two examples concerning the Roma and mass surveillance. What they show is that democracy, the rule of law and fundamental rights are in a triangular relationship,<sup>55</sup> reinforcing each other and together safeguarding the constitutional core of the EU and its Member States.

Third, the Commission remains opposed to the involvement of a panel of independent experts as proposed by the European Parliament, citing concerns relating to 'legitimacy, balance of inputs and the accountability of results'.<sup>56</sup> 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'.<sup>57</sup> 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'.<sup>58</sup>

#### Example 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 'anti-Gypsyism' 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, 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'.

#### Example 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 the 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'.

Fourth, Parliament envisaged the publication of the full report, including CSRs, 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. The Commission's approach, bearing in mind its prerogatives, does not take up those recommendations. It rather encourages interparliamentary debates within Parliament and Council. However, this stance does raise questions as to how the coherence between the various elements of the EU toolbox to monitor and enforce 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 stated how these discussions will influence the drafting of the second annual rule of law report, the launch of specific evaluations, such as that 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](#)) or training tools to strengthen the rule of law in the Member States.

## Policy options

A final assessment of the comparative European added value of the EU mechanism on DRF 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. Under the current circumstances, Parliament could still explore the policy option of launching its own DRF project as announced in a [2018 follow-up resolution](#).<sup>59</sup> It could also conduct a counter-analysis of the Commission's report. Furthermore, it could organise (interparliamentary) debates and continue visiting Member States in which it has

identified particular problems. It could still adopt a resolution recommending that the Commission, Council and Member States take follow-up action, or trigger such follow-up action itself, including under the Article 7(1) TEU procedure, if the conditions to do so are met. Finally, it could continue to insist on an interinstitutional agreement, with working groups on planning and methodology to be established as an intermediate step.

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## ENDNOTES

- <sup>1</sup> These Parliament proposals for a DRF policy cycle within EU institutions are beyond the scope of this briefing, 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.
- <sup>2</sup> See inter alia on this Armin von Bogdandy, 'Founding Principles', in Armin von Bogdandy and Jürgen Bast (eds.), *Principles of European Constitutional Law*, Hart - CH Beck and Nomos, 2010, pp. 20-23.
- <sup>3</sup> For more on this see *inter alia* C. Closa, and D. Kochenov (eds.), *Reinforcing the Rule of Law Oversight in the European Union*, Cambridge University Press, 2016.
- <sup>4</sup> See footnote 1, Annex, article 5.
- <sup>5</sup> See footnote 1, Annex, article 2.
- <sup>6</sup> See footnote 1, Annex, article 2.
- <sup>7</sup> W van Ballegooij and T Evas (2016), Annex II, Section 3.2, footnote 1, Annex, recital D.

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- <sup>8</sup> This is because Articles 2 and 7 TEU do not contain a similar limitation in their scope of application to that found in Article 51 of the EU Charter (OJ C326, 26 October 2012).
- <sup>9</sup> 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, p. 22 (on the Commission's Rule of Law Framework): 'Notwithstanding the soft law nature of the Framework and the lack of any binding acts the Commission may adopt on this basis, the Council Legal Service strongly questioned the legality of the Framework. Both the Council and the Court of Justice have since acknowledged the Framework and in doing so, implicitly rejected the Council Legal Service's analysis.'; Presidency conclusions – Evaluation of the annual rule of law dialogue, [Council doc. 14173/19](#) of 19 November 2019: '10. We agree that this yearly stocktaking could make use of the Commission's annual rule of law reports, which would create synergies between the institutions'.
- <sup>10</sup> CJEU judgment of 25 July 2018 in Case C-216/18 PPU *Minister for Justice and Equality v LM* [ECLI:EU:C:2018:586](#); W. van Ballegooij and I. Kiendl Krišto, European Arrest Warrant, [Framework for analysis and preliminary findings on its implementation](#), EPRS, February 2020, Section 2.2.4.
- <sup>11</sup> W van Ballegooij and T Evas (2016), Annex II, Section 4.2; see C. Hillion, [Overseeing the rule of law in the European Union, legal mandate and means](#), Swedish Institute for European Policy Studies, European Policy Analysis 2016/1.
- <sup>12</sup> See Article 49 TEU.
- <sup>13</sup> See footnote 1, 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'.
- <sup>14</sup> Interinstitutional Agreement between the European Parliament, the Council of the European Union and the European Commission on Better Law-Making, OJ L 123, 12.5.2016, pp. 1–14.
- <sup>15</sup> *Ibidem*, recitals 1 and 2.
- <sup>16</sup> *Ibidem*, paragraphs 1 and 2.
- <sup>17</sup> *Ibidem*, paragraphs 17.
- <sup>18</sup> See footnote 1, recital AA, paragraph 6.
- <sup>19</sup> CJEU, Opinion 2/13 of 18 December 2014, Opinion pursuant to Article 218(11) TFEU – Draft international agreement – Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms – Compatibility of the draft agreement with the EU and FEU Treaties, [ECLI:EU:C:2014:2454](#), paras. 191-194.
- <sup>20</sup> See footnote 1, Annex, article 7.
- <sup>21</sup> W van Ballegooij and T Evas (2016), Annex II, Section 4.4.
- <sup>22</sup> See footnote 1, Annex, article 6.
- <sup>23</sup> W van Ballegooij and T Evas (2016), Annex II, Section 4.
- <sup>24</sup> See footnote 1, Annex, articles 4 and 8.
- <sup>25</sup> 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.
- <sup>26</sup> *Ibidem*, Annex, article 8.1.
- <sup>27</sup> W van Ballegooij and T Evas (2016), Annex II, Section 4.8.
- <sup>28</sup> See footnote 1, Annex, article 10
- <sup>29</sup> *Ibidem*.
- <sup>30</sup> *Ibidem*
- <sup>31</sup> *Ibidem*; K.L. Scheppelle, 'Enforcing the Basic Principles of EU law through Systemic Infringement Actions', in C. Closa and D. Kochenov (eds.), *Reinforcing the Rule of Law Oversight in the European Union*, Cambridge University Press, 2016.
- <sup>32</sup> See footnote 1, Annex, article 10.
- <sup>33</sup> *Ibidem*, Annex, article 10.1.
- <sup>34</sup> *Ibidem*, Annex, Article 10.2
- <sup>35</sup> *Ibidem* Annex, article 10.2.1.
- <sup>36</sup> *Ibidem*, Annex, article 10.3
- <sup>37</sup> W van Ballegooij and T Evas (2016), Chapter 3.
- <sup>38</sup> 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](#).
- <sup>39</sup> 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.

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- <sup>40</sup> Commission communication, Strengthening the rule of law within the Union, A blueprint for action, [COM\(2019\) 343](#), 17 July 2019.
- <sup>41</sup> [COM \(2019\) 343](#), p. 9.
- <sup>42</sup> [COM \(2019\) 343](#), p. 11.
- <sup>43</sup> European Commission, Commission work programme 2020, A Europe that strives for more, [COM \(2020\) 37](#), 29 January 2020.
- <sup>44</sup> European Commission, [Annual Rule of Law Report-Stakeholder consultation](#).
- <sup>45</sup> European Commission, European Rule of Law mechanism: Methodology for the preparation of the Annual Rule of Law Report, Ares(2020)1737645 - 24 March 2020.
- <sup>46</sup> Ibidem.
- <sup>47</sup> [COM\(2019\) 343](#), p. 11.
- <sup>48</sup> Ibidem
- <sup>49</sup> 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'.
- <sup>50</sup> European Commission, European Rule of Law mechanism: Methodology for the preparation of the Annual Rule of Law Report, Ares(2020)1737645 - 24/03/2020
- <sup>51</sup> L. Pech, D. Kochenov, S. Platon, [The European Parliament Sidelined On the Council's distorted reading of Article 7\(1\) TEU](#), Verfassungsblog, 8 December 2019.
- <sup>52</sup> A. Delivorias and C. Scheinert, [Introduction to the European Semester, Coordinating and monitoring economic and fiscal policies in the EU](#), EPRS, European Parliament, December 2019, chapter 3.1.
- <sup>53</sup> European Commission, [Annual Reports on the application of the Charter](#).
- <sup>54</sup> [COM \(2020\) 37](#), p.8.
- <sup>55</sup> 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.
- <sup>56</sup> Footnote 1, Annex, article 7; [COM \(2019\) 343](#), p. 12.
- <sup>57</sup> Article 17(1) TEU; Article 258 TFEU.
- <sup>58</sup> L Pech, D. Kochenov, B. Grabowska-Moroz and J. Grogan, [The Commission's Rule of Law Blueprint for Action: A Missed Opportunity to Fully Confront Legal Hooliganism](#), Reconnect blog, 4 September 2019.
- <sup>59</sup> 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](#), para. 7: 'Considers that, if the Commission and Council continue to reject the establishment of a Pact for DRF, Parliament could take the initiative to launch a pilot DRF report and an interparliamentary debate'.

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