

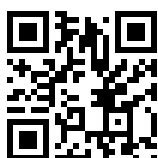
STUDY

Requested by the LIBE and AFCD  
committees



# The Commission's Rule of Law Report and the EU Monitoring and Enforcement of Article 2 TEU Values

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## **Abstract**

This study, commissioned by the European Parliament's Policy Department for Citizens' Rights and Constitutional Affairs at the request of the LIBE and AFCE Committees, offers a comprehensive and critical assessment of the European Commission's Annual Rule of Law Report. It does so in a broad and holistic manner by assessing this new monitoring tool in light of the EU's Article 2 TEU monitoring and enforcement architecture. Multiple recommendations are offered in order to remedy the serious gaps and weaknesses identified in this study.

This document was requested by the European Parliament's Committee on Civil Liberties, Justice and Home Affairs and the Committee on Constitutional Affairs.

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## LIST OF ABBREVIATIONS

<b>ALDE</b>	Alliance of Liberals and Democrats for Europe
<b>ALLEA</b>	European Federation of Academies of Sciences and Humanities
<b>ARoLR</b>	Annual Rule of Law Report
<b>BTI</b>	Bertelsmann Stiftung's Transformation Index
<b>CCBE</b>	Council of Bars and Law Societies of Europe
<b>CCJE</b>	Consultative Council of Judges
<b>CCPE</b>	Consultative Council of European Prosecutors
<b>CEPEJ</b>	European Commission for the Efficiency of Justice
<b>CJUE</b>	European Court of Justice
<b>CoE</b>	Council of Europe
<b>CSO</b>	Civil society organization
<b>CSR</b>	Country specific recommendation
<b>CVM</b>	Cooperation and Verification Mechanism
<b>DG BUDG</b>	Directorate-General for Budget
<b>DG NEAR</b>	Directorate-General for Neighbourhood and Enlargement Negotiations
<b>DG JUST</b>	Directorate-General for Justice and Consumers
<b>DRF</b>	Democracy, the rule of law and fundamental rights
<b>EAW</b>	European Arrest Warrant
<b>ECHR</b>	European Convention on Human Rights or Convention for the Protection of Human Rights and Fundamental Freedoms
<b>ECtHR</b>	European Court of Human Rights
<b>EFRIS</b>	EU Fundamental Rights Information System
<b>ENNHRI</b>	European Network of National Human Rights Institutions



<b>EPP</b>	European People's Party
<b>EPPO</b>	European Public Prosecutor's Office
<b>EPRS</b>	European Parliamentary Research Service
<b>EU</b>	European Union
<b>FRA</b>	European Union Agency for Fundamental Rights
<b>GRECO</b>	Group of States against Corruption
<b>Greens/EFA</b>	Greens–European Free Alliance
<b>GUE/NGL</b>	European United Left - Nordic Green Left
<b>LIBE</b>	European Parliament's Committee on Civil Liberties, Justice and Home Affairs
<b>MEP</b>	Member of the European Parliament
<b>MONEYVAL</b>	Committee of Experts on the Evaluation of Anti-Money Laundering Measures and the Financing of Terrorism
<b>MS</b>	Member State
<b>NGO</b>	Non-governmental organization
<b>OECD</b>	Organisation for Economic Co-operation and Development
<b>OLAF</b>	European Anti-Fraud Office
<b>OSCE</b>	Organization for Security and Co-operation in Europe
<b>S&amp;D</b>	Group of the Progressive Alliance of Socialists and Democrats in the European Parliament
<b>TEU</b>	Treaty on the European Union
<b>TFEU</b>	Treaty on the Functioning of the European Union
<b>UN</b>	United Nations
<b>EU</b>	European Union
<b>FRA</b>	European Union Agency for Fundamental Rights

<b>GRECO</b>	Group of States against Corruption
<b>Greens/EFA</b>	Greens–European Free Alliance
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<b>TFEU</b>	Treaty on the Functioning of the European Union
<b>UN</b>	United Nations

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## EXECUTIVE SUMMARY

### Background

**Rule of law backsliding represents a major, existential challenge for the EU** as it structurally endangers the foundations of the EU as a Union based on the rule of law and fundamentally threatens the functioning of the EU's interconnected legal order. To address the EU's worsening rule of law crisis and more broadly, the unprecedented and spreading attempts by some national authorities to organise the systemic undermining of EU's shared foundational values, **the European Parliament proposed a new EU mechanism in 2016** to better monitor and enforce the values of democracy, the rule of law and fundamental rights (DRF mechanism).

Instead of embracing the European Parliament's proposal, the **Commission** designed its own new annual **European Rule of Law Mechanism**. The European Rule of Law Mechanism provides an annual process for dialogue on the back of an **Annual Rule of Law Report (ARoLR)** which the Commission has presented as a new preventive tool. Launched for the first time in 2020, the ARoLR takes the form of twenty-seven country chapters and an umbrella report presenting an overview of the situation of the rule of law situation across the EU. To date, the ARoLR has focused on **four "pillars": (i) national justice systems; (ii) national anti-corruption frameworks; (iii) media pluralism; and (iv) other institutional checks and balances**.

The Commission's ARoLR differs in many respects from the European Parliament's DRF proposal. Most importantly, the ARoLR foresees **lesser involvement for other EU institutions** and does not provide for any formal involvement of **external experts**. It is also narrower in the sense that its scope is more limited as it **does not directly cover democracy and fundamental rights**; does not (yet) include country specific **recommendations** and does not automatically lead to the adoption of specific Council conclusions and a Parliament resolution.

This study offers a **critical assessment** of the Commission's ARoLR within the broader context of the EU's DRF architecture, and formulates **recommendations** in order to address the ARoLR's negative features identified by the present authors: the creation of false expectations; the use of euphemistic language; the lack of context and connected failure to see the wood for the trees; the denial of (autocratic) reality and resulting category errors; the emphasis on "dialogue no matter what"; and finally, the opportunity costs and possible displacement effect the ARoLR has had on enforcement. This is not to say that a number of positive features cannot be identified. The ARoLR can indeed be commended for offering a compelling definition of the rule of law; a clear outline of why the rule of law matters; a broadly suitable selection of relevant "pillars" and main sources of information; and increasing the political saliency of the rule of law.

### Recommendations

This study's main recommendations summarised below aim to remedy the ARoLR's identified gaps and shortcomings in the short to medium term. On the long term, it is recommended that renewed consideration is given to (i) the extension of the ARoLR's **scope** so that **all Article 2 TEU values** are subject to annual monitoring given that these values must be viewed as interconnected, interdependent and mutually reinforcing; (ii) the extensive involvement of an **expert panel** and (iii) the adoption of automatic **legal and/or financial actions** when country specific recommendations (which the third edition of the ARoLR is expected to contain for the first time) are not fully and promptly

addressed. Considering the Commission's continuing opposition to the adoption of a mechanism akin to the Parliament's proposed DRF mechanism, this study has prioritised the elaboration of recommendations which can be actioned in the **short to medium term** with the view of improving the effectiveness of the ARoLR without fundamentally changing its current scope and structure.

#### Recommendations on methodology:

- A **better preparation and publication cycle** should be organised and in particular, the same time window should be used each year so that planning can be done ahead of the timeline's official publication in respect of the next edition of the ARoLR;
- The Commission should promptly **publish the input documents they receive from national governments** so as to enable experts and civil society groups to fact check them as soon as possible;
- The Commission should be **mindful of deliberate attempts to deceive** it by those engaged in the systemic dismantlement of checks and balances and their proxies, such as government-organised non-governmental organisations (GONGOs). In this respect, it is recommended that the Commission provides **clearer details** than currently regarding country visits and interviews; selection of stakeholders, information selection, as well as greater protection for government critiques, especially those based in countries subject to an ongoing Article 7 procedure;
- The Commission should **elaborate on the indicators** taken into account for assessing the rule of law situation in each of the Member States and should aim to undertake a comprehensive assessment of the same elements based on the **same indicators** in all country chapters;
- The Commission should seek to **take better account** of the data and findings from **relevant indices** such as the Worldwide Governance Indicators (WGI) project, the World Justice Project Rule of Law Index, or the Varieties of Democracy (V-DEM) project;
- The involvement of an **expert panel/network of external experts and/or the EU Fundamental Rights Agency** should be considered if only at first to merely provide feedback to the Commission and help inter alia with methodological issues.

#### Recommendations on scope and structure:

- As long as the ARoLR is not extended to cover other foundational values enshrined in Article 2 TEU, the Commission should at a minimum **better link the ARoLR with the values of democracy and fundamental rights and connected EU action plans and other strategies**, considering the interconnected and mutual reinforcing nature of Article 2 TEU values. Scrutiny over **judicial independence** for example could extend to the evaluation of fair trial rights, access to justice, equality before the law in national case law;
- **New civic space pillar:** As long as the ARoLR does not fully encompass all the Article 2 TEU values, the Commission should also consider adopting a **fifth pillar** dedicated to monitoring national developments relating to civic space considering the crucial importance of civil society when it comes to maintaining and protecting a democratic and pluralist society as well as a proper functioning of public life;
- **New Article 7 section:** The insertion of a new Article 7 TEU state of play section **in the umbrella report** is recommended so as to better highlight in a transversal way the evolution of the

situation in the countries which have already been identified as being on an **autocratisation** pattern following the activation of one of the procedures laid down in Article 7 TEU;

- **New EU chapter:** In addition to the country chapters, the publication of a new EU chapter is recommended with the drafting of this report to be done either by the EU Fundamental Rights Agency and/or a new panel or network of academic experts.

#### **Recommendations regarding effectiveness and follow up:**

- The ARoLR should better outline countries' rule of law adherence over a **sufficient long period of time and highlight cross-cutting trends at EU level**. This could be done inter alia by taking into account and summarise key data and findings from relevant indices such as the Worldwide Governance Indicators (WGI) project, the World Justice Project Rule of Law Index, or the Varieties of Democracy (V-DEM) project;
- In order to better identify threats and violations of the rule of law and make non-compliance with court judgments a recurrent, more salient and costly issue for relevant national authorities, in addition to the forthcoming new country specific recommendations, the ARoLR ought to include data and information regarding **non-compliance** (or bad faith implementation) with **CJEU** orders and judgments but also national and **ECtHR** orders and rulings which concern any issue relating to any of the ARoLR's pillars;
- To guarantee better follow up, the ARoLR (including the country-specific recommendations) should be **more directly aligned with other rule of law tools and procedures**, such as **infringement procedures and the Rule of Law Conditionality Regulation 2020/2092**, so that remedial action could be more swiftly, consistently and effectively organised in situations where national authorities ignore or violate relevant recommendations;
- The adoption of **urgent reports** ought to be considered so as to allow for a prompt and formalised answer from the Commission in a situation where national rule of law related developments are indicative of a serious danger; if state action results in the violation of individual rights on a mass scale or if state action amounts to irreversible or systemic threat to or violation of the rule of law;

In addition to or alternatively to the suggested adoption of urgent reports, the Parliament should consider requesting the **Commission to present a mid-year assessment** of the state of compliance (or non-compliance) with the ARoLR's **country-specific recommendations**, with the Commission to be also requested to specify how non-compliance will be dealt with.



“Our objective is to find a solution that protects the rule of law, with cooperation and mutual support, but without ruling out an effective, proportionate and dissuasive response as a last resort.”

Commission President Ursula von der Leyen, 16 July 2019<sup>1</sup>

“I believe it is no exaggeration to say that its foundations as a Union based on the rule of law are under threat and that the very survival of the European project in its current form is at stake.”

CJEU President Koen Lenaerts, 4 November 2021<sup>2</sup>

## 1. INTRODUCTION

One of the most pressing issues currently faced by the EU is what has been labelled “**rule of law backsliding**”, which can be defined as “the process through which elected public authorities deliberately implement governmental blueprints which aim to systematically weaken, annihilate or capture internal checks on power with the view of dismantling the liberal democratic state and entrenching the long-term rule of the dominant party”.<sup>3</sup> One of the key features “of this process of weakening checks and balances is that it reflects a deliberate strategy of a ruling party, the (unadvertised) goal being to establish **electoral autocracies** (with elections possibly “free” but no longer “fair”) and the progressive solidification of de facto **one-party states**”.<sup>4</sup>

As of today, and following years of deliberate and sustained top-down undermining of the national system of checks and balances by national authorities, the EU includes the world’s top two autocratising countries: **Poland and Hungary**, with the latter no longer recognised as a democracy but rather an electoral autocracy.<sup>5</sup> Less severe but nonetheless worrying backsliding patterns can also be identified in an additional number of EU countries with **Lithuania** and **Slovakia** having lost their status as liberal democracy to become electoral democracies.<sup>6</sup> In **Romania** and **Bulgaria**, whose rule of law deficiencies led the EU to condition their EU accession to the unprecedented adoption of a new specific rule of law monitoring mechanism known as the Cooperation and Verification Mechanism, the

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<sup>1</sup> Political guidelines for the next Commission (2019-2024), pp. 14-15: [https://ec.europa.eu/info/files/political-guidelines-new-commission\\_en](https://ec.europa.eu/info/files/political-guidelines-new-commission_en)

<sup>2</sup> ‘Constitutional relationships between legal orders and courts within the European Union’, FIDE 2021, XXIX FIDE Congress, 4 November 2021: [https://fide2020.eu/wp-content/uploads/2021/11/FIDE-Opening-Ceremony\\_-4-November-2021\\_Koen-Lenaerts.pdf](https://fide2020.eu/wp-content/uploads/2021/11/FIDE-Opening-Ceremony_-4-November-2021_Koen-Lenaerts.pdf)

<sup>3</sup> Pech, L., Scheppele, K.L., ‘Illiberalism Within: Rule of Law Backsliding in the EU’ (2017) 19 *Cambridge Yearbook of European Legal Studies* 3, p. 10. To put it more bluntly, “[i]n order to undermine a democracy, you no longer need tanks on the streets or colonels bursting into the presidential palace. You can create your one-party state very slowly, over many years, just by massaging the rules, shifting money around, putting pressure on courts and prosecutors, eliminating unpleasant media, and above all by creating the oligarchs who will fund your projects, block your enemies, enable you to use state money to enrich your party or your family. This method is much more lucrative, and much less stressful than the old-fashioned coup d’état, and it’s coming to a democracy near you”, Applebaum, A., ‘The Disturbing New Hybrid of Democracy and Autocracy’, *The Atlantic*, 9 June 2021.

<sup>4</sup> Scheppele, K.L., Pech, L., ‘What is Rule of Law Backsliding?’, *VerfBlog*, 2 March 2018: <https://verfassungsblog.de/what-is-rule-of-law-backsliding/>

<sup>5</sup> V-Dem Institute, *Autocratization Turns Viral*, op. cit., p. 38

<sup>6</sup> V-Dem Institute, *Varieties of Democracy, Democracy of All? Annual Democracy Report 2018*, May 2018, p. 20.

situation has not improved in any meaningful way since 2007.<sup>7</sup> Indeed, just to briefly mention the example of Romania, it experienced an episode of severe rule of law backsliding in 2017-2019.<sup>8</sup> Most recently, Romania's Constitutional Court furthermore engaged in a process of systemic disregard of the EU's rule of law requirements following the Court of Justice's first judgment regarding Romania's judicial "reforms" adopted during this 2017-2019 backsliding episode.<sup>9</sup>

Rule of law backsliding represents a critical challenge for the EU because it represents an **existential threat** to the EU: it structurally undermines the fundamental premise on which the EU's interconnected legal order is based.<sup>10</sup> In light of the continuing deterioration of the situation on this front – which was entirely predictable and was indeed anticipated by the European Parliament in 2015 in light of the Commission and Council's mix of denials and lack of meaningful actions<sup>11</sup> – the President of the European Court of Justice was recently forced to publicly warn about the "extremely serious situation" the EU finds itself in which "leaves the Union at a constitutional crossroads" with the EU's "foundations as a Union based on the rule of law" now "under threat".<sup>12</sup> A few months prior to this speech, in a case concerning Polish rules relating to the secondment of judges, EU Advocate General Bobek warned about the potential emergence of legal black holes within the EU itself:

In a system such as that of the European Union, where the law is the main vehicle for achieving integration, the existence of an independent judicial system (both centrally and nationally), capable of ensuring the correct application of that law, is of paramount importance. Quite simply, without an independent judiciary, there would no longer be a genuine legal system. If there is no 'law', there can hardly be more integration. The aspiration of creating 'an ever closer union among the peoples of Europe' is destined to collapse if legal black holes begin to appear on the judicial map of Europe.<sup>13</sup>

<sup>7</sup> See Vassileva, R., 'Threats to the Rule of Law; The Pitfalls of the Cooperation and Verification Mechanism' (2020) 26(3) *European Public Law* 741. See also the democracy score history of both countries in Freedom House *Nations in Transit* 2021, p. 27.

<sup>8</sup> International IDEA, *The Global State of Democracy* 2019, p. 35 and p. 216.

<sup>9</sup> See the Court's judgment of 18 May 2021 in Joined Cases C-83/19, C-127/19 and C-195/19, Cases C-291/19, C-355/19 and C-397/19, *Asociația 'Forumul Judecătorilor din România' et al.*, EU:C:2021:393. In his opinion of 20 January 2022 with respect of pending Case C-430/21 *RS (effect of the decisions of a constitutional court)*, EU:C:2022:44, AG Collins opined that the Romanian Constitutional Court's Decision No 390/2021 is such as to raise serious doubts about that court's adherence to the essential principles of EU law and has furthermore unlawfully arrogated competence to itself in breach of the second subparagraph of Article 19(1) TEU, the principle of primacy of EU law and the fundamental requirement of an independent judiciary). The Grand Chamber judgment of the Court of Justice is expected to be delivered on 22 February 2022, an unusually rapid turnaround time justified on account of "the fact that the questions on the primacy of EU law raised by the present reference for a preliminary ruling were of fundamental importance for Romania and for the constitutional order of the Union", AG Opinion, op. cit., para 33.

<sup>10</sup> See most recently, Case C-156/21, *Hungary v European Parliament and Council*, EU:C:2022:97, para. 125: "once a candidate country becomes a Member State, it joins a legal structure that is based on the fundamental premiss that each Member State shares with all the other Member States, and recognises that they share with it, the common values contained in Article 2 TEU, on which the European Union is founded. That premiss is based on the specific and essential characteristics of EU law ... That premiss 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".

<sup>11</sup> See European Parliament resolution of 16 December 2015 on the situation in Hungary (2015/2935(RSP)), para 5: "Believes that Hungary is a test for the EU to prove its capacity and political willingness to react to threats and breaches of its own founding values by a Member State; deplores the existence of similar developments in some other Member States and considers that the inaction of the EU may have contributed to such developments, which show worrying signs, similar to those in Hungary, of the rule of law being undermined".

<sup>12</sup> Constitutional relationships between legal orders and courts within the European Union', FIDE 2021, XXIX FIDE Congress, 4 November 2021: [https://fide2020.eu/wp-content/uploads/2021/11/FIDE-Opening-Ceremony\\_-4-November-2021\\_Koen-Lenaerts.pdf](https://fide2020.eu/wp-content/uploads/2021/11/FIDE-Opening-Ceremony_-4-November-2021_Koen-Lenaerts.pdf)

<sup>13</sup> Opinion of AG Bobek delivered on 20 May 2021 in Joined Cases C-748/19 to C-754/19, *Prokuratura Rejonowa w Mińsku Mazowieckim et al.*, EU:C:2021:403, para. 138.

And prior to these stark, unprecedented warnings issued by the Court of Justice, in 2019, the president of three major European judicial networks offered the following diagnosis without however much acknowledgement of the gravity and urgent nature of the threat faced from either the European Commission or the Council of the EU/European Council (emphasis added by present authors):

Our common legal order is at risk, considering that several Member States are *systematically undermining* the core values on which the Union is based. In particular, the independence of the judiciary is being *severely threatened* and the separation of powers between the executive branch and the judicial branch is *being dismantled*. These Member States are seeking to use the judiciary in their countries primarily as an instrument for government policy.<sup>14</sup>

After more than a decade of rule of law backsliding, and the year Hungary ceased to be considered a fully-fledged democracy by V-DEM experts,<sup>15</sup> the Commission published its first **Annual Rule of Law Report** (hereinafter: ARoLR) in September 2020. Taking the form a transversal “umbrella” report accompanied by 27 country chapters,<sup>16</sup> the first and second editions of this latest addition to the EU’s growing rule of law toolbox focused on four themes which the Commission has presented as the four pillars of the ARoLR: (i) national justice systems; (ii) national anti-corruption frameworks; (iii) media pluralism; and (iv) other institutional checks and balances.

In face of the seriously deteriorating situation in Europe as regards compliance with the EU’s shared values laid down in Article 2 TEU<sup>17</sup> in some EU countries – values which the Court of Justice recently characterised as defining “the very identity” of the EU “as a common legal order”<sup>18</sup> – the **European Parliament** has been repeatedly calling for an inter-institutional agreement providing for stronger protection of these foundational and shared values by way of a new EU mechanism on democracy, the rule of law and fundamental rights.

As this study will outline, the Commission’s ARoLR **differs** in many respects than the European Parliament’s proposal for a new EU mechanism on democracy, the rule of law and fundamental rights. Usually referred to informally as the DRF pact, the Parliament’s proposed mechanism would primarily consist of an annual policy cycle (DRF policy cycle) based on annual reports (DRF Reports) drafted by an expert panel and the Commission, with these reports due to include general assessments and country-specific recommendations and be followed by a parliamentary debate and accompanied by arrangements to address risks or breaches. By contrast, the ARoLR organises a lesser involvement for other EU institutions and does not provide for any formal involvement from external experts. The ARoLR is also narrower in the sense that its scope is more limited as it does not directly cover democracy and fundamental rights, does not (yet) include country specific recommendations and does not automatically lead to the adoption of specific Council conclusions and a Parliament resolution.

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<sup>14</sup> Letter to the President-Elect of the European Commission from the president of the Network of Presidents of the Supreme Courts of the EU; the president of the European Association of Judges; and the president of the European Network of Councils for the Judiciary, Brussels, 20 September 2019: <https://www.encj.eu/node/535>

<sup>15</sup> V-Dem Institute, *Autocratization Turns Viral. Democracy Report 2021*, March 2021, p. 38

<sup>16</sup> The Commission’s 2020 annual rule of law “umbrella” report and the 27 country chapters presenting the Commission’s member state-specific assessments are available online: [https://ec.europa.eu/info/publications/2020-rule-law-report-communication-and-country-chapters\\_en](https://ec.europa.eu/info/publications/2020-rule-law-report-communication-and-country-chapters_en).

<sup>17</sup> Article 2 provides that the EU ‘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. Those 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’. For a genesis of Article 2 TEU focusing on the rule of law, see Pech, L., ‘Rule of Law’, in Craig, P., Búrca, de G., (eds), *The Evolution of EU Law*, Oxford University Press, 2021, 307-338.

<sup>18</sup> Case C-156/21, *Hungary v European Parliament and Council*, EU:C:2022:97, para. 127.

Following the adoption of the Ruiz Devesa report<sup>19</sup> and on the occasion of the publication of the second edition of the ARoLR by the Commission in July 2021,<sup>20</sup> the Committee on Civil Liberties, Justice and Home Affairs joined a previous and similar request by the Committee on Constitutional Affairs asking the Policy Department for Citizens' Rights and Constitutional Affairs to conduct a study on **"The Commission 2021 Rule of Law report"** and commissioned the present study to support inter alia the work of the European Parliament and in particular, the ongoing work undertaken by the LIBE rapporteur Terry Reintke in respect of the Commission's 2021 Rule of Law Report.<sup>21</sup>

In line with the aims and scope of the research outlined in the terms of reference, this study will offer a **critical analysis of the Commission's ARoLR within the broader context of the EU DRF architecture and its development.**

The study does so by first outlining the genesis of the Commission's ARoLR and how it fits within the broader EU Rule of Law Toolbox (Section 2) before offering a critical assessment of the ARoLR's key features in light of its first two editions (Section 3). The recommendations made to date by the European Parliament and other stakeholders to remedy the Commission's ARoLR's shortcomings, and the Commission's responses to these recommendations, follow (Section 4). Building on these recommendations, this study provides a detailed overview of how the ARoLR 3.0 should look like so as to avoid amounting to another rule of law tool which fails to address rule of law backsliding at Member State level (Section 5).

To avoid such a fate, this study offers **multiple recommendations** regarding the ARoLR's methodology, scope, structure, and follow-up. These recommendations take into account current political realities, especially the Commission's persistent reluctance to implement more overarching changes. They were also devised with the view of being actionable in the short- to mid-term. Some brief reflections are nonetheless offered as regards the long-term evolution of the ARoLR. In line with the European Parliament's position as regards the need for a joint EU mechanism on democracy, the rule of law and fundamental rights, it is recommended to **expand the scope of the ARoLR to all Article 2 TEU values**; to establish an **expert panel or network**, possibly under the auspices of the Parliament at first; and organise the automatic launch of **legal and/or financial remedial actions** in a situation where the ARoLR's recommendations are not implemented by the relevant deadline. The study concludes by recalling the **critical importance of a prompt and forceful enforcement of Article 2 TEU values for the European project** in a situation where these values are deliberately, persistently and systematically violated, and summarises the potential role of a reformed ARoLR in this context.

<sup>19</sup> See European Parliament resolution of 24 June 2021 on the Commission's 2020 Rule of Law Report, COM(2020) 580 (2021/2025(INI)), Rapporteur: MEP Domènec Ruiz Devesa.

<sup>20</sup> For the 2021 Rule of Law Report, see [https://ec.europa.eu/info/policies/justice-and-fundamental-rights/upholding-rule-law/rule-law/rule-law-mechanism/2021-rule-law-report\\_en](https://ec.europa.eu/info/policies/justice-and-fundamental-rights/upholding-rule-law/rule-law/rule-law-mechanism/2021-rule-law-report_en)

<sup>21</sup> See most recently, draft report on the Commission's 2021 Rule of Law Report (2021/2180(INI), LIBE Committee, Rapporteur: Terry Reintke, 21 January 2022.

## 2. THE COMMISSION'S RULE OF LAW REPORT WITHIN THE BROADER EU'S RULE OF LAW TOOLBOX

### 2.1. Genesis of the European Commission's Rule of Law

In a Resolution adopted on 8 September 2015 regarding the situation of fundamental rights in the EU,<sup>22</sup> the European Parliament invited the European Commission to draft an internal **strategy on the rule of law**. The Parliament furthermore recommended the concomitant adoption of a "**new mechanism**, soundly based on international and European law and embracing all the values protected by Article 2 TEU, in order to ensure coherence with the Strategic Framework on Human Rights and Democracy already applied in EU external relations and render the European institutions and Member States accountable for their actions and omissions with regard to fundamental rights."<sup>23</sup>

A number of concrete suggestions were then also made by the European Parliament, including:

- the establishment of a scoreboard on the basis of common and objective indicators by which democracy, the rule of law and fundamental rights will be measured;
- the broadening of the scope of the EU Justice Scoreboard (first launched in 2013);
- the monitoring of all Member States based on the scoreboard and a system of annual country assessment;
- the granting of wider powers to the EU Fundamental Rights Agency (established in 2007) so that it can monitor compliance with the rule of law and respect for fundamental rights on an annual basis;
- the issuance of formal warnings by the Commission in a situation where relevant indicators show that a Member State is violating the rule of law or fundamental rights;
- the systematic launch of an institutionalised dialogue in such a situation which would involve, in addition to the Commission and the Member state concerned, the Council, the European Parliament and the parliament of the Member State concerned.<sup>24</sup>

Having regard in particular to the resolution of 2015 outlined above, the European Parliament adopted a new resolution on 25 October 2016, which recommended the establishment, "until a possible Treaty change", of a **new mechanism** in the form of an interinstitutional agreement to more effectively monitor EU countries' adherence to the values laid down in Article 2 TEU.<sup>25</sup> This mechanism would permit ongoing assessment of all Member States' compliance with the rule of law so as to be able to spot deviating states early.

The proposed new mechanism's new features can be summarised as follows:<sup>26</sup>

- (i) Instead of the current 'crisis-driven' approach where EU institutions react to threats to or breaches of Article 2 values in specific countries, the new mechanism would be a permanent one all EU Member States would be subject to;
- (ii) Called the **DRF pact** (DRF stands for Democracy, the Rule of Law and Fundamental Rights), the new mechanism would also aim to guarantee compliance with EU values through preventive as well as corrective and sanctioning measures. Potential breaches at national level would be identified via new

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<sup>22</sup> European Parliament resolution of 8 September 2015 on the situation of fundamental rights in the European Union (2013-2014) (2014/2254(INI)).

<sup>23</sup> *Ibid.*, para. 10.

<sup>24</sup> *Ibid.*

<sup>25</sup> 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)), para. 1.

<sup>26</sup> This summary is based on the one offered in Pech, L., Scheppele, K.L., 'Illiberalism Within: Rule of Law Backsliding in the EU' (2017) 19 *Cambridge Yearbook of European Legal Studies* 3, pp. 35-37.



**annual reports** (DRF Report) that would include a general part and country-specific **recommendations**. This would be accompanied by a new **monitoring cycle** (DRF policy cycle) involving the main EU institutions, national parliaments as well as civil society, the EU Fundamental Rights Agency and the Council of Europe. The Commission would take the administrative lead when it comes to assessing compliance with Article 2 TEU on the basis of these new reports;

- (iii) To avoid political partisan considerations and possible interferences when it comes to assessing a country's adherence to Article 2, a new **expert panel** (DRF Expert Panel<sup>27</sup>) was to be set up and be made responsible for drafting the DRF report;
- (iv) To avoid confusion and duplication, the DRF report is supposed to incorporate into a **single instrument** existing instruments such as the Commission's Rule of Law Framework and the Council's Rule of Law Dialogue (both established in 2014) as well as the Commission's Justice Scoreboard (launched in 2013) and peer evaluation procedures based on Article 70 TFEU, which provides for the establishment of Member State monitoring mechanisms. The DRF pact would also replace the existing Cooperation and Verification Mechanism for Bulgaria and Romania;
- (v) In situations where evidence supports the conclusion that there are breaches of core elements of Article 2 values, the Commission would be expected to start a **dialogue** with that Member State without discretion or delay;
- (vi) In situation where the DRF expert panel is of the view that there is a clear risk of a serious breach of Article 2 values and that there are sufficient grounds for invoking Article 7(1) TEU, the European Parliament, the Council and the Commission would be under an obligation to promptly discuss the matter and adopt a **reasoned decision**;
- (vii) In situations where the DRF expert panel is of the view that there is a serious and persistent breach of Article 2 and that there are sufficient grounds for invoking Article 7(2), the European Parliament, the Council and the Commission would be under a similar obligation.

The above mechanism, which built on the proposal first made by Dutch MEP Sophie in 't Veld in her parliamentary report on the matter,<sup>28</sup> offered a comprehensive and potentially more effective, transparent and constraining framework than the one existing at the time. It also reflected most of the recommendations made in two studies<sup>29</sup> commissioned by the European Parliamentary Research Service.<sup>30</sup> In particular, the proposed DRF pact creatively linked the suggested DRF report with the possible launch of **systemic infringement actions**, which would bundle several infringements together to make the case that systemic violation is at issue,<sup>31</sup> and called for "the setting up of an

<sup>27</sup> The proposal to involve a new expert body is not without recalling the proposal to set up a "Systemic Deficiency Committee" made by Bogdandy, A. von, et al., 'Protecting EU values' in Jakab, A., Kochenov, D., (eds), *The Enforcement of EU Law and Values*, Oxford University Press, 2017, p. 228 et seq. In this instance, it was proposed that the DRF Expert Panel should be composed of one qualified constitutional court or supreme court judge not currently in active service designated by the national parliament of each Member State and ten further experts appointed by the European Parliament chosen from a list of experts nominated by: (i) the federation of All European Academies (ALLEA); (ii) the European Network of National Human Rights Institutions (ENNHRI); (iii) the Council of Europe, including the Venice Commission, GRECO and the Council of Europe Human Rights Commissioner; (iv) the CEPEJ and the Council of Bars and Law Societies of Europe (CCBE); (v) the UN, the OSCE and the OECD.

<sup>28</sup> Report with recommendations to the Commission on the establishment of an EU mechanism on democracy, the rule of law and fundamental rights (2015/2254(INL)), LIBE Committee, Rapporteur: Sophie in 't Veld, A8-0283/2016, 10 October 2016.

<sup>29</sup> See European Parliament (EPRS), *An EU mechanism on democracy, the rule of law and fundamental rights – Annex I An EU mechanism on democracy, the rule of law and fundamental rights* (study written by Pech, L., et al.), PE 579.328, April 2016; Annex II Assessing the need and possibilities for the establishment of an EU Scoreboard on democracy, the rule of law and fundamental rights (study written by Bárd, P. et al.), PE 579.328, April 2016.

<sup>30</sup> According to the European Parliamentary Research Service (EPRS) itself, the root causes of the gap between the proclamation of Article 2 TEU values and actual compliance by EU institutions and Member States are to be found in certain weaknesses in the existing EU legal and policy framework: See European Parliament (EPRS), *ibid*.

<sup>31</sup> European Parliament resolution of 25 October 2016, *op. cit.*, para. 10. The launch of systemic infringement action was first suggested by Scheppele, K.L., 'Enforcing the Basic Principles of EU Law through Systemic Infringement Actions' in Closa, C., Kochenov, D., (eds), *Reinforcing Rule of Law Oversight in the European Union*, Cambridge University Press, 2016, p. 105.

endowment for democracy grant-giving organisation that supports local actors promoting<sup>32</sup> Article 2 TEU values *within* the EU.

The **Commission's follow-up** to the 2016 Resolution, however, was **unambiguously negative**<sup>33</sup> with the Commission rejecting the core aspects of the DRF mechanism proposed by the Parliament:

At this stage the Commission has serious doubts about the need and the feasibility of an annual Report and a policy cycle on democracy, the rule of law and fundamental rights prepared by a committee of "experts" and about the need for, feasibility and added value of an inter-institutional agreement on this matter. Some elements of the proposed approach, for instance, the central role attributed to an independent expert panel in the proposed pact, also raise serious questions of legality, institutional legitimacy and accountability. Moreover, there are also practical and political concerns which may render it difficult to find common ground on this between all the institutions concerned. The Commission considers that, first, the best possible use should be made of existing instruments, while avoiding duplication. A range of existing tools and actors already provide a set of complementary and effective means to promote and uphold common values. The Commission will continue to value and build upon these means.<sup>34</sup>

Soon after the Commission essentially rejected the Parliament's DRF proposal, the continuing deterioration of the situation both in Poland and Hungary resulted in the Commission activating, for the very first time, **Article 7(1) TEU in respect of Poland** in December 2017 with the European Parliament, also for the very first time, following suit **in respect of Hungary** in September 2018.<sup>35</sup> In this worsening environment of unprecedented backsliding within the EU itself, respect for the rule of law increasingly became a salient issue both at EU and EU Member State levels, with multiple actors and political parties discussing possible adjustments to the EU's rule of law toolbox, in particular in the context of the European parliamentary elections of May 2019.<sup>36</sup>

Mindful of the rapid evolution of the situation and debate since it had rejected the Parliament's DRF proposal in February 2017, the Commission adopted two communications in April and July 2019

<sup>32</sup> European Parliament resolution of 25 October 2016, op. cit., para 17.

<sup>33</sup> Bárd, P., Carrera, S. 'The Commission's Decision on 'Less EU' in Safeguarding the Rule of Law: A play in four acts' *CEPS Policy Insights* 2017/08.

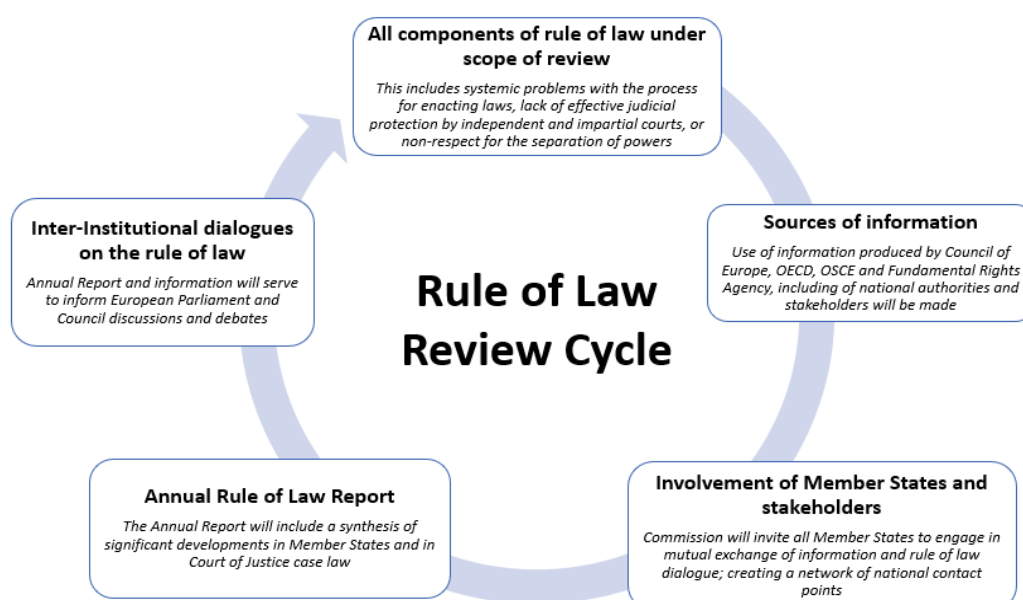
<sup>34</sup> European Commission, Follow up to the European Parliament resolution on with recommendations to the Commission on the establishment of an EU mechanism on democracy, the rule of law and fundamental rights, SP(2017)16, 17 February 2017.

<sup>35</sup> 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)); European Commission (2017) Reasoned Proposal in Accordance with Article 7(1) of the Treaty on European Union Regarding the Rule of Law in Poland – Proposal for a Council Decision on the Determination of a Clear Risk of a Serious Breach by the Republic of Poland of the Rule of Law COM(2017)835 final.

<sup>36</sup> See e.g. ALDE Party's European Election Manifesto adopted on 10 November 2018, *Freedom, opportunity, prosperity: the Liberal vision for the future of Europe*: <https://www.aldeparty.eu/manifestos> ("We shall establish a new effective mechanism outside the framework of Article 7 of the TEU to monitor violations of fundamental rights, civil liberties and the rule of law in the member states of the European Union on a regular basis. We call on the European Commission, as the guardian of the EU Treaties and on the basis of objective criteria, to enforce sanctions in cases of violations and create stronger conditionality between the rule of law and receipt of European funding"); European Greens, *Priorities for 2019: What European Greens Fight For*: <https://europeangreens.eu/priorities-2019-what-european-greens-fight> ("The EU needs a binding and comprehensive mechanism to regularly monitor the state of democracy, the right of opposition forces to be heard, the rule of law, free press and fundamental rights in all EU Member States. It also needs a system of political dialogue and swift intervention and support measures to independent media, civil society and, if necessary, adequate sanctions"); M. Weber (then the EPP's Spitzenkandidat) and U. di Fabio (former judge of the German Federal Constitutional Court), 'My plan for defending rule of law in EU', *EU Observer*, 18 March 2019, <https://euobserver.com/opinion/144429> (main aspect of this plan was the call for a new independent expert council of up to nine former ECJ or national judges with its own investigative resources).

respectively.<sup>37</sup> In this last communication the **Commission revised its previous position and announced the launch of a new “Rule of Law Review Cycle”** which would have the following characteristics: (i) a **broad scope** (all Member States and all different components of the rule of law to be covered, as well as issues relating to corruption, media pluralism, elections, and the capacity of all actors playing a role in the enforcement of EU law); (ii) use all existing **sources** of information, including non-EU sources; (iii) **involve** all Member States but also all stakeholders and non-EU bodies such as relevant bodies of the Council of Europe; and (iv) result in the publication of a new **Annual Rule of Law Report** which would then be regularly discussed within the framework of inter-institutional dialogues and dedicated follow-up debates and meetings.<sup>38</sup>

Table 1: New Rule of Law Review Cycle announced by the Commission in 2019



Source: Pech, L., Kochenov, D., Grabowska-Moroz, B., Grogan, J., 'The Commission's Rule of Law Blueprint for Action: A missed opportunity to fully confront legal hooliganism', RECONNECT blog, 4 September 2019: <https://reconnect-europe.eu/blog/commission-rule-of-law-blueprint/>

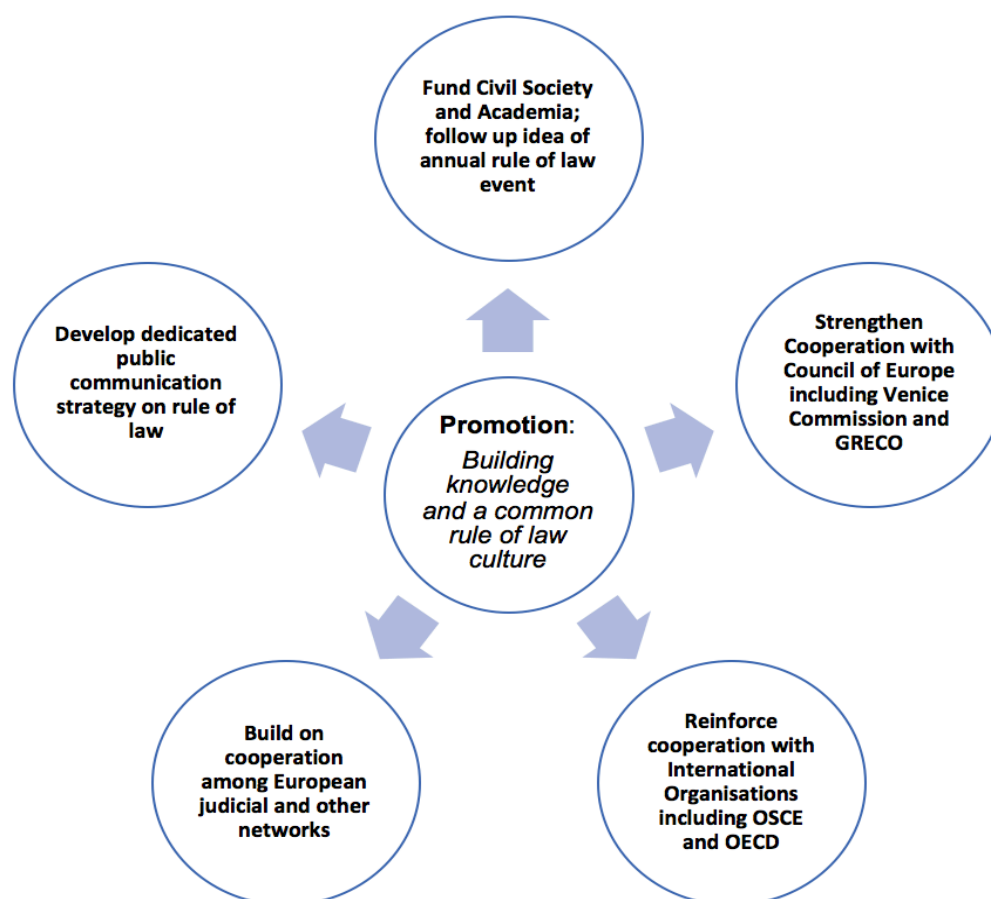
When it comes to building **knowledge and a common rule of law culture** – an uncontroversial objective – the Commission proposed to better promote a rule of law culture in Europe both at a professional and general public levels via different commitments:

<sup>37</sup> Commission Communication, *Further strengthening the Rule of Law within the Union. State of play and possible next steps*, COM(2019) 163 final, 3 April 2019; Commission Communication, *Strengthening the rule of law within the Union. A blueprint for action*, COM(2019) 343 final, 17 July 2019. For a critique, see e.g. Kochenov, D., 'Elephants in the Room: The European Commission's 2019 Communication on the Rule of Law' (2019) 11 *Hague Journal on the Rule of Law* 423.

<sup>38</sup> *Strengthening the rule of law within the Union*, *ibid.*, pp. 9-12.



Table 2: Actions to better promote the rule of law announced by the Commission in 2019



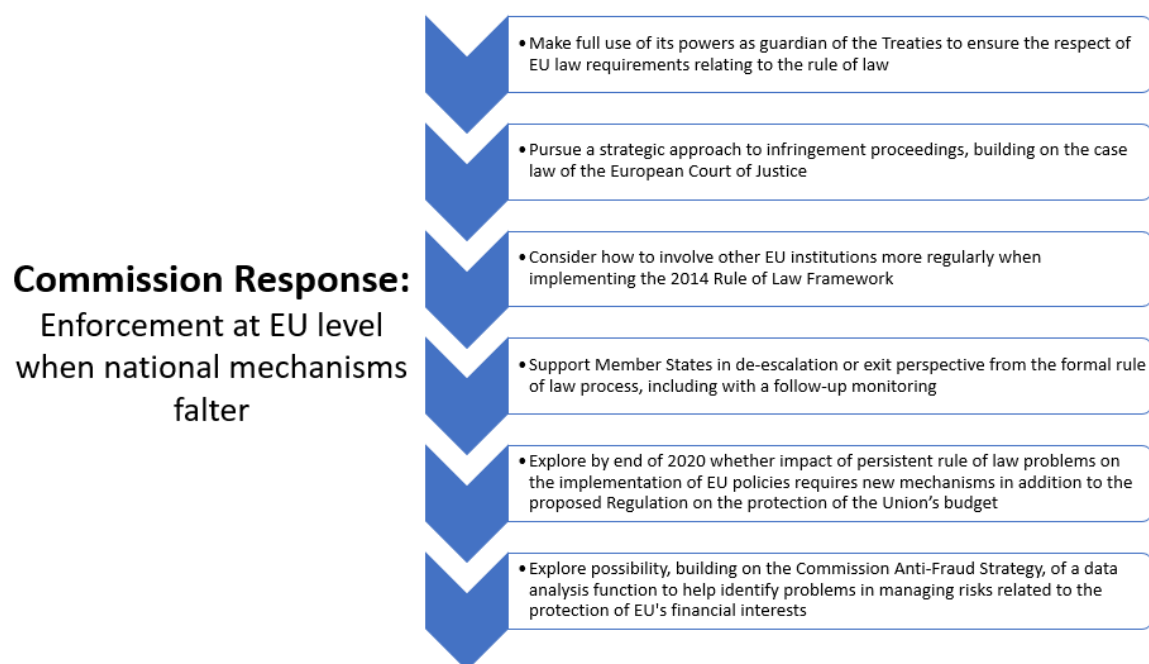
Source: Pech, L., Kochenov, D., Grabowska-Moroz, B., Grogan, J., 'The Commission's Rule of Law Blueprint for Action: A missed opportunity to fully confront legal hooliganism', RECONNECT blog, 4 September 2019: <https://reconnect-europe.eu/blog/commission-rule-of-law-blueprint/>

When it comes to **enforcement**, the European Commission reiterated *inter alia* its determination “to bring to the Court of Justice rule of law problems affecting the application of EU law, when these problems could not be solved through the national checks and balances” and to “pursue a strategic approach to infringement proceedings related to the rule of law, requesting expedited proceedings and interim measures whenever necessary”.<sup>39</sup> At the same time, the Commission stressed that it would not seek “to impose a sanction” as the objective must rather be “to find a solution that protects the rule of law, with cooperation and mutual support at the core – without ruling out an effective, proportionate and dissuasive response as a last resort”.<sup>40</sup> In addition, the Commission called on the European Parliament and the Council to adopt what subsequently became Regulation 2020/2092 on a general regime of conditionality for the protection of the Union budget and better work together when it comes to Article 7 TEU procedures.

<sup>39</sup> *Ibid.*, pp. 13-14.

<sup>40</sup> *Ibid.*, p. 5.

Table 3: Actions to better enforce the rule of law announced by the Commission in 2019



Source: Pech, L., Kochenov, D., Grabowska-Moroz, B., Grogan, J., 'The Commission's Rule of Law Blueprint for Action: A missed opportunity to fully confront legal hooliganism', RECONNECT blog, 4 September 2019: <https://reconnect-europe.eu/blog/commission-rule-of-law-blueprint/>

The day prior to the publication of the Commission's rule of law "blueprint for action" on 17 July 2019, **Ursula von der Leyen**, then Candidate for President of the European Commission, publicly confirmed her support for a new EU-wide rule of law mechanism in her opening statement in the European Parliament:

The Rule of Law is our best tool to defend these freedoms and to protect the most vulnerable in our Union. **This is why there can be no compromise when it comes to respecting the Rule of Law.** There never will be. I will ensure that we use our full and comprehensive toolbox at European level. In addition, I fully support an **EU-wide Rule of Law Mechanism**. To be clear: the new instrument is not an alternative to the existing instruments, but an additional one. The Commission will always be an independent guardian of the Treaties. Lady Justice is blind – she will defend the Rule of Law wherever it is attacked.<sup>41</sup>

<sup>41</sup> Opening statement in the European Parliament Plenary Session by Ursula von der Leyen, Candidate for President of the European Commission, Speech/19/4230, 16 July 2019. See also Ursula von der Leyen's Political guidelines for the next Commission (2019-2024) published on the same day at pp. 14-15 (bold in the original): "I will ensure that we use our full toolbox at European level. And I support an **additional comprehensive European Rule of Law Mechanism**, with an EU-wide scope and objective annual reporting by the European Commission. The monitoring approach will be the same in every Member State. [...] I will also ensure a greater role for the European Parliament in this rule-of-law mechanism. The new way forward brings transparency, allows early detection and offers targeted support to resolve any issues at an early stage. Our objective is to find a solution that protects the rule of law, with cooperation and mutual support, but without ruling out an effective, proportionate and dissuasive response as a last resort. I intend to focus on tighter enforcement, using recent judgements of the Court of Justice showing the impact of rule-of-law breaches on EU law as a basis. I stand by the proposal to **make the rule of law an integral part of the next Multiannual Financial Framework.**"

In September 2020, in her first State of the Union address, Commission President von der Leyen announced the then imminent publication of the **first edition of the Commission's Annual Rule of Law Report** (hereinafter: ARoLR) and presented its main features as follows:

Before the end of the month, the Commission will adopt the first annual rule of law report covering all Member States.

It is a preventive tool for early detection of challenges and for finding solutions.

I want this to be a starting point for Commission, Parliament and Member States to ensure there is no backsliding.

The Commission attaches the highest importance to the rule of law. This is why we will ensure that money from our budget and NextGenerationEU is protected against any kind of fraud, corruption and conflict of interest. This is non-negotiable.

But the last months have also reminded us how fragile it can be. We have a duty to always be vigilant to care and nurture for the rule of law.

Breaches of the rule of law cannot be tolerated. I will continue to defend it and the integrity of our European institutions. Be it about the primacy of European law, the freedom of the press, the independence of the judiciary or the sale of golden passports. European values are not for sale.<sup>42</sup>

The **first edition of the Commission's ARoLR** was published on 30 September 2020,<sup>43</sup> with the second edition published on 20 July 2021,<sup>44</sup> and the third edition due to be published in July 2022.<sup>45</sup> In practice, the ARoLR consists of a starting "umbrella" report covering the rule of law situation in the whole EU and twenty-seven country chapters (one chapter per member state). As regards the scope of the ARoLR, there has been no change with respect to the initial "four pillars" selected in 2020 by the Commission: (i) justice systems; (ii) the anti-corruption framework; (iii) media pluralism; (iv) other institutional checks and balances. By comparison to what was announced by the Commission in July 2019, one may note the **absence of election-related issues** as a specific pillar but this seems to be connected to the Commission's subsequent decision to address these issues as part of its European Democracy Action Plan.<sup>46</sup>

Building on the helpful preliminary assessment made by Wouter van Ballegooij of the European Parliamentary Research Service, the Commission's ARoLR can be said to differ in at least four key respects from the Parliament's DRF proposal: (i) the ARoLR is not based on an **inter-institutional agreement**; (ii) its scope is more limited as it does not directly cover **democracy and fundamental rights**; (iii) it does not provide any formal role to external **experts**; and (iv) it does not to date include country specific **recommendations** and does not automatically lead to the adoption of specific Council conclusions and a Parliament resolution.<sup>47</sup>

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<sup>42</sup> State of the Union Address by President von der Leyen at the European Parliament Plenary, Speech/20/1655, 16 September 2020.

<sup>43</sup> Commission Communication, *2020 Rule of Law Report, The rule of law situation in the European Union*, COM(2020) 580 final. For the individual country chapters, see [https://ec.europa.eu/info/publications/2020-rule-law-report-communication-and-country-chapters\\_en](https://ec.europa.eu/info/publications/2020-rule-law-report-communication-and-country-chapters_en).

<sup>44</sup> Commission Communication, *2021 Rule of Law Report The rule of law situation in the European Union*, COM(2021) 700 final. For the individual country chapters, see [https://ec.europa.eu/info/policies/justice-and-fundamental-rights/upholding-rule-law/rule-law/rule-law-mechanism/2021-rule-law-report/2021-rule-law-report-communication-and-country-chapters\\_en](https://ec.europa.eu/info/policies/justice-and-fundamental-rights/upholding-rule-law/rule-law/rule-law-mechanism/2021-rule-law-report/2021-rule-law-report-communication-and-country-chapters_en).

<sup>45</sup> Commission, 2022 Rule of Law report, Timeline: [https://ec.europa.eu/info/policies/justice-and-fundamental-rights/upholding-rule-law/rule-law/rule-law-mechanism/2022-rule-law-report\\_en](https://ec.europa.eu/info/policies/justice-and-fundamental-rights/upholding-rule-law/rule-law/rule-law-mechanism/2022-rule-law-report_en)

<sup>46</sup> See Commission Communication, *On the European democracy action plan*, COM(2020) 790 final, 3 December 2020 (action plan sets out a reinforced EU policy framework and specific measures to inter alia promote free and fair elections).

<sup>47</sup> Ballegooij, W. van (EPRS), *European added value of an EU mechanism on democracy, the rule of law and fundamental rights. Preliminary assessment*, Briefing paper, PE 642.831, April 2020: [https://www.europarl.europa.eu/RegData/etudes/BRIE/2020/642831/EPRS\\_BRI\(2020\)642831\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/BRIE/2020/642831/EPRS_BRI(2020)642831_EN.pdf)

Table 4: Main differences between the European Parliament's DRF proposal and the European Commission's ARoLR

	European Parliament's DRF proposal	European Commission's ARoLR
Legal basis	Article 295 TFEU (Inter-institutional agreement)	General monitoring competence derived from Articles 2, 3(1), 7 and 17 TEU
Scope	All values enshrined in Article 2 TEU	Rule of Law (four pillars: justice systems; anti-corruption framework; media pluralism; other institutional checks and balances)
Lead Actor	New expert Panel working with new permanent interinstitutional working group	Commission
Follow up	New annual Policy Cycle, including country-specific recommendations, formal positions adopted by Parliament and Council post publication of report	No formal cycle with Commission participating to debates and discussions organised by the Parliament and the Council (e.g. rule of law dialogues in the GAC); visiting national Parliaments and organising bilateral meetings to gather information on the state of play

Source: Authors, based on Ballegooij, W. van (EPRS), 'European added value of an EU mechanism on democracy, the rule of law and fundamental rights. Preliminary assessment', Briefing paper, PE 642.831, April 2020: [https://www.europarl.europa.eu/RegData/etudes/BRIE/2020/642831/EPRS\\_BRI\(2020\)642831\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/BRIE/2020/642831/EPRS_BRI(2020)642831_EN.pdf)

In response to the latest two resolutions from the European Parliament of 7 October 2020 and 24 June 2021 reiterating *inter alia* the Parliament's preference for a permanent and comprehensive mechanism based on its 2016 DRF proposal and highlighting the Commission's ARoLR's shortcomings and potential improvements,<sup>48</sup> the Commission announced on 25 October 2021 its readiness to improve the "consultation process to ensure the broadest involvement of stakeholders possible" and contribute to a new "inter-parliamentary dialogue between the European Parliament and national parliaments".<sup>49</sup> However, the Commission is yet to embrace the idea of new institutional arrangements akin to the Parliament's DRF proposal albeit it did not close the door to a new interinstitutional agreement. But in the Commission's view, this is to be "assessed at a later stage, on the basis of the experience gained

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Ballegooij, W. van (EPRS), *Addressing violations of democracy, the rule of law and fundamental rights*, EPRS Ideas Paper, September 2020, PE 652.070:

[https://www.europarl.europa.eu/RegData/etudes/BRIE/2020/652070/EPRS\\_BRI\(2020\)652070\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/BRIE/2020/652070/EPRS_BRI(2020)652070_EN.pdf)

<sup>48</sup> European Parliament resolution of 7 October 2020 on the establishment of an EU Mechanism on Democracy, the Rule of Law and Fundamental Rights (2020/2072(INI)), Rapporteur: MEP Michal Šimečka; European Parliament resolution of 24 June 2021 on the Commission's 2020 Rule of Law Report, *op. cit.*

<sup>49</sup> European Commission, Follow up to the European Parliament non-legislative resolution on the Commission's 2020 Rule of Law Report, SP(2021)557, 25 October 2021, section 6.

through the continued application of the European Rule of Law Mechanism”.<sup>50</sup> Lastly, while not clearly mentioned as such in its formal reply to Parliament’s resolution of 24 June 2021 in which the Parliament recommended country-specific recommendations and deadlines to be included in each country report, the President of the Commission confirmed in her State of the Union Address of 15 September 2021 that this **change** will be reflected in the 3<sup>rd</sup> edition of the Rule of Law Report (bold in the original):

Our values are guaranteed by our legal order and safeguarded by the judgments of the **European Court of Justice**. These judgments are binding. We make sure that they are respected. And we do so in every Member State of our Union. [...]

Our **Rule of Law reports** are part of this process, with for example justice reforms in Malta or corruption inquiries in Slovakia.

**And from 2022, our Rule of Law reports will come with specific recommendations to Member States.**<sup>51</sup>

The Parliament’s critical assessment of the Commission’s ARoLR and proposed recommendations to improve it will be more comprehensively examined in Sections II and III of this study respectively. Before doing so, the general evolution of the EU’s Rule of Law toolbox will be outlined so as to better understand how the Commission’s ARoLR fits into it.

## 2.2. The Commission’s ARoLR position within the broader EU’s Rule of Law Toolbox

The **Commission’s ARoLR** represents the core and most concrete element of the “European Rule of Law Mechanism” which the Commission, as previously outlined, first announced in July 2019 before launching it in September 2020.<sup>52</sup> According to the Commission itself, the two primary aims of the Rule of Law Mechanism, including the Rule of Law Report, are to (i) “**prevent** rule of law problems from emerging or deepening” and (ii) contribute “to **promoting** a robust political and legal rule of law culture throughout the EU” through the establishment of annual cycle of reporting and dialogue.<sup>53</sup>

The European Rule of Law Mechanism itself is just one of the core elements of the EU’s **Rule of Law toolbox**, which includes different instruments and procedures to respond to a variety of situations.

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<sup>50</sup> *Ibid.*

<sup>51</sup> 2021 State of the Union Address by President von der Leyen, Speech/21/4701, 15 September 2021.

<sup>52</sup> For a recent and concise overview, see EPRS, *The European Commission’s annual rule of law reports. A new monitoring tool*, European Parliament, PE 698.891, January 2022.

<sup>53</sup> European Commission, 2021 Rule of Law Report – Questions and Answers, 20 July 2021, QANDA/21/3762.

## Box 1: Where does the European Rule of Law Mechanism fit into the EU's existing Rule of Law toolbox?

The European Rule of Law Mechanism reinforces and complements other EU instruments that encourage Member States to implement structural reforms in the areas covered by its scope, including the EU Justice Scoreboard and the European Semester. The rule of law is also prominent in the **implementation of the Recovery and Resilience Facility**. The Member States' Recovery and Resilience Plans include important reform priorities such as improving the business environment through effective public administration and justice systems.

The European Rule of Law Mechanism is separate from the other response instruments in the EU's rule of law toolbox such as infringement procedures, [the Rule of Law Framework](#) and the procedure according to [Article 7 TEU](#). While the European Rule of Law Mechanism is meant as a preventive tool, these procedures will continue to provide an effective and proportionate response to challenges to the rule of law where necessary.

Source: European Commission, 2021 Rule of Law Report – Questions and Answers, 20 July 2021, QANDA/21/3762.

The evolution of the EU's Rule of Law toolbox, as well as the nature, scope and key features of the EU's main rule of law instruments and how these instruments relate to one another will be outlined below.<sup>54</sup> Before doing so, the key diagnosis underlying the development of the EU's rule of law toolbox will be briefly presented.

### 2.2.1. Commission's first acknowledgement of the emergence of a new type of threats (2012)

The emergence of a new type of **threats to the rule of law** in the past decade, sometimes diplomatically referred to as 'challenges to the rule of law in some Member States',<sup>55</sup> has been progressively acknowledged by key EU actors and institutions as a most pressing issue to address. Increasing awareness of the dangers created by growing and spreading rule of law **backsliding**, has resulted in the rapid evolution of the EU's rule of law toolbox since 2012,<sup>56</sup> which is when this

<sup>54</sup> The developments below build on Pech, L., 'Rule of Law', in Craig, P., Búrca, de G., (eds), *The Evolution of EU Law*, Oxford University Press, 2021, 307-338.

<sup>55</sup> *Strengthening the rule of law within the Union. A blueprint for action*, op. cit., p. 1.

<sup>56</sup> While actual rule of law backsliding did not arguably materialise or at the very least, no rule of law crisis was identified as such by the European Commission until the early 2010s, potential systemic backsliding post EU accession was first seriously considered in the 1980s with the European Parliament's draft Treaty establishing the European Union (so-called "Spinelli draft" of 1984) including for instance a provision providing that "in the event of serious and persistent violation of democratic principles or fundamental rights by a Member State, penalties may be imposed" (Article 4(4) of the draft Treaty which one may note, in passing, does not mention the rule of law as such). This led to the subsequent insertion of what is now Article 7 TEU in anticipation of the forthcoming accession of numerous countries to the EU. As explained by D. Kochenov, K. Scheppele and one of the present authors, "the Treaty of Amsterdam included the first version of Article 7 which only provided then for possible sanctions in a situation of 'serious and persistent breach'. With the Nice Treaty, Article 7 TEU was revised to further enable the EU to adopt preventive sanctions in the situation where there is 'a clear risk of a serious breach' of the EU values by a Member State. This change was made to enable the EU to step in in a situation similar to the one in Austria following the formation of a governmental coalition involving Jörg Haider's far-right Freedom party. Before the Nice amendment, EU's involvement with Austria took the form of a series of illegal *ad hoc* 'bilateral sanctions' imposed on Austria by 14 other Member States acting, strictly speaking, outside of the framework of EU law. These diplomatic sanctions were ended when the report issued by a "wise men" committee, which was set up to investigate the political and human rights situation in Austria, concluded that Austria's record and commitment to common European values, including the rights of minorities, refugees and immigrants, was at the time of the report satisfactory". See Kochenov, D., Pech, L., Scheppele, K.L., 'The European Commission's Activation of Article 7: Better Late than Never', *VerfBlog*, 23 December 2017: <https://verfassungsblog.de/the-european-commissions-activation-of-article-7-better-late-than-never/> and for a more comprehensive account, see Sadurski, W., 'Adding bite to a bark: The story of Article 7, EU enlargement, and Jörg Haider' (2010) 16 *Colum. J. Eur. L.* 385.



phenomenon was publicly acknowledged and identified as a new major challenge by **José Manuel Barroso, then President of the European Commission**:

A political union also means that we must strengthen the foundations on which our Union is built: the respect for our fundamental values, for the rule of law and democracy. In recent months we have seen **threats to the legal and democratic fabric** in some of our European states. The European Parliament and the Commission were the first to raise the alarm.<sup>57</sup>

In September 2020, the **current President of the European Commission** announced the forthcoming adoption of the first annual rule of law report covering all Member States:

Before the end of the month, the Commission will adopt the first annual rule of law report covering all Member States. It is a preventive tool for early detection of challenges and for finding solutions. I want this to be a starting point for Commission, Parliament and Member States to ensure there is no **backsliding**. The Commission attaches the highest importance to the rule of law. [...] But the last months have also reminded us how fragile it can be. We have a duty to always be vigilant to care and nurture for the rule of law.<sup>58</sup>

Prior to the adoption of the ARoLR, the period between 2012 and 2020 saw multiple **new instruments** being adopted: The Commission launched a new Justice Scoreboard in 2013 and adopted a new Rule of Law Framework in 2014. In 2014 as well, the Council decided to launch its own new Annual Rule of Law dialogue. Due to the continuing deterioration of the situation,<sup>59</sup> and as previously noted, the Commission launched a new Rule of Law Mechanism, including the new ARoLR, in September 2020.

In December 2020, following a proposal first made by the Commission in 2018 on the protection of the EU budget in case of generalised deficiencies as regards the rule of law in the Member States, the Parliament and Council adopted **Regulation 2020/2092** which is informally known as the EU's **Rule of Law Conditionality Regulation**. While yet to be activated at the time of writing, Regulation 2020/2092 enables inter alia the suspension of EU funding in a situation where it is established that breaches of the principles of the rule of law in a Member State affect or seriously risk affecting the sound management of the EU budget or the protection of the EU financial interests "in a sufficiently direct way".<sup>60</sup> Following the Court's twin landmark rulings issued on 16 February 2022, which entirely dismissed the annulment actions brought by Hungary and Poland against this Regulation, one may

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<sup>57</sup> State of the Union 2012 Address, Speech/12/596, 12 September 2012.

<sup>58</sup> State of the Union 2020 Address, Speech/20/1655, 16 September 2020.

<sup>59</sup> "While, in principle, all Member States are considered to respect the rule of law at all times, recent challenges to the rule of law in some Member States have shown that this cannot be taken for granted [...] Many recent cases with resonance at EU level have centred on the independence of the judicial process. Other examples have concerned weakened constitutional courts, an increasing use of executive ordinances, or repeated attacks from one branch of the state on another. More widely, high-level corruption and abuse of office are linked with situations where political power is seeking to override the rule of law, while attempts to diminish pluralism and weaken essential watchdogs such as civil society and independent media are warning signs for threats to the rule of law [...] principles such as the separation of powers, loyal cooperation amongst institutions, and respect for the opposition or judicial independence seem to have been undermined – sometimes as the result of *deliberate* [our emphasis] policy choices", *ibid*, pp. 1-2 and p. 5.

<sup>60</sup> Article 4 of Regulation 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a general regime of conditionality for the protection of the Union budget.

expect to see this new rule of law conditionality mechanism being at last activated by the Commission<sup>61</sup> as the Commission President Ursula von der Leyen has publicly promised to “act with determination”.<sup>62</sup>

In February 2021, an additional Regulation established a new **Recovery and Resilience Facility**,<sup>63</sup> which is itself the main financial vehicle of the **EU Recovery Instrument**, adopted under Regulation 2020/2094 of 14 December 2020 in order to supplement the MFF and help tackle the economic consequences of COVID-19.<sup>64</sup> The EU Recovery Instrument offers an additional avenue to give rule of law considerations a central place and indeed, **due to rule of law concerns, the Commission refused to sign off both Hungary's and Poland's national recovery and resilience plans** in 2021.<sup>65</sup>

In addition to the new instruments outlined above, mechanisms and procedures designed in the pre-rule of law backsliding era have been used for the first time (Article 7(1) TEU) or reinvented (for example, the European Semester), with the **Court of Justice** also playing a crucial role in particular by holding that a provision introduced by the Lisbon Treaty according to which ‘Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law’ (Article 19(1) TEU) imposes a **justiciable obligation on Member States to respect and maintain their courts' independence**.<sup>66</sup>

Each of these developments will be briefly outlined below before a transversal overview is given so as to understand how these instruments relate to one another.

## 2.2.2. New Rule of Law related Instruments adopted post 2012

To better appreciate the evolution of the EU's rule of law toolbox since 2012, a chronological structure will be followed, although one could also distinguish between (soft law) data/dialogue/reporting instruments and (hard law) enforcement instruments, including a new conditionality mechanism which aims to sanction breaches of the rule of law.

<sup>61</sup> See Case C-156/21, *Hungary v European Parliament and Council*, EU:C:2022:97 and Case C-157/21, *Poland v European Parliament and Council*, EU:C:2022:98 (the Court held inter alia that the new mechanism was adopted on an appropriate legal basis and is compatible with Article 7 TEU and the principle of legal certainty). For further analysis, see Pech, L., ‘No More Excuses: The Court of Justice greenlights the rule of law conditionality mechanism’, *VerfBlog*, 16 February 2022: <https://verfassungsblog.de/no-more-excuses/>.

<sup>62</sup> Statement by European Commission President Ursula von der Leyen on the judgments of the European Court of Justice on the General Conditionality Regulation, Statement/22/1106, 16 February 2022.

<sup>63</sup> Regulation 2021/241 of the European Parliament and of the Council of 12 February 2021 establishing the Recovery and Resilience Facility.

<sup>64</sup> Regulation 2020/2094 of the European Parliament and of the Council of 14 December 2020 establishing a European Union Recovery Instrument to support the recovery in the aftermath of the COVID-19 crisis.

<sup>65</sup> Alemanno, A., Morijn, J., Pech, L., Sarmiento, D., (on behalf of The Good Lobby Profs), *6 reasons why the EU should use the approval of National Recovery and Resilience Plans to enforce the rule of law in Hungary and Poland*, The Good Lobby, 30 August 2021, <https://www.thegoodlobby.eu/2021/08/30/6-reasons-why-eu-should-use-the-approval-of-national-recovery-and-resilience-plans-to-enforce-the-rule-of-law-in-hungary-and-poland/>.

<sup>66</sup> Pech, L., Kochenov, D., *Respect for the Rule of Law in the Case Law of the European Court of Justice. A Casebook Overview of Key Judgments since the Portuguese Judges Case*, SIEPS 2021:3.



Table 5: Specific soft and hard EU rule of law instruments adopted since 2012

Data/dialogue/monitoring instruments	Enforcement mechanism
<ul style="list-style-type: none"> <li>➤ Commission's Justice Scoreboard (2013-present): Annual data gathering exercise</li> <li>➤ Commission's Rule of Law Framework (2014): Structured dialogue procedure to be activated by the Commission on a case by case basis to prevent emergence of systemic threat to the rule of law in a Member State when national rule of law mechanisms cease to operate effectively</li> <li>➤ Council's Rule of Law Dialogue (2014-present): Annual dialogue within the Council, with two parallel transversal and country specific dialogues since 2020</li> <li>➤ Commission's Rule of Law Mechanism (2020-present): Annual monitoring exercise resulting inter alia in the annual publication of an umbrella and country specific reports</li> </ul>	<ul style="list-style-type: none"> <li>➤ Regulation 2020/2092 on a general regime of conditionality for the protection of the EU budget (2020): Suspension/reduction of EU funding possible in a situation where breaches of the principles of the rule of law in a Member State affect or seriously risk affecting the sound financial management of the Union budget or the protection of the financial interests of the EU in a sufficiently direct way. To be decided by the Commission on a case by case basis, with the Council to agree by a qualified majority</li> </ul>

Source: Authors

#### a. New data-gathering instrument of a permanent nature and general scope: The Commission's EU Justice Scoreboard (2013)

The Commission published its **first annual Justice Scoreboard in 2013** and connected this new instrument to the '**European Semester**', the EU process of economic policy coordination it introduced in 2010, with the Justice Scoreboard primarily justified on business/economic grounds.<sup>67</sup> And indeed, the first edition of the EU Justice Scoreboard was primarily concerned with 'efficiency indicators' and the provision of data relating to length of proceedings, clearance rate and number of pending cases with respect to 'non-criminal cases'.

Fast-forwarding to the 9<sup>th</sup> and latest edition to date of the EU Justice Scoreboard, it is remarkable to see how this tool has **evolved**, not only from the point of view of its length (from 26 pages in 2013 to 64 pages in 2021), but also its substance if one looks at the inclusion of indicators starting in 2019 on elements such as the appointment and dismissal of national prosecutors and the authorities involved in disciplinary proceedings regarding judges. In 2021, for the first time, **new indicators** on the independence of national Supreme Court judges, the autonomy of prosecution services and the independence of lawyers and bars were also included.<sup>68</sup>

<sup>67</sup> *The EU Justice Scoreboard. A tool to promote effective justice and growth*, COM(2013) 160 final, 1.

<sup>68</sup> In addition to offering data on perceived judicial independence and main reasons for the perceived lack of independence among the general public and among companies, the 2021 European Justice Scoreboard offers an overview of the situation in the EU based on existing data regarding the appointment of Supreme Court judges; the safeguards relating to the functioning of national prosecution services in the EU and the independence of Bars and lawyers in the EU.

From an initial and primary focus on efficiency, the Justice Scoreboard has therefore gradually focused more and more on **judicial independence**. One must however keep in mind that the EU Justice Scoreboard, as it currently stands, does not provide an assessment or present quantitative data on the effectiveness of the national safeguards regarding judicial independence. As such, it is not yet able to help one detect systemic threats to the rule of law at Member State, in other words, "whether a Member State actually does not want to guarantee an independent rule of law."<sup>69</sup>

The 2021 edition of the Justice Scoreboard also explains as follows how it relates to the Commission's Rule of Law Mechanism/Report and has been adjusted accordingly:

The 2020 Rule of Law Report was published on 30 September 2020 and was based on a variety of sources, including the EU Justice Scoreboard. The 2021 EU Justice Scoreboard has been further developed also to reflect the needs for additional comparative information as observed during the preparation of the 2020 Rule of Law Report and with a view to **supporting further the annual Rule of Law reports**.<sup>70</sup>

To evidence the importance of the EU Justice Scoreboard as a source of information, one may mention that **the 2021 Rule of Law Report makes 273 references to the EU Justice Scoreboard**.

Due to its growing use and increasing focus on judicial independence issues, it was also not surprising to see the EU Justice Scoreboard cited for the first time in an opinion of an EU advocate general in 2019 in a case concerned with the lack of independence of the "disciplinary chamber" of Poland's Supreme Court to emphasise the outlier nature of Poland's new National Council of the Judiciary.<sup>71</sup> Two opinions respectively issued in 2020 and 2021 also referred to the EU Justice Scoreboard in relation to the issue of whether Bulgarian prosecutors can be said to act independently in an EAW context<sup>72</sup> and the claim made by the Hungarian government that Regulation 2020/2092 "seeks to add another procedure to those already in place to protect the rule of law, with no legal basis for it in primary law".<sup>73</sup> In the latter case, the Hungarian government referred to the EU Justice Scoreboard but also the European Rule of Law Mechanism, the EU's infringement procedure and the Article 7 TEU procedure.<sup>74</sup>

<sup>69</sup> Jakab, A., Kirchmair, L., 'How to Develop the EU Justice Scoreboard into a Rule of Law Index: Using an Existing Tool in the EU Rule of Law Crisis in a More Efficient Way' (2021) 22 *German Law Journal* 936, p. 950.

<sup>70</sup> *The 2021 EU Justice Scoreboard*, COM(2021) 389, p. 1.

<sup>71</sup> Opinion of Advocate General Tanchev in Cases C-585/18, C-624/18 and C-625/18 A. K., EU:C:2019:551, fn. 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."

<sup>72</sup> Opinion of Advocate General de la Tour in Case C-414/20 PPU, *Criminal proceedings against MM*, EU:C:2020:1009, para. 60: "Furthermore, on the basis of all the information contained in the order for reference and the 2020 EU Justice Scorecard, the European Commission concludes that Bulgarian public prosecutors participate in the administration of criminal justice in Bulgaria and act independently in the execution of those of their responsibilities which are inherent in the issuing of a European arrest warrant".

<sup>73</sup> Opinion of Advocate General Campos Sánchez-Bordona delivered on 2 December 2021 in Case C-156/21, *Hungary v European Parliament and Council*, EU:C:2021:974, para. 132.

<sup>74</sup> As previously mentioned, the Court dismissed Hungary's application in its entirety in its judgment delivered on 16 February 2022. In reply to this specific point about the use of the EU Justice Scoreboard and other sources mentioned in Regulation 2020/2092, the Court dismissed Hungary's claims at para. 343 of its judgment on account inter alia that the Commission "remains responsible for the information it uses and for the reliability of the sources of that information. Furthermore, the Member State concerned has the option ... to submit observations on the information which the Commission intends to use with the view to proposing the adoption of appropriate measures. Accordingly, it may challenge the probative value of each piece of evidence relied on, and the merits of the Commission's assessments may, in any event, be subject to review by the EU judicature in the context of an action brought against a Council decision" adopted under Regulation 2020/2092.

## b. Structured dialogue instrument to be used on an exceptional case by case basis: The Commission's Rule of Law Framework (2014)

Adopted in 2014 and informally known as the “pre-Article 7 procedure”, the **Rule of Law Framework** was the Commission's direct answer to the diagnosis that developments in some Member States during the period 2010-2013 showed “that [existing] mechanisms are not always appropriate to quickly respond to threats to the rule of law in a Member State.”<sup>75</sup>

Leaving aside the debatable accuracy of this diagnosis,<sup>76</sup> this new instrument foresees a three-stage “**structured dialogue**” process at the entire discretion of the Commission: Should the Commission be of the view that a systemic threat to the rule of law may materialise in the relevant EU country, the Commission may adopt a formal **opinion** following the activation of the Framework (stage 1); In the absence of any satisfactory answers from the relevant Member State, the Commission may then issue a formal **rule of law recommendation** which may include specific recommendations and deadline to implement them (stage 2); Following a final phase of monitoring the Member State's compliance, the Commission may then decide to activate one of the mechanisms set out in **Article 7 TEU** in case of non-compliance (stage 3).

Despite repeated requests from the European Parliament as early as 2015,<sup>77</sup> the Commission has continuously refused to trigger its 2014 Rule of Law Framework in respect of Hungary but did activate it in respect of **Poland** in January 2016 on two main grounds: the lack of compliance with binding rulings of the (then still independent) Polish Constitutional Tribunal and the adoption of measures by the Polish legislature to undermine its functioning.<sup>78</sup> The Court of Justice has since acknowledged the Commission's Framework in an order adopted on 17 December 2018,<sup>79</sup> with subsequent references made to it by one EU Advocate General<sup>80</sup> and national referring courts.<sup>81</sup>

<sup>75</sup> *A new EU Framework to strengthen the Rule of Law*, op. cit., p. 5.

<sup>76</sup> For further analysis, see Kochenov, D., Pech, L., ‘Better late than never: On the European Commission's Rule of Law Framework and its first activation’ (2016) 54(5) *Journal of Common Market Studies* 1062.

<sup>77</sup> See European Parliament resolution of 16 December 2015 on the situation in Hungary (2015/2935(RSP)), para 5: “Believes that Hungary is a test for the EU to prove its capacity and political willingness to react to threats and breaches of its own founding values by a Member State; deplores the existence of similar developments in some other Member States and considers that the inaction of the EU may have contributed to such developments, which show worrying signs, similar to those in Hungary, of the rule of law being undermined” and para 8: “Reiterates the call on the Commission to activate the first stage of the EU framework to strengthen the rule of law, and therefore to initiate immediately an in-depth monitoring process concerning the situation of democracy, the rule of law and fundamental rights in Hungary, including the combined impact of a number of measures, and evaluating the emergence of a systemic threat in that Member State which could develop into a clear risk of a serious breach within the meaning of Article 7 TEU”.

<sup>78</sup> European Commission, Readout by the First Vice-President Timmermans of the College Meeting of 13 January 2016, Speech/16/71.

<sup>79</sup> Case C-619/18 R *Commission v Poland (Indépendance de la Cour suprême)*, EU:C:2018:1021, para. 81: “However, it is common ground that, before initiating the infringement procedure, the Commission triggered the mechanisms laid down by the Commission's communication to the European Parliament and the Council of 11 March 2014 entitled ‘A new EU Framework to strengthen the Rule of Law’ (COM(2014) 158 final)”.

<sup>80</sup> See Opinion of Advocate General Campos Sánchez-Bordona in Case C-156/21, *Hungary v European Parliament and Council*, EU:C:2021:974, paras 80-81 and fn 145.

<sup>81</sup> See order of the Court on 15 January 2020 in Case C-647/18, *Corporate Commercial Bank*, EU:C:2020:13 (request for a preliminary ruling held inadmissible). One of the questions submitted to the Court of Justice by the Bulgarian referring court concerned the obligation for the national legislature to comply with the value of the rule of law and referred to the definition of the rule of law adopted by the Commission in its 2014 communication regarding the EU Framework. In a subsequent preliminary ruling case, a Romanian court made a brief mention to the EU Framework in relation to two of the questions it asked the Court of Justice regarding the possibility to disregard the decisions of the Romanian Constitutional Court when it exceeds its jurisdiction and undermine the principle of the rule of law: see summary of the request for a preliminary ruling in C-379/19, para. 30. The Court of Justice did not however refer to the Commission's Framework in its

As regards the first and to date only activation of the Rule of Law Framework, the Commission was forced to admit – one formal Rule of Law Opinion and four formal Rule of Law Recommendations later – that **Polish authorities have continued to ignore** its concerns and adopt laws allowing the executive and legislative branches to systematically “interfere in the composition, powers, administration and functioning of the judicial branch”.<sup>82</sup>

This left the Commission no choice but to **trigger for the very first time Article 7(1) TEU in December 2017**. This arguably proves that the early scholarly criticism of the Framework – a discursive tool cannot effectively address a situation where national authorities are pursuing a *deliberate* strategy of *methodically* annihilating the rule of law<sup>83</sup> – was well-founded. Before examining the use of Article 7(1) TEU, another new “soft” dialogue-based mechanism adopted in 2014, this time by the Council, will be briefly presented below.

### c. Structured dialogue instrument of a permanent nature and general scope: The Council's Annual Rule of Law Dialogue (2014)

First established in December 2014 to help promote and safeguard the rule of law, several dialogues have taken place and the following topics discussed: The rule of law in the digital era (first dialogue during the Luxembourg Presidency in November 2015); Migrants' integration and EU fundamental values (second dialogue during the Netherlands Presidency in May 2016); Media pluralism and the rule of law in the digital age (third dialogue during the Estonian Presidency in October 2017); Trust in public institutions and the rule of law (fourth dialogue during the Austrian Presidency in November 2018).

An **evaluation** of the Council's rule of law dialogue was undertaken under the Finnish Presidency in the second semester of 2019. However, the Council proved unable to adopt the conclusions proposed by the Finnish Presidency due to the opposition of the Hungarian and Polish governments. Instead, the conclusions were adopted as presidency conclusions.<sup>84</sup>

Notwithstanding the lack of unanimity, a **new “peer review” format** of the annual dialogue was introduced during the German presidency of the Council in the second semester of 2020. This resulted in the introduction of two new types of dialogues and political discussions for the first time: (i) a **horizontal** discussion covering general rule of law developments across the EU and (ii) **country-specific** discussions addressing key developments in each selected Member State.

In other words, in lieu of a single annual discussion on a single theme which takes the format of a brief presentation from each national government, two (in camera) discussions based – for the first time – on the themes identified in the Commission's first annual Rule of Law Report were organised: (i) an ‘horizontal discussion’ on pan-European developments regarding justice systems, anti-corruption, media pluralism and other issues linked to checks and balances on 13 October 2020 and (ii) a country-

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judgment in this case: see Joined Cases C-357/19, C-379/19, C-547/19, C-811/19 and C-840/19, *Euro Box Promotion e.a.*, EU:C:2021:1034.

<sup>82</sup> European Commission, *Rule of Law: European Commission acts to defend judicial independence in Poland*, IP/17/5367, 20 December 2017.

<sup>83</sup> See e.g. Kochenov, D., Pech, L., ‘Monitoring and Enforcement of the Rule of Law in the EU: Rhetoric and Reality’ (2015) 11(3) *European Constitutional Law Review* 512.

<sup>84</sup> Council of the EU, *Presidency conclusions: evaluation of the annual rule of law dialogue*, 14173/19, 19 November 2019.

specific discussion limited to five countries (Belgium, Bulgaria, Czechia, Denmark and Estonia) on 10 November 2020.<sup>85</sup> It was reported that this last discussion lasted a total of three hours.<sup>86</sup>

A similar approach was followed in 2021 with “an open exchange of comments and best practice covering specific rule-of-law developments in five member states (Germany, Ireland, Greece, Spain and France)” organised on 20 April 2021 at the General Affairs Council (GAC),<sup>87</sup> followed by a similar exercise with respect to five more EU Member States at the 23 November GAC2021: Croatia, Italy, Cyprus, Latvia, Lithuania.<sup>88</sup> In addition, on 19 October 2021, the Council had a horizontal discussion of the rule of law situation in the EU following the publication of the Commission’s second annual Rule of Law Report published on 20 July 2021.<sup>89</sup> In 2022, the General Affairs Council is due to discuss the situation in Luxembourg, Hungary, Malta, the Netherlands and Austria during its meeting of 22 March.

It remains to be seen if the Council’s rule of law dialogue “2.0” will lead to any tangible results until we get to 2023 at which point “the experience acquired on the basis of this dialogue”<sup>90</sup> is to be re-evaluated. For the time being, the Council’s horizontal discussion means in practice **a confidential discussion** of about **one hour every year** on the overall rule of law situation in the EU, with the country-specific dialogue amounting in practice to **another confidential discussion** of the situation in each Member State of the EU **every 3 years for about 30 minutes**, with **no transparency** regarding the information provided to the Council, the nature of the discussion within the Council and any eventual follow up (or lack thereof).

#### **d. New enforcement tool of a permanent nature and general scope: Regulation 2020/2092 on a general regime of conditionality for the protection of the Union budget (“Rule of Law Conditionality Regulation”)**

Following a difficult and conflict-prone gestation period due to the unsurprisingly strong opposition from the two countries subject to the Article 7(1) TEU procedure, Regulation 2020/2092 was adopted on 16 December 2020 and formally applies from 1 January 2021. This Regulation provides for a **new financial conditionality mechanism** to protect the EU budget, including funds available via the new EU Recovery instrument/“Next Generation EU” (Regulation 2020/2094), **in cases of breaches of the principle of the rule of law**.<sup>91</sup> While the Commission has presented this new conditionality mechanism

<sup>85</sup> Council meeting no VC-GAC-10110, 17 November 2020. No outcome document or minutes were however published making it impossible to assess how the discussion was conducted and the outcomes (if any) of the country-specific rule of law aspects which were supposed to be discussed in relation to the first five EU countries selected for this discussion.

<sup>86</sup> Agence Europe, ‘First five Member States scrutinised by their European Partners’, Europe Daily Bulletin No. 12603, 18 November 2020: <https://agenceurope.eu/en/bulletin/article/12603/7>

<sup>87</sup> Council, Informal video conference of European affairs ministers, meeting no. VTC-EA-200421, 20 April 2021: <https://www.consilium.europa.eu/en/meetings/gac/2021/04/20/>

<sup>88</sup> Council of the EU, General Affairs Council, 23 November 2021, <https://www.consilium.europa.eu/en/meetings/gac/2021/11/23/>

<sup>89</sup> Council (GAC), Outcome of the Council meeting, 3820<sup>th</sup> Council meeting, 12947/21, 19 October 2021, p. 4: <https://www.consilium.europa.eu/en/meetings/gac/2021/10/19/>

<sup>90</sup> Council of the EU, *Presidency conclusions: evaluation of the annual rule of law dialogue*, 14173/19, 19 November 2019, para. 16, p 2.

<sup>91</sup> “Conditionality Regulation applies to all EU funds. In this respect, the co-legislators have also clarified that the Conditionality Regulation may be triggered where the proper functioning of the authorities implementing the Recovery and Resilience Facility (RRF) is not ensured, in line with Article 8 of Regulation (EU) 2021/241 of the European Parliament and of the Council of 12 February 2021 establishing the Recovery and Resilience Facility (‘RRF Regulation’),” Commission draft guidelines on the application of Regulation 2020/2092 (not adopted yet but shared with the Parliament on 14 June 2021), para. 15.



as a preventive tool,<sup>92</sup> this arguably constitutes, at least in part, a mischaracterisation, as the mechanism provides for appropriate measures to be adopted where it is established that “breaches of the principles of the rule of law *affect* [our emphasis] or seriously risk affecting the sound financial management of the **Union budget** or the protection of the **financial interests of the Union** in a sufficiently direct way” (Article 4(1) of Regulation 2020/2092). This means that the mechanism has both a preventive and a reactive dimension.

To date, the European Commission has *de facto* refused to effectively apply this new instrument following the controversial and arguably unlawful “compromise” agreed by the European Council in December 2020 and which instructed the Commission not to apply Regulation 2020/2092 until after the Court of Justice had decided on its legality and the subsequent publication of (superfluous) **guidelines** reflecting the Court of Justice’s rulings.<sup>93</sup> Following the Court of Justice’s twin landmark judgments issued on 16 February 2022 in the annulment cases lodged by the Hungarian and Polish governments on 11 March 2021,<sup>94</sup> the European Commission has indicated on the same day that it “will adopt in the following weeks guidelines providing further clarity about how [it] will apply” the Regulation in practice,<sup>95</sup> and eventually finally activating Regulation 2020/2092 by sending written notifications – within the meaning of Article 6(1) of the Regulation – to the relevant EU Member State(s). Last November, the Commission did however send **information request letters**, pursuant to Article 6(4) of the Regulation, to **Hungary and Poland**.<sup>96</sup>

For the European Parliament, the Commission’s persistent refusal to send written notifications amounts to unlawful inaction which is why the Parliament voted to take the Commission to the Court of Justice for **failure to act** under Article 265 TFEU.<sup>97</sup> One may note in this respect that EU Advocate

<sup>92</sup> *Ibid.*, para 41: “Given the nature of the Conditionality Regulation as a preventive tool to protect the Union budget, the Commission endeavours to ensure a sincere dialogue and cooperation with the Member State concerned, while keeping the procedure at the right pace”.

<sup>93</sup> European Council meeting (10 and 11 December 2020) – Conclusions, Brussels, 11 December 2020, EUCO 22/20. For a critique, see Alemanno, A., Chamon, M., ‘To Save the Rule of Law you Must Apparently Break It’, *VerfBlog*, 11 December 2020, <https://verfassungsblog.de/to-save-the-rule-of-law-you-must-apparently-break-it/> and Scheppele, K.L., Pech, L., Platon, S., ‘Compromising the Rule of Law while Compromising on the Rule of Law’, *VerfBlog*, 13 December 2020, <https://verfassungsblog.de/compromising-the-rule-of-law-while-compromising-on-the-rule-of-law/>.

<sup>94</sup> See Case C-156/21, *Hungary v European Parliament and Council*, EU:C:2022:97 and Case C-157/21, *Poland v European Parliament and Council*, EU:C:2022:98 (the Court held inter alia that the new mechanism was adopted on an appropriate legal basis and is compatible with Article 7 TEU and the principle of legal certainty). For further analysis, see Pech, L., ‘No More Excuses: The Court of Justice greenlights the rule of law conditionality mechanism’, *VerfBlog*, 16 February 2022: <https://verfassungsblog.de/no-more-excuses/>.

<sup>95</sup> Statement by European Commission President Ursula von der Leyen on the judgments of the European Court of Justice on the General Conditionality Regulation, Statement/22/1106, 16 February 2022.

<sup>96</sup> The Commission did formally rely on Regulation 2020/2092 for the first time last November when it sent (confidential) letters on 17 November 2021 to the Hungarian and Polish governments. These two letters however merely requested information pursuant to Article 6(4) of Regulation 2020/2092 and must be understood as a preliminary (but not compulsory) step prior to any actual activation of the conditionality mechanism via a formal written notification sent to the relevant EU country. See Zalan, E., ‘EU Commission letters to Poland, Hungary: too little, too late’, *EU Observer*, 23 November 2021: <https://euobserver.com/democracy/153591>

<sup>97</sup> See most recently European Parliament resolution of 10 June 2021 on the rule of law situation in the European Union and the application of the Conditionality Regulation (EU, Euratom) 2020/2092 (2021/2711(RSP)); European Parliament resolution of 8 July 2021 on the creation of guidelines for the application of the general regime of conditionality for the protection of the Union budget (2021/2071(INI)); European Parliament, “Parliament prepares legal proceedings against Commission over rule of law mechanism”, 20 October 2021:

<https://the-president.europarl.europa.eu/en/newsroom/parliament-prepares-legal-proceedings-against-commission-over-rule-of-law-mechanism>

Letter of the President of the European Parliament to the Parliament’s legal service dated 20 October 2021: <https://the-president.europarl.europa.eu/files/live/sites/president/files/pdf/Letter%20Conditionality%20Regulation%2020-20-21/Letter%20Sassoli-Drexler%20Conditionality%20Regulation.pdf>.

General is also of the opinion that the Commission, by agreeing with the European Council's request to adopt guidelines to be finalised *after* the Court of Justice's annulment judgment, **has de facto suspended the application of Regulation 2020/2092**.<sup>98</sup> This amounts, in our opinion, to a straightforward breach of the EU Treaties, as actions brought before the Court shall not have suspensory effect.

Leaving aside this complicated background, Regulation 2020/2092 represents a significant addition to the EU's rule of law toolbox for several reasons:

- It expressly and comprehensively **links** for the first time implementation of the EU **budget** to compliance with the core principles of the **rule of law**;
- It comprehensively **codifies** for the first time in a legislative instrument the meaning and scope of the **rule of law** in light of the EU Treaties and the Court of Justice's associated extensive case law;
- It clearly **describes** in a non-exhaustive manner situations indicative of **breaches** of the principles of the rule of law, with the Regulation furthermore covering both individual and systemic breaches which can either amount to actions (general measures or recurrent practices) or failures to act by public authorities;
- It is also of significant political, legal and practical importance to establish the **legal relationship** between the different instruments available to the EU, "particularly to assess whether and to what extent these instruments could be operationalised in parallel so as to ensure a (more) comprehensive and (more) robust defence of rule of law principles in the Union legal order";<sup>99</sup>
- Finally, "it authorises a comprehensive, proactive, risk-based approach that facilitates EU-intervention to safeguard sound financial management even **before disbursement** of EU funds".<sup>100</sup>

When it comes to the sources of information the Commission may rely on to decide whether or not to activate the Rule of Law Conditionality Regulation, Recital 16 of Regulation 2020/2092 explicitly lists the ARoLR in the non-exhaustive list of available sources and recognised institutions it offers. The Commission has since stressed that while the Conditionality Regulation and Commission's ARoLR "have different objectives and should remain separate", "the findings of the annual Rule of Law Report **may feed** the Commission's assessment under the Regulation, and references to adopted measures under the Regulation may be included in the annual Rule of Law Report."<sup>101</sup>

<sup>98</sup> Opinion of Advocate General Campos Sánchez-Bordona delivered on 2 December 2021 in Case C-156/21, *Hungary v European Parliament and Council*, EU:C:2021:974, fn 49: "The Parliament voiced its opposition to this compromise and criticised the Commission for accepting the need for guidelines on the application of Regulation 2020/2092 and for making adoption of the guidelines subject to the judgment of the Court of Justice in any potential actions for annulment of the regulation. [...] In December 2021 the guidelines had still not been adopted, and the application of the regulation is therefore, de facto, suspended."

<sup>99</sup> For further analysis, see Scheppele, K.L., Kelemen, R.D., Morijn, J., *The EU Commission has to cut funding to Hungary: The Legal Case*, Appendix 1 (An analysis of Regulation 2020/2092 on a general regime of conditionality for the protection of the Union budget and its legal context), p. 44: <https://www.greens-efa.eu/en/article/document/the-eu-commission-has-to-cut-funding-to-hungary-the-legal-case>.

<sup>100</sup> *Ibid.*, p. 46.

<sup>101</sup> European Commission, Follow up to the European Parliament non-legislative resolution on the rule of law situation in the European Union and the application of the Conditionality Regulation (EU, Euratom) 2020/2092, SP(2021)570, 3 November 2021.

### 2.2.3. First or new use of pre-2012 instruments/procedures

In addition to establishing new instruments as previously outlined, the post 2012 period has also seen pre-2012 instruments and procedures used either for the first time (e.g. Article 7(1) TEU procedure both in 2017 and 2018), or used in a new way (e.g. European Semester and infringement procedure both in 2018) primarily in response to the severe deterioration of the situation in Poland and Hungary from an Article 2 TEU point of view. These first or new uses of pre-2012 instruments/procedures, also illustrated in the table below, will be examined in detail in the following sub-chapters.

Table 6: Pre-2012 EU instruments used in response to rule of law violations in the Member States

Data/dialogue/monitoring tools and procedures	Enforcement proceedings
<ul style="list-style-type: none"> <li>➤ First activation of Article 7(1) TEU by the European Commission <b>in 2017</b> (Poland)</li> <li>➤ First activation of Article 7(1) TEU by the European Parliament <b>in 2018</b> (Hungary)</li> <li>➤ First judicial independence related country specific recommendation as part of the European Semester annual cycle <b>in 2018</b> (Slovakia)</li> </ul>	<ul style="list-style-type: none"> <li>➤ First infringement actions based on Article 19(1) TEU (principle of effective judicial protection) <b>in 2018</b></li> <li>➤ First application for interim measures based inter alia on Article 19(1) TEU in relation to measures which prima facie undermine judicial independence <b>in 2018</b></li> <li>➤ First application for a daily penalty payment within framework of an infringement action based on Article 19(1) TEU <b>in 2021</b></li> <li>➤ First ECJ judgment on the legal nature and effects of the 2006 Cooperation and Verification Mechanism <b>in 2021</b></li> </ul>

Source: Authors

#### a. First use of the Article 7(1) TEU *preventive* procedure (established in 2001) in 2017

Article 7 TEU, initially numbered as Article F.1 TEU when it entered into force as a result of the 1997 Treaty of Amsterdam, empowered the EU for the first time to adopt sanctions against national authorities of a Member State where a **serious and persistent breach** of the EU's common values has materialised. This provision was further amended by the 2001 Nice Treaty to additionally authorise *preventive* EU action in the situation where there is "a **clear risk of a serious breach** by a Member State" (currently Article 7(1) TEU) of the values now laid down in Article 2 TEU.

One particularly unique feature of the Article 7's preventive and sanctioning mechanisms is that they may be activated by relevant EU institutions to monitor and assess actions/inactions of national authorities **in any area**, including in areas not connected to EU law. This also explains and justifies the wide scope of the Commission's **Rule of Law Report**, which **looks at issues beyond the scope of application of EU law *stricto sensu***.



## Box 2: European Commission communication on Article 7 TEU

The scope of Article 7 is not confined to areas covered by Union law. This means that the Union could act not only in the event of a breach of common values in this limited field but also in the event of a breach in an area where the Member States act autonomously. [...] The fact that Article 7 of the Union Treaty is horizontal and general in scope is quite understandable in the case of an article that seeks to secure respect for the conditions of Union membership. There would be something paradoxical about confining the Union's possibilities of action to the areas covered by Union law and asking it to ignore serious breaches in areas of national jurisdiction. If a Member State breaches the fundamental values in a manner sufficiently serious to be caught by Article 7, this is likely to undermine the very foundations of the Union and the trust between its members, whatever the field in which the breach occurs.

Article 7 thus gives the Union a power of action that is very different from its power to ensure that Member States respect fundamental rights when implementing Union law.

Source: COM(2003) 606 final, 15 October 2003, p. 5.

Moving away from the misleading “nuclear option” label which has often but mistakenly been used to describe Article 7 TEU, the Commission more accurately referred to Article 7 TEU in 2019 as “the most prominent mechanism for protecting all common values”, even if it is meant to be “used only exceptionally”.<sup>102</sup> The plural could actually be used as this Treaty provision provides for two procedures which do not have to be used in sequence: a preventive one (Article 7(1) TEU), and a sanctioning one (Article 7(2), (3) and (4) TEU).

As previously noted, the **preventive arm** of Article 7 has been activated twice in respect of **Poland and Hungary** by the European Commission and the European Parliament in 2017 and 2018 respectively.<sup>103</sup> At the time of writing, four hearings have been organised by the Council in relation to the rule of law situation in Poland, with three hearings organised in relation to the broader Article 2 TEU situation in Hungary. One additional hearing in respect of both countries is due to be organised during the first semester of 2022.

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<sup>102</sup> *Further strengthening the Rule of Law within the Union. State of play and possible next steps*, op. cit., p. 2.

<sup>103</sup> See generally Pech, L., ‘Article 7 TEU: From ‘Nuclear Option’ to ‘Sisyphean Procedure’?’ in Belavusau, U., Gliszczyńska-Grabias, A., (eds), *Constitutionalism under Stress: Essays in Honour of Wojciech Sadurski*, Oxford University Press, 2020, pp. 157-174.

Table 7: Article 7(1) TEU hearings and length of the formal reports of the hearings

	Dates of Article 7(1) TEU formal hearings	Length of (confidential) formal report of each hearing <sup>104</sup>
<b>Poland</b>	First hearing: 26 June 2018	Report shared with Council delegations on 8 August 2018: 9 pages
	Second hearing: 18 September 2018	Report shared with Council delegations on 5 November 2018: 9 pages
	Third hearing: 11 December 2018	Report shared with Council delegations on 20 December 2018: 7 pages
	Fourth hearing: 22 June 2021	Report shared with Council delegations on 9 July 2021: 3 pages
	Fifth hearing: <i>expected on 22 February 2022 at the time of writing</i>	
<b>Hungary</b>	First hearing: 16 September 2019	Report shared with Council delegations on 19 September 2019: 8 pages
	Second hearing: 10 December 2019	Report shared with Council delegations on 26 February 2020: 3 pages
	Third hearing: 22 June 2021	Report shared with Council delegations on 9 July 2021: 4 pages
	Fourth hearing: <i>expected in April 2022 at the time of writing</i>	

Source: Authors

Leaving aside the different activating institution (Commission for Poland and Parliament for Hungary), several **differences** between the two ongoing Article 7(1) TEU procedures are worth noting. First, as regards the topics covered, the hearings held in respect of **Poland** have exclusively dealt with **rule of law** issues, such as the lack of effective constitutional review in Poland. By contrast, the hearings held in respect of **Hungary** have not only been concerned with rule of law issues, but also with issues such as **corruption** and **academic freedom**. A second procedural difference is that unlike the Commission, **the Council has refused**, arguably in manifest breach of EU primary law and in particular the principle of institutional balance,<sup>105</sup> **to allow the Parliament to present and defend its Article 7(1) reasoned proposal** at any of the formal hearings organised to date.<sup>106</sup> Thirdly, unlike what the Commission did

<sup>104</sup> For no obvious reason, the formal reports of Article 7(1) hearings have yet to be made systematically publicly available by the Council. This means that access to documents requests have had to be made to secure their public release. See e.g. the requests lodged by one of the present authors: [https://www.asktheeu.org/en/user/laurent\\_pech](https://www.asktheeu.org/en/user/laurent_pech).

<sup>105</sup> Pech, L., Kochenov, D., Platon, S., 'The European Parliament Sidelined: On the Council's distorted reading of Article 7(1) TEU', *VerfBlog*, 8 December 2019: <https://verfassungsblog.de/the-european-parliament-sidelined>.

<sup>106</sup> The Council's legal stance on this aspect also contradicts the analysis of AG Bobek who rejected – in our view compellingly – the analogy with Commission's legislative proposals. For AG Bobek, Article 7 TEU "sets out a sanctions procedure of a *constitutional* nature against an individual Member State" which "is very different from a general *legislative* procedure which aims to give shape to policies". Furthermore, "It is reasonable to assume that a reasoned proposal under Article 7(1) TEU should have the same value, irrespective of the body which adopted it. Thus, the fact that one [i.e. the Parliament] of

in relation to Poland, the Parliament did not deem necessary to include a draft list of explicit recommendations on how to prevent the clear risk of a serious breach of Article 2 values it has identified from materialising.

In the name of improving the organisation of Article 7(1) hearings, the Council adopted for the first time a set of **formal procedural rules** in July 2019.<sup>107</sup> These rules distinguish between three main scenarios: (i) activation of Article 7(1) by one third of the Member States; (ii) activation by the European Parliament; and (iii) activation by the European Commission. Three main remarks can be made: First, the only actor which gained the opportunity to speak without any time limit is the government in the dock. Secondly, the only actor which was denied the opportunity to present its reasoned proposal is the European Parliament. Thirdly, coincidentally or not, the length of the formal reports of the hearings have since shrunk by about two-thirds, with the shrinking reports simultaneously making it more difficult to know the nature of the Commission's remarks; which national delegation asked which question; the exact content of the questions asked; and whether follow up questions were asked and if so, which answers were provided to those.

In fact, the Council now very **briefly, not to say superficially, summarises** both the issues raised and the "detailed answers" of the governments subject to Article 7(1) in a couple of paragraphs. "Detailed" is however understood by the Council in this context as the opposite of how "detailed" is defined in any dictionary. In doing so, and in the absence of any fact checking whatsoever, the Council has primarily ended up repeating straightforwardly misleading or false statements. And as if to make hearings as ineffective as possible, the formal reports do not make any references whatsoever to what happened or did not happen in relation to the issues and statements made at the previous hearing. This means *inter alia* that deliberate and repeated violations of the principle of sincere cooperation are left unmentioned, let alone sanctioned.

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the three bodies able to initiate that procedure plays a subsequent role by giving its consent should make no difference". See his Opinion delivered on 3 December 2020 in Case C-650/18, EU:C:2020:985, paras. 87 and 91.

<sup>107</sup> Council, *Standard modalities for hearings referred to in Article 7(1) TEU*, 10641/2/19, REV 2, 9 July 2019.

Table 8: The distorted reality reflected in the Council's formal Article 7(1) reports

Legal claims (non-exhaustive examples)	Legal reality (not acknowledged in any of the Council's formal reports)
<p><b>Hungarian government</b>, 10 December 2019: The Central European University "failed to comply with Hungarian law, unlike 16 other foreign universities operating in Hungary".<sup>108</sup></p> <p><b>Polish government</b>, 22 June 2021: "no judges were held responsible for referring preliminary questions to the Court of Justice of the European Union" and "all judges sitting on the Constitutional Tribunal [have] been lawfully appointed".<sup>109</sup></p>	<p><b>Court of Justice</b>, judgment of 6 October 2020 in Case C-66/18, <i>Commission v Hungary</i>: The conditions introduced by Hungary to enable foreign higher education institutions to carry out their activities in its territory are incompatible with EU Law.</p> <p><b>European Commission</b>, Letter of Formal Notice to Poland, 3 April 2019:<sup>110</sup> New disciplinary regime allows for judges to be subject to disciplinary proceedings for the content of their judicial decisions. This includes decisions to refer questions to the Court of Justice.</p> <p><b>Court of Justice</b>, judgment of 26 March 2020 in Joined Cases C-558/18 and C-563/18, <i>Miasto Łowicz</i>: The Court notes at para. 54 that two referring judges have been the subject of an investigation prior to the initiation of potential disciplinary proceedings against them as a result of making requests for a preliminary ruling.<sup>111</sup></p> <p><b>European Court of Human Rights</b>, judgment of 7 May 2021 in case of <i>Xero Flor v Poland</i>: The bench which heard the case regarding the applicant included a judge irregularly elected to the Constitutional Tribunal on the back of repeated illegal actions by the Polish President and the then Polish Prime Minister.</p>

Source: Authors

The **European Parliament** has regularly expressed its **serious misgiving** as regards the Council's inability or rather, unwillingness to organise structured, regular and transparent Article 7(1) hearings. In a resolution of 16 January 2020, the Parliament stressed in particular the need for the Council to (i) address concrete recommendations to the Member States in question; (ii) ensure the same treatment

<sup>108</sup> Report on the hearing held by the Council on 10 December 2019, 5775/20, 26 February 2020, Annex I, p. 4.

<sup>109</sup> Report on the hearing held by the Council on 22 June 2021, 9 July 2021, 103346/21, pp. 3 and 4.

<sup>110</sup> European Commission, *Rule of Law: European Commission launches infringement procedure to protect judges in Poland from political control*, IP/19/1957, 3 April 2019.

<sup>111</sup> See also most recently, Jałoszewski, M., 'Judge Niklas-Bibik suspended for applying EU law and for asking preliminary questions to the CJEU', *Rule of Law in Poland*, 30 October 2021: <https://ruleoflaw.pl/judge-niklas-bibik-suspended-for-applying-eu-law-and-for-asking-preliminary-questions-to-the-cjeu/>

for Parliament as for the Commission for the purposes of presenting Article 7(1) reasoned proposals; and (iii) ensure that new developments and risks are also addressed.<sup>112</sup>

In a letter dated 15 February 2021, several MEPs led by MEP Gwendoline Delbos-Corfield (Greens/EFA), European Parliament Article 7(1) Rapporteur regarding Hungary and Juan Fernando Lopez Aguilar (S&D), Chair of the European Parliament LIBE Committee and European Parliament Article 7(1) Rapporteur regarding Poland, asked the Council to explain itself in light of the repeated **refusal of the Council to organise hearings** on account of the **COVID-19** situation. The following questions were submitted: (1) Which legal provisions impose on the Council the obligation to ensure that hearings under Article 7(1) TEU must take place during face-to-face meetings of the Council? Could such provisions, if any, be modified during the period of pandemic? (2) Did the Council ask for an opinion of the Legal Service (formal or informal) on the subject referred to in question 1?<sup>113</sup>

The Council did not bother answering the second half of the first question while also completely ignoring the second question. In its answer to the first half of the first question, the Council also failed to identify any legal (Treaty or otherwise) provision which would allegedly impose a physical rather than remote (or hybrid) hearings. Instead, the Council hid behind its **internal rules** of procedures without however specifically mentioning those. Adding insult to injury, the Council failed to explain the extent to which its internal rules applicable to meetings where formal decisions have to be adopted are relevant, as Article 7(1) hearings do not lead to any decisions. In addition, but unsurprisingly, the Council similarly failed to explain why, since the Council *did* meet physically on rare occasions, Article 7(1) hearings were not worthy of these rare in-person meetings?

Apart from the **Council's political unwillingness to effectively fulfil its role under Article 7(1)**, it is difficult to understand what may have prevented the Council from adapting its internal rule of procedures to the post-COVID era, yet another issue raised by the MEPs, which the Council ignored. The Council's reluctance in this regard can be contrasted with the swift adjustments made by the European Parliament regarding remote meetings/debates/voting,<sup>114</sup> and the CJEU regarding remote hearings and the use of videoconferencing for actual judicial proceedings unlike Article 7(1)'s non-judicial hearings.

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<sup>112</sup> European Parliament resolution of 16 January 2020 on ongoing hearings under Article 7(1) of the TEU regarding Poland and Hungary (2020/2513(RSP)).

<sup>113</sup> Letter to the Portuguese Presidency, Brussels, 15 February 2021 (on file with the authors).

<sup>114</sup> European Parliament, Remote voting in the European Parliament and national parliaments, 25 March 2020 [https://www.europarl.europa.eu/RegData/etudes/ATAG/2020/649348/EPRS\\_ATAG\(2020\)649348\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/ATAG/2020/649348/EPRS_ATAG(2020)649348_EN.pdf).

Table 9: Unconvincing arguments behind the Council's reluctance to hold Article 7(1) TEU hearings

Council's (legal) justification	(Legal) Reality Check
<p>"Article 7(1) TEU requires that "the Council" hears the Member State in question. However, with the current Covid-19 pandemic, the Council rarely meets physically and instead informal videoconferences of ministers are organized. These informal videoconferences of ministers are not formal Council meetings.</p>	<p>Hearings at the CJEU were suspended from 13 March 2020 before resuming on 25 May 2020 with parties not able to travel to Luxembourg permitted "by way of exception, to submit oral arguments remotely. To that end, the Institution designed a specific videoconferencing system allowing the provision of simultaneous interpretation to and from the 24 official languages."<sup>115</sup> As of 15 June 2021, parties entirely unable to travel to Luxembourg may, under certain conditions, still "be permitted to attend a hearing by videoconference."<sup>116</sup></p>
<p>The hearing of the Member State in question by the Council under Article 7(1) TEU is an essential procedural requirement, the respect of which may be reviewed by the Court of Justice of the European Union pursuant to Article 269 TFEU. Therefore, a formal hearing of the Member State in question under Article 7(1) TEU cannot be held in informal videoconferences of ministers."<sup>117</sup></p>	<p>In its resolution of 24 June 2021, the European Parliament criticised "the Council's failure to organise hearings, using COVID-19 as a pretext for this, despite the fact that there is no legal obligation whatsoever to require hearings to be held in person as opposed to via videoconferencing; requests that any legal opinion issued by the Council's legal service arguing otherwise should be made public".<sup>118</sup></p>

Source: Authors on the basis of materials cited in footnotes

The activation of Article 7(1) TEU has unsurprisingly led to an increasing number of cases where the Court of Justice was asked to clarify the impact of this activation. Prior to this, the General Court also received several Article 7 TEU-related applications but due to its limited jurisdiction with respect to this provision, the conditions governing the activation of the preventive and sanctioning arms of this provision as well as the strident rules governing legal standing of non-privileged plaintiffs, the General Court has rejected all of the applications it has received.<sup>119</sup> One may however note that for the first time, the General Court recently annulled a Commission decision in a competition law context on account of the fact that the Commission did not properly examine the body of specific evidence submitted by the applicant as regards the impact of Poland's current rule of law systemic or generalised deficiencies

<sup>115</sup> CJEU, *The Year in Review. Annual Report 2020*, p. 69.

<sup>116</sup> CJEU, 'COVID-19 – Information – Parties before the Court of Justice. Change to Judicial Activities', 15 June 2021: [https://curia.europa.eu/jcms/jcms/p1\\_3012064/en/](https://curia.europa.eu/jcms/jcms/p1_3012064/en/)

<sup>117</sup> Reply from the Portuguese Presidency of the Council (via the Secretary of state for European Affairs, Ana Paula Zacarias), Lisbon, 1 March 2021 (on file with the authors).

<sup>118</sup> European Parliament resolution of 24 June 2021 on the Commission's 2020 Rule of Law Report (2021/2025(INI)), para. 54.

<sup>119</sup> See e.g. Case T-304/18, *MLPS v Commission*, EU:T:2019:34 (action dismissed regarding application seeking annulment of a Commission decision refusing to institute Article 7 TEU proceedings against France).

on its rights should its case have to be examined by Polish authorities.<sup>120</sup> While the General Court does not directly take into account Article 7(1) TEU, it does so indirectly by examining the applicant's rule of law claim in light of the two-stage test devised by the Court of Justice in a 2018 judgment relating to the execution of European arrest warrants (EAW) where the Court took explicit account of the activation of Article 7(1) TEU in respect of Poland as will be outlined below.

The Court of Justice's most important **judgments regarding Article 7(1) TEU** have dealt with two issues to date: EAW surrenders to Poland and the Court's jurisdiction to review under Article 263 TFEU a resolution of the Parliament activating Article 7(1) TEU.<sup>121</sup>

With respect to **EAW surrenders**, the Court of Justice held for the very first time in 2018 that the activation of Article 7(1) TEU "is particularly relevant" when it comes to assessing whether there is a real risk, connected with a lack of independence of Polish courts on account of systemic or generalised deficiencies there, of the fundamental right to a fair trial being breached.<sup>122</sup> The Court has since been invited by judges of national executing courts to give Article 7(1) proceedings even more relevance and to better take rule of law decline into consideration, by allowing them suspension of EAWs in general in a situation where the systemic violation of the right to an independent tribunal established by law has been "legalised", and not just on a case-by-case basis on the back of a burdensome, not to say unworkable, judicial test.<sup>123</sup>

With respect to the **Court's jurisdiction** under Article 263 TFEU (which details the "normal" judicial review jurisdiction of the Court) versus its jurisdiction under Article 269 TFEU (which provides for a limited possibility of bringing a judicial review action against acts adopted by the European Council or the Council on the basis of Article 7 TEU), the Court confirmed on 3 June 2021 the admissibility of Hungary's Article 263 TFEU action directed at the Parliament Article 7(1) activating resolution of 12 September 2018.<sup>124</sup> For the Court, Article 269 TFEU, as an exception to the general jurisdiction of the Court, must be interpreted narrowly. In addition, Article 7(1) resolutions of the Parliament are not referred to in Article 269. Furthermore, as an act producing binding legal effects (i.e., it had the immediate effect of lifting the prohibition which is imposed on the Member States on taking into consideration or declaring admissible to be examined an asylum application made by a Hungarian national), the resolution must be considered a challengeable act, and not an intermediate measure, the annulment of which can be sought by the Member State which is the subject of the reasoned proposal. However, as regards the merits of Hungary's annulment action, the Court rejected Hungary's claims

<sup>120</sup> T-791/19, *Sped-Pro v Commission*, EU:T:2022:67. For further analysis, Cseres, K., Borgers, M., 'Mutual (Dis)trust: EU Competition Law Enforcement in the Shadow of the Rule of Law Crisis', *VerfBlog*, 16 February 2022: <https://verfassungsblog.de/mutual-distrust/> ("the judgement is seminal in that it openly questions the ability of national authorities impacted by rule of law backsliding to effectively enforce" EU competition law).

<sup>121</sup> See also (at the time of writing) pending Case C-156/21, *Hungary v European Parliament and Council* and Case C-157/21, *Poland v European Parliament and Council* regarding the issue of whether Regulation 2020/2092 is compatible with Article 7 TEU. In his opinions delivered on 2 December 2021, Advocate General Campos Sánchez-Bordona argued that the EU's Rule of Law Conditionality Regulation is not intended and does not organise the protection of the rule of law by means of a mechanism similar to Article 7 TEU. See his opinions in Case C-156/21, EU:C:2021:974 and in Case C-157/21, EU:C:2021:978.

<sup>122</sup> Case C-216/18 PPU, *LM*, EU:C:2018:586, para 61. See also C-354/20 PPU, *Openbaar Ministerie*, EU:C:2020:925, para. 52.

<sup>123</sup> See currently pending Case C-480/21, *W O, J L v. Minister for Justice and Equality*; Case C-562/21 PPU, *Openbaar Ministerie (Tribunal établi par la loi dans l'État membre d'émission)*; Case C-563/21 PPU, *Openbaar Ministerie (Tribunal établi par la loi dans l'État membre d'émission)*. For a critique of the surrender test previously established in the *LM* case. See Bárd, P., 'Canaries in a coal mine: rule of law deficiencies and mutual trust', *Pravni zapisi* 2/2021, pp. 371-395; Bárd, P., Bodnar, A., *The End of an Era. The Polish Constitutional Court's Judgment on the Primacy of EU Law and Its Effects on Mutual Trust*, CEPS Policy Insights, 2021, p. 15.

<sup>124</sup> Case C-650/18, *Hungary v Parliament*, EU:C:2021:426.



and interpreted the rule laid down in the fourth paragraph of Article 354 TFEU (two-thirds majority of the votes cast) as precluding the taking into account of abstentions.

Arguably the most significant conclusion one may derive from the Court's judgment is that contrary to what is widely assumed, **Article 7(1) is not a "toothless" procedure devoid of any legal effects**. It is true that the Council cannot adopt decisions on this basis but may "at best" adopt recommendations<sup>125</sup> before eventually determining that there is a clear risk of a serious breach by the relevant Member State of one, several or all of the values referred to in Article 2 TEU. However, some **legal effects materialise as soon as Article 7(1) is activated**: as noted above, any country subject to Article 7(1) TEU "may no longer be regarded as a safe country of origin in respect of the other Member States for all legal and practical purposes in relation to asylum matters".<sup>126</sup> In addition, the mere existence of a reasoned proposal has had "an impact on mutual trust and mutual recognition within the area of freedom, security and justice, in particular, in the context of the execution of European arrest warrants, but such an impact is certainly not limited to that area of law".<sup>127</sup>

While not about Article 7(1) TEU specifically, one must finally mention the Court's twin landmark rulings issued on 16 February 2022 regarding the EU rule of law conditionality mechanism and which the Court found compatible with the sanctioning arm of Article 7 TEU in response to the claim that the EU legislature sought to circumvent it via secondary legislation.<sup>128</sup> In this context, the Court clarified several crucial points as regards the EU's overall system of monitoring compliance with Article 2 TEU values and sanctioning any eventual violation of each or several of these values, the most important of which is arguably the following: "*in addition* [our emphasis] to the procedure laid down in Article 7 TEU, numerous provisions of the Treaties, frequently implemented by various acts of secondary legislation, grant the EU institutions the power to examine, determine the existence of and, where appropriate, to impose penalties for breaches of the values contained in Article 2 TEU committed in a Member State".<sup>129</sup> The claim "to the effect that the value of the rule of law can be protected by the European Union only under the procedure laid down in Article 7 TEU"<sup>130</sup> was emphatically rejected by the Court of Justice. This means that the European Council was plainly mistaken when it endorsed in December 2020 the (flawed) *lex specialis* type argument whereby the EU could allegedly only review and eventually sanction violations of Article 2 values via the sole Article 7.<sup>131</sup>

<sup>125</sup> By analogy with the status of recommendations as laid down in Article 288 TFEU ("To exercise the Union's competences, the institutions shall adopt regulations, directives, decisions, recommendations and opinions. [...] Recommendations and opinions shall have no binding force"), one may be tempted to argue that Article 7(1) recommendations should similarly lack binding force. By contrast, under Article 7(3), the Council may adopt *decisions* to suspend certain rights of the Member State concerned. These decisions are legal acts that may produce legal effects, not only for the Member State concerned, but also for third parties. However, with respect to recommendations to be found in the Commission CVM reports in respect of Bulgaria and Romania, the Court of Justice has recently clarified that these two countries are under a legal obligation to take due account of them in compliance with the principle of second cooperation laid down in Article 4(3) TUE: Joined Cases C-83/19, C-127/19 and C-195/19, Cases C-291/19, C-355/19 and C-397/19, *Asociația 'Forumul Judecătorilor din România' et al.*, EU:C:2021:393, paras 174-178. Viewed in this light, one may therefore conclude that at the very least, a similar legal obligation exists in relation to any potential Article 7(1) recommendation which the Council could adopt.

<sup>126</sup> Opinion of Advocate General Bobek delivered on 3 December 2020 in Case C-650/18, EU:C:2020:985, para. 103.

<sup>127</sup> *Ibid.*, para. 110.

<sup>128</sup> See Case C-156/21, *Hungary v European Parliament and Council*, EU:C:2022:97 and Case C-157/21, *Poland v European Parliament and Council*, EU:C:2022:98.

<sup>129</sup> C-156/21, op. cit., para. 159.

<sup>130</sup> *Ibid.*, para. 163.

<sup>131</sup> Pech, L., 'No More Excuses: The Court of Justice greenlights the rule of law conditionality mechanism', *VerfBlog*, 16 February 2022: <https://verfassungsblog.de/no-more-excuses/>.

What the EU legislature is prohibited from doing is establishing “a procedure parallel” to that laid down in Article 7 TEU “having, in essence, the same subject matter, pursuing the same objective and allowing the adoption of identical measures, while providing for the involvement of different institutions or for different material and procedural conditions from those laid down by that provision”.<sup>132</sup> It is however perfectly fine for the EU legislature, “where it has a legal basis for doing so, to establish, in an act of secondary legislation, *other procedures relating to the values contained in Article 2 TEU* [our emphasis], which include the rule of law, provided that those procedures are different, in terms of both their aim and their subject matter, from the procedure laid down in Article 7 TEU”<sup>133</sup>

#### **b. Expanded scope of the European Semester (introduced in 2010) to cover Article 2 TEU related issues starting in 2018**

A **broadening of the scope of the European Semester**, first introduced in 2010 to *inter alia* help with the monitoring and coordination of fiscal, economic, employment and social policies, is noticeable since **2018** when, for the first time, the Council adopted its **first country specific recommendation (CSR) in relation to judicial independence** matters in respect of **Slovakia**.<sup>134</sup> The following year, the 2019 edition of the Commission’s European Semester country reports in respect of **Poland and Hungary** contained unprecedentedly detailed assessment and **criticism** of the rule of law situation in both countries.

While diverging in parts from the stronger language of the Commission draft proposals, the Council agreed to explicitly recall the Commission’s rule of law “concerns” in relation to **Poland**.<sup>135</sup> In the case of **Hungary**, the Council went further as it did not only explicitly note its concerns over Hungary’s exposure to corruption and recent developments in relation to the independence of Hungary’s justice and higher education systems, but also adopted a formal **CSR** whereby Hungary must take action to reinforce the anti-corruption framework and “strengthen judicial independence”.<sup>136</sup> This led the Hungarian government to adopt a strongly worded **unilateral declaration** – the first time a national government did so in the framework of the European semester to the best of our knowledge – deploring that the

[S]tatements on the Hungarian judicial system are politically motivated, biased and do not reflect the reality as the relevant legislative environment has not changed in the reporting period. In addition, the text fails to establish the direct relevance of the highlighted issues for the objectives of the European Semester, thus undermining the credibility of the process.<sup>137</sup>

<sup>132</sup> C-156/21, op. cit., para. 167.

<sup>133</sup> Ibid., para. 168.

<sup>134</sup> See recommendation no 3 in Council Recommendation of 13 July 2018 on the 2018 National Reform Programme of Slovakia and delivering a Council opinion on the 2018 Stability Programme of Slovakia [2018] OJ C320/24: “Improve the effectiveness of the justice system, in particular by safeguarding independence in judicial appointment procedures”.

<sup>135</sup> Council recommendation of 9 July 2019 on the 2019 National Reform Programme of Poland [2019] OJ C301/123, recital 18, 127.

<sup>136</sup> Council recommendation of 9 July 2019 on the 2019 National Reform Programme of Hungary [2019] OJ C301/101, 106, CSR no 4: “Reinforce the anti-corruption framework, including by improving prosecutorial efforts and access to public information, and strengthen judicial independence. Improve the quality and transparency of the decision-making process through effective social dialogue and engagement with other stakeholders and through regular, appropriate impact assessments. [...]”

<sup>137</sup> Declaration of Hungary on the Council Recommendation on the 2019 national reform programme of Hungary, annex of draft minutes of the EFA Council meeting of 9 July 2019, 11129/19 ADD 1 REV 1, 4.

This did not prevent, however, either the **Commission or the Council to reiterate their concerns and call for actions the following year** as the table below shows in relation to Hungary. One should note that while the Council Recommendation of 20 July 2020 does not include a CSR regarding anti-corruption and judicial independence, it is merely because of the Council's focus on tackling the socio-economic impacts of the COVID-19 pandemic and the absence of progress as regards CSR no 4 adopted by the Council in July 2019. This means that this CSR is therefore maintained and will continue to be monitored. A new CSR furthermore requires Hungary *inter alia* to ensure that the emergency measures it has adopted or may adopt to be "in line with European and international standards", which would require the strengthening of judicial independence to ensure effective oversight.

Looking beyond Hungary, the issue of **judicial independence** was raised in relation to two additional EU countries: First, and unsurprisingly, the Council adopted a new CSR in 2020 in respect of **Poland** recommending that Polish authorities "enhance the investment climate, in particular by safeguarding judicial independence".<sup>138</sup> One additional EU Member State – **Malta** – was asked to "complete reforms addressing current shortcomings in institutional capacity and governance to enhance judicial independence".<sup>139</sup>

Table 10: Commission and Council concerns regarding Hungary voiced in 2020

Commission Country Report Hungary 2020 <sup>140</sup> (bold in original)	Council Recommendation of 20 July 2020 <sup>141</sup>
<p>"No progress has been made to address the persisting concerns regarding judicial independence." (p. 6)</p> <p>"No progress has been made in improving [...] the anti-corruption framework, prosecutorial efforts, judicial independence, regulatory environment in services or the quality and transparency of decision-making, including the social dialogue." (p. 16)</p> <p>"Persistent concerns over judicial independence may impact the business environment. [...] Developments of checks and balances in the Hungarian courts system have however continued to raise concerns. [...] The Parliament recently adopted a new piece of legislation in December 2019, introducing structural changes that may have a significant impact on the organisation of the justice system. There was no consultation of</p>	<p>The duration of the state of danger declared on 11 March 2020 is not predefined and the government has discretionary power to maintain it or to terminate it. [...] The emergency powers granted appear more extensive than those adopted in other Member States, in light of the combined effect of broadly defined powers and the absence of a clear time limit. [...] Strengthening judicial independence would also be crucial for effective oversight over the emergency measures concerned." (Recital 27)</p> <p>"The 2019 country-specific recommendations remain pertinent and will continue to be monitored throughout next year's European Semester. [...] All of the 2019 country-specific recommendations should be taken into account for the strategic programming of post-2020 cohesion policy funding, including for mitigating measures and exit strategies with regard to the current crisis." (Recital 31)</p>

<sup>138</sup> Council recommendation of 20 July 2020 on the 2020 National Reform Programme of Poland and delivering a Council opinion on the 2020 Convergence Programme of Poland [2020] OJ C287/135, 141, CSR no 4.

<sup>139</sup> Council recommendation of 20 July 2020 on the 2020 National Reform Programme of Malta and delivering a Council opinion on the 2020 Convergence Programme of Malta [2020] OJ C287/116, 121, CSR no 4.

<sup>140</sup> Commission Staff Working Document. Country Report Hungary 2020, 26 February 2020, SWD(2020) 516 final

<sup>141</sup> Council recommendation of 20 July 2020 on the 2020 National Reform Programme of Hungary and delivering a Council opinion on the 2020 Convergence Programme of Hungary [2020] OJ C287/107.

<p>relevant stakeholders before the adoption of the law. [...] Corruption remains an area of concern. [...] Determined systematic action to prosecute high-level corruption is lacking. [...] Restrictions on access to information continue to hinder corruption prevention. [...] Dissuasive practices for accessing public information can deter citizens and non-governmental organisations from exercising their constitutional rights. [...] The prevailing degree of media freedom may not provide appropriate support for the anti-corruption framework. Several mutually supporting principles, in particular transparency, accountability, press freedom and an active civil society, are key in the fight against corruption" (pp. 45-46)</p>	<p>"Corruption, access to public information and media freedom caused concerns even before the crisis. These areas are even more exposed to further deterioration in the state of danger as control mechanisms have become weaker. Investigation and prosecution appears less effective in Hungary than in other Member States. Determined systematic action to prosecute high-level corruption is lacking. Accountability for decisions to close investigations remains a matter of concern as there are no effective remedies against decisions of the prosecution service not to prosecute alleged criminal activity. Restrictions on access to information continue to hinder the fight against corruption. Dissuasive practices for accessing public information can deter citizens and non-governmental organisations from exercising their constitutional rights." (Recital 32)</p> <p>CSR 4: "Ensure that any emergency measures be strictly proportionate, limited in time and in line with European and international standards and do not interfere with business activities and the stability of the regulatory environment. Ensure effective involvement of social partners and stakeholders in the policy-making process. Improve competition in public procurement. [...]"<sup>142</sup></p>
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Source: Authors on the basis of materials cited in the footnotes

The broadening scope given to the reports and recommendations adopted within the framework of the European Semester proved consequential in 2021 following the adoption of the RRF Regulation 2021/241. Indeed, **EU recovery money can only be accessed** following the submission of recovery and resilience plans which should themselves be consistent with *inter alia* the relevant country-specific challenges and priorities identified in the context of the European Semester (Article 17(3) of the RRF Regulation). Recital 15 explicitly mentions in this context the importance of reforms and investments that aim *inter alia* to improve the effectiveness of **judicial systems, fraud prevention and anti-money laundering** supervision. Article 22(1) of the RRF Regulation furthermore provides that "the Member States, as beneficiaries or borrowers of funds under the Facility, shall take all the appropriate measures to protect the **financial interests of the Union** and to ensure that the use of funds in relation to measures supported by the Facility complies with the applicable Union and national law, in particular

<sup>142</sup> The previous year, one of the recommendations made by the Council asked Hungary to "Reinforce the anti-corruption framework, including by improving prosecutorial efforts and access to public information, and strengthen judicial independence. Improve the quality and transparency of the decision-making process through effective social dialogue and engagement with other stakeholders and through regular, appropriate impact assessments. Continue simplifying the tax system, while strengthening it against the risk of aggressive tax planning. Improve competition and regulatory predictability in the services sector". See Council recommendation of 9 July 2019 on the 2019 National Reform Programme of Hungary and delivering a Council opinion on the 2019 Convergence Programme of Hungary [2019] OJ C301/123, CSR no 4.

regarding the prevention, detection and correction of **fraud, corruption and conflicts of interests**. To this effect, the Member States shall provide an effective and efficient internal control system.”

### c. First infringement actions coupled with first application for interim measures to protect judicial independence on the basis of Article 19(1) TEU in 2018

2018 saw the **Court of Justice**'s first momentous albeit indirect answer to the worsening process of rule of law backsliding at Member State level when it issued its judgment in a case informally known as **Portuguese Judges**,<sup>143</sup> a judgment which one can view “as belonging to the Pantheon of the European Court of Justice's rulings, on a par with *Van Gend en Loos* and *Costa*”.<sup>144</sup>

To put it concisely, the Court confirmed for the first time that the rule of law referred to in **Article 2 TEU** is given concrete and justiciable expression by *inter alia* the second subparagraph of **Article 19(1) TEU**, a provision which was inserted into the TEU by the Lisbon Treaty: “Member States shall provide remedies sufficient to ensure **effective legal protection** in the fields covered by Union law”. It follows that while the organisation of justice in the EU Member States falls within the competence of those Member States, this competence cannot be exercised in a way which violates EU law and in particular the obligation, which flows from the second subparagraph of Article 19(1) TEU, to ensure that their national courts meet the requirements essential to **effective judicial protection in the “fields covered by Union law”**. In doing so, the Court confirmed that its jurisdiction under this provision is not limited to situations where Member States are implementing EU law but covers any national measure which may undermine the independence of any national court which may hear an action based on EU law.

The **Commission** got the Court's message and launched the same year **two infringement** actions primarily based on the second subparagraph of Article 19(1) TEU to defend the independence and irremovability of **Polish judges**. This led to the Commission's first legal successes on this legal basis in 2019 when Case C-619/18, *Commission v Poland (Independence of the Supreme Court)* and Case C-192/18, *Commission v Poland (Independence of the ordinary courts)* were decided on the merits by the Court of Justice. In light of the continuing deterioration of the situation, and again primarily based on the second subparagraph of Article 19(1) TEU in relation to Poland's rule of law breakdown, the Commission launched **three additional infringement actions** on 3 April 2019, 29 April 2020 and 22 December 2021 respectively.

The first two actions of 3 April 2019 and 29 April 2020 have since been lodged with the Court of Justice: Case C-791/19, *Commission v Poland (Disciplinary regime for judges)* and Case C-204/21, *Commission v Poland (Muzzle Law)*, with Case 791/19 decided on the merits on 15 July 2021. The **last infringement action**, launched on 22 December 2021 but yet to be lodged with the Court of Justice at the time of writing, targets for the first time Poland's Constitutional Tribunal on account of its “legal Polexit” decisions of 14 July and 7 October 2021. According to the Commission, these two decisions violate *inter alia* Article 19(1) TEU by giving it an unduly restrictive interpretation with the Commission also correctly asserting, in light *inter alia* of its current unlawful composition, that Poland's Constitutional Tribunal no longer ensures effective judicial protection by an independent and impartial tribunal previously established by law in the fields covered by EU law as required by Article 19(1) TEU.<sup>145</sup>

<sup>143</sup> Case C-64/16, *Associação Sindical dos Juízes Portugueses*, EU:C:2018:117.

<sup>144</sup> Pech, L., Kochenov, D., *Respect for the Rule of Law in the Case Law of the European Court of Justice. A Casebook Overview of Key Judgments since the Portuguese Judges Case*, SIEPS 2021:3, p. 8.

<sup>145</sup> European Commission, *Rule of Law: Commission launches infringement procedure against Poland for violations of EU law by its Constitutional Tribunal*, Press release IP/21/7070, 22 December 2021.

Table 11: *Commission v Poland* – rule of law infringement cases lodged with ECJ to date (Article 258 TFEU)

Case C-619/18 (Independence of the Supreme Court)	Case C-192/18 (Independence of the ordinary courts)	Case C-791/19 (Disciplinary regime for judges)	Case C-204/21 (Muzzle Law)
<p>Action brought on 2 October 2018</p> <p>Judgment adopted on 24 June 2019</p> <p><b>Outcome:</b> Poland has failed to fulfil its obligations under the second subparagraph of Article 19(1) TEU by adopting a measure consisting in lowering the retirement age of the judges of Poland's Supreme Court is to apply to judges in post who were 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</p>	<p>Action brought on 15 March 2018</p> <p>Judgment adopted on 5 November 2019</p> <p><b>Outcome:</b> In granting, the Minister for Justice the right to decide whether or not to authorise judges of the ordinary Polish courts to continue to carry out their duties beyond the new retirement age of those judges, Poland has failed to fulfil its obligations under the second subparagraph of Article 19(1) TEU</p> <p>(another violation of Article 157 TFEU and Directive 2006/54 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation was established by the Court)</p>	<p>Action brought on 25 October 2019</p> <p>Judgment adopted on 15 July 2021</p> <p><b>Outcome:</b> Poland has failed to fulfil its obligations under the second subparagraph of Article 19(1) TEU (i) by failing to guarantee the independence and impartiality of the Disciplinary Chamber of the Supreme Court; (ii) by allowing the content of judicial decisions to be classified as a disciplinary offence; (iii) by conferring on the President of Disciplinary Chamber the discretionary power to designate the disciplinary tribunal with jurisdiction at first instance in cases concerning judges of the ordinary courts; (iv) by failing to guarantee that disciplinary cases against judges of the ordinary courts are examined within a reasonable time, and by providing that actions relating to the appointment of defence counsel and the taking up of the defence by that counsel do not have a suspensory effect and that the disciplinary tribunal is to conduct the proceedings despite the justified absence of the notified accused judge or his or her defence counsel</p> <p>(another violation of Article 267 TFEU was established)</p>	<p>Action brought on 1 April 2021</p> <p>No judgment yet but see Case C-204/21 R</p> <p><b>Ongoing:</b> Commission is alleging that multiple provisions of Poland's "muzzle law" of 20 December 2019 violate the second subparagraph of Article 19(1) TEU as well as Article 267 TFEU, the principle of the primacy of EU law and Regulation 2016/679 of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data</p>



		by the Court due to the new possibility organised by Polish authorities to trigger disciplinary proceedings against judges submitting requests for a preliminary ruling to the Court)	
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Source: Table compiled by authors based on the cases mentioned above

In parallel to this more effective use of the traditional infringement procedure laid down in Article 258 TFEU, the Court of Justice “nudged” the Commission into adopting a rule of law-enhancing interpretation of Article 279 TFEU which provides that the Court of Justice “may in any cases before it prescribe any necessary **interim measures**”. This led the **Commission** on 2 October 2018 – in yet another long overdue but welcome change of enforcement approach – **to request the Court to order for the first time the provisional suspension of the national provisions** organising what amounted to a purge of Poland’s Supreme Court. A **second application for interim measures** was subsequently but belatedly submitted on 23 January 2020 in relation to Poland’s infamous Disciplinary Chamber. This was the first time the Commission requested and secured the provisional suspension of provisions governing the functioning of a body considered by national authorities to constitute a judicial body. Finally, on 1 April 2021, the Commission, arguably again belatedly, **applied for interim measures** in relation to Poland’s Muzzle Law of 20 December 2019. The Court’s order in this instance has been openly **ignored by Polish authorities** leaving no choice to the Commission but to request on 7 September 2021, **for the first time in relation to judicial independence matters, the imposition of a daily penalty payment**.

As the table shows, the Court of Justice has granted every interim order request submitted to it by the Commission, culminating in the order of 27 October 2021 imposing a periodic penalty payment of €1.000.000 per day due to Poland’s continuing and manifest failure to comply with Court’s previous order of 14 July 2021.

Table 12: *Commission v Poland* rule of law orders (Article 279 TFEU)

Case C-619/18 R	C-791/19 R	C-204/21 R
Application for interim measures lodged on 2 October 2018 (same day as infringement application lodged) <b>Final order adopted on 17 December 2018</b>	Application for interim measures lodged on 23 January 2020 (infringement application lodged on 25 October 2019) <b>Order adopted on 8 April 2020</b>	Application for interim measures lodged on 1 April 2021 (same day as infringement application lodged) <b>Order adopted on 14 July 2021</b>
<b>Outcome:</b> Polish authorities required to immediately suspend: (i) the application of relevant legal provisions; (ii) take all necessary measures to ensure that the judges of the Supreme Court concerned may continue to perform their duties in	<b>Outcome:</b> Polish authorities required to immediately suspend: (i) the application of relevant legal provisions; (ii) to refrain from referring the cases pending before the Disciplinary Chamber) of the Supreme Court before a panel that does not meet the requirements of independence	<b>Outcome:</b> Polish authorities required to immediately suspend: (i) the application of legal provisions relating to the jurisdiction of the Disciplinary Chamber to adjudicate on applications for authorisation to initiate criminal proceedings against judges or trainee judges, place them



<p>the positions which they held on 3 April 2018, the date on which the Law on the Supreme Court entered into force, while continuing to enjoy the same status and the same rights and working conditions as they did until 3 April 2018;</p> <p>(iii) to refrain from adopting any measure concerning the appointment of judges to the Supreme Court to replace the Supreme Court judges concerned by those provisions, or any measure concerning the appointment of a new First President of that court or indicating the person tasked with leading that court in its First President's stead pending the appointment of a new First President; and</p> <p>(iv) to inform the European Commission, one month after being notified of the present order at the latest, and then regularly — every month — thereafter, of all the measures it has adopted or plans to adopt in order to fully comply with that order.</p>	<p>defined, inter alia, in the judgment of 19 November 2019, <i>A. K. and Others</i> (Independence of the Disciplinary Chamber of the Supreme Court) (C-585/18, C-624/18 and C-625/18, EU:C:2019:982); and</p> <p>(iii) to inform the European Commission, at the latest one month after being notified of the order of the Court granting the requested interim measures, of all the measures it has adopted in order to comply fully with this order.</p>	<p>in provisional detention, arrest them or summon them to appear before it, and second, the effects of the decisions already adopted by the Disciplinary Chamber, and to refrain from referring cases to a court which does not meet the requirements of independence;</p> <p>(ii) the application of provisions relating to the jurisdiction of the Disciplinary Chamber to adjudicate in cases relating to the status of judges of the Supreme Court and the performance of their office, and to refrain from referring those cases to a court which does not meet the requirements of independence;</p> <p>(iii) the provisions relating to the disciplinary liability of judges to be incurred for having examined compliance with the requirements of independence and impartiality of a tribunal previously established by law;</p> <p>(iv) the provisions prohibiting national courts from verifying compliance with the requirements of the EU relating to an independent and impartial tribunal previously established by law;</p> <p>(v) the provisions establishing the exclusive jurisdiction of the Extraordinary Review and Public Affairs Chamber of the Supreme Court to examine complaints alleging lack of independence of a judge or a court;</p> <p>(vi) to communicate to the European Commission, no later than one month after notification of the order of the Court ordering the interim measures sought, all the measures adopted in order to comply in full with that order.</p> <p><b>Latest order to date (27 October 2021)</b></p> <p>Polish authorities ordered to pay the Commission a periodic penalty payment of €1.000.000 per day until such time as they comply with the obligations arising from the order of 14 July 2021 or it fails to do so, until the date of delivery of the judgment closing the proceedings in Case C-204/21.</p>
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Source: Table compiled by authors based on the cases mentioned above

Considering the above judicial developments on the infringement front since 2018 and the crucial impact the Court's infringement judgments and orders have had in terms of at least slowing down and establishing rule of law damage in Poland, one may only regret it took the Court's 2018 preliminary ruling judgment in *Portuguese Judges* for the **Commission** to make a decisive use of the second subparagraph of Article 19(1) TEU.

In addition to the crucial and immediate impact the Court's judgment in *Portuguese Judges* had on the Commission's infringement strategy, one must also note the even more dramatic impact this judgment had on **national judges under siege**, in particular in Poland and Romania, with more than 50 national requests for a preliminary ruling relating to Article 19(1) TEU having since been submitted to the Court of Justice.<sup>146</sup>

This has allowed the Court of Justice, in turn, to further **clarify** *inter alia* the **meaning and scope of the rule of law** and its core components and most crucially, the legal obligations which flow from the EU principle of effective judicial protection such as the obligation for Member States to ensure and maintain the **independence of national courts** and the **obligation of non-regression**,<sup>147</sup> which means that national authorities cannot amend national laws in such a way as to bring about a reduction in the protection of the value of the rule of law, a value which is given concrete expression by, *inter alia*, Article 19 TEU. Most recently, and as will be shown below, the Court of Justice has also drastically strengthened the effectiveness of the special rule of law monitoring mechanism established in 2006 in respect of Bulgaria and Romania in a context where the Commission has never gone beyond producing reports regardless of the arguably manifest and repeated violations i.a. of the EU principle of effective judicial protection.

#### **d. First judgment on the legal nature and effects of the Cooperation and Verification Mechanism (established in 2006) in 2021**

As the EU was concerned with Bulgaria and Romanian's rule of law shortcomings ahead of their EU accession which took place on 1 January 2007, a bespoke and unprecedented **Cooperation and Verification Mechanism (CVM)** was set up in 2006 in order to monitor the countries' progress in addressing specific benchmarks in the areas of judicial reform and the fight against corruption and organised crime post accession.<sup>148</sup> These two issues were explicitly linked with the principle of the **rule of law**, which was defined as implying "the existence of an impartial, independent and effective judicial and administrative system properly equipped, *inter alia*, to fight corruption and organised crime".<sup>149</sup> To monitor progress on meeting these benchmarks, annual reports are produced by the Commission.

Due to the COVID situation, no CVM report in relation to **Romania** was however produced in 2020 while in 2021, only one progress report was published.<sup>150</sup> In the case of **Bulgaria**, in a move which is hard to

<sup>146</sup> For further analysis and references, see Pech, L., Kochenov, D., *Respect for the Rule of Law in the Case Law of the European Court of Justice*, *op. cit.*

<sup>147</sup> C-896/19 *Repubblika*, 20 April 2021, EU:C:2021:311, Joined Cases C-83/19, C-127/19 and C-195/19, Cases C-291/19, C-355/19 and C-397/19, *Asociația 'Forumul Judecătorilor din România' et al.*, EU:C:2021:393, 18 May 2021, CLI:EU:C:2021:393.

<sup>148</sup> Commission Decision 2006/928/EC of 13 December 2006 establishing a mechanism for cooperation and verification of progress in Romania to address specific benchmarks in the areas of judicial reform and the fight against corruption, OJEU 2006 L 354/56; Commission Decision 2006/929/EC of 13 December 2006 establishing a mechanism for cooperation and verification of progress in Bulgaria to address specific benchmarks in the areas of judicial reform and the fight against corruption and organised crime, OJ 2006 L 354/58. Both CVM decisions were adopted on the basis of Articles 37 and 38 of the 2005 Treaty on the accession of Bulgaria and Romania.

<sup>149</sup> Commission Decision 2006/929/EC, *ibid.*, recital 3.

<sup>150</sup> According to the European Commission, "since the last CVM report in 2019, the situation within the parameters of the CVM benchmarks has shown a positive trend. The Commission welcomes the fact that a renewed impetus has been given in 2021 to reform and to reverse the backtracking of the 2017-2019 period", Press release, IP/21/2881, 8 June 2021. The

reconcile with any serious analysis of the situation on the ground and despite criticism by civil society and experts, including MEDEL and the former Permanent European Commission Representative on the CVM, the Commission declared three of the country's benchmarks (judicial independence, legal framework, and organised crime) provisionally closed in the 2018 CVM report and all benchmarks (the remaining ones being continued judicial reform, high-level corruption, and general corruption) provisionally closed in the 2019 CVM report.<sup>151</sup> In 2019, the Commission further announced in a press release that it "consider[ed] that the progress made by Bulgaria under the CVM [was] sufficient to meet Bulgaria's commitments made at the time of its accession to the EU" and that it planned to take into account the observations of the European Parliament and Council before taking a final decision on the termination of Bulgaria's CVM.<sup>152</sup> Since then, the current Commission has made it clear that it has neither the intention to reconsider its prior (manifestly flawed) conclusions on Bulgaria, nor the intention to publish further CVM reports, essentially leaving Bulgaria's CVM in a limbo and de facto subject to the sole new ARoLR mechanism.<sup>153</sup>

The **Commission's** failure to properly take account of obvious weaknesses and react to manifest violations of the rule of law has happened in a broader context showing its sustained **unwillingness to launch infringement actions**. Notwithstanding a severe pattern of rule of law backsliding and associated manifest violations of EU law experienced in **Romania** during the period 2017-19<sup>154</sup> and a long standing pattern of state-sponsored corruption and state capture in **Bulgaria**,<sup>155</sup> the European Commission has *never* launched a single infringement action on these grounds. In the absence of an infringement action connected to the non-implementation and/or violation of the rule of law benchmarks defined by the Commission in its 2006 CVM decisions, it took more than 15 years for the Court of Justice to get its first opportunity to clarify the legal nature and effects of the CVM and the scope of the Commission's CVM reports following several national requests for a preliminary ruling submitted by Romanian judges.

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very same day, however, Romanian's (controversial) Constitutional Court essentially nullified the first and seminal Court of Justice's judgment relating to the legal nature and effects of the CVM and in which the Court also made clear that the judicial "reforms" adopted in 2017-2019 were all incompatible with EU law and in particular the second subparagraph of Article 19(1) TEU. See Joined Cases C-83/19, C-127/19 and C-195/19, Cases C-291/19, C-355/19 and C-397/19, *Asociația 'Forumul Judecătorilor din România' et al.*, EU:C:2021:393. For further analysis, see Dimitrovs, A., Kochenov, D., 'Of Jupiters and bulls: CVM as a redundant special regime of the rule of law – Romanian Judges', *EU Law Live*, No. 61, 5 June 2021, <https://eulawlive.com/weekend-edition/weekend-edition-no61>.

<sup>151</sup> For an analysis, see Vassileva, R., 'Sweet Like Sugar, Bitter Like a Lemon: Bulgaria's CVM Report', *VerfBlog*, 16 November 2018, <https://verfassungsblog.de/sweet-like-sugar-bitter-like-a-lemon-bulgarias-cvm-report>; 'So Why Don't We Just Call the Whole Rule of Law Thing Off, Then? On Tomatoes, Tomahtoes, and Bulgaria's Cooperation and Verification Mechanism', *VerfBlog*, 24 October 2019: <https://verfassungsblog.de/so-why-dont-we-just-call-the-whole-rule-of-law-thing-off-then>.

<sup>152</sup> Commission, 'Commission reports on progress in Bulgaria under the Cooperation and Verification Mechanism', Press Release IP/19/6136, 22 October 2019.

<sup>153</sup> On the hearing of Commissioner Vera Jourova with the LIBE Committee on the situation in Bulgaria after mass protests erupted against the government and General Prosecutor Ivan Geshev, see Vassileva, R., 'On Coins, Parallel Universes and the Cooperation and Verification Mechanism', *VerfBlog*, 12 September 2020, <https://verfassungsblog.de/on-coins-parallel-universes-and-the-cooperation-and-verification-mechanism>.

<sup>154</sup> See e.g. Pech, L., Perju, V., Platon, S., 'How to address rule of law backsliding in Romania. The case for an infringement action based on Article 325 TFEU', *VerfBlog*, 29 May 2019: <https://verfassungsblog.de/how-to-adress-rule-of-law-backsliding-in-romania>.

<sup>155</sup> European Parliament resolution of 8 October 2020 on the rule of law and fundamental rights in Bulgaria (2020/2793(RSP)), For further analysis, Vassileva, R., 'Capturing Bulgaria's Justice System: The Homestretch', *VerfBlog*, 29 May 2019: <https://verfassungsblog.de/capturing-bulgarias-justice-system-the-homestretch/>; 'Threats to the Rule of Law: The Pitfalls of the Cooperation and Verification Mechanism' (2020) 26 *European Public Law* 741.

In a seminal Grand Chamber **judgment** of 18 May 2021, the Court of Justice confirmed, for the first time and contrary to the Romanian government's assertions (supported by the Polish government as regards the issue of the Court of Justice's jurisdiction),<sup>156</sup> that:

- Decision 2006/928 establishing a CVM in respect of Romania and the CVM reports drawn up by the Commission on the basis of that decision constitute acts of an EU institution, which are amenable to interpretation by the Court under Article 267 TFEU;
- Decision 2006/928 falls within the scope of Romania's Treaty of Accession and continues to produce its effects as long as it has not been repealed;
- Decision 2006/928 is addressed to all Member States, which includes Romania as from its accession and is therefore binding in its entirety on that Member State as from its accession to the EU as long as it has not been repealed;
- The benchmarks in the Annex to Decision 2006/928 are intended to ensure that Romania complies with the Article 2 TEU value of the rule of law and are binding on Romania, with the result that Romania is subject to the specific obligation to address those benchmarks and to take appropriate measures to meet them as soon as possible. Similarly, Romania is required to refrain from implementing any measure which could jeopardise those benchmarks being met;
- Romania is also under an obligation, under the principle of sincere cooperation laid down in Article 4(3) TEU, to take due account of the requirements and recommendations formulated in the CVM reports drawn up by the Commission. In particular, Romania cannot adopt or maintain measures in the areas covered by the benchmarks which could jeopardise the result prescribed by those requirements and recommendations.

In light of the patent lack of progress and indeed, Romania's Constitutional Court's increasingly obvious contempt for the rule of law<sup>157</sup> and its decision of 8 June 2021 which essentially nullified the above seminal judgment of the Court of Justice on the back of a "reasoning" aptly characterised as "a hallucinating succession of legal nonsense"<sup>158</sup> – one may question the wisdom of the Commission's advertised aim to end the CVM mechanism and replace it with what is currently a weaker form of monitoring, that is, the Commission's ARoLR<sup>159</sup> although a CVM-like evolution of the ARoLR is likely.<sup>160</sup>

Be that as it may, the situation has further deteriorated following a **second judgment** of the Court of Justice issued on 21 December 2021 in reply to another of set of national requests for a preliminary ruling originating from Romanian courts and holding *inter alia* that **EU Law precludes the application of a constitutional court's case insofar as this creates a systemic risk of impunity for corruption-**

<sup>156</sup> Joined Cases C-83/19 et al., *op. cit.*

<sup>157</sup> At the time, Romania was governed by the leader of the Social Democratic Party and president of the Chamber of Deputies – an individual sentenced to a three-and-a-half year prison sentence for abuse of power in May 2019 – a packing of the court was organised with individuals such the head of the new Judicial Inspection tasked with conducting disciplinary actions against magistrate (a body itself subsequently found to be incompatible with EU law by the Court of Justice) appointed to it. Unsurprisingly, once captured, the Constitutional Court played its expected part in undermining anti-corruption efforts and participated for instance in the unlawful dismissal of the current head of the EU EPP: See ECtHR judgment of 5 May 2020 in the case of *Kövesi v. Romania* (application no. 3594/19) in which the ECtHR unanimously held that the applicant's removal as the chief prosecutor of the National Anticorruption Directorate before the end of her second term following her criticism of legislative reforms in the area of corruption violated her right to a fair trial and right to freedom of expression. In May 2018, the Constitutional Court ordered the President to sign the dismissal decree. For the ECtHR, Romanian authorities "impaired the very essence of the applicant's right of access to a court owing to the specific boundaries for a review of her case set down in the ruling of the Constitutional Court."

<sup>158</sup> Selejan-Gutan, B., 'A Tale of Primacy Part II: The Romanian Constitutional Court on a Slippery Slope', *VerfBlog*, 18 June 2021: <https://verfassungsblog.de/a-tale-of-primacy-part-ii/>; 'Part III: Game of Courts', *VerfBlog*, 17 November 2021: <https://verfassungsblog.de/a-tale-of-primacy-part-iii/>.

<sup>159</sup> For the Commission, since the CVM was set as a transitional measure, monitoring should continue under horizontal instruments "once this special mechanism ends": *Strengthening the rule of law within the Union, op. cit.*, p. 15, fn 52.

<sup>160</sup> As will be discussed in Part III of this study, the European Parliament has suggested and the Commission agreed to include country specific recommendations in the 2022 edition of its ARoLR.

**related offences.**<sup>161</sup> Adding insult to injury, Romania's Constitutional Court has again indicated – this time *via a press release* not connected to any case pending before it and of no legal value whatsoever<sup>162</sup> – its refusal to accept that Romanian judges must comply and apply directly effective provisions of EU law relating to the rule of law as interpreted by the Court of Justice and set aside any conflicting provision of domestic law as long as the Romanian Constitution is not revised.<sup>163</sup> This flies in the face *inter alia* of Romania's legal obligations under the Treaty of Accession, the EU Treaties and the entirety of the Court of Justice's case law regarding the **autonomy, primacy, effectiveness and uniform application of EU law**, not to forget the **binding effect of the rulings of the Court**. A development which will no doubt be detailed in the 2022 edition of the Commission's country chapter on the rule of law situation in Romania.

In the meantime, the Court of Justice is about to decide its **third Romanian judges preliminary ruling case**,<sup>164</sup> while the **Commission** is still seemingly **pondering** whether to launch an infringement action in the face of what Didier Reynders has publicly described as a "real, permanent and persistent position to go against the EU law or the binding character of the ECJ decisions."<sup>165</sup> One may only wonder what it will take for the Commission to finally act.

In the case of **Bulgaria**, some of the key **threats** to the rule of law which the Commission has recognised in the 2020 ARoLR and, more prominently, in the 2021 ARoLR, were either marked off as '**progress**' in the CVM reports or **encouraged** through CVM observations and recommendations. For instance, in Bulgaria's 2021 and 2020 ARoLR country chapters, the Commission has raised concern about the excessive powers of the Prosecutor's Office – namely, the lack of a mechanism for an effective investigation into alleged crimes of the General Prosecutor as well as the disproportionate influence of the General Prosecutor on the Supreme Judicial Council and his weight in the career development of magistrates, including the judiciary.<sup>166</sup> First, all of these issues were well-known at the time of Bulgaria's accession to the EU in 2007. Second, in the 2016 CVM report on Bulgaria, the Commission presented a highly contested "reform" preserving the General Prosecutor's influence on the Supreme Judicial Council as an "an important step towards a reform",<sup>167</sup> despite protests by the judiciary and Hristo Ivanov, Minister of Justice in Boyko Borissov's second government, who resigned as he deemed Borissov was undermining the rule of law.<sup>168</sup> Similarly, while the lack of an effective mechanism for

<sup>161</sup> Joined Cases C-357/19 et al., *Euro Box Promotion and Others*, EU:C:2021:1034. The Court's judgment is yet another seminal judgment issued by the Court of Justice which may be understood as a green light given to the Commission to move ahead with its now pending infringement action in respect of Poland's unlawfully composed and politically compromised Constitutional Tribunal: Filipek, P., and Taborowski, M., 'From Romania with Love: The CJEU confirms criteria of independence for constitutional courts', *VerfBlog*, 14 February 2022: <https://verfassungsblog.de/from-romania-with-love/>.

<sup>162</sup> In addition, we agree with the view that the press release "can be regarded as a form of pressure against judges, in order to deter them to correctly apply the CJEU judgment. Ironically, the press release signed by the RCC's president only confirms the concerns expressed by CJEU in relation to the independence (or lack thereof) of the constitutional court": Selejan-Gutan, B., 'Who's Afraid of the „Big Bad Court“?', *VerfBlog*, 10 January 2022: <https://verfassungsblog.de/whos-afraid-of-the-big-bad-court/>.

<sup>163</sup> See the press release dated 23 December 2021: <https://www.ccr.ro/comunicat-de-presa-23-decembrie-2021/>.

<sup>164</sup> See pending Case C-430/21 *RS* (in his opinion of 20 January 2022, AG Collins opined that the Romanian Constitutional Court's Decision No 390/2021 is such as to raise serious doubts about that court's adherence to the essential principles of EU law and has furthermore unlawfully arrogated competence to itself in breach of the second subparagraph of Article 19(1) TEU, the principle of primacy of EU law and the fundamental requirement of an independent judiciary).

<sup>165</sup> Quoted by Pop, V., 'Romania joins challenges to EU law supremacy', *Financial Times*, 14 January 2022.

<sup>166</sup> 2021 Rule of Law Report. Country Chapter on the rule of law situation in Bulgaria, pp. 3-6; 2020 Rule of Law Report. Country Chapter on the rule of law situation in Bulgaria, pp. 2-6.

<sup>167</sup> CVM Report, COM(2016) 40 final, 27 January 2016, p. 3.

<sup>168</sup> According to the largest professional organisation of the judiciary, the Bulgarian Judges Association, "the long-awaited changes that were in the draft for constitutional amendment ... were instead replaced with 'accepted corrections' which will not result in a real change; will not give any guarantees for the rule of the law and the independence of judges; and



investigating potential criminal activity by the General Prosecutor and the excessive powers concentrated within the Prosecutor's Office were clearly established in the **ECHR** case of *Kolevi v Bulgaria* in 2009<sup>169</sup> – a major source of concern for the **Council of Europe** and the **Venice Commission** for more than a decade<sup>170</sup> – the European Commission has only showed sporadic, limited concern in the CVM reports and even embraced as “progress” initiatives by the General Prosecutor to self-increase his own powers.<sup>171</sup> In the last 2019 CVM report on Bulgaria, **10 years after the Kolevi judgment**, the Commission “welcome[d] the readiness” of Bulgarian authorities “to help find a measured and balanced solution, to guarantee that judicial independence is assured in the future procedure” aimed at ensuring the independence at all stages of any investigation involving allegations of criminal misconduct by a Prosecutor General while still in office” even though a proper solution was nowhere in sight and incomprehensibly closed the judicial reform benchmark.<sup>172</sup> The reality of the Bulgaria's rule of law situation begs the questions of **undue partisan interferences within the Commission** considering the view publicly expressed by the then President of the Commission Jean-Claude Juncker who once told reporters that “he had always said ... that Bulgaria would exit the CVM during the mandate of [his] Commission”.<sup>173</sup>

To conclude and help better appreciate the evolution and densification of the EU's rule of law toolbox since 2012 as well as quickly appreciate their different purposes and scopes, a concise and transversal overview of the tools which are now available to the EU is offered below.

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will not eliminate the widely suspected dependencies within the judicial system. The ratio of the quotas of the colleges of judges and prosecutors may mean little to those not familiar with the issue, but it is important, because it gets down to the most fundamental problem – which is whether we can have judicial courts that are independent of politicians and whether we can rely on a prosecutor's office which is independent of political interference”. See *Open Letter to Bulgarian Citizens* by the Bulgarian Judges Association, 14 December 2015, <https://www.rechtersvoorrechters.nl/media/bulgarije/OpenLetterBJA.pdf>.

<sup>169</sup> Judgment of 5 November 2009, Application no. 1108/02, paras 205 and 209 (this judgment concerns the unlawful detention of a senior Bulgarian prosecutor who served as deputy chief public prosecutor between 1994 and 1997 and the ineffective investigation of his murder on 28 December 2002 when he was shot dead in front of his home).


<sup>170</sup> Vassileva, R., ‘Kolevi: Bulgaria's 10-Year Cat-and-Mouse Game with the Council of Europe and the Venice Commission’, *VerfBlog*, 12 February 2020, <https://verfassungsblog.de/kolevi-bulgarias-10-year-cat-and-mouse-game-with-the-council-of-europe-and-the-venice-commission>.

<sup>171</sup> Vassileva, R., ‘Threats to the Rule of Law: The Pitfalls of the Cooperation and Verification Mechanism’ (2020) 26 *European Public Law* 741, pp. 749-755.

<sup>172</sup> CVM Report, COM(2019) 498 final, 22 October 2019, p. 7.

<sup>173</sup> ‘Juncker: CVM on Bulgaria to Be Lifted by End-2019’, *Novinite.com*, 18 February 2016: <https://www.novinite.com/articles/173175/Juncker%3A+CVM+on+Bulgaria+to+Be+Lifted+by+End-2019>. (See also the claims made by Ivanov, H., ‘The Commission's Report: a Severe Case of Institutional Sciatica. A Requiem for the CVM or What Follows After its Premeditated Political Murder?’, *ClubZ*, 14 November 2018, <https://www.clubz.bg/75830-dokladyt-na-ek-tejyk-ppictyp-na-inctitycionalen-ishiac>).

Table 13: The EU's Rule of Law Toolbox (2022)

	<b>Exceptional procedures to ensure protection of Article 2 TEU values or rule of law specifically</b> (case by case use)	<ul style="list-style-type: none"> <li>Article 7 TEU procedure</li> <li>Pre-Article 7 TEU procedure (strictly speaking known as new EU Framework to strengthen the Rule of Law which aims to deal with systemic threats to the rule of law only)</li> </ul>
	<b>Standard procedures to ensure compliance with EU Law, including rule of law requirements</b> (case by case use)	<ul style="list-style-type: none"> <li>Infringement procedure (Arts 258-260 TFEU), including interim measures (Article 279 TFEU)</li> <li>National requests for a preliminary ruling (Article 267 TFEU)</li> </ul>
	<b>Financial instruments</b> (case by case use)	<ul style="list-style-type: none"> <li>Negative conditionality: Specific mechanism to protect EU budget against risks arising from rule of law breaches (Regulation 2020/2092) but see also NextGenerationEU regulations 2020/2094 and 2021/241 as well as Common Provisions Regulation 2021/1069</li> <li>Positive conditionality: Grants for civil society and networks to promote EU values, enhance judicial cooperation, etc (see Justice, Rights and Values Fund and support available via Technical Support Instrument)</li> </ul>
	<b>Rule of law monitoring instruments covering all Member States</b> (cyclical)	<ul style="list-style-type: none"> <li>Commission's annual Justice Scoreboard</li> <li>Commission's annual Rule of Law Report</li> <li>Council's annual dialogue</li> <li>European semester's annual economic, fiscal, labour and social policy coordination process (Commission and Council)</li> </ul>
	<b>Rule of law monitoring instrument covering specific Member States</b> (cyclical)	<ul style="list-style-type: none"> <li>Cooperation and Verification Mechanism (Bulgaria and Romania only and due to end on account of launch of Commission's annual Rule of Law Report)</li> </ul>

Source: Authors



### 3. A CRITICAL ASSESSMENT OF THE COMMISSION'S RULE OF LAW REPORT

This section will first offer the main positive features but also main weaknesses one may identify in relation to the Commission's ARoLR following the publication of its first two editions in 2020 and 2021.<sup>174</sup>

#### 3.1. Positive features

A number of positive features can be highlighted: In response to allegations claiming that the rule of law was too vague a notion to be defined and/or enforced, the Commission has offered a compelling definition of the rule of law and its core components. The ARoLR also makes it easy to understand why the rule of law matters for the European project. The selection of themes on which the reports are based also gives a good overview of where EU Member States stand in terms of the rule of law. Finally, the annual pan-European discussion on rule of law matters, which the ARoLR has helped crystallise, has helped make this foundational value an increasingly more salient issue at both national and EU levels. These positive features are examined below.

##### 3.1.1. Compelling definition of the rule of law

One of the positive features of the 2020 ARoLR is that the Commission starts with a **compelling definition of the core elements of the rule of law**, one of the EU's foundational and common values enshrined in Article 2 TEU.<sup>175</sup> The Commission's definition codifies the key legal principles laid down in the EU Treaties, EU secondary legislation, the case-law of the Court of Justice as well as the case law of the European Court of Human Rights. Furthermore, the ARoLR helpfully recalls that "[w]hile Member States have different national identities, legal systems and traditions, the core meaning of the rule of law is the same across the EU", which is indeed the case.<sup>176</sup>

<sup>174</sup> This section builds on our previous works: Bárd, P., 'The Bumpy Road to Rule of Law Enforcement: The Commission's 2020 Annual Rule of Law Report' in Urbanik, J., Bodnar, A., (eds), *Περιμένοντας τους Βαρβάρους. Law in a time of Constitutional Crisis. Studies Offered to Mirosław Wyrzykowski*, Beck, 2021, 59; Bárd, P., 'Diagnostic Autopsy: The Commission's 2020 Annual Rule of Law Report' *Reconnect blog*, 28 October 2020: <https://reconnect-europe.eu/blog/diagnostic-autopsy-the-commissions-2020-annual-rule-of-law-report/>; Pech, L., 'Doing more harm than good? A critical assessment of the European Commission's first Rule of Law Report', *Reconnect Blog*, 9 December 2020: <https://reconnect-europe.eu/blog/doing-more-harm-than-good-a-critical-assessment-of-the-european-commissions-first-rule-of-law-report/>. See also Hegedüs, D., 'The European Commission's Missed Rule-of-Law Opportunity', German Marshall Fund, 1 October 2020: <https://www.gmfus.org/news/european-commissions-missed-rule-law-opportunity>; Kelemen, R.D., 'You can't fight autocracy with toothless reports', *EU Law Live*, 6 October 2020: <https://eulawlive.com/op-ed-you-cant-fight-autocracy-with-toothless-reports-by-roger-daniel-kelemen/>; Mungiu-Pippidi, A., 'Unresolved Questions on the EU Rule of Law Report', *Carnegie Europe*, 20 October 2020: <https://carnegieeurope.eu/2020/10/20/unresolved-questions-on-eu-rule-of-law-report-pub-82999>.

<sup>175</sup> For a critique, see Azmanova, A., Howard, B., *Binding the Guardian. On the European Commission's failure to safeguard the rule of law*, Study Commissioned by Clare Daly MEP (GUE/NGL), 25 October 2021, 114p: <https://kar.kent.ac.uk/92062/>. The authors criticise the Commission's definition of the rule of law on account of the link made with the democratic nature of law-making which "could be interpreted to mean that the rule of law is conditional on democracy", "a conceptual fallacy that misrepresents the rule of law" (p. 11). Our reading of the Commission's understanding is however different. In other words, the Commission's rule of law approach does not mean that the Commission conditions the rule of law on the will of the people or that democratically elected bodies can escape the prohibition on the arbitrary use of public power. The Commission therefore does not condition the rule of law on democracy and does not immunise democratically adopted law from rule of law scrutiny. There is consensus therefore on the authors' point that "a democratically issued law that contributes to the arbitrary use of power violates the rule of law" (p. 94). We share however the authors' recommendation to include economic actors, as per the approach of the Venice Commission.

<sup>176</sup> 2020 Rule of Law Report. The rule of law situation in the European Union, COM(2020) 580 final, p. 1.

This is not however the first time the **Commission** has made clear its understanding of the rule of law and its core legal components. Indeed, it offered a largely similar definition to that of the 2020 ARoLR already in 2014 when it adopted a new EU Rule of Law Framework (the pre-Article 7 procedure previously described in Part I of this study). This 2014 definitional effort itself reflected the previous efforts by the Venice Commission which led to the adoption of the **Council of Europe's** first ever Rule of Law Checklist.<sup>177</sup> Last but not least, the Commission's definition has since been embraced – with some slight phrasing variations – by the **EU's co-legislators** when they adopted the Rule of Law Conditionality Regulation in December 2020.

Table 14: What is the rule of law?

Council of Europe's definition 178	European Commission's definition 179	European Parliament and Council's definition 180
The core elements of the rule of law are: "(1) Legality, including a transparent, accountable and democratic process for enacting law; (2) Legal certainty; (3) Prohibition of arbitrariness; (4) Access to justice before independent and impartial courts, including judicial review of administrative acts; (5) Respect for human rights; and (6) Non-discrimination and equality before the law."	"Under the rule of law, all public powers always act within the constraints set out by law, in accordance with the values of democracy and fundamental rights, and under the control of independent and impartial courts. The rule of law includes principles such as legality, implying a transparent, accountable, democratic and pluralistic process for enacting laws; legal certainty; prohibiting the arbitrary exercise of executive power; effective judicial protection by independent and impartial courts, effective judicial review including respect for fundamental rights; separation of powers; and equality before the law."	The rule of law "includes the principles of legality implying a transparent, accountable, democratic and pluralistic law-making process; legal certainty; prohibition of arbitrariness of the executive powers; effective judicial protection, including access to justice, by independent and impartial courts, also as regards fundamental rights; separation of powers; and non-discrimination and equality before the law. The rule of law shall be understood having regard to the other Union values and principles enshrined in Article 2 TEU."

Source: Table compiled by authors based on the materials listed in footnotes

The above codification of the core elements of the rule of law in both non-legislative and legislative documents has to be understood as an answer to the increasing propensity by those engaged in the systemic violation of the rule of law but also democratic principles and fundamental rights to claim that

<sup>177</sup> Venice Commission, *Report on the Rule of Law*, Study No. 512/2009, CDL-AD(2011)003rev, Strasbourg, 4 April 2011. It is therefore inaccurate to infer, as Advocate General Campos Sánchez-Bordona did in his Opinion in Case C-156/21, *Hungary v European Parliament and Council*, EU:C:2021:974, para. 277, that the Venice Commission borrowed from the European Commission when it is actually the other way around.

<sup>178</sup> Venice Commission, *Rule of Law Checklist*, 18 March 2016, para 18.

<sup>179</sup> 2020 Rule of Law Report. The rule of law situation in the European Union, op. cit., p. 1.

<sup>180</sup> Article 2 (Definitions) of Regulation 2020/2092.

they cannot be violating the rule of law since EU law would allegedly not provide any definition of this principle.

This trend recently culminated in the two governments currently subject to Article 7(1) TEU proceedings arguing before the Court of Justice that the rule of law “cannot be the subject of a uniform definition in EU law” (Hungarian government) and that a budgetary-related EU regulation “cannot define the concept of the rule of law or the constituent elements of infringements of the rule of law” (Polish government).<sup>181</sup> In reply to these claims – which just plainly ignore the EU’s legal framework, the multiple references if not definitions one can find in legislative and non-legislative instruments adopted by the EU in particular in the context of its external action,<sup>182</sup> and the Court of Justice’s well established case law regarding the core components of the EU rule of law – EU Advocate General Campos Sánchez-Bordona helpfully recalled that:

272. Although the concept of the rule of law as a value of the European Union enshrined in Article 2 TEU is broad, there is nothing to prevent the EU legislature from defining it more precisely in a specific area of application, such as implementation of the budget, for the purposes of establishing a financial conditionality mechanism.

273. The concept of the rule of law has an autonomous meaning within the EU legal system. It cannot be left to the national law of the Member States to determine its parameters, because of the risk this would pose to its uniform application [...]

274. As I noted earlier, the Court’s case-law has helped to develop the value of the rule of law as regards its implications for effective judicial protection or the independence of the judiciary. That case-law can provide the EU legislature with guidelines to help in defining that value in secondary legislation. That is what has happened with Regulation 2020/2092.<sup>183</sup>

Accordingly, the Hungarian and Polish’s claim alleging a violation of legal certainty must be rejected. Indeed, the EU’s co-legislators merely developed the value of the rule of law by specifying the core legal principles this value embodies and which are all **based on the Court of Justice’s own case law in addition to being also guaranteed by the European Court of Human Rights**. The Court confirmed the validity of the EU Advocate General’s approach and rejected all of the claims raised by the Hungarian and Polish governments in respect of the definition laid down in this Regulation.<sup>184</sup> As stressed by the Court, while Article 2 of Regulation 2020/2092 does not set out in detail the principles of the rule of law that it mentions, these principles have not only “been the subject of extensive case-law” but are also “recognised and applied by the Member States in their own legal systems”.<sup>185</sup> It follows, inter alia, that it cannot be claimed that these “principles are of a purely political nature and

<sup>181</sup> Opinions of Advocate General Campos Sánchez-Bordona delivered on 2 December 2021 in Case C-156/21, *Hungary v European Parliament and Council*, EU:C:2021:974, para. 267 and in Case C-157/21, *Poland v European Parliament and Council*, EU:C:2021:978, para. 17.

<sup>182</sup> One may argue that the problem in EU law has never been the lack of a definition but rather the proliferation of multiple varying definitions in multiple documents of a variable legal nature since the early 1990s. See Pech, L., ‘Promoting The Rule of Law Abroad: On the EU’s limited contribution to the shaping of an international understanding of the rule of law’ in Amtenbrink, F., Kochenov, D., (eds), *The EU’s Shaping of the International Legal Order*, Cambridge University Press, 2013, p. 108; ‘The EU as a Global ‘Rule of Law Promoter’: The Consistency and Effectiveness Challenges’ (2016) 14(1) *Europe-Asia Journal* 7 and ‘The rule of law as a well-established and well-defined principle of EU Law’ (2022) *Hague Journal on the Rule of Law* (forthcoming).

<sup>183</sup> Opinion of Advocate General Campos Sánchez-Bordona delivered on 2 December 2021 in Case C-156/21, *Hungary v European Parliament and Council*, EU:C:2021:974.

<sup>184</sup> For further analysis, see Pech, L., ‘No More Excuses: The Court of Justice greenlights the rule of law conditionality mechanism’, *VerfBlog*, 16 February 2022: <https://verfassungsblog.de/no-more-excuses/>.

<sup>185</sup> C-156/21, op. cit., paras 236-237.

that an assessment of whether they have been respected cannot be the subject of a strictly legal analysis".<sup>186</sup>

### 3.1.2. Clear outline of why the rule of law matters

The Commission has repeatedly and compelling explained, albeit not always in a particularly structured and consistent manner, why the rule of law matters not only in general but more specifically in the EU considering the specific features of the EU's constitutional *raison d'être*, framework, objectives and policies. According to the Commission, and to summarise the explanations outlined in several of its communications, **respect for the rule of law** is:

- A **prerequisite** for ensuring the protection of **fundamental rights** and safeguarding **democracy** at the Member State and EU levels in particular to the extent that the rule of law is essential for citizens to trust public institutions and aims to prevent abuse of power by public authorities and allow for decision-makers to be held accountable;
- A **prerequisite** for the enjoyment of **all of the rights** deriving from the application of the Treaties;
- A **prerequisite** for the consistent, effective and uniform application of **EU law and budgets** to be spent in accordance with applicable rules;
- A **prerequisite** for **mutual trust** between Member States and more broadly, for the effective functioning of the EU as an **area of freedom, security and justice** and an **internal market** as these are based inter alia on the principles of mutual trust and mutual recognition, which means the confidence of all EU citizens and national authorities in the legal systems of all other Member States is vital for the functioning of the whole EU;
- A **prerequisite** for a well-functioning **business environment** in which citizens and businesses can rely on a framework of predictable and equitable rules and a system of judicial remedies ensuring effective judicial protection for natural and legal persons;
- A **prerequisite** for the **credibility** and **effectiveness** of the EU's **external** actions and policies at bilateral, regional and multilateral level.

In light of the above, it should be easy to understand why **the EU has a strong if not existential interest** in safeguarding and strengthening the rule of law across the Union. Indeed, deficiencies in one Member State inherently impact other Member States and the EU as a whole. Arguably missing from the Commission's explanations of why the rule of law matters is a stronger emphasis on the **specific characteristics of the EU and EU law**, on the fundamental premiss on which the EU's legal order is based, as well as the deeply interconnected and interdependent nature of this legal "ecosystem".<sup>187</sup> In this respect, the Commission would be well inspired to better recall in future communications what the Court of Justice has repeatedly stressed over the years:

EU Law is characterised by the fact that it stems from an independent source of law, the Treaties, by its primacy over the laws of the Member States, and by the direct effect of a whole series of provisions which are applicable to their nationals and to the Member States themselves.

These essential characteristics of EU law have given rise to 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 [...]

<sup>186</sup> Ibid., para. 240.

<sup>187</sup> In such an interconnected system, the autocratisation of any EU Member State is bound to produce consequences beyond its borders. To borrow the (daring) analogy used by Professor Kelemen, "accepting an autocratic member government in the EU is like allowing a toilet area in a swimming pool – eventually the filth will contaminate the entire pool", Kelemen, R.D., 'Is Differentiation Possible in Rule of Law?' (2019) 17(2) *Comparative European Politics* 246–260, p. 249.

This legal structure is based on the fundamental premiss that each Member State shares with all the other Member States, and recognises that they share with it, a set of common values on which the EU is founded, as stated in Article 2 TEU. That premiss implies and justifies the existence of mutual trust between the Member States that those values will be recognised and, therefore, that the law of the EU that implements them will be respected.<sup>188</sup>

Viewed in this light, it should be obvious why the deliberate process of rule of law **backsliding** and ongoing consolidation of at least two EU countries into electoral autocracies represent an **existential threat** to the EU as it undermines the fundamental premise on which the EU legal order is based. This explains why the Court recently and forcefully stressed that compliance with Article 2 TEU values “cannot be reduced to an obligation which a candidate State must meet in order to accede to the European Union and which it may disregard after its accession” before emphasising that the EU “must be able to defend those values” within the limits of its powers.<sup>189</sup> This is especially true and necessary in respect of the rule of law which, as the Court of Justice forcefully put it, “forms part of the very foundations of the European Union and its legal order”.<sup>190</sup>

### 3.1.3. Suitable selection of relevant “pillars” and main sources of information

Another positive feature of the Commission’s Rule of Law Report is the selection of appropriate and **broad pillars**, namely (i) the justice system, (ii) the anti-corruption framework, (iii) media pluralism and (iv) a catch-all pillar entitled “other institutional issues related to checks and balances”. While there is room for a better justification of why these pillars were selected,<sup>191</sup> the choice of topics and sub-topics covered under each of these four pillars, and how the Commission conducts its analysis under each pillar and across pillars, the ARoLR does already allow interested parties to relatively quickly gain a broad overview of the situation across the EU and in each of the EU Member State.

By using the same pillars over the years, the ARoLR should also increasingly help one understand the evolution of the situation in the EU and assess a country’s adherence to the rule of law over time. The four “pillars” are furthermore correctly understood as “key interdependent pillars for ensuring the rule of law. Effective justice systems and robust institutional checks and balances are at the heart of the respect for the rule of law in our democracies. However, laws and strong institutions are not enough. The rule of law requires an enabling ecosystem based on respect for judicial independence, effective anti-corruption policies, free and pluralistic media, a transparent and high-quality public administration, and a free and active civil society”.<sup>192</sup>

<sup>188</sup> Opinion 2/13 of the ECJ of 18 December 2014, EU:C:2014:2454, paras 166-168.

<sup>189</sup> C-156/21, *op. cit.*, paras 126-127; C-157/21, *op. cit.*, paras 144-145.

<sup>190</sup> C-156/21, para. 128 and C-157/21, para. 146.

<sup>191</sup> For instance, one could argue that it would have been more logical for the Commission’s ARoLR to more closely reflect the Commission’s own list of seven rule of law principles which one may recall does include the requirement of democratic and pluralistic law-making process and respect for fundamental rights from an effective judicial protection point of view. In this respect, it is worth noting what the Court of Justice recently stated when responding to the claim that the principles of the rule of law listed in Regulation 2020/2092 allegedly go beyond the limits of the concept of the rule of law: “the reference to the protection of fundamental rights is made only by way of illustration of the requirements of the principle of effective judicial protection, which is also guaranteed in Article 19 TEU and which Hungary itself acknowledges to be part of that concept. The same is true of the reference to the principle of non-discrimination. Although Article 2 TEU refers separately to the rule of law as a value common to the Member States and to the principle of non-discrimination, it is clear that a Member State whose society is characterised by discrimination cannot be regarded as ensuring respect for the rule of law, within the meaning of that common value”, Case C-156/21, *op. cit.*, para. 229.

<sup>192</sup> 2020 Rule of Law Report. The rule of law situation in the European Union, *op. cit.*, p. 4.

Table 15: Scope of the Annual Rule of Law Report<sup>193</sup>

Justice Systems (civil, administrative and criminal, all instances, all branches, all stages (including prosecution and enforcement of judgments))	Anti-corruption framework	Media pluralism	Other institutional issues related to checks and balances
(i) independence (ii) quality (iii) efficiency	(i) institutional framework capacity to fight against corruption (ii) prevention (iii) repressive measures	(i) media regulatory authorities and bodies (ii) transparency of media ownership and safeguards against government and political interference (iii) framework for journalists' protection	(i) process for preparing and enacting laws (ii) independent authorities (iii) accessibility, judicial review of administrative decisions; (iv) enabling framework for civil society (v) initiatives to foster a rule of law culture <sup>194</sup>

Source: European Commission

The Commission must also be commended for relying on many existing comparative and country-specific **sources** of information from governmental, inter-governmental bodies (in particular Council of Europe bodies) as well as private natural and legal persons while also making clear which main sources of information will be used on a pillar by pillar basis.

The only new source or rather channel of information which did not exist before the launch of the European Rule of Law Mechanism/ARoLR is the new possibility for **Member States and other stakeholders** to submit specific written **contributions** in the form of responses to a **questionnaire**, with the Commission also proactively seeking contributions from “key European stakeholders” (i.e. judicial networks/associations; Council of Bars and Law Society of Europe; European Network of National Human Rights Institutions; anti-corruption networks; European Federation of Journalists; network of media regulators).

Another positive feature of the feedback channel organised by the Commission is the possibility to provide contributions focusing on one, several or all of the four pillars and the additional possibility to do so for several Member States as well as the possibility to provide information on general horizontal developments. New **country visits** (replaced by videoconferences depending on the COVID-19 situation) have also been organised.

<sup>193</sup> European Commission, European Rule of Law Mechanism: Methodology for the preparation of the Annual Rule of Law Report, 2021 Rule of Law Report, 20 July 2021: [https://ec.europa.eu/info/files/2021-rule-law-report-methodology\\_en](https://ec.europa.eu/info/files/2021-rule-law-report-methodology_en).

<sup>194</sup> This specific issue is not mentioned in the Commission document outlining its methodology but is mentioned in the 2022 questionnaire made available by the Commission.



While there is also room for improvement when it comes to sources, the involvement of stakeholders and more broadly, the methodology used for the preparation of its ARoLR,<sup>195</sup> the Commission, within a very tight timeframe and arguably insufficient resources, has put together an **ambitious and sophisticated monitoring and reporting cycle**. Notwithstanding the significant weaknesses which this study will outline below, one must agree that “the efforts of the Commission civil servants who conducted research, took input from stakeholders, and reported on these developments are laudable”,<sup>196</sup> especially when one considers the Commission’s limited resources and the tight timeframe within which the first edition of the Rule of Law Report was produced.

#### 3.1.4. Increasing political saliency of the rule of law

By forcing an annual pan-European discussion on ongoing positive and problematic developments in each of the Member States, the ARoLR has arguably already helped make the rule of law an increasingly **more salient** issue which is now **debated more regularly at national and European levels**. The regular publication of relevant information about developments relating to the previously outlined four “pillars” and the connected feedback processes, debates and meetings organised within the framework of the ARoLR may well have a long-term positive crystallising effect, in particular by motivating the creation of new groups, new initiatives, new collaborations between existing and new actors both within and across countries, with the result that a **pro-rule of law ecosystem** may progressively solidify.

More generally speaking, the Commission was certainly right when it identified a crucial need to promote “awareness among the general public on the importance of the rule of law in a democracy” and also identified the EU as “a unique platform to develop and promote awareness on rule of law challenges”.<sup>197</sup> There is so much however the Commission can do on its own. It is important therefore for the Council and national governments, the European Parliament and national parliaments, European and national actors to reflect on how best one could **promote and strengthen a rule of law culture** at a European, national, regional and local level.

### 3.2. Negative features

Perhaps unsurprisingly considering the rapid launch of the ARoLR, its first two editions have revealed a significant number of **serious weaknesses**. As we will explain in the following sections of this chapter, one may first note that the ARoLR has first often oversold as a new preventive tool whereas it is primarily a monitoring **after-the-event** tool. The language of the reports is furthermore overly **diplomatic** with the overviews provided often lacking relevant contextual analysis or failing to connect the **dots**. The excessively euphemistic language used coupled with a failure to stress the **systemic** nature of rule of law violations often veil the reality of **autocratisation** in some EU Member States. The main method of rule of law promotion and prevention, i.e. **dialogue** – as useful as it may be with Member States that act in good faith and adhere to the rule of law – is insufficient on its own. Indeed, the EU Commission’s infatuation with dialogue has been instrumentalised by governments keen on implementing blueprints resulting in the systematic dismantlement of checks and balances. The

<sup>195</sup> See European Parliament resolution of 24 June 2021 on the Commission’s 2020 Rule of Law Report (2021/2025(INI)), paras 43-47.

<sup>196</sup> Kelemen, R.D., ‘You can’t fight autocracy with toothless reports’, *EU Law Live*, 6 October 2020: <https://eulawlive.com/op-ed-you-cant-fight-autocracy-with-toothless-reports-by-roger-daniel-kelemen>.

<sup>197</sup> *Further strengthening the Rule of Law within the Union*, *op. cit.*, pp. 10-11.



dialogue-based ARoLRs has furthermore exacerbated a previous pattern whereby the Guardian of the Treaties would rather produce reports about threats to and violations of the rule of law and engage in permanent instrument-creation navel gazing rather than **responding** to these threats and/or violations with legal actions and financial sanctions.<sup>198</sup>

### 3.2.1. Creation of false expectations

High expectations were noticeable ahead of the publication of the Commission's first ARoLR in July 2020. Expectations were high as open and sustained challenges to the most basic tenets of the rule of law were becoming simultaneously increasingly difficult to ignore and politically salient. **Mixed signals** however were sent by the new **Commission led by Ursula von der Leyen** whose support for the rule of law appeared lukewarm to many and whose appointment was furthermore only endorsed by a narrow majority of the European Parliament, which included the MEPs of the ruling coalitions of the two countries subject to Article 7(1) procedures.<sup>199</sup> The appointment of Hungary's nominee to the Neighbourhood and Enlargement portfolio, which *inter alia* requires to promote Article 2 TEU values and monitor candidate countries' adherence to these values, only reinforced the concerns of those who view Ursula von der Leyen as "weak on the rule of law".<sup>200</sup> It has since been reported that the Hungarian Commissioner "has overseen a push to play down concerns about the rule of law and human rights in candidates for EU membership."<sup>201</sup>

With regard to the ARoLR, the **rhetoric** surrounding it does not arguably match the **reality** of it. Stating for instance that the starting point for the Commission is "to ensure there is no backsliding".<sup>202</sup> But the reality is of course "that in some EU countries, severe backsliding has been occurring for years. Leading international ratings bodies such as the V-Dem Institute and Freedom House have already recategorized Hungary as the EU's first non-democratic member. Other countries such as Poland and Bulgaria are backsliding fast, on track to join Hungary in the hybrid authoritarian regime category."<sup>203</sup> In the case of Bulgaria, one may add there was little to backslide from to the extent that the country joined the EU with unremedied serious, structural rule of law weaknesses. That said, it is correct in our view to consider the situation of Bulgaria as worse or certainly not better in 2019 – when the

<sup>198</sup> As recently and aptly summarised by Professor Kelemen, "[i]t has often been argued – even by the most well-meaning defenders of democracy and the rule of law in the EU, that the Union simply cannot do more because it lacks the necessary tools to do so. This is a damaging myth. The EU has always had in its possession the necessary tools to steer backsliding member states back towards democracy – or at least to strongly discourage any others from following their lead. Unfortunately, EU leaders have refused to apply these tools for political and economic reasons that I elaborate below. As Laurent Pech of Middlesex University has put it, EU leaders repeatedly engage in a "rule of law instrument creation cycle" – reacting to new episodes of backsliding by calling for the creation of new tools, rather than using tools it already has. As a result, the EU has an ever better stocked toolbox, the contents of which have barely been used", "European's authoritarian cancer: diagnosis, prognosis, and treatment" in FEPS, *Progressive Yearbook* 2022, p. 80.

<sup>199</sup> Wergin, C., Schiltz, Ch. B., 'Die Enttäuschung war am Schluss überwältigend und fast ausnahmslos', *Welt*, 10 July 2019: <https://www.welt.de/politik/ausland/article196681411/Ursula-von-der-Leyen-auf-Werbetour-Die-Enttaeuschung-war-ueberwaeltigend.html>.

<sup>200</sup> Kelemen, R.D., 'Von der Leyen is weak on rule of law', *Politico*, 21 September 2020: <https://www.politico.eu/article/ursula-von-der-leyen-weak-rule-of-law>.

<sup>201</sup> Wanat, Z., Bayer, L., 'Olivér Várhelyi: Europe's under-fire gatekeeper', *Politico*, 5 October 2021: <https://www.politico.eu/article/oliver-varhelyi-eu-commissioner-enlargement-western-balkans-serbia-human-rights-democracy-rule-of-law>. Most recently, thirty MEPs have asked for an investigation of Commissioner Várhelyi's alleged role in assisting Milorad Dodik's separatist escalation in Bosnia-Herzegovina: 'MEPs urge for investigation against Enlargement Commissioner over ties to Dodik', *N1*, 12 January 2021: <https://ba.n1info.com/english/news/meps-urge-for-investigation-against-enlargement-commissioner-for-ties-to-dodik/>.

<sup>202</sup> State of the Union Address by President von der Leyen at the European Parliament Plenary, Speech/20/1655, 16 September 2020.

<sup>203</sup> Kelemen, R.D., 'Von der Leyen is weak on rule of law', *op. cit.*

Commission incomprehensively stopped monitoring Bulgaria under the CVM as relevant rule of law benchmarks were deemed met – than in 2007 when the country joined the EU.<sup>204</sup>

Similarly, presenting the ARoLR as a **preventive** tool which will help “prevent problems from emerging or deepening and address them”<sup>205</sup> is arguably creating **false expectations** of effectiveness. To begin with, the mere act of publishing an annual transversal and multiple country reports will not help avert, let alone address rule of law backsliding in countries whose authorities are engaged in a deliberate process of systemic dismantlement of all checks and balances. To put it differently, **an annual reporting cycle will not, in and of itself, help prevent deliberate/systemic violations of the rule of law or deter** would-be autocrats regularly intentionally acting in violation of the principle of sincere cooperation as the ARoLR is, at least for the time being, **primarily an after-the-event monitoring/reporting mechanism which does not include concrete recommendations and clear follow up processes**. One may recall in this context that there have been 15 years of reports regarding the situation in Bulgaria and Romania and nobody would seriously claim that the **CVM** reports have had any preventive effect. Worse, in the case of Bulgaria at least, CVM reports have regularly offered an account of the situation which regularly omitted inconvenient developments,<sup>206</sup> while in Romania, the Constitutional Court is now seemingly seeking to emulate Poland's unlawfully composed Constitutional Tribunal and neutralise the application of EU rule of law requirements using reasoning which was rightly described – as already recalled – as “a hallucinating succession of legal nonsense”.<sup>207</sup>

Finally and as of today, there is no compelling evidence of any preventive effect, with limited evidence of after-the-event effectiveness.

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<sup>204</sup> See *supra* Part I of the study.

<sup>205</sup> European Commission, *2021 Rule of Law Report – Questions and Answers*, QANDA/21/3762, 20 July 2021.

<sup>206</sup> See e.g. Vassileva, R., ‘On Coins, Parallel Universes and the Cooperation and Verification Mechanism’, *VerfBlog*, 12 September 2020: <https://verfassungsblog.de/on-coins-parallel-universes-and-the-cooperation-and-verification-mechanism>.

<sup>207</sup> Selejan-Gutan, B., ‘A Tale of Primacy Part II: The Romanian Constitutional Court on a Slippery Slope’, *VerfBlog*, 18 June 2021: <https://verfassungsblog.de/a-tale-of-primacy-part-ii/>; ‘Part III: Game of Courts’, *VerfBlog*, 17 November 2021: <https://verfassungsblog.de/a-tale-of-primacy-part-iii/>.

Table 16: Evidence of effectiveness of the ARoLR put to the test

"It is too early to say how effective this new mechanism will be, but the first signs are encouraging [...] Bulgaria has already announced it wants to address the shortcomings addressed in the report. It proved useful also in the case of Spain when, after the reaction from the Commission, the government decided to pause the controversial proposal to change the appointment system for the Supreme Council for Magistracy." European Commission Vice-President for Values and Transparency V. Jourová<sup>208</sup>

Regarding Bulgaria, one may first note that Michael Roth, then German Minister for Europe, similarly cited the example of Bulgaria as evidence of the effectiveness of the Council's Rule of Law Dialogue in November 2020 on account on the Bulgarian government's pledges to address the shortcomings identified "including those relating to the *"influence of politics on judges and prosecutors"*."<sup>209</sup> Two institutions have therefore claimed credit for the same set of pledges which were however not made public (to the best of our knowledge) and appear to be connected to an action plan which does not survive any close rule of law scrutiny.<sup>210</sup> Contrary to the analysis to be found in the Commission's 2021 ARoLR country report, the action plan can be rather expected to make the situation worse by i.a. providing more influence to the captured prosecutor's office.

Regarding Spain, problems relating to the membership and lack of renewal of the General Council of the Judiciary (CGPJ) pre-existed the launch of the ARoLR and the Commission primarily acted outside the framework of the ARoLR to issue warnings regarding the Spanish government's plan to "reform" the way appointments are made to the CGPJ, including when it requested the Spanish Prime Minister Pedro Sánchez to request an evaluation of his reform plan from the Venice Commission.<sup>211</sup> In its 2021 ARoLR country report for Spain, the Commission reiterated its "concerns over the lack of renewal" of the CGPJ and noted the lack of "significant progress" on reaching an agreement on this issue.<sup>212</sup>

Source: Authors on the basis of materials indicated in footnotes

It would therefore be **best for the Commission not to "oversell"** the ARoLR which, for the time being, remains first and foremost a cyclical *ex post facto* reporting exercise rather than a genuine preventive or even an early detection mechanism.

<sup>208</sup> Speech at the webinar organised by the Centre for European Reform, 20 November 2020: [https://ec.europa.eu/commission/commissioners/2019-2024/jourova/announcements/speech-vice-president-jourova-webinar-how-can-europe-protect-rule-law-times-crisis-organised-centre\\_en](https://ec.europa.eu/commission/commissioners/2019-2024/jourova/announcements/speech-vice-president-jourova-webinar-how-can-europe-protect-rule-law-times-crisis-organised-centre_en).

<sup>209</sup> Agence Europe, 'First five Member States scrutinised by their European Partners', Europe Daily Bulletin No. 12603, 18 November 2020: <https://agenceurope.eu/en/bulletin/article/12603/7>.

<sup>210</sup> Vassileva, R., 'Borissov's Latest Plan to Avoid True Reforms: On Bad Habits, the CVM, and the New Rule of Law Mechanism', *VerfBlog*, 7 December 2020: <https://verfassungsblog.de/borissovs-latest-plan-to-avoid-true-reforms>.

<sup>211</sup> Miguel, B. de, Cué, C. E., 'Spain defends its judicial reform plans despite warning from Brussels', *El País*, 16 October 2020: [https://english.elpais.com/spanish\\_news/2020-10-16/spain-defends-its-judicial-reform-plans-despite-warning-from-brussels.html](https://english.elpais.com/spanish_news/2020-10-16/spain-defends-its-judicial-reform-plans-despite-warning-from-brussels.html); Nieva-Fenoll, J., 'Justice and Independence, an Actual Problem in Spain', *VerfBlog*, 15 October 2020: <https://verfassungsblog.de/justice-and-independence-an-actual-problem-in-spain/>.

<sup>212</sup> 2021 Rule of Law Report. Country Chapter on the rule of law situation in Spain, SWD(2021) 710 final, pp. 2-3.

### 3.2.2. Use of euphemistic language

The ARoLR frequently uses extremely **soft, diplomatic language**, a damaging feature which previously marred the CVM and the enlargement reports. As noted by Professor Kelemen, by deploying “a language of euphemisms and understatement”,<sup>213</sup> the ARoLR has created a serious **risk of normalising evident threats and/or violations** of the rule of law.

In addition, there is no overall and clear assessment of countries' adherence (or lack thereof) to the rule of law over time. This means for instance that non-expert readers of the 2020 and 2021 editions of the ARoLR would find it difficult to appreciate that **two EU countries have become the world's top two autocratising countries in 2020** and that they would not be allowed to join the EU if they were to apply in their current backsliding state:

Table 17: Top-10 Autocratising Countries in the world, 2010–2020

		CHANGE	LDI 2010	LDI 2020	REGIME TYPE 2010	REGIME TYPE 2020
1	Poland	−0.34	0.83	0.49	Liberal Democracy	Electoral Democracy
2	Hungary	−0.32	0.68	0.37	Electoral Democracy	Electoral Autocracy
3	Turkey	−0.29	0.40	0.11	Electoral Democracy	Electoral Autocracy
4	Brazil	−0.28	0.79	0.51	Electoral Democracy	Electoral Democracy
5	Serbia	−0.27	0.51	0.24	Electoral Democracy	Electoral Autocracy
6	Benin	−0.26	0.55	0.29	Electoral Democracy	Electoral Autocracy
7	India	−0.23	0.57	0.34	Electoral Democracy	Electoral Autocracy
8	Mauritius	−0.23	0.73	0.50	Liberal Democracy	Electoral Democracy
9	Bolivia	−0.18	0.41	0.231	Electoral Democracy	Electoral Autocracy
10	Thailand	−0.17	0.34	0.17	Electoral Autocracy	Closed Autocracy

Source: V-Dem Institute, *Autocratization Turns Viral. Democracy Report 2021*, March 2021, p. 38.

As made clear by the table above, the two EU Member States currently subject to Article 7(1) proceedings have become the world's **top two autocratising countries** according to Varieties of Democracy (V-Dem) taking 2010 as a starting point. And while both Member States were initially categorised as liberal democracies a decade ago, by 2019 **Hungary had become the EU's first electoral autocracy** and **Poland, an electoral democracy now on track to becoming the EU's second electoral autocracy**. One may note in passing that this fully vindicates the Commission and Parliament's decisions to activate Article 7(1) TEU in 2017 and 2018 respectively.

The assessment offered by V-Dem is corroborated by other indexes and measuring tools. For instance, the US-based non-governmental organization **Freedom House**, for the very first time in the history of EU, **stopped listing a Member State – Hungary – in its list of “free countries”**.<sup>214</sup> Similarly, the

<sup>213</sup> Kelemen, R.D., ‘You can't fight autocracy with toothless reports’, *EU Law Live*, 6 October 2020: <https://eulawlive.com/op-ed-you-cant-fight-autocracy-with-toothless-reports-by-roger-daniel-kelemen/>.

<sup>214</sup> Freedom House, Countries and Territories: <https://freedomhouse.org/countries/freedom-world/scores>. Hungary's “downgrading” happened in 2020 with the situation further worsening in 2021: Maksimov, V., ‘Hungary drops in Freedom House report’, 26 March 2021: [https://www.euractiv.com/section/politics/short\\_news/hungary-drops-in-freedom-house-report/](https://www.euractiv.com/section/politics/short_news/hungary-drops-in-freedom-house-report/).

**Bertelsmann Stiftung's** Transformation Index (BTI), which evaluates countries' democratic and economic transitions,<sup>215</sup> showed that in many states including EU countries such as **Poland and Romania**, separation of powers has weakened with **Hungary** also listed among the countries states that had seen the most significant drops when it comes to the rule of law.<sup>216</sup> The **World Justice Project's** Rule of Law Index, which relies on household surveys at the national level and expert assessments by legal practitioners and other experts, also identified **Poland, Hungary and Bulgaria** as belonging to the group of countries which have experienced the biggest declines in constraints on government powers in the world since 2015. With a decline of -6.8% during the period 2015-2020 in relation to this benchmark, which aims to identify countries engaged in a process of autocratisation, Poland is the country which experienced the second worst decline in the world after Egypt.<sup>217</sup>

Against this background, one can only but be surprised by the **extremely soft language** used by the Commission in the ARoLRs. For example, in relation to **Hungary**, it was stated in 2020 that "the independence and effectiveness of the Media Council is at risk."<sup>218</sup> In reality, the Media Council was one of the first regulatory entities to be captured, which allowed for the progressive and systemic undermining of media pluralism while also making access to information and deliberative democracy impossible, and contributed to the fact that elections are not fair anymore.<sup>219</sup> This euphemistic language was used again in 2021 with the Commission pointing out that "[c]oncerns persist as regards the independence and effectiveness of the Media Council and the Media Authority" or "[c]ertain decisions of the Media Council have added to the concerns regarding its effective independence".<sup>220</sup> Even in the face of obvious and most serious violations of EU law such as the launch of disciplinary investigation against a judge for referring questions to the Court of Justice and the subsequent attempt to organise the systemic disablement of the preliminary ruling mechanism, the Commission could not do better than expressing its **traditional "concerns"**. The Court of Justice has since, but not thanks to an infringement action by the Commission, stated the obvious: EU law precludes a national supreme court from declaring a request for a preliminary ruling submitted by a lower court unlawful and similarly precludes disciplinary proceedings from being brought against a national judge on the ground that he or she has made a reference for a preliminary ruling to the Court of Justice.<sup>221</sup>

Looking at **Poland**, the world's top autocratising country according to V-DEM, the 2020 and 2021 reports are more accurate and comprehensive, yet the Commission still regularly uses similar **soft language**. For instance, the country reports continue to use the misleading language of the Polish government when it repeatedly refers to repeated gross violations of EU law requirements relating to judicial independence as judicial "reforms",<sup>222</sup> notwithstanding the dozens of orders and judgments

<sup>215</sup> BTI Transformation Index: <https://www.bti-project.org/>.

<sup>216</sup> BTI 2020 Infographics, <https://www.bti-project.org/en/press.html>; BTI 2020, Sikk, A, 'Trouble at the Top, Regional Report East-Central and Southeast Europe', [https://www.bti-project.org/content/en/reports/regional-reports/regional\\_report\\_ESE\\_2020\\_EN.pdf](https://www.bti-project.org/content/en/reports/regional-reports/regional_report_ESE_2020_EN.pdf).

<sup>217</sup> World Justice Project, *Rule of Law Index 2020 Insights*, 2020, p. 20.

<sup>218</sup> 2020 Rule of Law Report. Country Chapter on the rule of law situation in Hungary, SWD(2020) 316 final, at 13.

<sup>219</sup> OSCE Office for Democratic Institutions and Human Rights (ODIHR), Hungary Parliamentary elections, 8 April 2018, ODIHR Limited Election Observation Mission Final Report, 27 June 2018. In anticipation of an official invitation from Hungarian authorities to observe the parliamentary elections to be held on 3 April 2022, the OSCE-ODHIR undertook a Needs Assessment Mission in January 2022 which recommended the deployment of an Election Observation Mission on 4 February 2022: <https://www.osce.org/files/f/documents/7/6/511429.pdf>.

<sup>220</sup> 2021 Rule of Law Report. Country Chapter on the rule of law situation in Hungary, SWD(2021) 714 final, p. 16.

<sup>221</sup> Case C-564/19, *IS* (Illégalité de l'ordonnance de renvoi), EU:C:2021:949. For further analysis, see Bárd, P., 'The Sanctity of Preliminary References: An analysis of the CJEU decision C-564/19 IS', *VerfBlog*, 26 November 2021: <https://verfassungsblog.de/the-sanctity-of-preliminary-references/>.

<sup>222</sup> 2020 Rule of Law Report. Country Chapter on the rule of law situation in Poland, SWD(2020) 320 final.



from national and European courts (i.e. the Court of Justice and the European Court of Human Rights) establishing the opposite and the Polish authorities' extensive track record of violating national and European rule of law-related rulings finding against them since 2016.<sup>223</sup>

One may finally mention the example of **Bulgaria** which again shows the Commission's difficulty to move beyond excessively **euphemistic** language – a feature which also characterised its previous CVM reports – and a connected tendency to **confuse rule of law related changes with reforms** without much attention paid to substance, overall context and underlying aims and/or actual consequences. For instance, in the 2021 country chapter, the establishment of a register of threats against judicial independence by the Supreme Judicial Council is presented as a "positive development".<sup>224</sup> However, in practice, this register has been used to target critics of corruption or critics of the Prosecutor's Office and the Supreme Judicial Council.<sup>225</sup>

Table 18: Euphemistic language and decontextualised assessment in the Bulgaria's ARoLR country chapters (selected examples)

Commission's assessments	Reality check
2020 country chapter, p. 10: "The current anti-corruption strategy covers the period 2015-2020 and a new strategy for 2021-2027 is under preparation. The fight against corruption has been declared a main priority of the Government in its 2017-2021 programme. At the same time, protests that erupted in summer 2020 show discontent in society with the lack of progress in effectively fighting corruption."	The mass protests of 2020 did not denounce target corruption in general – citizens were protesting against the corruption of then Prime Minister Boyko Borissov, his government, and his party as well as against the actions of the current General Prosecutor Ivan Geshev. This was i.a. emphasised by the European Parliament which noted that protesters' demands "included the resignation of the government and the Prosecutor General". <sup>226</sup>
2021 country chapter, p. 6: "The Action Plan adopted to address certain challenges expressed in the 2020 Rule of Law Report covers, among others, judicial reform."	The Commission has presented a controversial Action Plan as a good faith attempt to comply with the 2020 Rule of Law Report without seriously analysing its merits and considering criticism by civil society. <sup>227</sup>
2021 country chapter, pp. 6-7: "Though reforms have resulted in a more balanced composition of the [Supreme Judicial Council (SJC)], the involvement of prosecutors, and the Prosecutor	The Commission has omitted to take account of the context underlying the proposal for a new Constitution – large demonstrations and civil society protests against the government – and make

<sup>223</sup> Pech, L., Wachowiec, P., Mazur, D., 'Poland's Rule of Law Breakdown: A Five-Year Assessment of EU's (In)Action' (2021) 13 *Hague Journal on the Rule of Law* 1.

<sup>224</sup> 2021 Rule of Law Report. Country Chapter on the rule of law situation on Bulgaria, SWD(2021) 703 final, p. 7.

<sup>225</sup> See for example the situation of *Euractiv* journalist Valya Ahchieva who found herself on this register after exposing the irregularities surrounding the appointment of the new President of the Sofia City Court, one of the most important courts by virtue of its jurisdiction. See Ahchieva, V., 'The Ministry of Justice established that Alexey Trifonov does not have Bulgarian citizenship', *Fakti*, 2 September 2021, <https://fakti.bg/bulgaria/609585-vala-ahchieva-ministerstvoto-na-pravosadieto-ustanovi-che-predsedatelat-na-sgs-nama-balgarsko-grajdanstvo>. See also Vassileva, R., 'A Judge Born in the USSR: How a Judge's Citizenship Became Relevant for Bulgaria's Rule of Law and Judicial Self-Governance', *VerfBlog*, 21 July 2019: <https://verfassungsblog.de/a-judge-born-in-the-ussr/>.

<sup>226</sup> European Parliament resolution of 8 October 2020 on the rule of law and fundamental rights in Bulgaria (2020/2793(RSP)), Recital N.

<sup>227</sup> Vassileva, R., 'Borissov's Latest Plan to Avoid True Reforms: On Bad Habits, the CVM, and the New Rule of Law Mechanism', *VerfBlog*, 7 December 2020, <https://verfassungsblog.de/borissovs-latest-plan-to-avoid-true-reforms/>.



General in particular, in the governance of judges continues to raise concerns. The attempted amendments to the Constitution changing the composition of the SJC, tabled in September 2020, were intended to partially address these concerns.”	clear the strong criticism levelled at this proposal as well as the absence of any actual solutions to Bulgaria’s longstanding problems in the area of rule of law identified by experts. <sup>228</sup>
2021 country chapter, p. 13: “Despite increased investigative activity, results in final high-level corruption convictions remain low with no solid track-record of final convictions.”	The Commission does not engage with the perceived corruption of Bulgaria’s Prosecutor’s Office, its political dependencies and lack of accountability, and the unbalanced role of the General Prosecutor which has been established since at least the 20009 ECtHR judgment in <i>Kolevi v Bulgaria</i> . The Commission’s assessment also does not take due account of Bulgaria’s ECtHR record. Speaking of “increased investigative activity” seems particularly euphemistic in this context, especially since none of the serious high-level corruption allegations, in particular those raising a direct involvement of the now the former PM, have been properly investigated.

Source: Authors on the basis of the ARoLRs and materials indicated in footnotes

### 3.2.3. Lack of context and connected failure to see the wood for the trees

As currently drafted, the transversal “umbrella” report and country reports do not track each Member State’s adherence to the rule of law (or lack thereof) over a sufficiently long period while also regularly **failing to connect the dots** between the developments observed. In other words, the ARoLR does not adequately outline the countries’ **direction of travel** or the **severity** and, in some cases, the **deliberate** nature of the multifaceted process of **autocratisation**. This flaw is not unique to the ARoLR since the Commission is simply reproducing the problematical approach it had previously adopted in relation to its enlargement reports.<sup>229</sup>

This **blindness to the multifaceted and interconnected nature of the autocrats’ playbook** is all the more surprising considering the public **declarations of Commissioners Jourová and Reynders** who both rightly stressed the importance of understanding the systemic nature of the problems in some countries<sup>230</sup> and “see the links” between the different issues raised in the reports “because problems often merge into an undrinkable cocktail”.<sup>231</sup> Yet neither the 2020 nor the 2021 transversal reports use

<sup>228</sup> Vassileva, R., ‘A Grand National Assembly or Grand Bulgarian Chicanery? Boyko Borissov’s proposal for a new Constitution’, *VerfBlog*, 19 August 2020, <https://verfassungsblog.de/a-grand-national-assembly-or-grand-bulgarian-chicanery/>.

<sup>229</sup> Bieber, F., ‘Why the EU’s enlargement process is running out of steam’, *LSE EUROPP blog*, 12 October 2020: <https://blogs.lse.ac.uk/euoppblog/2020/10/12/49895/> (the reports “are obscuring the real picture by offering too much detail and too little clarity”)

<sup>230</sup> Didier Reynders à propos de l’Etat de droit: «Dans certains pays, comme la Pologne et la Hongrie, le problème est systémique», *Le Monde*, 30 September 2020: [https://www.lemonde.fr/international/article/2020/09/30/didier-reynders-a-propos-de-l-etat-de-droit-dans-certains-pays-comme-la-pologne-et-la-hongrie-le-probleme-est-systemique\\_6054221\\_3210.html](https://www.lemonde.fr/international/article/2020/09/30/didier-reynders-a-propos-de-l-etat-de-droit-dans-certains-pays-comme-la-pologne-et-la-hongrie-le-probleme-est-systemique_6054221_3210.html).

<sup>231</sup> ‘POLITICO Brussels Playbook: Jourová hits back — Rule of law deep-dive — Unpresidential trainwreck’, *Politico*, 30 September 2020: <https://www.politico.eu/newsletter/brussels-playbook/politico-brussels-playbook-jourova-hits-back-rule-of-law-deep-dive-unpresidential-trainwreck/>

the adjective “**systemic**” *once*.<sup>232</sup> As a point of comparison, the **European Parliament** resolution of 24 June 2021 on the Commission’s 2020 Rule of Law Report refers several times to the systemic threats to EU values and EU and the systemic challenges faced by the EU, not to forget the systemic breaches of the rule of law one may identify at a time of increasing backsliding in some countries.<sup>233</sup>

Using the example of **Hungary**, one can see how the ARoLR periodically attempts to give a systematic overview and qualitative analysis, but fails to provide the necessary context and connect the dots when it comes to systemic breaches. In other words, the scale and especially the progressive and systemic nature of the problem of state capture is not discernible. Hungary’s first two country reports do not even attempt to summarise and take into account the consequences arising from the preliminary phase of what is now a decade-long process of autocratisation, such as the consequences arising from the capture and limited jurisdiction of the Hungarian **Constitutional “Court”**.<sup>234</sup> This is all the more surprising as these early steps have been comprehensively documented *inter alia* by the European Parliament.<sup>235</sup>

Without mentioning early instances of constitutional capture, and without the ARoLR linking more recent developments to earlier ones, one cannot fully make sense of the current and still deteriorating situation outlined in the country reports. One example is the Hungarian Parliament’s 2019 **omnibus law**,<sup>236</sup> which interfered with the normal procedure governing judicial appointments in order to enable the “transfer” of Constitutional Court justices to the **Supreme Court (Kúria)**.<sup>237</sup> The new rules were also specifically designed to enable a specific member of the constitutional court with no ordinary judicial practice experience to become the new *Kúria* President, endowed with additional powers, regardless of a negative opinion from the National Judicial Council.<sup>238</sup> Another example is the new possibility granted to public authorities to **challenge ordinary court decisions** before the Hungarian Constitutional Court. Such rules of course violate legal security, but more importantly – and this is not made clear in the ARoLR – they extend the powers of the Hungarian Constitutional Court judges who were selected by a simple majority of Fidesz MPs.<sup>239</sup>

Another instance of insufficient contextualization is the reference to **judges** being subject to **negative narratives in the media**.<sup>240</sup> This is in reality a much more sinister problem. The judicial system, court

<sup>232</sup> Adjective “systemic” was only used 4 times in 2 country reports in 2020: Hungary (in relation to systemic obstruction and intimidation faced by independent media) and Slovenia (to point out there is no systemic issue in relation to judicial backlogs). In 2021, “systemic” was used 5 times in the country reports of Bulgaria, Hungary, Poland and Portugal but only by stakeholders and in reference to a ruling of Poland’s Supreme Administrative Court and another ruling of the European Court of Human Rights rather than by the Commission itself.

<sup>233</sup> European Parliament resolution of 24 June 2021 on the Commission’s 2020 Rule of Law Report (2021/2025(INI)).

<sup>234</sup> Bárd, P., Pech, L., *How to build and consolidate a partly free pseudo democracy by constitutional means in three steps: The “Hungarian model*, RECONNECT Working Paper No. 4, October 2019.

<sup>235</sup> See esp. European Parliament resolution of 3 July 2013 on the situation of fundamental rights: standards and practices in Hungary (2012/2130(INI)).

<sup>236</sup> An omnibus law covers various unrelated issues. Such laws were held to be unconstitutional by the Hungarian Constitutional Court, for violating legal certainty. See for example Decisions 108/B/2000. AB, 8/2004. (III. 25.) AB.

<sup>237</sup> On the *ad hominem* laws which paved the way to the election of Zsolt András Varga as Supreme Court President, see Amnesty International, *Status of the Hungarian judiciary: Legal changes have to guarantee the independence of the judiciary in Hungary*, Amnesty International Hungary, 2021: <https://www.amnesty.org/en/wp-content/uploads/2021/05/EUR2736232021ENGLISH.pdf>, 6,

<sup>238</sup> *Ibid.*

<sup>239</sup> Drinóczi, T., Bień-Kacała, A., ‘Illiberal Constitutionalism: The Case of Hungary and Poland’ (2019) 20 *German Law Journal* 1140.

<sup>240</sup> 2020 Rule of Law Report. Country Chapter on the rule of law situation in Hungary, p. 4.

decisions and individual judges are in fact regularly attacked by pro-governmental media outlets.<sup>241</sup> Judges have very few platforms for protecting themselves, and when they try to do so, they are blamed for engaging in politics. As noted by Amnesty International, this deliberate targeting of judges by the ruling party and their proxies has had a chilling effect on judges who are now even less likely than before to stand up for their independence.<sup>242</sup>

Another instance mischaracterised and downplayed is the compensation awarded to **Roma** victims of school segregation and compensation awarded to prisoners detained under inhuman conditions. The 2020 country report refers to "Government and pro-government media outlets [...] criticis[ing these] judicial decisions"<sup>243</sup> and lawyers fearing that this would "undermine public trust and confidence in the justice system".<sup>244</sup> But when it comes to dismissing court decisions on the false ground that it was a provocation of the Soros-network,<sup>245</sup> the potential undermining of public trust is not the only crucial matter. The country report should have instead stressed that **prison conditions** were so heinous that it resulted in a pilot judgment condemning Hungary.<sup>246</sup> It should have also mentioned that instead of rethinking its penal policy, the government continued to keep prisoners under horrible conditions and put in place a fast track **compensation system** existing outside the traditional judicial route so as to pre-empt further Strasbourg condemnations.<sup>247</sup> It was precisely the system Fidesz itself created which was then presented as a "prison business" of lawyers and their clients.<sup>248</sup> What is more, the ruling party disregarded court decisions awarding compensations by suspending the payment of compensation for months.<sup>249</sup> So not only did the government let prisoners down by keeping them under inhuman conditions, but it also adopted a law with the aim of overriding judicial decisions and making sure that inmates could not be awarded compensation following any adverse judgment from either the European Court of Human Rights or national courts. In clear violation of the principle of separation of powers, court decisions were disregarded by the Parliament, i.e. the ruling party in practice, but the ARoLR fails to mention this.<sup>250</sup> One must add that the government not only **incited to hatred** against prisoners, but did so also in relation to **Roma children and the Roma population** following the awarding of **compensation** on account of segregation suffered in education. In another attempt to

<sup>241</sup> See Amnesty International, *Status of the Hungarian judiciary: Legal changes have to guarantee the independence of the judiciary in Hungary*, Amnesty International Hungary, 2021, pp. 20-22: <https://www.amnesty.org/en/wp-content/uploads/2021/05/EUR2736232021ENGLISH.pdf>.

<sup>242</sup> Amnesty International Hungary et al. (eds), *Contributions of Hungarian NGOs to the European Commission's Rule of Law Report*, May 2020, p. 17: [https://www.amnesty.hu/wp-content/uploads/2020/09/HUN\\_NGO\\_contribution\\_EC\\_RoL\\_Report\\_2020.pdf](https://www.amnesty.hu/wp-content/uploads/2020/09/HUN_NGO_contribution_EC_RoL_Report_2020.pdf).

<sup>243</sup> 2020 Rule of Law Report. Country Chapter on the rule of law situation in Hungary, p. 4.

<sup>244</sup> *Ibid.*, p. 5.

<sup>245</sup> NYG, 'Orbán: Engem már nyolcszor ölt meg Soros hálózata [Orbán: I was killed eight times by the Soros network]', *index*, 17 January 2020: [https://index.hu/belfold/2020/01/17/orban\\_engem\\_mar\\_nyolcszor\\_olt\\_meg\\_soros\\_halozata/](https://index.hu/belfold/2020/01/17/orban_engem_mar_nyolcszor_olt_meg_soros_halozata/)

<sup>246</sup> European Court of Human Rights, *Varga and Others v. Hungary*, Application nos. 14097/12, 45135/12, 73712/12, 34001/13, 44055/13, and 64586/13, 10 March 2015.

<sup>247</sup> Győry, Cs., 'Fighting Prison Overcrowding with Penal Populism – First Victim: the Rule of Law: New Hungarian Law "Suspends" the Execution of Final Court Rulings', *VerfBlog*, 12 March 2020: <https://verfassungsblog.de/fighting-prison-overcrowding-with-penal-populism-first-victim-the-rule-of-law/>.

<sup>248</sup> *About Hungary* website (managed by the International Communications Office of the Cabinet Office of the Prime Minister): <http://abouthungary.hu/prison-business/>.

<sup>249</sup> See Act IV of 2020.

<sup>250</sup> News in Brief, 'Parliament suspends compensation payments to prisoners', *About Hungary*, 26 February 2020: <http://abouthungary.hu/news-in-brief/parliament-suspends-compensation-payments-to-prisoners/>.

deprive courts from awarding similar types of compensation in future segregation cases,<sup>251</sup> the Parliament adopted an amendment of the act on national public education.<sup>252</sup>

Lastly, Hungary's country reports to date seem unable to go to the heart of relevant matters. With regard to **corruption**, one may have expected the Commission to list all the **OLAF** reports and procedures indicating how much money was used in breach of rules rather than merely giving the total number of procedures. Focusing the analysis on asset declarations of senior civil servants and MPs and the lack of systemic verification<sup>253</sup> also shows a great deal of naïveté in a country where strawmen have been used to hide wealth illegally acquired. In light of numerous and well-documented examples of corruption,<sup>254</sup> it seems particularly misguided to only speak of *risk* of corruption, or state that "[i]ndependent control mechanisms remain insufficient for detecting corruption"<sup>255</sup> in what is a **state captured** country.<sup>256</sup>

The ARoLR's assessment of the situation in **Bulgaria** is reminiscent of the problems identified above in relation to Hungary. For instance, the 2021 country chapter on Bulgaria reiterates a recurring theme from the CVM – "a solid track record of final convictions in **high-level corruption** cases remains to be established" – and refers to a list of Bulgarians sanctioned for corruption by the United States Government under the Global **Magnitsky Act**.<sup>257</sup> However, as this observation is not contextualised, it is unclear why Bulgaria has not established such record. Here it should be mentioned that Bulgaria is the only EU member to have received special attention in the United States' latest global anti-corruption strategy.<sup>258</sup> First, considering that Bulgaria, similarly to Hungary, is also a **captured state** and having in mind the political dependencies and impunity of the **Prosecutor's Office**, as highlighted by the mass protests against the corruption of Borissov's government and General Prosecutor Ivan Geshev in 2020<sup>259</sup> and as exposed by diverse reports,<sup>260</sup> a proper investigation into the sanctioned individuals' activities is impossible given the context but this context is difficult to discern from the mere regarding of the 2021 country chapter dedicated to the rule of law situation in Bulgaria.

<sup>251</sup> See also Hungarian Helsinki Committee, *Hungary: Illiberal Highlights of 2020*, 1 December 2020, p. 7: [https://helsinki.hu/wp-content/uploads/HHC\\_Illiberal\\_Highlights\\_of\\_2020.pdf](https://helsinki.hu/wp-content/uploads/HHC_Illiberal_Highlights_of_2020.pdf)

<sup>252</sup> See Section 18 of Act LXXXVII of 2020. See also Győry, Cs., 'Fighting Prison Overcrowding with Penal Populism – First Victim: the Rule of Law: New Hungarian Law "Suspends" the Execution of Final Court Rulings', *VerfBlog*, 12 March 2020: <https://verfassungsblog.de/fighting-prison-overcrowding-with-penal-populism-first-victim-the-rule-of-law/>

<sup>253</sup> 2020 Rule of Law Report. Country Chapter on the rule of law situation in Hungary, SWD(2020) 316 final, p. 11.

<sup>254</sup> Batory, A., 'A free lunch from the EU? Public perceptions of corruption in cohesion policy expenditure in post-communist EU member states' *Journal of European Integration* Vol. 43, No. 6, 2021, p. 651; Dávid-Barrett, E., Fazekas, M., 'Grand corruption and government change: an analysis of partisan favoritism in public procurement' (2020) 26 *European Journal on Criminal Policy and Research* 411; CRCB (2016) Competitive Intensity and Corruption Risks: Statistical Analysis of Hungarian Public Procurement – 2009–2015. Data and Descriptive Statistics. Corruption Research Center Budapest: <http://www.crcb.eu/?p=943>; CRCB (2016) Competitive Intensity, Overpricing, Corruption Risks and Crony Capitalism in Hungary 2009–2015. Corruption Research Center Budapest: <http://www.crcb.eu/?p=1083>

<sup>255</sup> 2021 Rule of Law Report. Country Chapter on the rule of law situation in Hungary, SWD(2021), 714 final, p. 2.

<sup>256</sup> Fazekas, M., Tóth, I. J., 'From Corruption to State Capture: A New Analytical Framework with Empirical Applications from Hungary' *Political Research Quarterly*, Vol. 69, No. 2, 2016, p. 320.

<sup>257</sup> 2021 Rule of Law Report. Country Chapter on the rule of law situation in Bulgaria, SWD(2021) 703 final, p. 14.

<sup>258</sup> United States Strategy on Countering Corruption, December 2021, p. 27: <https://www.whitehouse.gov/wp-content/uploads/2021/12/United-States-Strategy-on-Countering-Corruption.pdf>.

<sup>259</sup> Vassileva, R., 'Bulgaria: 100 days of protests', *New Eastern Europe*, 28 October 2020: <https://neweasterneurope.eu/2020/10/28/bulgaria-100-days-of-protests/>.

<sup>260</sup> See e.g. Venice Commission, Opinion No. 968/2019 on draft amendments to the criminal procedure code and the judicial system act concerning criminal investigations against top magistrates, 9 December 2019 and Opinion no. 515/2009 on the draft law amending and supplementing the law on judicial power, 16 March 2009.

### 3.2.4. Denial of (autocratic) reality and resulting category errors

The ARoLR also suffers from an occasional manifest **disconnection from reality**, which seems to derive from a (flawed) diagnosis whereby no backsliding aka autocratisation had been happening prior to its first edition. To give a single example, the 2020 umbrella report states that the EU is facing a situation “where the resilience of rule of law safeguards is being tested and where shortcomings become more evident,”<sup>261</sup> whereas in reality we have been witnessing the systemic undermining of the rule of law *for years* in a country such as Poland, a process which has resulted in the progressive “*destruction* [our emphasis] of judicial independence.”<sup>262</sup>

The first two editions of the ARoLR appear **unwilling to accept the autocratic reality** in countries such as **Hungary and Poland**. This denial is all the more surprising considering that Commissioners Jourová and Reynders have themselves be rightly outspoken regarding, for instance, the situation in Poland with Commissioner Jourová comparing the changes made to the judiciary to a case of “carpet bombing” of the courts.<sup>263</sup>

To date, the ARoLR fails to make clear that **not all rule of law shortcomings, threats and violations are of the same nature and/or intensity**. If assaults on the rule of law are persistent and pervasive enough, a country may cease to be a democracy in good standing yet all the national reports, including the Commission’s transversal umbrella reports, merely list negative and positive developments. In other words, the Commission’s reports never grasp or even acknowledge **how hybrid/autocratic regimes are qualitatively different from consolidated democracies** not subject to any **top-down process of systemic autocratisation and state capture**.<sup>264</sup>

This approach helps and indeed has fuelled “**whataboutism**”. Current Hungarian authorities have pushed this to the extreme, with the Hungarian Justice Minister seeking to shift the debate on social media on rule of law issues in some other carefully selected countries (but not Poland), mentioning for instance the abolition of referenda in the Netherlands and the treatment of the Sami minority in Finland.<sup>265</sup> Needless to say, rule of law **problems and/or violations in other countries cannot justify the dismantlement of the rule of law in one’s country**. In addition, the Hungarian Justice Minister is unsurprisingly omitting that referenda are carefully “managed” by the ruling party in her country and its captured bodies such as the National Election Commission and the Constitutional Court used to undermine democracy, the rule of law and/or respect for human rights.<sup>266</sup>

This shows how the Commission’s current approach facilitates **misleading comparisons and false equivalences** on the back of reports which **do not yet offer adequate contextualisation and information on countries’ structural weaknesses**, connect the different elements reported in a

<sup>261</sup> 2020 Rule of Law Report, The rule of law situation in the European Union, COM(2020) 580 final, p. 7.

<sup>262</sup> ENCJ, Judicial networks express concern over the rule of law in letter to president-elect von der Leyen, 20 September 2019: <https://www.encj.eu/node/535>

<sup>263</sup> Reuters staff, ‘Polish judiciary changes are a ‘destruction’: EU commissioner’, *Reuters*, 8 February 2020: <https://reut.rs/31Bz3rT>

<sup>264</sup> Bozóki, A., Hegedüs, D., ‘An externally constrained hybrid regime: Hungary in the European Union’ (2018) 25(7) *Democratization* 1173.

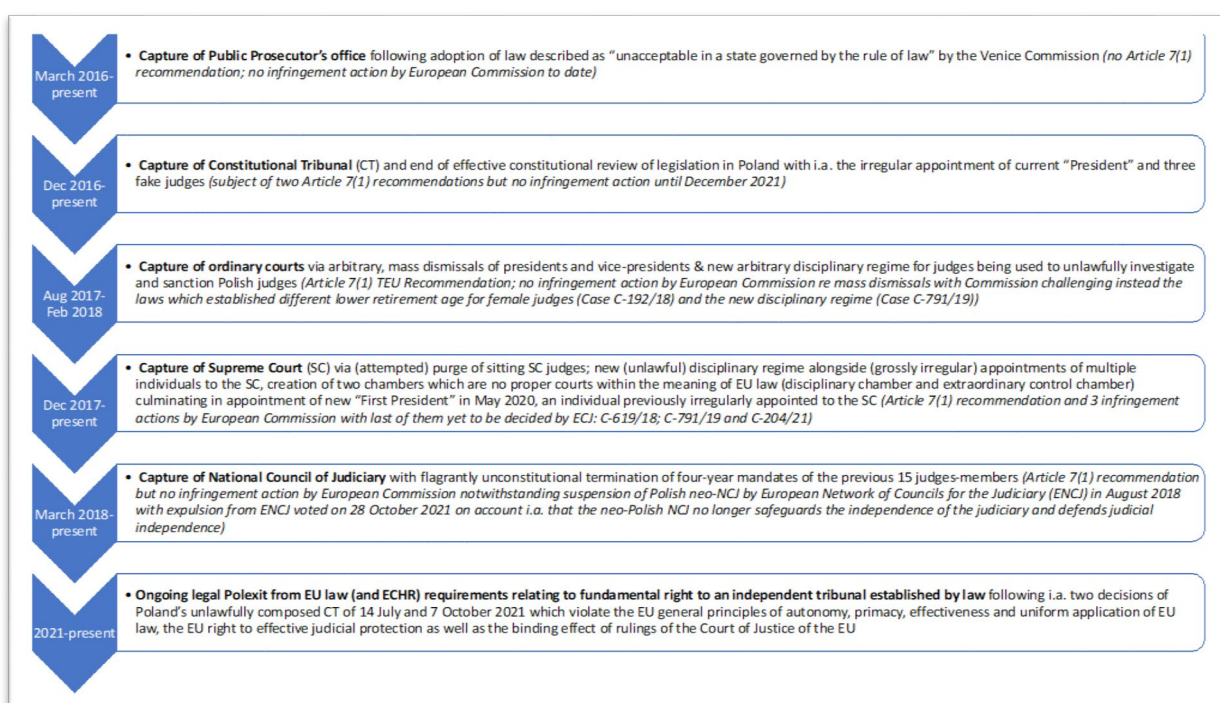
<sup>265</sup> Judit Varga on Facebook, 4 October 2020: <https://m.facebook.com/VargaJuditMinisterofJustice/photos/a.2028879340464345/3755546631130932/?type=3>.

<sup>266</sup> Bánkuti, M., Halmai, G., Scheppele, K.L., ‘Hungary’s Illiberal Turn: Disabling the Constitution’ (2012) 23(3) *Journal of Democracy* 138, p. 140. See also the forthcoming anti-LGBTI referenda packaged as a referendum on children’s protection, upcoming on 3 April 2022: <https://hungarytoday.hu/child-protection-act-law-hungary-hungarian-constitutional-court-sex-gender-reassignment-surgery/>. For the Constitutional Court decision allowing the question “Do you support the availability of gender reassignment treatment to minor children?” to be subject to a referendum, see [https://alkotmanybirosag.hu/uploads/2021/12/sz\\_iv\\_3991\\_2021.pdf](https://alkotmanybirosag.hu/uploads/2021/12/sz_iv_3991_2021.pdf).



transversal **connecting-the-dots** way and offer a clear overview of countries' rule of law adherence over a **sufficiently long period of time**. For instance, non-experts reading the otherwise accurate and comprehensive 2020 and 2021 country reports for Poland would most likely struggle to get an overall sense of how the rule of law has been progressively dismantled in a structural way. To appreciate rule of law backsliding in a specific country, a **timeline type of analysis** bringing different elements together over a significant period of time is necessary. To make clearer what we mean by this, here is a table bringing the most significant legislative changes made to the structure of Poland's judicial branch along with some other significant legal developments.

Table 19: Poland's progressive autocratisation one judicial captured institution at a time since 2016



Source: Pech, L.

Even good faith and pro rule of law actors sometimes fall for the false equivalence trap when faced with allegations of double standards or the EU's allegedly excessive focus on the **situation in Central and Eastern European countries**. For instance, Commissioner Jourová misconstrued a Luxembourg judgment in which the Court of Justice held that German prosecutors were not independent judicial authorities and could not therefore continue to issue European arrest warrants on account of the fact that they could be given instructions by the justice ministers of the respective *Länder*. Commissioner Jourová claimed this as a clear weakness in terms of the Rule of Law.<sup>267</sup> To argue that "Western" Member States also suffer from rule of law weaknesses on the basis of this ruling is misguided. Indeed, holding that German prosecutors are not sufficiently independent to issue European arrest warrants does not

<sup>267</sup> Becker, M., Müller, P., 'EU Commission Vice President on the Rule of Law in Europe "The Condition of Hungary's Media Landscape Is Alarming"', *SPIEGEL International*, 29 September 2020: <https://www.spiegel.de/international/europe/eu-commission-vice-president-on-the-rule-of-law-in-europe-the-condition-of-hungary-s-media-landscape-is-alarming-a-1d762f7d-b4a0-4cb8-b7a4-1a1ca5f4f9fa>.



mean that the German prosecutorial system is inherently incompatible with the rule of law or is evidence of a process of rule of law backsliding in Germany.

One must in particular be careful not to claim that “**nobody’s perfect**” when it comes to the rule of law as this rhetoric only ends up **disguising** the qualitatively different problem of a country whose authorities are engaged in a systemic, deliberate and deceitful process of **dismantlement of all checks and balances**. The Commission should therefore avoid treating similarly a non-democracy and a democracy, or a country on an autocratisation path and one which is not. Quantitative differences that are getting larger and more persistent over time at some point become qualitative differences. By failing to avoid this pitfall, we end up with a set of reports which, no matter how detailed and well intentioned they are, **fail to provide a clear and correct big picture**.

It is therefore important for the ARoLR to clearly **distinguish** the situation of countries experiencing methodical top-down **autocratisation from ad hoc rule of law shortcomings, problems or even violations** which may be identified in non-backsliding countries. This denial of autocratic reality is not, however, unique, to the ARoLR. Indeed, the Commission’s enlargement reports have long suffered from the same flaw.<sup>268</sup> Be that as it may, we have ended up with a reporting exercise which for the time being, as Daniel Hegedüs pointed out, has unfortunately **relativised the reality of the authoritarian entrenchment** in at least two EU countries.<sup>269</sup>

One possible explanation is that **the Commission cannot publicly admit the uncomfortable reality** of the ongoing autocratisation in countries such as Hungary as doing so would *inter alia* render its call for dialogue particularly hollow. At the very least, the Commission’s annual transversal report should **deal separately with countries under ongoing Article 7 proceedings** to illustrate how the rule of law has been structurally undermined to facilitate the consolidation of a *de facto* one-party state regime. Instead, the first two editions of the country reports on Hungary make virtually no reference to the ongoing Article 7 procedure.

### 3.2.5. Emphasis on “dialogue no matter what”

Notwithstanding the lack of any evidence that dialogue works with actors who are implementing rule of law backsliding agendas, the Commission’s “**dialogue no matter what**” approach – an approach which has also the favours of the Council – continues to be the dominant default one. In an interview shortly after the European Parliament elected her the next president of the European Commission, Ursula von der Leyen made clear her preference for dialogue over enforcement in an the interview entitled “Not the worst threat right at the beginning”.<sup>270</sup> The Commission’s July 2019 “blueprint for action” similarly presents dialogue as the alpha and omega of the Commission’s rule of law approach while enforcement is presented as a last resort response.<sup>271</sup> Prior to his appointment as Justice

<sup>268</sup> Bieber, F., 'Why the EU's enlargement process is running out of steam', *LSE EUROPP blog*, 12 October 2020: <https://blogs.lse.ac.uk/europpblog/2020/10/12/49895/> (“The new reports appear to address some of the earlier criticism that they lack detail and miss out on important developments, especially weaknesses and shortcomings. The sheer volume of the reports now makes them more comprehensive and most important developments in what has been a turbulent year were caught. Yet, this does not add up to a clear picture of how the Commission sees the region. The details drown out the big picture. [...] While the reports have moved closer to capturing the problems of the region than earlier reports, they are still lagging behind in capturing the decline of democracy and rule of law in most countries and offer too little analysis to show a path forward”)

<sup>269</sup> ‘The European Commission’s Missed Rule-of-Law Opportunity’, *German Marshall Fund*, 1 October 2020: <https://www.gmfus.org/news/european-commissions-missed-rule-law-opportunity>.

<sup>270</sup> Brössler, D., ‘Von der Leyen im Interview: “Nicht die schärfste Drohung an den Anfang”’, *Süddeutsche Zeitung*, 18 July 2019: <https://www.sueddeutsche.de/politik/von-der-leyen-eu-interview-1.4530615>.

<sup>271</sup> *Op. cit.*, p. 5.

Commissioner, Didier Reynders similarly presented regular discussions as the key solution to address rule of law problems,<sup>272</sup> which explains his strong advocacy for a new periodic peer review mechanism within the Council.<sup>273</sup> With respect to Hungary and Poland, the Justice Commissioner continues to present dialogue in 2021 as the way forward.<sup>274</sup>

After more than ten years of serious and unprecedented rule of law backsliding in the EU, one may however conclude that discursive-based approach and mechanisms **can only work with those Member States' governments that adhere to constitutionalism and liberal democracy, but not with autocratic actors who engage in "constitutional barbarism"**.<sup>275</sup>

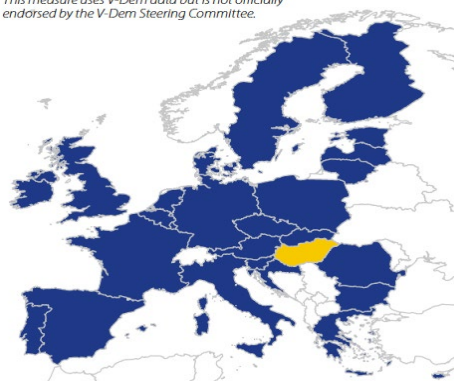
Table 20: Ten years of dialogue with Hungarian authorities (2010-2020):  
Rhetoric<sup>276</sup> v outcome

2011: "The Commission not only has a duty, but also a sincere interest, in facilitating the dialogue amongst stakeholders and policymakers at a European level. The changing structure of the media landscape in Europe causes concern for the future. It brings opportunities but also wider risks for media pluralism", European Commission Vice-President Neelie Kroes<sup>277</sup>

2012: "By adopting a condemning Resolution on Hungary, the Socialist, Liberal, Green and Communist Groups of the European Parliament are neglecting the fact that there is an ongoing dialogue between the Hungarian Government and the European Commission. These Groups have already made their judgement before the end of this process. This is the authoritarian method", European People's Party<sup>278</sup>

**FIGURE 7: HUNGARY – THE ONLY AUTHORITARIAN EU MEMBER STATE**

This figure is based on the *Regimes of the World* typology (see Lüthmann, Tanneberg and Lindberg 2018). This measure uses V-Dem data but is not officially endorsed by the V-Dem Steering Committee.



Source: V-DEM, *Autocratization Surges – Resistance Grows. Democracy Report 2020*, March 2020 p. 14

<sup>272</sup> Center for European Policy Studies, CEPS - Europe, back on track: speech by Minister Didier Reynders, 23 February 2018" [https://diplomatie.belgium.be/en/newsroom/news/2018/ceps\\_europe\\_back\\_on\\_track](https://diplomatie.belgium.be/en/newsroom/news/2018/ceps_europe_back_on_track).

<sup>273</sup> Brzozowski, A., 'Belgium, Germany make joint proposal for EU rule of law monitoring mechanism', 19 March 2019, <https://www.euractiv.com/section/justice-home-affairs/news/belgium-germany-make-joint-proposal-for-eu-rule-of-law-monitoring-mechanism/>.

<sup>274</sup> 'Didier Reynders: "Nous ne devons pas avoir peur du débat ouvert et constructif sur l'État de droit"', *Euractiv.fr*, 18 February 2021: <https://www.euractiv.fr/section/politique/interview/didier-reynders-nous-ne-devons-pas-avoir-peur-du-debat-ouvert-et-constructif-sur-letat-de-droit/>.

<sup>275</sup> Kovács, K., Tóth, G.A., 'The Age of Constitutional Barbarism', *VerfBlog*, 7 September 2019: <https://verfassungsblog.de/the-age-of-constitutional-barbarism/>.

<sup>276</sup> For an enlightening article using the rule of law crisis as a case study to show how a "rhetoric of inaction" has been mobilised by national and European policymakers to legitimate stasis, i.e., hiding their inaction behind inter alia calls for more "dialogue", alleged limitations of existing toolbox and possible rally-round-the-flag effect, see Emmons, C., Pavone, T., 'The rhetoric of inaction: failing to fail forward in the EU's rule of law crisis' (2021) *Journal of European Public Policy* (published online on 19 July 2021).

<sup>277</sup> Neelie Kroes, Vice-President of the Commission in the European Parliament debate on media law in Hungary, 16 February 2011, [https://www.europarl.europa.eu/doceo/document/CRE-7-2011-02-16-INT-3-512-000\\_EN.html](https://www.europarl.europa.eu/doceo/document/CRE-7-2011-02-16-INT-3-512-000_EN.html).

<sup>278</sup> 'European Parliament officially rebukes Hungarian government on democracy, rule of law', MTI, February 2012 reproduced in Venice Commission's opinions on Hungarian legislation, January-April 2021, Press review, 23 April 2012. The EPP press release is also available at <https://www.eppgroup.eu/newsroom/news/hungary-judgement-has-been-made>.

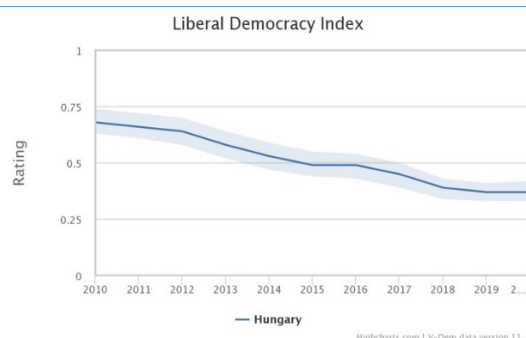
2013: “The Commission expects the Hungarian authorities to engage in a political dialogue with this House in order to address any conclusions the Resolution may contain”, European Commission Vice-President Viviane Reding<sup>279</sup>

2017: “Dialogue is the European way. Dialogue to solve misunderstandings. Dialogue when we disagree. That is the European way”, European Commission First Vice-President Frans Timmermans<sup>280</sup>

2018: “When it comes to the application of EU law and the respect of the EU’s fundamental values, the Commission intervenes based on accurate and thorough legal analysis, it focuses on concrete national measures and it engages in a dialogue with the authorities,” European Commission First Vice-President Frans Timmermans<sup>281</sup>

2019: “We first need to seek dialogue”, European Commission President Ursula von der Leyen<sup>282</sup>

2020: “Nous nous attendons à ce que le gouvernement hongrois [...] reprenne le dialogue sur d’anciens problèmes persistants”<sup>283</sup>; “we believe it is never late for dialogue”,<sup>284</sup> European Commission Vice-President Jourová



Source: V-DEM variable graph  
(LDI Index, 2010-20)

Source: Authors based on references indicated in footnotes

The Commission’s ARoLR continues to embody this belief that continued dialogue will help deepen “common understanding”, promote “a robust political and legal rule of law culture throughout the EU” as well as help prevent serious “rule of law problems from emerging or deepening”.<sup>285</sup> The word “**dialogue**” itself is mentioned 14 times in the 2020 umbrella report, and 19 times in the 2021 edition, which gives us an average of **1 mention for every other page of the reports**.

<sup>279</sup> Hungary and the Rule of Law - Statement of the European Commission in the Plenary Debate of the European Parliament, Speech/13/324, 17 April 2013.

<sup>280</sup> Opening remarks of First Vice-President Frans Timmermans in the European Parliament debate on Hungary, Speech/17/1118, Brussels, 26 April 2017.

<sup>281</sup> Frans Timmermans, First Vice-President of the Commission during the debate on the situation in Hungary, in the European Parliament, 11 September 2018, Procedure : 2017/2131(INL).

<sup>282</sup> Quoted in Weise, Z., ‘Von der Leyen rows back on ‘United States of Europe’’, *Politico*, 18 July 2019, <https://www.politico.eu/article/ursula-von-der-leyen-rows-back-on-united-states-of-europe/>.

<sup>283</sup> Quoted in Udrescu, M., ‘Vera Jourova, vice-présidente de la Commission européenne, à La Libre: “Un Viktor Orban dans l’Union européenne, c’est assez”’, *La Libre Belgique*, 25 Avril 2020 : <https://www.lalibre.be/international/europe/vera-jourova-vice-president-de-la-commission-europeenne-a-la-libre-un-viktor-orban-dans-l-union-europeenne-c-est-assez-5ea3456f9978e21833ce5b5d>.

<sup>284</sup> In answer to question from journalist Lily Bayer asking in relation to Hungary “at what point is dialogue simply not enough?”: Press conference by Věra Jourová & Didier Reynders on the 2020 Annual Rule of Law Report, 30 September 2020: <https://youtu.be/iffX4LzJINI>.

<sup>285</sup> 2020 Rule of Law Report. The Rule of Law situation in the European Union, pp. 3 and 27.

In order to pretend that dialogue can still be meaningful in the case of the two countries subject to Article 7(1) proceedings, the 2020 ARoLR also “presents the situation in Poland or Hungary as one where a largely intact system of **constitutional checks and balances** is being attacked” but “in both countries key ones **were already removed** a while ago and the authoritarian developments are already institutionally **entrenched**.”<sup>286</sup> It was also particularly striking to see Commissioner Jourová at the presentation of the first edition of the ARoLR continuing to emphasise dialogue as the way forward one day after the Hungarian Prime Minister suspended all relations with her – in a manifest breach of the principle of sincere cooperation left unsanctioned to date – and **requested her to resign**.<sup>287</sup>

This “**dialogue at any cost**” approach, notwithstanding all evidence that it does not work with autocrats, is not however unique to the Commission. Indeed, the **Council** also similarly and regularly downplays reality by using the most euphemistic language while emphasising the primacy of dialogue as the way forward to deal with those engaged in rule of law backsliding,<sup>288</sup> even after the President of the Court of Justice publicly warned how this trend was now threatening the very survival of the European Project.<sup>289</sup>

### 3.2.6. Opportunity costs and possible displacement effect on enforcement

The annual production of 28 rule of law reports (1 transversal communication and 27 country chapters) and associated country visits, debates, meetings, etc., has to be an extremely **resource-intensive** exercise. The question one may ask is therefore whether the ARoLR may have ended up **cannibalising the focus, energy and limited resources** of the Commission to the **detriment of the Commission's enforcement of EU legal requirements relating to the rule of law**.<sup>290</sup> To put it more colourfully, one could ask whether the von der Leyen Commission was right to prioritise the publication of “an obscurantist treatise on the importance of fire safety and on warning signs of fire risk” at a time where one democracy was “already burned to the ground and another in the midst of a three-alarm fire”.<sup>291</sup> Writing in June 2019, several experts, including the present two authors, advised against the prioritisation of a revamping of the EU's rule of law toolbox at a time where rule of law backsliding is both worsening and spreading “so as not to distract the Commission from what should be its immediate priorities”<sup>292</sup> and which one may be tempted to summarise in three words: enforcement, enforcement and enforcement.

<sup>286</sup> Hegedüs, D., ‘The European Commission's Missed Rule-of-Law Opportunity’, *op. cit.*

<sup>287</sup> Zsiros, S., Gill, J., ‘Hungary calls for EU's Jourova to quit over ‘sick democracy’ comment’, *Euronews*, 29 September 2020: <https://www.euronews.com/2020/09/29/hungary-calls-for-eu-commissioner-jourova-to-resign-over-derogatory-comments>. Commissioner Jourová had merely stated, in a quick-witty way, that Hungary was not an “illiberal” but rather an “ill democracy”. See Becker, M., Müller, P., “The Condition of Hungary's Media Landscape Is Alarming”, *Spiegel International*, 29 September 2020: <https://www.spiegel.de/international/europe/eu-commission-vice-president-on-the-rule-of-law-in-europe-the-condition-of-hungary-s-media-landscape-is-alarming-a-1d762f7d-b4a0-4cb8-b7a4-1a1ca5f4f9fa>.

<sup>288</sup> See most recently, Présidence française du Conseil de l'UE, *Relance, puissance, appartenance* (1<sup>er</sup> janvier-30 juin 2022), p. 9 : « Au titre des instruments préventifs, la présidence poursuivra le dialogue mené sur le fondement du rapport annuel de la Commission [...] Elle soutiendra la Commission dans son rôle de gardienne des traités et, en mobilisant les instruments prévus par l'article 7 TUE, dans la recherche d'une solution aux préoccupations identifiées par le maintien d'un dialogue ouvert et constructif ».

<sup>289</sup> “Constitutional relationships between legal orders and courts within the European Union”, FIDE 2021, XXIX FIDE Congress, 4 November 2021: <https://fide2020.eu/wp-content/uploads/2021/11/FIDE-Opening-Ceremony-4-November-2021-Koen-Lenaerts.pdf>

<sup>290</sup> Pech, L., ‘Doing more harm than good?’, *op. cit.*

<sup>291</sup> Kelemen, R.D., Op-Ed: ‘You can't fight autocracy with toothless reports’, *op. cit.*

<sup>292</sup> Pech, L., Kochenov, D., *Strengthening the rule of law within the European Union: Diagnoses, Recommendations, and What to Avoid*, RECONNECT Policy Brief, June 2019, p. 17.

When announcing the launch of the ARoLR in July 2019, the Commission did simultaneously announce its determination “to bring to the Court of Justice rule of law problems affecting the application of EU law, when these problems could not be solved through the national checks and balances” and “pursue a strategic approach to infringement proceedings related to the rule of law, requesting expedited proceedings and interim measures whenever necessary”.<sup>293</sup> The reality on the enforcement front, however, offers a different picture but as will be shown below, there is evidence of a (welcome) change of approach since June/July 2021 with **more enforcement actions** accompanying the publication of the **second edition of the ARoLR in July 2021** albeit arguably more and better enforcement is required.

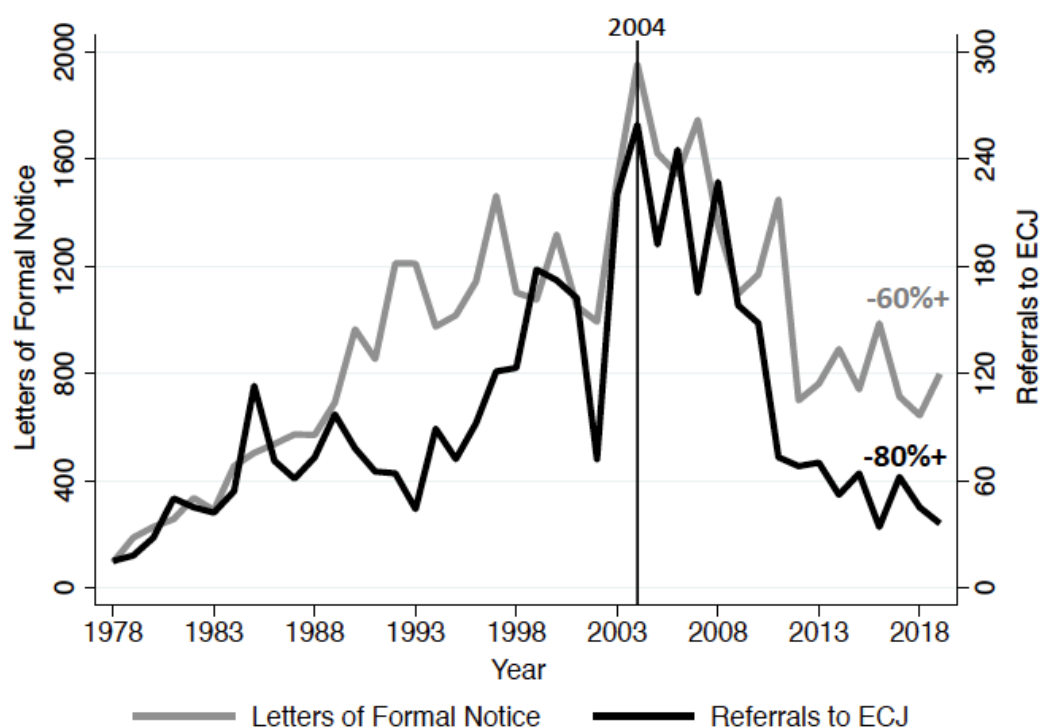
To begin with, one must stress that the Commission’s ostensible reluctance to enforce EU law is not a new phenomenon but can be traced back to **2004** (i.e., “big bang” **enlargement** when 10 new countries joined the EU), with **steep declines** both when it comes to **letters of formal notice and referrals to the Court of Justice** as compelling evidenced by Professors Kelemen and Pavone.<sup>294</sup>

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<sup>293</sup> *Strengthening the rule of law within the Union*, op. cit., pp. 13-14.

<sup>294</sup> Kelemen R.D., Pavone, T., ‘Where have the Guardians gone? Law enforcement and the politics of supranational forbearance in the European Union’, 27 December 2021 (publication forthcoming): [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3994918](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3994918) (authors argue that the Commission sacrificed its role as guardian of the Treaties to safeguard its role as engine of integration by embracing dialogue with governments over robust enforcement so as not to jeopardise intergovernmental support for its policy proposals). This study led Sophie in 't Veld (Renew) to submit a priority question for written answer to the Commission on 10 January 2022 (one of the questions submitted is asking the Commission to respond to the study’s findings and clarify whether it agrees with the study’s finding of a “steep decline in enforcement” and whether it agrees that “this amounts to dereliction of duty”). At the time of finalising this study (14 February 2022), the Commission had yet to answer the questions submitted by the MEP: [https://www.europarl.europa.eu/doceo/document/P-9-2022-000097\\_EN.html](https://www.europarl.europa.eu/doceo/document/P-9-2022-000097_EN.html).

Table 21: The curious case of the declining infringements (1978-2019)



Source: Kelemen, R.D., Pavone, T., 'Where have the Guardians gone? Law enforcement and the politics of supranational forbearance in the European Union', 27 December 2021 (publication forthcoming): [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3994918](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3994918), pp. 5 and 8.

The steep declines, which span almost all Member States and happened **despite a rising number of infringement complaints**, cannot be explained by better compliance or conversely, a lack of EU law compliance challenges, not least when it comes to respect of EU requirements relating to judicial independence. In this respect, one may add that the **decoupling of infringement actions and requests for a preliminary ruling** identified by the authors is particularly striking in the area of **judicial independence**. In this specific area, we have had a total to date of **five infringement actions based on Article 19(1) TEU** (principle of effective judicial independence) – the latest one on 22 December 2021 in relation to Poland's unlawfully composed constitutional "court" – versus **more than fifty national requests for a preliminary ruling from (under-siege) judges** asking the Court of Justice to answer questions regarding the interpretation and application of Article 19(1) TEU in the face of manifest violations of judicial independence committed by national authorities.<sup>295</sup> This decoupling has proved particularly problematic this area as national judges submitting questions have faced **grossly unlawful harassment and sanctions** (including a dismissal in one case<sup>296</sup>), with **national judges also**

<sup>295</sup> See Pech, L., Kochenov, D., *Respect for the Rule of Law in the Case Law of the European Court of Justice*, op. cit., pp. 94-95.

<sup>296</sup> See question for written answer E-004700/2021 to the Commission by G. Delbos-Corfield (Verts/ALE), Isabel Wiseler-Lima (PPE), Bettina Vollath (S&D), Ramona Strugariu (Renew), Malin Björk (The Left) regarding Hungarian judge Gabriella Szabó. In its response dated 21 December 2021, the Commission stated that it is "examining the complaint received concerning a Hungarian judge whose judicial tenure was not extended. Only after the conclusion of its analysis will the Commission be able to decide whether launching infringement proceedings would be warranted." The judge was effectively dismissed in March 2021.



**prevented from applying the preliminary judgments of the Court** via multiple, formal and informal, unlawful means.<sup>297</sup>

One could retort that fewer is not necessarily, in and of itself, an indication of a reluctance to enforce EU law. It may instead reflect a reprioritisation of Commission's limited resources to tackle the most structurally important violations of EU law. Yet, when one looks at the situation in **Hungary and Poland** – as previously noted, the world's top two autocratising countries for the period 2010-2020 according to V-DEM – it is striking to see how **so few Article 2 TEU-related infringement actions were launched and lodged** with the Court of Justice during the same period of time. In the case of Hungary, the Commission lodged no more than a total of eight Article 2 TEU-related infringement actions in the same period (2010-2020),<sup>298</sup> that is, **less than one per year**. In the case of **Poland**, the Commission has also lodged less than one infringement action with the Court per year since it activated its Rule of Law Framework in January 2016. As a point of reference, the Commission opened 903 new infringement cases against EU countries in 2020, 797 in 2019, 644 in 2018, 716 in 2017 and 986 in 2016.

In July 2021, President von der Leyen defended her Commission's rule of law enforcement record as follows: "Since the beginning of my mandate, we have launched around 40 infringement cases linked to the protection of the rule of law and of other Union values laid down in Article 2 of the Treaty".<sup>299</sup> The expression "linked to" does a lot of work in this sentence and may be viewed as misleading. Indeed, the list of **42 infringement actions** subsequently disclosed shows that most of these actions are primarily about the incorrect or partial **transposition of directives adopted more than a decade before**.<sup>300</sup> Furthermore, almost half these actions relate to EU **environmental law** – total of 17 environmental law transposition related actions concerned with access to justice as regards Environmental Liability Directive 2004/35 and Air Quality Directive 2008/50<sup>301</sup> – with an additional total of 11 actions relating to transposition issues concerning EU Framework Decision 2008/913 on combating certain forms of expressions of racism and xenophobia by means of criminal law. The list of 42 actions also include a couple of actions which do not primarily, if at all, raise violations of Article 2 TEU values such as the ones raising the issue of access to high-level posts in the Greek public service, Cyprus and Malta's investor citizenship schemes, or the non-conformity of Bulgarian pension law with Directive 79/7.

<sup>297</sup> This is especially visible in Poland. See most recently, the report written by Judge Mazur on behalf of THEMIS, *Challenging the principles of primacy and direct applicability of EU law by the Polish authorities, 6 months after the CJEU's rulings of July 2021*, THEMIS, up to date as of 25 January 2022: <http://themis-sedziowie.eu/materials-in-english/in-depth-report-challenging-the-principles-of-primacy-and-direct-applicability-of-eu-law-by-the-polish-authorities-6-months-after-the-cjeu-rulings-of-july-2021>.

<sup>298</sup> Only 5 judgments on the merits were issued during the same decade in the following Cases: *C-286/12*; *C-288/12*; *C-718/17*; *C-66/18*; *C-78/18*.

<sup>299</sup> Speech by President von der Leyen at the European Parliament Plenary on the conclusions of the European Council meeting of 24-25 June 2021, Speech/21/3526, 7 July 2021.

<sup>300</sup> In reply to an access to document to request submitted by Mr Patryk Wachowiec, the Commission shared a link to a list of 42 infringement cases on 20 July 2021: [https://www.asktheeu.org/en/request/infringement\\_proceedings\\_related#incoming-32696](https://www.asktheeu.org/en/request/infringement_proceedings_related#incoming-32696)

<sup>301</sup> 15 actions concern transposition issues relating to Environmental Liability Directive 2004/35 (problem with national legislation not allowing all categories of natural and legal persons mentioned in Directive to request the competent authority to take remedial action for environmental damage) and 2 actions concern transposition issues relating to the Air Quality Directive 2008/50 (problem with access to justice in relation to air quality plans).

When it comes to infringement actions primarily about the rule of law/Article 2 values, and which can be reasonably described as “founding values”<sup>302</sup> actions launched by the von der Leyen Commission by July 2021, one may mention the following (by date of adoption of the letter of formal notice):

- **29 April 2020 (referral to the ECJ announced on 31 March 2021):** Poland’s “Muzzle Law” not compatible with the primacy and direct effect of EU law, the requirements of judicial independence set out in Article 19(1) TEU and the functioning of the preliminary ruling mechanism;
- **18 February 2021 (Article 260(2) TFEU action with no referral to the ECJ yet):** Hungary’s failure to take necessary measures to comply with the Court of Justice’s ruling of 18 June 2020 in Case C-78/18 regarding the Hungarian law on foreign-funded NGOs;<sup>303</sup>
- **9 June 2021 (case closed on 2 December 2021):** German Federal Constitutional Court violated the principles of autonomy, primacy, effectiveness and uniform application of EU law, as well as the respect of the jurisdiction of the ECJ, when it declared a judgment of the Court of Justice ultra vires depriving this judgment of its legal effect in Germany;
- **9 June 2021 (reasoned opinion on 12 November 2021):** Lack of independence of the Belgian Data Protection authority in breach of the GDPR;
- **9 June 2021 (Article 260(2) TFEU action with referral to the ECJ announced on 12 November 2021):** Hungary’s failure to take necessary measures to comply with the Court of Justice’s ruling of 17 December 2020 in Case C-808/18, in particular as regards the infringement of the relevant provisions of the Asylum procedures, Reception Conditions and Return Directives;<sup>304</sup>
- **9 June 2021 (no reasoned opinion yet):** Hungarian legislation sanctioning discrimination in the field of education and vocational training not compatible with the Racial Equality Directive 2000/43 and Directive on Equal Treatment in Employment and Occupation 2000/78 following revision of the national sanction regime in July 2020 obliging courts to award moral compensation in lieu of one-time payments as in other fields;
- **9 June 2021 (reasoned opinion on 2 December 2021):** Hungarian Media Council’s decision to reject Klubradio’s application done on highly questionable grounds in violation of the principles of proportionality and non-discrimination under Directive 2018/972 establishing the European Electronic Communications Code;
- **15 July 2021 (reasoned opinion on 2 December 2021):** Hungary’s obligation to provide information on a divergence from ‘traditional gender roles’ violates the freedom of expression of authors and book publishers (Article 11 of the EU Charter); discriminates on grounds of sexual orientation in an unjustified way (Article 21 of the EU Charter) and incorrectly applies the EU rules on unfair commercial practices (Directive 2005/29);
- **15 July 2021 (reasoned opinion on 2 December 2021):** Hungarian national rules that seek to prohibit or limit access to content that portrays the so-called ‘divergence from self-identity corresponding to sex at birth, sex change or homosexuality’ for individuals under 18 years of age not compatible inter alia with Audiovisual Media Services Directive 2010/13 and the e-Commerce Directive 2000/31;
- **15 July 2021 (no reasoned opinion yet):** Poland’s “LGBT-ideology free zones” resolutions may violate EU law regarding non-discrimination on the grounds of sexual orientation with Polish authorities having failed to provide requested information in breach of the principle of sincere cooperation under Article 4(3) TEU.

<sup>302</sup> One may note that the Commission itself did not use the heading “founding values” for most of these actions when publicising them in its infringement package press releases.

<sup>303</sup> This action was not mentioned in the list of 42 actions most likely because it is based on Article 260 rather than 258 TFEU. Hungary repealed the relevant Act in May 2021 only to replace it with an Act which continues to violate EU law. One may also note that Hungary continues to violate the ruling of the Court of Justice in the Lex CEU case (see judgment of 6 October 2020 in Case C-66/18) but the Commission is yet to launch an Article 260 action in this respect. See Amnesty International, ‘Hungary repeals controversial laws restricting the right to association but concerns remain’, 28 July 2021: <https://www.amnesty.org/en/documents/eur27/4526/2021/en/>

<sup>304</sup> This action was not mentioned in the list of 42 actions most likely because it is based on Article 260 rather than 258 TFEU. In December 2021, the Hungarian Prime Minister confirmed his intention to continue violating the Court of Justice’s ruling: “Orban says Hungary will defy EU court ruling on asylum policy”, *Euronews*, 22 December 2021: <https://www.euronews.com/2021/12/21/orban-says-hungary-will-defy-eu-court-ruling-on-asylum-policy>

We have included above three infringement actions which were shortly announced after President von der Leyen's speech at the European Parliament Plenary on 7 July 2021. It is striking to see how **few Article 2 "founding values"-related 258 TFEU infringement proceedings were launched before June 2021**.<sup>305</sup> As aptly observed by Professors Kelemen and Pavone, "the Commission's reluctance to bring enforcement actions took root at a particularly bad time: shortly before member governments like Hungary and Poland started to autocratize and challenge the very foundations of the EU legal order — precisely when muscular use of the EU's legal tools was imperative."<sup>306</sup> While it is difficult to evidence this claim, it appears that after prioritising dialogue and the production of two editions of the ARoLR, the von der Leyen Commission may have finally come to the realisation that **soft discursive approaches will not help contain democratic and rule of law backsliding**. President von der Leyen's State of the Union address on 15 September 2021 gives further credence to this interpretation:

[T]here are worrying developments in certain Member States. Let me be clear: dialogue always comes first. But dialogue is not an end in itself, it should lead to results.

This is why we take a dual approach of dialogue *and* decisive action. This is what we did last week. And this is what we will continue to do.<sup>307</sup>

Decisive action cannot however just mean the launch of infringement actions only to "sit on them" for months afterwards as otherwise we – again – just end up with another variant of façade of (decisive) action. Infringement actions **must be promptly followed with ECJ referrals** when the deadlines, which should be no more than one month, for replying the Commission's letters of formal notices and reasoned opinions have expired.<sup>308</sup> In the face of systemic dismantlement of checks and balances, **a systemic infringement approach is required**. At the very least, more and prompt infringement actions **targeting the stepping stones** on which autocratising regimes are built, and not merely the

<sup>305</sup> We have borrowed the expression of "Article 2 TEU-related infringement proceedings" from the Commission. See European Commission's non-paper providing factual information on the values-related infringement proceedings in relation to Hungary, Council document no 14022/18, 8 November 2018, p. 1: "Unlike the European Parliament, the European Commission has a right under the Treaty on European Union to launch infringement procedures and, in the case of Hungary, has launched many value-related infringement proceedings." We are not however arguing that the Commission can launch infringement actions on the sole basis of Article 2 TEU. For further discussion on this, see Scheppele, K.L., Kochenov, D., Grabowska-Moroz, B., 'EU Values Are Law, after All: Enforcing EU Values through Systemic Infringement Actions by the European Commission and the Member States of the European Union' (2021) *Yearbook of European Law* 1, p. 62 et seq ("The Commission could easily change course by using the infringement procedure to enforce the broader principles on which the EU rests, principles which consist of a common commitment to the values of Article 2 and the requirement that Member States engage in sincere cooperation with the EU's goals, among others"). One may note in this respect that the Court of Justice has since forcefully emphasised "Article 2 TEU is not merely a statement of policy guidelines or intentions, but contains values which ... are an integral part of the very identity of the European Union as a common legal order, values which are given concrete expression in principles containing legally binding obligations for the Member States", Case C-156/21, op. cit., para. 232.

<sup>306</sup> Kelemen, R.D., Pavone, T., 'The curious case of the EU's disappearing infringements', *Politico*, 13 January 2022: <https://www.politico.eu/article/curious-case-eu-disappearing-infringements/>.

<sup>307</sup> 2021 State of the Union Address by President von der Leyen, Speech/21/4701, 15 September 2021.

<sup>308</sup> The same applies to Article 260 actions. To give a single example, it beggars belief that almost six months after the Commission sent a letter of formal notice under Article 260(2) TFEU to Poland for not complying with the Court of Justice's judgment in Case C-791/19 (new disciplinary regime for Polish judges), the Commission is yet to refer the matter to the Court in the face of sustained and gross violations of the Court's judgment and the continuing unlawful harassment of any Polish judge who seeks to apply EU requirements relating to the right to effective judicial protection. See European Commission, Independence of Polish judges: Commission asks European Court of Justice for financial penalties against Poland on the activity of the Disciplinary Chamber, IP/21/4587, 7 September 2021 and Judge Mazur on behalf of THEMIS, IN-DEPTH REPORT: Challenging the principles of primacy and direct applicability of EU law by the Polish authorities, 6 months after the CJEU's rulings of July 2021, THEMIS, updated as of 25 January 2022: <http://themis-sedziowie.eu/materials-in-english/in-depth-report-challenging-the-principles-of-primacy-and-direct-applicability-of-eu-law-by-the-polish-authorities-6-months-after-the-cjeu-rulings-of-july-2021/>.

symptoms, are needed. This is no time to play it safe as compelling argued by Professors Scheppele, Kochenov and Grabowska-Moroz:

Under present practice, the Commission focuses on the detail of the acquis and exhibits a tendency to see problems as individual trees rather than as larger forests. [...] In short, the Commission has preferred to focus on small technical violations rather than larger structural problems [...] The technical violations that the Commission identifies are often symptoms and not the cause of the underlying disease. By only addressing the symptoms, however, the disease remains uncured [...] As long as rogue governments see all of these pieces as connected in a common web, the Commission will never successfully address the challenges posed unless the Commission sees all of the pieces together in a common web as well [...] Unless the Commission learns to connect the dots just as the Member State governments do, it is doomed to generate a resounding failure.<sup>309</sup>

In this respect, a revamped ARoLR may help as will be discussed in the next Part of this study.

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<sup>309</sup> Scheppele, K.L., Kochenov, D., Grabowska-Moroz, B., 'EU Values Are Law', op. cit., pp. 59-60, 62 and 79-80.

## 4. REMEDYING THE COMMISSION'S RULE OF LAW REPORT'S SHORTCOMINGS: RECOMMENDATIONS MADE TO DATE AND THE COMMISSION'S ANSWERS

### 4.1. Recommendations made by the European Parliament

The **recommendations made by the European Parliament** listed below summarise the ones made in particular after the publication of the Commission's first ARoLR in the resolution of 7 October 2020 on the establishment of an EU Mechanism on Democracy, the Rule of Law and Fundamental Rights<sup>310</sup> (Rapporteur: Michal Šimečka) and the resolution of 24 June 2021 on the Commission's 2020 Rule of Law Report<sup>311</sup> (Rapporteur: Domènec Ruiz Devesa).<sup>312</sup> The preliminary recommendations made in the context of the ongoing drafting of the resolution on the Commission's 2021 Rule of Law Report<sup>313</sup> (Rapporteur: Terry Reintke) will also be taken into account below.

**"Macro-recommendations"**, i.e., those relating to the overall European rule of law monitoring and enforcement architecture, the new Rule of Law Mechanism/ARoLR and how it must be used in this broader framework, will be distinguished from **"micro-recommendations"**, i.e., those relating to the internal structure, content and scope of the ARoLR.

#### 4.1.1. Macro-recommendations

##### a. Renewed call for the establishment of a permanent and comprehensive EU DRF mechanism

While the Parliament did acknowledge the Commission's annual rule of law review cycle, including its ARoLR component, as a welcome addition to the tools available to preserve Article 2 TEU values and in particular the rule of law, the Parliament deplored its **limited scope as it does not cover all EU values enshrined in Article 2 TEU**.

For the Parliament, there is still a need to more fundamentally "strengthen and streamline existing mechanisms and to develop an effective EU mechanism on democracy, the rule of law and fundamental rights to ensure that the principles and values enshrined in the Treaties are upheld throughout the Union".<sup>314</sup>

What the European Parliament means by a new EU Mechanism on Democracy, the Rule of Law and Fundamental Rights (DRF Mechanism), first proposed on 25 October 2016, was most recently detailed in a resolution adopted on 7 October 2020, which also includes a detailed proposal for an Interinstitutional Agreement on Reinforcing Union Values:

5. Proposes the establishment of an EU mechanism on democracy, the rule of law and fundamental rights (the 'Mechanism'), building on Parliament's 2016 proposal and the Commission's annual Rule of

<sup>310</sup> European Parliament resolution of 7 October 2020 on the establishment of an EU Mechanism on Democracy, the Rule of Law and Fundamental Rights, 2021/2072(INI)

<sup>311</sup> European Parliament resolution of 24 June 2021 on the Commission's 2020 Rule of Law Report COM(2020) 580 (2021/2025(INI)).

<sup>312</sup> The authors of the present study have been consulted in relation to the follow-up resolution on the DRF mechanism of 7 October 2020 and the resolution of 24 June 2021. Some of their findings were made public during the Reconnect webinar on Strengthening the EU's Rule of Law Toolbox: A proposal for an Annual Monitoring Cycle on Union Values, 22 September 2020, <https://www.youtube.com/watch?v=AAT5xLZGtaY>.

<sup>313</sup> Draft opinion of the AFCD for LIBE on the Commission's 2021 Rule of Law Report, (2021/2180(INI)), Rapporteur: Sophie in 't Veld, 21 January 2022.

<sup>314</sup> Resolution of 24 June 2021, recital L, para. 49 and paras 52-53.

Law Report, to be governed by an interinstitutional agreement between the three institutions, consisting of an Annual Monitoring Cycle on Union values, covering all aspects of Article 2 TEU and applying equally, objectively and fairly to all Member States, while respecting the principles of subsidiarity and proportionality;

6. Underlines that the Annual Monitoring Cycle must contain country-specific clear recommendations, with timelines and targets for implementation, to be followed up in subsequent annual or urgent reports; stresses that failure to implement the recommendations must be linked to concrete Union measures, including procedures under Article 7 TEU, infringement proceedings and budgetary conditionality once in force; points out that recommendations should not only be aimed at redressing violations but should also promote policies enabling citizens to benefit from Union rights and values;

7. Points out that the Mechanism should consolidate and supersede existing instruments to avoid duplication, in particular the Commission's annual Rule of Law Report, the Commission's Rule of Law Framework, the Commission's annual reporting on the application of the Charter, the Council's Rule of Law Dialogue and the Cooperation and Verification Mechanism (CVM), while increasing complementarity and coherence with other available tools [...]

The **Commission**, however, continues to oppose the Parliament's idea of a new DRF mechanism. The Commission's priority appears to be instead an **effective application of the existing European Rule of Law Mechanism/ARoLR** while leaving the door open for a possible codification of interinstitutional cooperation in this respect in a future interinstitutional agreement:

The Commission stresses the importance of swiftly finalising the setting-up of the European Rule of Law Mechanism. With a view of ensuring effectiveness, the Commission does therefore favour cooperation under existing institutional arrangements, and could see value in having regular meetings or an interinstitutional exchange of views, which could help in the preparation and discussion of rule of law, democracy or fundamental right issues. Whether in the future such cooperation should be codified in an interinstitutional agreement will have to be assessed at a later stage, on the basis of the experience gained through the application of the European Rule of Law Mechanism.<sup>315</sup>

Many of the Parliament's key ideas outlined in its resolution of 7 October 2020, including a better use of the findings gathered as part of the EU's monitoring mechanisms by relevant EU institutions in their assessment for the purposes *inter alia* of triggering Article 7 TEU and the Rule of Law Conditionality Regulation, have found their ways into recommendations directly connected to the Commission's ARoLR as will be shown below.

#### **b. Better linkage of the ARoLR with other distinct but complementary mechanisms to strengthen synergies**

In its first resolution specifically dedicated to the Commission's first edition of its ARoLR, the European Parliament has stressed what ought to be the Commission's main priority: "to *enforce* [our emphasis] EU law when breaches of Article 2 TEU occur and that its annual rule of law reports should mainly contribute to that end."<sup>316</sup> This is a direct link and a primary purpose the Commission is yet to accept as the Commission continues, for the time being, to instead regularly emphasise the preventive dialogue-based nature of its ARoLR with virtually no emphasis on enforcement and no links made to enforcement procedures within the framework of the ARoLR. However, for the European Parliament,

<sup>315</sup> European Commission, Follow up to the European Parliament non-legislative resolution on the establishment of an EU Mechanism on Democracy, the Rule of Law and Fundamental Rights of 7 October 2020, SP(2020)686, 3 March 2021, p. 3.

<sup>316</sup> Resolution of 24 June 2021, op. cit., para. 63.



and correctly in our view, the Commission ought to better “align” the ARoLR “with tools that could be applied to remedy the shortcomings identified”<sup>317</sup> in the ARoLR and activate other rule of law tools when necessary. In other words, **the “annual report should serve as a basis for deciding whether to activate one or several relevant instruments** such as the procedure provided for in Article 7 TEU, the conditionality mechanism, whether to activate the Rule of Law Framework or whether to launch infringement procedures, including expedited procedures, applications for interim measures before the CJEU and actions regarding non-implementation of CJEU judgments concerning the protection of EU values”.<sup>318</sup>

As regards specifically Article 7 TEU procedures, the Parliament has helpfully recommended that the relevant EU institutions **use the findings of the annual monitoring cycle** in their assessment for the purposes of triggering **Article 7 TEU and the Rule of Law Conditionality** Regulation 2020/2092<sup>319</sup>. In this respect, one may note the damning yet accurate diagnosis of the Parliament in relation to the “Council’s hesitance to apply Article 7 TEU” which “is in fact effectively enabling a continued disregard for the values provided for in Article 2 TEU, including blatant non-compliance with CJEU judgments and the harassment of those seeking to uphold the rule of law in some Member States”.<sup>320</sup>

As regards specifically infringement proceedings (Article 258-260 TFEU), the Parliament has also rightly suggested using the **ARoLR to better and more clearly assess and designate shortcomings and findings in relation to judicial independence as a clear risk of a serious breach of the rule of law**. This, in turn, should be followed up with **legal actions** (primarily infringement actions), especially when the serious **risks** regarding the rule of law identified in the country reports have materialised into actual **breaches** of the rule of law.<sup>321</sup> In more practical terms and connected to the goal of not letting infringements of EU law, in particular increasing open and defiant violations of the Court of Justice’s judgments, go unsanctioned, the Parliament has recommended the inclusion of “detailed data on **Member States’ compliance with CJEU rulings**”<sup>322</sup> but also “on non-compliance with judgments of the **European Court of Human Rights**”.<sup>323</sup> This would indeed not only help better highlight cases where these rulings are violated but also more easily identify the Member States that consistently breach the principle of primacy of EU law – often allegedly in the name of the national constitution on the back of an abusive recourse to the notion of “constitutional identity” often left undefined<sup>324</sup> – but also more easily identify the instances where the Commission is not providing immediate and adequate legal responses in particular on the basis of Article 260 TFEU. In this respect, one must note that the Commission has also arguably **failed to react appropriately to non-compliance with ECJ**

<sup>317</sup> *Ibid.*, para. 51.

<sup>318</sup> *Ibid.*, para. 55.

<sup>319</sup> *Ibid.*, para. 41.

<sup>320</sup> *Ibid.*, para. 54.

<sup>321</sup> *Ibid.*, paras 14-15.

<sup>322</sup> *Ibid.*, para. 16.

<sup>323</sup> *Ibid.*, para. 48.

<sup>324</sup> Kelemen, R.D., Pech, L., ‘The uses and abuses of constitutional pluralism: Undermining the rule of law in the name of constitutional identity in Hungary and Poland’ (2019) 21 *Cambridge Yearbook of European Legal Studies* 59. See most recently, opinion of Advocate General Collins in Case C-430/21, *RS (Effect of the decisions of a constitutional court)*, EU:C:2022:44, para. 62: “In instances where a Member State invokes national identity in order to justify non-compliance with provisions of EU law, the Court will examine whether those provisions in fact pose a genuine and sufficiently serious threat to a fundamental interest of the society, or the fundamental structures, political and constitutional, of a Member State. Vague, general and abstract assertions do not reach that threshold. Indeed, it appears from the request for a preliminary ruling that the Curtea Constituțională (Constitutional Court) itself has not identified what aspect of national identity the judgment in *Asociația Forumul Judecătorilor din România* impinges upon.”

**judgments**<sup>325</sup> in a similar way than the Commission has arguably failed to launch infringement actions when faced with systemic attacks on judicial independence as previously noted.<sup>326</sup>

Finally, as regards the Rule of Law Conditionality Regulation 2020/292, the Commission has been invited “to place greater emphasis on the misuse of EU funds, particularly in view of the Rule of Law Conditionality Regulation, and to review the proper functioning of investigations and public prosecution services in each Member State in relation to the investigation and prosecution of fraud, including tax fraud, corruption or other breaches of EU law relating to the implementation of the EU budget or the protection of the Union’s financial interests”.<sup>327</sup> In more practical terms, the Commission has been advised to consider including in its ARoLR “a **dedicated section** with an analysis of cases where breaches of the principles of the rule of law in a particular Member State could affect or seriously risk **affecting the sound financial management of the EU budget** in a sufficiently direct way, which could then serve as a basis for triggering the conditionality mechanism”.<sup>328</sup>

#### 4.1.2. Micro-recommendations

The **European Parliament** has not only made multiple recommendations in relation to the Commission’s ARoLR, it has also highlighted a number of its **positive features**: (i) its contribution to the establishment of a European rule of law monitoring and enforcement architecture in the EU; (ii) the choice of four pillars (functioning of the justice systems, the anti-corruption framework, media pluralism and certain institutional issues related to checks and balances, including civic space to a certain extent); (iii) the Commission’s efforts to engage with national governments and national parliaments as well as civil society and other national actors; (iv) the monitoring of all Member States according to the same indicators and methodology.

The Parliament’s overall diagnosis **remains however primarily critical** of the ARoLR: “While the 2020 report raises concerns and awareness, it does not provide a sufficient **assessment** of the effectiveness of the changes carried out by each country, nor any concrete country-specific **recommendations** or examination of each country’s adherence to the rule of law **over time**”.<sup>329</sup> In addition, the ARoLR does not yet make sufficiently clear “that not all rule of law shortcomings and violations are of the same nature and/or intensity and that when the values listed in Article 2 TEU are being deliberately, gravely, permanently and systematically violated over a period of time, Member States could fail to fulfil all the criteria that define a democracy and become **authoritarian regimes**”.<sup>330</sup>

In other words, the ARoLR remains overly descriptive and no effective follow-up is currently organised. In addition, the ARoLR fails to recognise that some countries are experiencing a “deliberate process of democratic and rule of law backsliding organised by national authorities in some EU Member States and the ensuing progressive establishment of (semi-)autocratic regimes based on the gradual annihilation of all checks and balances”.<sup>331</sup> In light of these transversal shortcomings, the ARoLR “may

<sup>325</sup> Falkner, G., ‘A causal loop? The Commission’s new enforcement approach in the context of non-compliance with EU law even after CJEU judgments’ (2018) 40(6) *Journal of European Integration* 769 (“A number of recent developments and puzzling facts shall be presented in the first part of this article, hinting at a limited capacity and increased restraint of the European Commission in suing noncompliance”).

<sup>326</sup> See our previous summary of the analysis and evidence gathered by Professors Kelemen and Pavone.

<sup>327</sup> Resolution of 24 June 2021, para. 19.

<sup>328</sup> *Ibid.*, para. 58.

<sup>329</sup> *Ibid.*, recital E.

<sup>330</sup> *Ibid.*, para. 63.

<sup>331</sup> *Ibid.*, para. 33.

**fail to prevent, detect and effectively address** systemic challenges and backsliding on the rule of law as witnessed in several EU Member States in recent years".<sup>332</sup>

#### a. Cross pillar recommendations

On the back of this overall critical diagnosis, a number of cross-pillar recommendations are made which one may note, in passing, **the 2021 edition of the ARoLR does not take into account**, possibly because it was already mostly finalised by the time the Parliament adopted its resolution on the 2020 edition of the ARoLR. For ease of reading due to their number, these will be presented in bullet point format:

- **Broader scope** to encompass fully the Article 2 TEU values of democracy and fundamental rights;
- **Full transparency** when it comes to Member States' submissions;
- **More in-depth analysis in general** with the view to better assessing the severity of rule of law challenges and avoiding presenting breaches of a different nature equally, with the Commission also urged to differentiate its reporting by distinguishing between systemic breaches of the rule of law and individual, isolated breaches;
- **More in-depth analysis in relation to countries currently subject to Article 7 TEU proceedings** "in order to illustrate how the rule of law has been structurally undermined to facilitate the consolidation of authoritarian-style governance structures",<sup>333</sup>
- **Less descriptive analysis** with the Commission asked to state whether there are serious deficiencies, a risk of a serious breach or an actual breach of EU values in each of the pillars analysed in the country chapters and to remember that adherence to the rule of law, checks and balances, and democratic institutions, including the independence thereof, should be assessed not only *de jure* but also *de facto*;
- **More evidence-based analysis** when it comes to the Commission's claim that the ARoLR has preventive effects, with the Parliament correctly noting that the ARoLR has had no preventive effect whatsoever as regards the two Member States currently subject to the Article 7(1) TEU procedure;
- **More integrated analysis** on the interlinkages between the four pillars included in the ARoLR and of how combined deficiencies may amount to systemic breaches of the rule of law or risks thereof;
- **New analysis of cross-cutting trends** at EU level in order inter alia to clearly identify where the most important risks and problems lie across the Member States;
- **Better involvement** of civil society representatives when it comes to the elaboration of the ARoLR and **new involvement of a panel of independent experts** in cooperation with the **EU Agency for Fundamental Rights and the Venice Commission**, in order to help identify the main positive and negative developments in each Member State;
- **Better identification of backsliding countries** by taking into account the multiple annual reports and indexes by respected and established organisations which assess EU countries' adherence to democracy, the rule of law and human rights over time;
- **Better follow up** to prevent, detect and effectively address systemic challenges and backsliding on the rule of law, with the Commission asked to identify follow-up actions and remedial measures and tools in the future editions of its ARoLR, with the Parliament in particular calling for the inclusion of **country-specific recommendations** on how to address the concerns identified or remedy breaches, including **deadlines** for implementation, where appropriate, and benchmarks to be followed up on, including timelines, targets and concrete actions to be taken, in order to assist Member States in addressing the weaknesses identified in the report. Once the ARoLR includes specific recommendations, the Commission should then include indications of the follow-up on the implementation of its recommendations and remedial action in subsequent editions of the ARoLR or special "urgent reports",<sup>334</sup>

<sup>332</sup> *Ibid.*, recital F.

<sup>333</sup> *Ibid.*, para. 63.

<sup>334</sup> Resolution of 24 June 2021, para. 50. The idea of urgent reports originates from the Parliament's proposal for a new DRF mechanism which provides for urgent reports where the situation in one or several Member States portends imminent

- **Additional country chapters** for all candidate and potential candidate countries to the EU.

While not yet endorsed by the European Parliament's Committee on Constitutional Affairs at the time of finalising this study, one may note the following, new and complementary proposals made by Sophie in 't Veld on 14 December 2021:<sup>335</sup>

- **New "traffic light" assessment** of the fulfilment of the conditions of the Rule of Law Conditionality Regulation 2020/2092 to be included in each country report;
- **New "Application of EU law Scoreboard"** (to be included in the umbrella report and/or each country report) to provide an overview per Member State of all enforcement actions undertaken by the Commission, including pending infringement proceedings, as well as **the state of compliance** with Court of Justice of the EU and European Court of Human Rights rulings;
- **New specific report** focusing on the separation of powers, accountability and checks and balances at EU level to be done by the Council of Europe's Venice Commission; inclusion of constitutional checks and balances at EU level in the ARoLR;
- **New annual EU Values Week** each September, in which the ARoLR is presented to the European Parliament and national parliaments at the same time as the Justice Scoreboard, the Fundamental Rights Report, and the Media Pluralism Monitor.

## b. Pillar specific recommendations

As regards the justice system pillar, the Parliament makes many specific and helpful recommendations, the most fundamental of which are arguably the need for the Commission to monitor "the **enabling environment** to ensure access to justice for all" and go "beyond a static annual snapshot and include any relevant information in the country chapters about the state of the rule of law, including on relevant **antecedents and the political context** in which new developments take place, so as to enable an accurate, dynamic and integral assessment of the **de jure and de facto independence** of judicial systems, including the independence of lawyers and the legal profession, and should cover a longer period of time than just the previous 12 months".<sup>336</sup>

Regarding the content of future editions of the ARoLR, the Parliament has recommended the **inclusion of certain important elements of the Venice Commission's 2016 Rule of Law Checklist**, such as legal safeguards to prevent arbitrariness and abuse of power by public authorities, the independence and impartiality of the legal profession, equality before the law and non-discrimination. With a view of leading to prompt and stronger enforcement, the Parliament has also recommended the inclusion of "detailed data on Member States' **compliance with CJEU rulings**"<sup>337</sup> so to better highlight cases where CJEU rulings are not complied with the view of more easily identifying situations where the Commission is not providing immediate and adequate legal responses, in particular on the basis of Article 260 TFEU. **Closer monitoring of rulings** of (captured) national courts is also recommended so as to facilitate the initiation of infringement proceedings under Article 258 TFEU against national authorities hiding behind (captured) national courts to consistently breach the principle of primacy of EU law.

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and serious damage to Union values, in which case the Commission may, either on its own initiative or upon request by the European Parliament or the Council, draft an urgent report on the situation.

<sup>335</sup> Draft opinion of the AFCD for LIBE on the Commission's 2021 Rule of Law Report, (2021/2180(INI)), Rapporteur: Sophie in 't Veld, 21 January 2022.

<sup>336</sup> Resolution of 24 June 2021, para. 11.

<sup>337</sup> *Ibid.*, para. 16.

As regards the anti-corruption framework pillar, a similar better **linkage** with another more recently adopted instrument, i.e., the Rule of Law **Conditionality Regulation** 2020/2092, is recommended. In line with one of the Parliament's cross pillar suggestions, the Parliament indicated its support for country-specific recommendations for improvements when it comes to anti-corruption. In addition, the Parliament called on the Commission to using the ARoLR's findings to better respond to any deficiency identified in relation to the EU's anti-corruption legislation. Looking beyond the ARoLR, policy and legislative work is recommended in relation to the judicial corruption in the Member States, the EU's anti-corruption legislation and in particular the harmonisation of definitions of corruption offences.

As regards the media freedom pillar, the Commission is again urged to consider launching infringement proceedings but this time in relation to Article 30 of the 2018 **Audiovisual Media Services Directive** which should be closely monitored *inter alia* via the ARoLR. The Parliament is also in favour of using the ARoLR to better assess the *de jure* and *de facto* degree of **independence of the public service and private media** sector, including national **media regulatory bodies**. It is also recommended that additional issues are specifically outlined in future editions of the ARoLR: (i) the efficiency and effectiveness of the national frameworks for the protection of media freedom and media pluralism; (ii) **attacks against journalists** across the Union, with a specific focus on assassinations of journalists, including the effective independence of subsequent criminal investigations and proceedings from political interference, and the responses provided by Member States in this regard; (iii) all aspects of **freedom of expression**, including artistic freedom and academic freedom, which should lead to the media freedom pillar being renamed accordingly; (iv) **hate crimes and hate speech** and their effect on **discrimination**.

Finally, as regards the other checks and balances pillar, the Parliament is in favour of (i) more attention being paid to the activities, degree of independence and real contribution of national **ombudspersons and equality bodies**; (ii) a deeper assessment of **civic space**; and (iii) an assessment of whether the exercise of **political rights** by EU citizens is guaranteed in all Member States.

## 4.2. Recommendations made by other institutions and stakeholders

### 4.2.1. Contributions from national parliaments<sup>338</sup>

For the **Bundesrat**,<sup>339</sup> in line with the Commission's assessment, the rule of law is a well-established principle whose core meaning is the same across the EU despite some differences when it comes to national identities and legal traditions. The close involvement of the Länder in the preparation of the 2020 ARoLR country chapter on Germany is praised with the Bundesrat also expressing its hope that country-specific discussions will contribute to an improved understanding of the rule of law and better awareness of relevant problems and challenges. However, it is also noted that this will not suffice, with the Bundesrat stressing that violations of the rule of law should be addressed by the EU with all the means available to it as a community based on the rule of law in which individual Member States do not share fundamental values is not sustainable in the long-term.

<sup>338</sup> The European Parliament has received three contributions from national parliaments in relation to the Commission's 2020 Rule of Law Report within the framework of procedure 2021/2025(INI): [http://www.connefop.europarl.europa.eu/connefop/app/exp/COM\(2020\)0580](http://www.connefop.europarl.europa.eu/connefop/app/exp/COM(2020)0580)

<sup>339</sup> Bundesrat, Drucksache 585/20 (Beschluss), 6 November 2020.



The **Swedish Parliament (Constitutional Committee)** also adopted an opinion on the Commission's 2020 ARoLR on 11 February 2021 which outlines the main features of this new mechanism while also welcoming it on account of the fundamental importance of the rule of law and fundamental rights as foundations of any democratic polity and their central role for cooperation within the EU.<sup>340</sup> For the Swedish Parliament, the ARoLR can positively contribute to increasing respect for the rule of law in the EU.

In a Political Opinion adopted on 18 March 2021,<sup>341</sup> the **French Senate (European Affairs Committee)** offers a critical diagnosis of the situation and regrets *inter alia* the multiplication of rule of law violations in several EU Member States for several years and the EU's connected failure to timely respond to these violations. As regards the first edition of the Commission's ARoLR specifically, the French Senate simultaneously and correctly observes that dialogue is beneficial when it comes to improve respect for the rule of law but is insufficient when it comes to dealing with persistent violations of the rule of law. Accordingly, the French Senate recommends *inter alia* that the ARoLR eventually includes specific recommendations and should also lead to a regular and in-depth follow up.

#### 4.2.2. Contributions from non-governmental stakeholders

In a joint statement published on 22 September 2021, a large **coalition of civil society organisations** offered a comprehensive list of recommendations with the view of improving the credibility, inclusiveness and impact of the Commission's ARoLR.<sup>342</sup>

As regards credibility and inclusiveness, a number of suggestions have been made to make the participation of non-governmental stakeholders more meaningful throughout the process via *inter alia* a **longer timeframe** (i.e. 12 weeks) to provide evidence of the Commission and earlier indication of the Commission's submission deadline; **more transparent methodology** regarding selection of **stakeholders** by the Commission and regarding the extent to which civil society submissions have been used (or not); **better involvement** throughout the process to avoid in particular blatant omissions of inconvenient facts in relevant country reports.

As regards the scope of the ARoLR, the Commission is requested to move beyond a narrow interpretation of the rule of law and take better on board: (i) systemic **human rights** violations failing what the Commission ends up ignoring core rule of law issues relating to human rights; (ii) **media freedom issues** such as those relating to the capture and state control over public service media, SLAPPs, smear campaigns and abuse of provisions regulating free speech; (iii) **civic space** which, while better taken on board in the 2021 edition of the ARoLR, is only superficially covered with the Commission's assessment not going beyond a "law in the books" approach. It is also suggested that due to its importance, civic space must become assessed in a new additional pillar.<sup>343</sup>

<sup>340</sup> Konstitutionsutskottets utlåtande 2020/21:KU14.

<sup>341</sup> Sénat, Commission des affaires européennes, *Avis Politique sur l'Etat de droit dans l'Union européenne*, 18 March 2021.

<sup>342</sup> Civil society recommendations: how the Commission can improve the credibility, inclusiveness and impact of the Rule of Law Report, 22 September 2021: <https://www.fidh.org/en/international-advocacy/european-union/civil-society-recommendations-how-the-commission-can-improve-the>. See also most recently, *Liberties Rule of Law Report 2022. Country and trend reports on democratic records by civil society organisations across the European Union*, February 2022: <https://www.liberties.eu/en/stories/liberties-rule-of-law-report-2022/43972>.

<sup>343</sup> For a more detailed account of the situation regarding civic space, see European Civic Forum, *Civic space in the rule of law framework. Assessing the inclusion of civil society in the consultation, methodology and follow up of the European rule of law mechanisms 2 years on*, November 2021, 30p (report compellingly highlights, using many concrete examples, how the silos approach to the rule of law, democracy and fundamental rights currently adopted by the European Commission leads to significant gaps and inconsistencies in the analysis of the rule of law framework and limits the effectiveness of the European rule of law mechanism).



Finally, as regards impact, it is recommended that the Commission offers a **less descriptive/more analytical assessment** of the situation and better follow up. Accordingly, the inclusion of concrete, country specific **recommendations** is suggested as well as more **explicit language** when referring to exceptionally poor and regressive situations such as the ones existing in **Hungary** and **Poland**. In addition, **better linkage** with other EU frameworks and policy instruments; a new **alert and rapid response mechanism**; follow-up dialogue and a proper **evaluation** of the ARoLR after its third edition in 2022 are recommended.

A number of **professional networks or associations** have also made recommendations in relation to the ARoLR with the view of convincing the Commission to take better account of a specific issue and/or a particular profession. One can mention in this respect the recommendations made by **Scholars at Risk (SAR)**, an international network of academic institutions which supports and defends academic freedom and scholars around the world, and the **Council of Bar and Law Societies of Europe (CCBE)**, an international non-profit association and the “voice” of European lawyers since 1960.

In September 2021, **SAR Europe** welcomed the first clear acknowledgement by the Commission in the 2021 edition of the ARoLR of the threat posed by **SLAPPs** yet identified significant limitations which could be remedied via the following actions: A broader interpretation of the report’s areas of focus and a recognition of the role of **academic freedom** as an effective check on government power; more effective answer to violations of the rule of law via *inter alia* **infringement actions** when academic freedom and **university autonomy** are violated; a more meaningful consultation process with the Commission reaching out to the **higher education sector**.<sup>344</sup>

As regards the **CCBE**, one may refer to its statement on 16 November 2021 in which it welcomes the first explicit reference to the importance of the role played by lawyers and the Bars in the chapter on justice systems in the 2021 edition of the ARoLR.<sup>345</sup> For the CCBE, however, there is room for a deeper analysis of the independence of lawyers and Bars in a similar way to what is already done with respect to judges and prosecutors, which is why the CCBE called “for an equal approach in the next RoL [rule of law] report with a **more developed analysis of the independence of lawyers and Bars** as indispensable component of the independence of the justice system and of the rule of law”<sup>346</sup> and the inclusion of country specific **recommendations** regarding, where appropriate, the independence of lawyers and the Bars, access to justice, legal aid and relevant funding to safeguard this access.

### 4.3. Commission’s answers to date

As previously mentioned, with respect to the key and recurrent recommendation of the European Parliament to adopt the **DRF mechanism** first proposed in 2016, the European **Commission has repeatedly refused to consider it**, initially on account that existing tools were sufficient. The Commission subsequently **changed** its position in 2019 and adopted the **European Rule of Law Mechanism**, including its ARoLR, in 2020. As previously shown, the European Rule of Law Mechanism differs significantly from the DRF mechanism. At this stage, there are no indications that the

<sup>344</sup> SAR, European Commission’s 2021 Rule of Law Report, 7 September 2021: <https://www.maynoothuniversity.ie/sar-europe/news/european-commission-s-2021-rule-law-report>

<sup>345</sup> CCBE Statement on the rule of law, 16 November 2021: [https://www.ccbe.eu/fileadmin/speciality\\_distribution/public/documents/ROL/RoL\\_Statements/EN\\_RoL\\_20211116\\_CCBE-Statement-on-the-rule-of-law.pdf](https://www.ccbe.eu/fileadmin/speciality_distribution/public/documents/ROL/RoL_Statements/EN_RoL_20211116_CCBE-Statement-on-the-rule-of-law.pdf)

<sup>346</sup> *Ibid.*, p. 2.

Commission is ready to reconsider its opposition to the Parliament's DRF proposal. As also recalled previously, the Commission did however recently indicate that it might **in due course** consider the eventual adoption of a new **institutional agreement** to codify current interinstitutional cooperation when it comes to Article 2 TEU values and in particular the rule of law.

With respect to the Parliament's multiple suggestions outlined in its resolution of 24 June 2021, the European Commission has essentially only agreed to date with the suggestion to include country specific recommendations notwithstanding an initial reluctance to do so.

Table 22: European Commission's opposition to the European Parliament's DRF mechanism proposal

European Commission's reply to the European Resolution of 25 October 2016 on the establishment of an EU DRF mechanism <sup>347</sup>	European Commission's reply to the European Resolution of 7 October 2021 on the establishment of an EU DRF mechanism <sup>348</sup>
<p>"At this stage the Commission has serious doubts about the need and the feasibility of an annual Report and a policy cycle on democracy, the rule of law and fundamental rights prepared by a committee of "experts" and about the need for, feasibility and added value of an inter-institutional agreement on this matter. Some elements of the proposed approach, for instance, the central role attributed to an independent expert panel in the proposed pact, also raise serious questions of legality, institutional legitimacy and accountability. Moreover, there are also practical and political concerns which may render it difficult to find common ground on this between all the institutions concerned.</p> <p>The Commission considers that, first, the best possible use should be made of existing instruments, while avoiding duplication."</p>	<p>"The Commission stresses the importance of swiftly finalising the setting-up of the European Rule of Law Mechanism. With a view of ensuring effectiveness, the Commission does therefore favour cooperation under existing institutional arrangements, and could see value in having regular meetings or an interinstitutional exchange of views, which could help in the preparation and discussion of rule of law, democracy or fundamental right issues. Whether in the future such cooperation should be codified in an interinstitutional agreement will have to be assessed at a later stage, on the basis of the experience gained through the application of the European Rule of Law Mechanism."</p>

Source: European Commission

As regards the **scope** of the ARoLR, the Commission is of the view that it is already sufficiently broad. The Commission has also pointed out that the analysis offered in the 2021 edition is **more detailed** than in the first edition of the ARoLR while also covering, for the first time, the impact of the **COVID-19** pandemic under the report's different pillars. The Commission also observed that many of the new topics suggested by the Parliament "are already included within the scope of the report".<sup>349</sup> The

<sup>347</sup> European Commission, Follow up to the European Parliament resolution on with recommendations to the Commission on the establishment of an EU mechanism on democracy, the rule of law and fundamental rights, SP(2017)16, 17 February 2017, p. 2.

<sup>348</sup> European Commission, Follow up to the European Parliament non-legislative resolution on the establishment of an EU Mechanism on Democracy, the Rule of Law and Fundamental Rights of 7 October 2020, SP(2020)686, 3 March 2021, p. 3.

<sup>349</sup> European Commission, Follow up to the European Parliament non-legislative resolution on the Commission's 2020 Rule of Law Report, SP(2021)557, 25 October 2021, p. 4.

Commission did not however specifically explain what it meant by “many” in this context. It only mentioned that the 2021 ARoLR included “relevant developments related to **lawyers**, and information related to the length of proceedings and backlogs in courts is also provided, as well as on systemic issues related to the implementation of European Court of Human Rights (**ECtHR**) **judgments** related in particular to excessive length of proceedings” and relevant developments relating to the principle of primacy of EU law.<sup>350</sup> For the time being therefore, one can expect the **ARoLR’s pillars to remain the same** with the Commission aiming to monitor the situation and defend **democracy and fundamental rights** with other tools and actions such as the **European Democracy Action Plan** and the **Strategy for the Implementation of the Charter of Fundamental Rights**.

As regards specific pillars, the Commission is of the view that the 2021 edition of the ARoLR **did cover** the issues highlighted by the Parliament such as public procurements, *de jure* and *de facto* independence of the media, the different types of attacks against journalists, the enabling framework for civil society and covers developments related to national human rights institutions, equality bodies and ombudsperson institutions.

As regards **methodology**, the Commission does not see any significant problems while however recognising that there may be room to “further **improve**” its consultation process “to ensure the broadest involvement of stakeholders possible”.<sup>351</sup> The Commission also highlighted that previous proposals for meetings by both national authorities and stakeholders have been taken into account in 2021 when the Commission carried out over **400 meetings** (compared to around **300 meetings** in 2020), with the list of authorities and stakeholders met during country visits made public in the annex of each country chapter.

As regards external expertise, the Commission continues to **oppose any direct involvement of external experts** on the ground that “delegation of decision-making powers to an external panel of experts could raise concerns in terms of legitimacy, the balance of inputs and the accountability for the results”.<sup>352</sup> **For the Commission, the ARoLR can only reflect the Commission’s own assessment** for which it can be held accountable which however does not mean that the Commission does not rely on “external expertise from a variety of bodies, organisations and independent experts, including the Fundamental Rights Agency and the Council of Europe.”<sup>353</sup>

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<sup>350</sup> *Ibid.*

<sup>351</sup> *Ibid.*, p. 3.

<sup>352</sup> *Ibid.*

<sup>353</sup> *Ibid.*

## 5. THE COMMISSION'S RULE OF LAW REPORT 3.0

Some of our recommendations are only likely to be followed on the **long term**. Even though we find them absolutely crucial, the Commission's defiance thus far makes them unlikely to be realised in the near future. These include first, an **extension of the scope of the ARoLR to other foundational Article 2 TEU values**, notably democracy and fundamental rights. Second, an **expert panel** should be entrusted with assessing the state of Article 2 TEU values. Third, a negative assessment should lead – beyond recommendations, which are foreseen for the 2022 edition – to automatic **legal and/or financial consequences**. The following recommendations take into account the unwillingness of the Commission to follow some overarching changes. They were formulated to make the most out of the ARoLR on the **short term**, without fundamentally changing its scope and structure. Our recommendations can be grouped into three clusters: methodology, scope and structure, effectiveness and follow up.

Table 23: Recommendations to reform the Commission's ARoLR on the long and short term

LONG-TERM recommendations	SHORT-TERM recommendations		
	Methodology	Scope and structure	Effectiveness and follow up
(i) extension of the scope of the ARoLR to other foundational Article 2 TEU values, notably democracy and fundamental rights.  (ii) establishment of an expert panel entrusted with assessing the state of Article 2 TEU values  (iii) a negative assessment by the ARoLR should lead to recommendations, and depending on the gravity of the problem to automatic legal and/or financial remedial actions	(i) better preparation and publication cycle  (ii) benchmarks, information selection and sources  (iii) making the ARoLR autocracy-proof  (iv) guarding and helping the Guardian: potential advisory and/or supporting role for an expert panel/network of experts	(i) overall focus: better linkage with other Article 2 TEU values  (ii) pillar structure: a new civic space pillar  (iii) umbrella report: a new Article 7 state of play section highlighting systemic violations  (iv) a new EU specific report	(i) overall clarity: better outlining of countries' rule of law adherence over time and cross-cutting trends  (ii) overall effectiveness: better linkage with other rule of law tools and procedures  (iii) better follow up: country-specific recommendations with mid-year compliance assessment and eventual urgent reporting option

Source: Authors

## 5.1. Methodology

### 5.1.1. Better preparation and publication cycle

Civil society groups and the European Parliament have both requested a **more extensive timeframe** for submitting evidence to the Commission,<sup>354</sup> with a large group of NGOs deploring for instance the short deadline of 5 weeks given for the 2021 edition of the ARoLR.<sup>355</sup> On this front, the Commission has already improved the situation with close to a total of 8 weeks for the stakeholder consultation for the 2022 edition. What would be further helpful on this front is to continue using the **same time window each year** so that planning could be done ahead of the official publication of the timeline for the next edition of the ARoLR, which itself should happen in a timely fashion. Any change made to the **questionnaire** should also be communicated ahead of the publication of the said questionnaire. If done accordingly, a total of 8 weeks would be acceptable as one could start working on one's submission ahead of the official consultation window. Regarding the content of the questionnaire, in accordance with what the Parliament requested, the 2022 questionnaire allows "stakeholders to report aspects **beyond the scope** envisaged by the Commission",<sup>356</sup> which is positive.

Table 24: Rule of Law Mechanism/Report annual timeline

2021 timeline	2022 timeline
1 February – 8 March 2021: Stakeholder consultation + input from Member States (in practice, over 200 horizontal and country-specific written contributions from stakeholders were received)	1 December 2021 – 24 January 2022: Stakeholder consultation + input from Member States
March – May: Virtual meetings (due to pandemic with over 400 meetings organised)	February – April: Country visits
July: Adoption	July: Adoption
September – November: Discussion in the Council, the European Parliament and at national level	September – November: Discussion in the Council, the European Parliament and at national level

Source: European Commission

When it comes to **country visits and interviews**, we would also support the recommendations made by a large coalition of NGOs for (i) more and clearer details on country visits and contact information

<sup>354</sup> See European Parliament resolution of 24 June 2021 on the Commission's 2020 Rule of Law Report, *op. cit.*, para. 47: "Considers that the timeframes for consultation with civil society could often be perceived as too short and should be suitably adapted and flexible in order to allow for complete and comprehensive input; points out that this has made it more difficult for stakeholders, especially civil society organisations, to prepare and plan their contributions as well as the domestic awareness-raising activities they intend to pursue for the launch of the report; notes that organising consultations before the annual release of public statistics impoverishes contributions; calls on the Commission to allow multilingual submissions; suggests making the framework for stakeholders' contributions predictable and less rigid; notes that consultation can be improved by ensuring, among other endeavours, follow-up with civil society actors on the input they provide".

<sup>355</sup> Civil society recommendations: how the Commission can improve the credibility, inclusiveness and impact of the Rule of Law Report, 22 September 2021: <https://www.fidh.org/en/international-advocacy/european-union/civil-society-recommendations-how-the-commission-can-improve-the>

<sup>356</sup> European Parliament resolution of 24 June 2021 on the Commission's 2020 Rule of Law Report, *op. cit.*, para. 46.

for all thematic and country focal points on the rule of law; (ii) detailed country pages providing all relevant information on the consultation process in the respective Member State, including contact details of the country focal point, as well as important updates relating to the ARoLR, with all information available in all of the EU's official languages; (iii) clear criteria for the selection of stakeholders to be consulted in country visits and interviews and increased transparency regarding stakeholders consulted with due regard however paid to the need to protect confidentiality especially in countries where there is evidence of state-sponsored harassment of critics via for instance SLAPPs, arbitrary administrative or criminal proceedings, etc.; (iv) clear criteria for the processing of consultation submissions and input, including clear selection criteria for the inclusion and exclusion of input in the final reports.<sup>357</sup>

In addition, it is recommended that the Commission organises the prompt **publication** of the input documents they have received from every Member State so as to enable experts and civil society groups to fact check them as soon as possible. It should not be possible for Member States to refuse the publication of their submission.<sup>358</sup> Should they do so, the Commission must reject it and take no account of it. For the 2021 exercise, 25 Member States have made their submissions publicly available via the Commission's website, the two **exceptions** being **Belgium** and **Cyprus**.<sup>359</sup> It is not clear to the present authors, however, if the non-availability of any input from these two EU Member States reflect a refusal to consent to the publication of their submission or the absence of any submission.

When it comes to the publication window, considering the decisive importance of promoting the ARoLR's findings, fostering debate about the rule of law at national, regional and local levels and enabling civil society organisations to play their part in this processes, it is recommended to adopt Sophie in 't Veld's recommendation:

Stresses that public debate about the report is central to the annual rule of law cycle and therefore that the time of its publication is key; regrets therefore the publication of the 2021 report just before parliamentary recess in mid-July; calls on the Commission to instate an annual EU Values Week each September, in which the report is presented to the European Parliament and national parliaments at the same time as the Justice Scoreboard, the Fundamental Rights Report, and the Media Pluralism Monitor.<sup>360</sup>

### 5.1.2. Benchmarks, information selection and sources

The **methodological framework** the Commission developed in respect of the ARoLR has been criticised. One may for instance refer to the comprehensive study published by Albena Azmanova and Bethany Howard in which the authors criticise the Commission for *inter alia* failing "to give justification for the **selectivity of information** it has included" and "using of obscure language that condones inherent threats to the rule of law and systemic institutional deficiencies".<sup>361</sup> As regards information selection, the authors note that the Commission has offered no criterion when it comes to deciding on

<sup>357</sup> *Ibid.*, p. 2.

<sup>358</sup> Three Member States refused to make public their 2020 ARoLR contributions. See European Parliament resolution of 24 June 2021 on the Commission's 2020 Rule of Law Report, *op. cit.*, para 43: "while welcoming the fact that 24 Member States transparently made public their submissions for the 2020 report, regrets the fact that three Member States refused to do so; calls for full transparency in the process and for all Member States' submissions to be made public".

<sup>359</sup> 2021 Rule of law report – input from Member States, first published on 20 July 2021: [https://ec.europa.eu/info/policies/justice-and-fundamental-rights/upholding-rule-law/rule-law/rule-law-mechanism/2021-rule-law-report-input-member-states\\_en](https://ec.europa.eu/info/policies/justice-and-fundamental-rights/upholding-rule-law/rule-law/rule-law-mechanism/2021-rule-law-report-input-member-states_en).

<sup>360</sup> Draft opinion of the AFCE for LIBE on the Commission's 2021 Rule of Law Report, (2021/2180(INI)), Rapporteur: Sophie in 't Veld, 21 January 2022, para. 2.

<sup>361</sup> Azmanova, A., Howard, B., *Binding the Guardian. On the European Commission's failure to safeguard the rule of law*, Study Commissioned by Clare Daly MEP, 25 October 2021, p. 10: <https://kar.kent.ac.uk/92062/>



what amounts to a “significant development” which may be therefore included in the country chapters. It is argued that this has led to some country reports painting a picture disconnected from reality with the Commission failing in particular to capture Bulgaria’s “well-recorded evidence of assaults on the rule of law” and “landslide into lawlessness, state capture and authoritarianism, to borrow from Evgenii Dainov’s letter to Justice Commissioner Didier Reynders of 2019”.<sup>362</sup> We share this assessment in relation to Bulgaria’s country reports.

Focusing on two elements of the ARoLR (judicial independence and media freedom), a study by Carlos Closa and Gisela Hernández González, while generally more positive about the ARoLR, has also made the case for **methodological improvements** so as to improve transparency, validity and legitimacy of this new cyclical exercise.<sup>363</sup> According to their diagnosis, with which we agree,

while the methodology identifies topics to be assessed in all member states, it does not include a comprehensive list of the indicators taken into account for evaluating each of the elements (e.g. which features are taken into account to consider that the appointment and promotion of judges system of a member state is independent?). Moreover, although every topic and element singled out in the methodology is equally evaluated in all member states, country chapters only mention the most relevant issues (i.e. mostly those which awake certain concerns). Improving these involve the development of a set of specific and detailed indicators, as well as a standardisation of the content of country chapters.<sup>364</sup>

To remedy these shortcomings, the authors make a number of suggestions which may be summarised as follows: (i) a more exhaustive and detailed identification of the information and data collected; (ii) a refinement of the standards identified for review and (iii), a more “comprehensive assessment of the same elements in all country chapters (whether the Member States perform well or show weaknesses).”<sup>365</sup>

For the **justice** pillar, this would mean, for instance, a more systematic account of judicial independence, both in its external and internal dimension, and accountability of the judiciary, with an assessment to be made not merely on the basis of public perceptions but also according to pre-defined parameters, standards and indicators such as the ones already elaborated by the Venice Commission and to be used in relation to all Member States as regards the following issues: judicial governance; status of judges; independence of courts; professional obligations and fundamental rights; disciplinary regime and proceedings. The **Committee of Ministers of the Council of Europe** elaborated on the level at which judicial independence should be safeguarded in the national legal system, the external and internal aspects of judicial independence, councils of the judiciary, efficiency and resources, the status and duties of the judge.<sup>366</sup> The **United Nations Rule of Law Indicators** may also be considered in this respect to see if the current list of issues covered in the Commission’s ARoLR justice pillar is adequate.<sup>367</sup>

<sup>362</sup> *Ibid.*, p. 87.

<sup>363</sup> Closa, C., Hernández González, G., *Towards a strengthened methodology for the elaboration of the rule of law report*, EUI STG Policy Papers, December 2021: <https://cadmus.eui.eu/handle/1814/73250>.

<sup>364</sup> *Ibid.*, p. 3.

<sup>365</sup> *Ibid.*, p. 10.

<sup>366</sup> Committee of Ministers of the Council of Europe, Judges: independence, efficiency and responsibilities, Recommendation CM/Rec(2010)12 and explanatory memorandum adopted on 17 November 2010, Council of Europe Publishing, November 2011.

<sup>367</sup> The United Nations Rule of Law Indicators. Implementation Guide and Project Tools, UN publication, 2011: [https://www.un.org/ruleoflaw/files/un\\_rule\\_of\\_law\\_indicators.pdf](https://www.un.org/ruleoflaw/files/un_rule_of_law_indicators.pdf)

Table 25: Standards and indicators for assessing judicial independence

European Commission's Justice Systems Pillar <sup>368</sup>	Venice Commission's Rule of Law Checklist (Access to justice benchmark) <sup>369</sup>	Committee of Ministers of the Council of Europe <sup>370</sup>	UN Rule of Law Indicators for the Judiciary <sup>371</sup>
<p>(i) Independence: appointment, irremovability including transfers of judges and dismissal, promotion, independence and powers of the body tasked with safeguarding the independence of the judiciary, accountability including disciplinary regime and ethical rules, independence/ autonomy of the prosecution service, independence of the Bar, etc.</p> <p>perception of independence</p> <p>(ii) Quality: Accessibility (e.g. legal aid, digitalisation), resources, use of assessment tools and standards</p> <p>(iii) Efficiency: Length of proceedings</p> <p>Enforcement of judgments</p>	<p>(i) Independence and impartiality:</p> <p>a) independence of the judiciary; b) independence of individual judges; c) impartiality of the judiciary; d) prosecution service (autonomy and control); e) independence and impartiality of the Bar</p> <p>(ii) Fair trial:</p> <p>a) access to courts; b) presumption of innocence; c) other aspects of the right to a fair trial; d) effectiveness of judicial decisions</p> <p>(iii) Constitutional justice (if applicable)</p>	<p>(i) General aspects: Independence, the hierarchy of laws, and remedy against interferences</p> <p>(ii) External independence of judges: sanctions against influencing judges; the executive and legislative powers interfere with the judiciary</p> <p>(iii) Internal independence: adjudication without any restriction, pressure, threat or interference, from any authority, including authorities internal to the judiciary, hierarchical judicial organisation or superior courts; allocation of cases</p> <p>(iv) Councils for the judiciary</p> <p>(v) Status of the judge: selection and career, tenure and irremovability, remuneration, training, and assessment</p>	<p>(i) Performance: public confidence; access to justice; effectiveness and efficiency</p> <p>(ii) Integrity, transparency, and accountability: integrity and independence; transparency and accountability</p> <p>(iii) Treatment of vulnerable groups</p> <p>(iv) Capacity: material resources; human resources; administrative and management capacity</p>

Source: Compiled by authors on basis of materials referenced in footnotes

Another issue concerns the sources used by the Commission. Beyond the data and information provided by the Member State governments as well as the natural and legal persons responding to the ARoLR questionnaire, the Commission should seek to take better account of the data and findings from

<sup>368</sup> European Commission, European Rule of Law mechanism: Methodology for the preparation of the Annual Rule of Law Report, op. cit., pp. 1-2.

<sup>369</sup> Venice Commission, *Rule of Law Checklist*, Council of Europe publication, May 2016, p. 33 et seq.

<sup>370</sup> Committee of Ministers of the Council of Europe, Judges: independence, efficiency and responsibilities, Recommendation, op. cit., pp.

<sup>371</sup> The United Nations Rule of Law Indicators, op. cit., pp. 7-8.

**relevant indexes** such as the Worldwide Governance Indicators (WGI) project,<sup>372</sup> the World Justice Project Rule of Law Index,<sup>373</sup> or the Varieties of Democracy (V-DEM) project.<sup>374</sup>

Table 26: Main sources currently used by the Commission

Comparative sources	Country specific sources
<ul style="list-style-type: none"> <li>• EU Justice Scoreboard</li> <li>• Annual questionnaires to the Group of contact persons on national justice systems and to Supreme Courts/Councils for the Judiciary</li> <li>• Council of Europe (CoE): in particular Committee for the efficiency of justice (CEPEJ) annual study for DG JUST</li> <li>• Eurobarometer survey on perceived judicial independence</li> <li>• Reports and surveys from relevant international organisations (e.g. World Bank, OECD, OSCE, UN, World Economic Forum)</li> </ul>	<ul style="list-style-type: none"> <li>• Contributions from EUMS in the context of the European Rule of Law Mechanism</li> <li>• Contributions from other stakeholders in the context of the European Rule of Law Mechanism</li> <li>• Country visits</li> <li>• Case law of the European Court of Justice (ECJ)</li> <li>• Implementation reports</li> <li>• Case law of the European Court of Human Rights (ECtHR)</li> <li>• Country-specific assessment in the European Semester and the Cooperation and Verification Mechanism, including country visits</li> <li>• DG BUDG and OLAF on prosecution</li> <li>• EU Fundamental Rights Information System (EFRIS) by the Fundamental Rights Agency</li> <li>• Council of Europe reports: in particular from Venice Commission, Group of States against Corruption (GRECO), Consultative Council of Judges (CCJE), Consultative Council of European Prosecutors (CCPE), Department for the execution of judgments, Committee of Experts on the Evaluation of Anti-Money Laundering Measures and the Financing of Terrorism (MONEYVAL).</li> <li>• Contacts with stakeholders, in particular judicial networks, national human rights institutions, civil society, academics</li> </ul>

Source: European Commission, European Rule of Law mechanism: Methodology for the preparation of the Annual Rule of Law Report, 2021, pp. 1-2.

It is difficult to understand in this respect why the Commission has indicated its readiness to take account of the World Economic Forum's findings but not the findings from more rule of law specialised organisations such as the ones previously mentioned. And while the Commission does already aim to

<sup>372</sup> <https://info.worldbank.org/governance/wgi/>

<sup>373</sup> <http://worldjusticeproject.org/rule-of-law-index/>

<sup>374</sup> <https://www.v-dem.net/en/>

take into account the assessments and findings made by Council of Europe bodies, including the ECtHR, and relevant UN human rights bodies, this does not appear to be done in a **systematic manner**.

Table 27: Main sources for monitoring functioning of anti-corruption framework v. main sources for identifying breaches of the rule of law with respect to corruption

Sources listed in the Commission's AROLR methodology document regarding the anti-corruption framework pillar <sup>375</sup>	Sources listed in the Rule of Law Conditionality Regulation <sup>376</sup>
<ul style="list-style-type: none"> <li>• Contributions from EUMS in the context of the European Rule of Law Mechanism</li> <li>• Contributions from other stakeholders in the context of the European Rule of Law Mechanism</li> <li>• Country visits</li> <li>• Implementation reports</li> <li>• Country-specific assessment in the European Semester and the Cooperation and Verification Mechanism, including country visits</li> <li>• Local corruption research correspondents</li> <li>• Reports of national authorities (e.g. Court of Auditors, corruption prevention authorities, prosecution authorities)</li> <li>• Expert Group on Policy Needs for Data on Crime, National contact Points on corruption</li> <li>• Eurobarometer surveys on perception of corruption</li> <li>• Expert group on the transposition of the whistleblowers directive</li> <li>• Contribution from OLAF</li> <li>• Relevant materials by the EU Fundamental Rights Agency (FRA)</li> <li>• Council of Europe reports: in particular Venice Commission, Group of States against Corruption (GRECO), Department for the execution of judgments; Committee of Experts on the Evaluation of Anti-Money Laundering Measures and the Financing of Terrorism (MONEYVAL).</li> <li>• Reports and surveys by other international and regional organisations, including review under the UN Convention against Corruption and the OECD Anti-Bribery Convention.</li> </ul>	<ul style="list-style-type: none"> <li>• Judgments of the Court of Justice of the European Union</li> <li>• Reports of the Court of Auditors,</li> <li>• Commission's annual Rule of Law Report</li> <li>• EU Justice Scoreboard</li> <li>• Reports of the European Anti-Fraud Office (OLAF)</li> <li>• Reports of the European Public Prosecutor's Office (EPPO)</li> <li>• Conclusions and recommendations of relevant international organisations and networks</li> <li>• Council of Europe bodies such as the Council of Europe Group of States against Corruption (GRECO) and the Venice Commission, in particular its rule-of-law checklist</li> <li>• European networks of supreme courts and councils for the judiciary</li> <li>• European Union Agency for Fundamental Rights</li> </ul>

Sources: European Commission and Regulation 2020/2092

As regards the anti-corruption pillar, more attention should arguably be paid to the **implementation and gaps of EU's anti-corruption legislation**. We argue *infra* for better connections to be made with existing rule of law tools but as already recommended by the Parliament, it is also submitted that the

<sup>375</sup> European Commission, European Rule of Law mechanism: Methodology for the preparation of the Annual Rule of Law Report, 2021, p. 2.

<sup>376</sup> Regulation 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a general regime of conditionality for the protection of the Union budget [2020] OJ L 433I 1, recital 16.

Commission must consider the inclusion of a dedicated section in its ARoLR assessing the situation in each Member State when it comes to functioning of investigations and public prosecution services “in relation to the investigation and prosecution of fraud, including tax fraud, corruption or other breaches of EU law relating to the implementation of the EU budget or the protection of the Union’s financial interests”.<sup>377</sup> In more practical terms, “a dedicated section with an analysis of cases where breaches of the principles of the rule of law in a particular Member State could affect or seriously risk affecting the sound financial management of the EU budget in a sufficiently direct way” would be particularly helpful.<sup>378</sup> Finally, regarding **sources**, the case for harmonising them should be considered.

### 5.1.3. Making the ARoLR autocracy-proof

When analysing **information gathered from national authorities and other stakeholders**, the Commission should always be mindful of deliberate attempts to deceive it by those engaged in the systemic dismantlement of checks and balances in order “to facilitate the consolidation of authoritarian-style governance structures”.<sup>379</sup> In other words, the Commission should expect to receive input which seeks to paint an alternative reality by organisations acting as proxies for autocratising/autocratic governments such as for instance, government-financed entities disguising themselves as civil society originations, i.e., **GONGOS**. This is a phenomenon which “was in the past observed in authoritarian non-democratic countries only, but is now spreading in the EU as well.”<sup>380</sup>

More recently, there have been attempts to set up and use supposedly academic research bodies/centres and pseudo think-tanks to similarly **normalise authoritarianism** by arguing that it just amounts to a different form of democracy labelled “illiberal democracy” or muddy the waters with the view of justifying for instance rule of law violations on account of new autocratic compatible understanding of the rule of law.<sup>381</sup> As aptly summarised by Freedom House in its 2021 Nations in Transit report,

The goal of the ruling parties in Hungary and Poland is to legitimize their antidemocratic practices. This is why, after politically subjugating their respective court systems, Fidesz and PiS have started to promote their judicial “innovations” in newly founded law journals. And while their planned “rule of law institute” has yet to get off the ground, they have clearly staked out a position beyond the pale of Europe’s legal norms, challenging the European Union’s rule-of-law enforcement mechanism as “political” and arguing that there is no commonly agreed definition of the rule of law.<sup>382</sup>

With respect to Hungary, the Hungarian Ferenc Mádl Institute of Comparative Law was supposed to play a leading role as regards the **creation of a rule of law/comparative law institute** with researchers

<sup>377</sup> European Parliament resolution of 24 June 2021 on the Commission’s 2020 Rule of Law Report, *op. cit.*, para. 19.

<sup>378</sup> *Ibid.*, para. 58.

<sup>379</sup> *Ibid.*, para. 63.

<sup>380</sup> Divjak, T., Forbici, G., *The future evolution of civil society in the European Union by 2030*, European Economic and Social Committee, December 2017, p. 27:

[https://www.eesc.europa.eu/sites/default/files/files/the\\_future\\_evolution\\_of\\_civil\\_society\\_in\\_the\\_eu\\_by\\_2030.pdf](https://www.eesc.europa.eu/sites/default/files/files/the_future_evolution_of_civil_society_in_the_eu_by_2030.pdf);

Szuleka, M., ‘First victims or last guardians? The consequences of rule of law backsliding for NGOs - Case studies of Hungary and Poland’, CEPS Papers in Liberty and Security, No. 2018-06, p. 23. The European Parliament LIBE committee has adopted on 15 February 2022 a draft report on the shrinking space for civil society in Europe, rapporteur Anna Júlia Donáth, which expresses grave concern regarding GONGOS on account of “their detrimental effect on the perceived legitimacy of CSOs and hence on citizens’ willingness to engage in active citizenship: <https://www.europarl.europa.eu/news/en/press-room/20220211IPR23111/shrinking-space-of-civil-society-a-threat-to-democratic-values-and-eu-policies>

<sup>381</sup> See e.g. Bozóki, A., ‘Broken Democracy, Predatory State, and Nationalist Populism’ in Krasztov, P., Til, J. van, (eds.), *The Hungarian Patient. Social Opposition to an Illiberal Democracy*, CEU Press, Budapest, 2015, pp. 3-36; Pap, A.L., Śledzińska-Simon, A., ‘The Rise of Illiberal Democracy and the Remedies of Multi-Level Constitutionalism’ (2019) 60(1) *Hungarian Journal of Legal Studies* 65.

<sup>382</sup> *Nations in Transit 2021. The Antidemocratic Turn*, p. 3.

from Visegrád countries but it would appear that to date, the sole current Polish authorities (via the so-called Institute of Justice, a state body subordinated to Poland's Ministry of Justice) are keen to cooperate with current Hungarian authorities when it comes to accumulating "the necessary legal security, basis and knowledge against the suppression of opinions by liberal ideology".<sup>383</sup> As one of the present authors observed at the time, this initiative is a good illustration of one of the favourites strategies used by autocratic authorities to hide their attempts to undermine the rule of law by "electively using foreign examples or comparative law to distract and mislead, with the aim of leading to generalised whataboutism".<sup>384</sup> Be that as it may, Czech and Slovak authorities have since indicated their opposition to this initiative with Mária Kolíková, the Slovak Minister of Justice, publicly stating that she "was shocked that the Hungarian government would formulate a unique position on the principle of the rule of law in the name of the V4 countries" and this initiative amounted to "an abuse of the V4 brand".<sup>385</sup> One should also note that according to the original plan, a V4 **network of professors** was supposed to be established with the alleged objective of representing the region's specific points of view in the areas of EU law and integration.<sup>386</sup> Most recently, the Slovenian government, when in charge of the Council of the EU's rotating presidency and whose rule of law backsliding actions have been widely criticised,<sup>387</sup> proposed the establishment of a **European foundation for constitutional democracy**,<sup>388</sup> raising the suspicion that "in practice, this could be a platform to promote a different approach rule of law – one in opposition to that of Brussels."<sup>389</sup>

When going through the input it received from non-governmental stakeholders, it is submitted that the Commission should make use of the criteria previously developed with regard to EU external policies. In other words, the Commission must undertake a **preliminary assessment** of whether a particular organisation was set up by a current or former high-level state official; whether it accepts transparent and comprehensive audits; or whether it has internal procedures which help an outsider to determine whether it is mission-driven.<sup>390</sup>

Both in democracies and even more so, in autocratising countries, the burden of proof in establishing relevant facts in respect of Article 2 values must be spelt out. While the starting assumption could be that governments and the bodies they control de jure or de facto act in accordance with the principle of sincere cooperation, where contradictory information is revealed, the Commission should demand clear **explanations** from relevant authorities. And where it is established that **incorrect or misleading**

<sup>383</sup> 'Hungary and Poland to set up joint institute for comparative law against 'suppression of opinions by liberal ideology', *Hungary today*, 29 September 2020: <https://hungarytoday.hu/hungary-poland-new-comparative-law-institute/>.

<sup>384</sup> Walker, S., 'Hungary and Poland to counter critics with 'rule of law institute'', *The Guardian*, 28 October 2020: <https://www.theguardian.com/world/2020/oct/28/hungary-and-poland-to-counter-critics-with-rule-of-law-institute>.

<sup>385</sup> Balogh, E. S., 'The Czechs and Slovaks abandon Poland and Hungary on the issue of the rule of law', *Hungarian Spectrum*, 5 November 2020: <https://hungarianspectrum.org/2020/11/05/the-czechs-and-slovaks-abandon-poland-and-hungary-on-the-issue-of-the-rule-of-law/>.

<sup>386</sup> Inotai, E., et al., 'Jury's Out on V4 Comparative Law Institute', *Balkan Insight*, 26 November 2020: <https://balkaninsight.com/2020/11/26/jurys-out-on-v4-comparative-law-institute/>.

<sup>387</sup> See e.g. European Parliament resolution of 16 December 2021 on fundamental rights and the rule of law in Slovenia, in particular the delayed nomination of EPPO prosecutors (2021/2978(RSP)). One may also mention that International IDEA added Slovenia to its list of backsliding countries in 2020. See International IDEA, *The Global State of Democracy 2021. Building Resilience in a Pandemic Era*, 2021, p. 8.

<sup>388</sup> See Programme of the Slovenian Presidency of the Council of the European Union, 1 July–31 December 2021, p. 14: <https://slovenian-presidency.consilium.europa.eu/media/i4qnfeqt/programme-sl-presidency-en.pdf>.

<sup>389</sup> Piaskowska, G., 'The dangers of Slovenia's presidency', *ECFR*, 15 July 2021: <https://ecfr.eu/article/the-dangers-of-slovenias-presidency/>.

<sup>390</sup> Bousac, J., et al., *Improving the EU's support for the civil society in its neighbourhood: rethinking procedures, ensuring that practices evolve*, Study for the European Parliament, PE 433.693, 23 July 2012, pp. 27-29.



**information** has been provided, “the burden of proof should – following the UN model – shift to the Member State authorities” to show that governmental actions are consistent with EU values.<sup>391</sup>

#### 5.1.4. Guarding and helping the Guardian: Potential advisory and/or supporting role for an expert panel/network of experts

As previously outlined in Part III of this study, the **Commission has repeatedly rejected** the Parliament’s recurrent suggestion to directly involve **external experts**, either as part of the Parliament’s DRF proposal or the Commission’s ARoLR, as “delegation of decision-making powers to an external panel of experts could raise concerns in terms of legitimacy, the balance of inputs and the accountability for the results”.<sup>392</sup> Leaving aside that it is difficult to see how the mere involvement of external experts in the drafting of reports and/or the mere provision of feedback on the reports would entail any actual delegation of decision-making powers, it is submitted that there is room for a **panel or network of individual academic experts** as a support/advisory network for the Commission during the drafting process of the ARoLR and/or as an “accountability” network post publication of the ARoLR to highlight any eventual omissions. The suggested panel/network could also be helpfully relied upon by the Commission to respond to *post* ARoLR publication criticism – especially of a bad faith nature – originating from national governments, specific (captured or not) national institutions, government-sponsored “NGOs”, etc.<sup>393</sup>

This panel or network of external experts could be **hosted within the EU Agency for Fundamental Rights (EU FRA), the European Parliament or be led by a team of experts based at a university**. One may recall in this respect that an EU network of independent experts on fundamental rights used to exist with its two main tasks consisting of preparing annual reports and deliver (when requested) specific information and opinions regarding the situation of fundamental rights in the EU and in the Member States.<sup>394</sup> This network, which was set up in 2002 by the Commission in response to a recommendation made by the European Parliament in 2000, was presented by the same Commission in 2003 as “a good example of cooperation between the Commission and Parliament, because, although its aim is to provide input for the Commission’s work, it also provides Parliament with essential information”.<sup>395</sup> This network was also supposed to be able to contribute to Article 7 proceedings prior or after this Treaty provision had been activated.<sup>396</sup> It is difficult to understand why the network was discontinued in 2007 when the EU FRA was established as this **created an obvious “gap in monitoring**, because the mandate of the agency does not allow it to carry out the same task as the network”.<sup>397</sup>

<sup>391</sup> Bárd, P., et al., *An EU mechanism on Democracy, the Rule of Law and Fundamental Rights*, Center for European Policy Studies (CEPS), 2016, pp. 89-90.

<sup>392</sup> European Commission, Follow up to the European Parliament non-legislative resolution on the Commission’s 2020 Rule of Law Report, SP(2021)557, 25 October 2021, p. 3.

<sup>393</sup> Grabowska-Moroz, B., Kochenov, D., ‘EU Rule of Law: The State of Play following the Debates Surrounding the 2019 Commission’s Communication’ in Amato, G., Barbisan, B., Pinelli, C., (eds), *Rule of Law vs Majoritarian Democracy*, Hart Publishing, 2021.

<sup>394</sup> EU Network of Independent Experts on Fundamental Rights, Introduction, 12 January 2006: <https://sites.uclouvain.be/cridho/documents/Documentos.Institucionales/CFR-CDFpresentationEN.pdf>. The network was coordinated by Prof. Olivier De Schutter of the Université Catholique de Louvain.

<sup>395</sup> Commission Communication on Article 7 TEU, *op. cit.*, p. 9.

<sup>396</sup> *Ibid.*

<sup>397</sup> Butler, I., *How to monitor the rule of law, democracy and fundamental rights in the EU*, Open Society European Policy Institute, August 2013: <https://www.opensocietyfoundations.org/uploads/aad3f011-e848-4202-8c2b-2103219c31be/how-monitor-rule-law-democracy-and-fundamental-rights-eu.pdf>; Schutter, O. de, *Strengthening the Fundamental Rights Agency. The Revision of the Fundamental Rights Agency Regulation*, Study requested by the LIBE Committee, Policy

Be that as it may, we recommend pursuing the European Parliament's recent suggestion to launch "a pilot project involving independent experts assessing compliance with EU values could help to build the requisite knowledge and expertise".<sup>398</sup> It is indeed crucial to do so to balance a tool – the Commission's ARoLR – which currently primarily relies on a network of national contact points *controlled* by Member States. This raises the obvious risk that "rule of law-deficient Member States designate a contact point that has been politically captured".<sup>399</sup> And while anyone can indeed submit answers to the ARoLR questionnaire, there are obvious issues of having sufficient resources to do so considering the array of topics to be covered, not to forget the dangers of doing so when one does so in a backsliding country.<sup>400</sup> A more recent development also plainly shows the need to subject the Commission to a meaningful *external* check to prevent the **Commission's own civil servants from being internally pressurised into "diluting" or even censoring** inconvenient rule of law facts for political reasons by Commissioners acting in manifest breach of their Treaty obligations and mandates.

Table 28: Commission's internal capture problem: The example of Serbia's 2021 enlargement report

Recent revelations regarding European Commissioner for Neighbourhood and Enlargement Olivér Várhelyi <sup>401</sup>	European Commission, Serbia Report 2021, 19 October 2021 <sup>402</sup>	V-DEM, Democracy Report 2021
<p>"According to more than a dozen officials from multiple institutions and an analysis of internal documents, European Commissioner Olivér Várhelyi has overseen a push to play down concerns about the rule of law and human rights in candidates for EU membership. [...] Three officials said the Commission's Directorate-General for Justice and Consumers gave a "negative opinion" on this year's draft enlargement report. The move was mostly due to concern that Serbia's progress was portrayed too positively, two of the officials said. [...] Multiple officials said DG NEAR staff have made calls to colleagues in other departments</p>	<p>"As regards the political criteria, the Serbian Parliament and political forces continued to engage in the inter-party dialogue led by the European Parliament, with a view to forging broad cross-party consensus on EU-related reforms, which is vital for the country's progress on its EU path. However, the political climate during the reporting period remained polarised."</p> <p>"Serbia has some level of preparation in applying the EU acquis and the European standards in this area [Judiciary and fundamental rights]. Limited progress was made in the reporting period. [...] Serbia has</p>	<p>"States in Eastern Europe such as Hungary, Poland, and Serbia have continued their downward decline after continued assaults on the judiciary and restrictions on the media and civil society. [...] Turkey is still found in the very top group among the major decliners, closely followed by Brazil and Serbia."</p> <p>"The commonalities in the way autocratization unfolds across these varying contexts is notable. Media and academic freedoms, and civil society, are typically repressed first [...] Eight of the top 10 major autocratizers over the last ten years follow this pattern: Brazil, Bolivia, Hungary, India, Poland, Turkey, as</p>

Department for Citizens' Rights and Constitutional Affairs, European Parliament, PE 653.056, 2020, pp. 20-21, [https://www.europarl.europa.eu/RegData/etudes/STUD/2020/653056/IPOL\\_STU\(2020\)653056\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2020/653056/IPOL_STU(2020)653056_EN.pdf).

<sup>398</sup> European Parliament resolution of 24 June 2021 on the Commission's 2020 Rule of Law Report, *op. cit.*, para. 53.

<sup>399</sup> Pech, L., Kochenov, D., Grabowska-Moroz, B., Grogan, J. 'The Commission's Rule of Law Blueprint for Action: A Missed Opportunity to Fully Confront Legal Hooliganism', *Reconnect blog*, 4 September 2019: <https://reconnect-europe.eu/blog/commission-rule-of-law-blueprint/>

<sup>400</sup> See e.g. Dunai, M., 'Soros foundation to shut its office in 'repressive' Hungary', *Reuters*, 15 May 2018: <https://reut.rs/2wKje6k>

<sup>401</sup> For further background on Mr. Várhelyi's controversial nomination, see Bayer, L., 'Hungary names EU ambassador as new Commission nominee', *Politico*, 1 October 2019: <https://www.politico.eu/article/hungary-names-eu-ambassador-as-new-commission-nominee-oliver-varhelyi-viktor-orban-laszlo-trocsanyi/>; Jávors, B., 'The Wrong Man in the Wrong Place', *Heinrich-Böll-Stiftung*, 8 October 2019: <https://eu.boell.org/en/2019/10/08/wrong-man-wrong-place>.

<sup>402</sup> European Commission, Serbia Report 2021, SWD(2021) 288 final, 19 October 2021, p. 4 and pp. 17-18.

asking them to push back against DG NEAR's own policy drafts." <sup>403</sup>	some level of preparation in the area of judiciary. Limited progress was made overall."	well as Benin and Serbia, although the latter two show some more variation."  "In Serbia it was declining electoral integrity alongside deteriorating academic, civil society, and media freedoms that among other things contributed to the backsliding into authoritarianism by 2013." <sup>404</sup>
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Source: Table compiled by the authors on basis of materials referenced in footnotes

In light of the above, it is submitted that internal capture attempts or compromised outputs would be made more difficult in the presence of an external, credible and properly resourced panel/network of individual experts. Organising their selection may prove difficult in practice and to avoid any politicisation of the process, it may be best to reproduce the model selected when the first network of high-level experts from each Member State, coordinated by Professor De Schutter, was established following the publication of a tender for the network in 2002.<sup>405</sup>

We would however caution against contracting this task out to the **Venice Commission** until it reviews its **internal quality-control procedures** when it comes to its own membership. To give a single example, a member of the Venice Commission was held by the European Court of Human Rights to have been manifestly **irregularly appointed to his post** (i.e. judge of the Constitutional Court of Poland), with the Strasbourg Court emphasising at paragraph 263 of its judgment of 7 May 2021 in *Xero Flor* that

the general context in which the Constitutional Court has operated since the end of 2015 and its actions aimed at undermining the Supreme Court resolution's finding as to the manifest breach of domestic and international law due to the deficient judicial appointment procedure involving the NCJ. These actions started from an unprecedented interim decision of 28 January 2020, suspending the Supreme Court's jurisdiction [...]. The Court considers that this kind of interference with a judicial body, aimed at incapacitating it in the exercise of its adjudicatory function in the application and interpretation of the Convention and other international treaties, *must be characterised as an affront to the rule of law and the independence of the judiciary*.<sup>406</sup> (our emphasis)

<sup>403</sup> Wanat Z., Bayer, L., 'Olívér Várhelyi: Europe's under-fire gatekeeper', *Politico*, 5 October 2021: <https://www.politico.eu/article/oliver-varhelyi-eu-commissioner-enlargement-western-balkans-serbia-human-rights-democracy-rule-of-law/>. See also Tomanić, A., 'Enlargement 2021: Captured states, captured Commission', *Euractiv*, 5 November 2021: <https://www.euractiv.com/section/enlargement/opinion/enlargement-2021-captured-states-captured-commission/> ('We have captured states aiming to join the EU, we have captured EU institutions pretending to run a fair process') and Cramon-Taubadel, V. von, 'Commission compromising Rule of Law standards in the interest of Orban-Vucic axis', *Euractiv*, 16 November 2021: <https://www.euractiv.com/section/enlargement/opinion/commission-compromising-rule-of-law-standards-in-the-interest-of-orban-vucic-axis/> ('the overall 2021 Enlargement package must be considered carefully since it is manifestly unreliable and flawed. This is furthermore a prime example of why the overall assessment of the Commission regarding Serbia in particular, and possibly some other countries, cannot be a trustworthy source'). In January 2022, Olívér Várhelyi was again in the news in relation to the situation in Bosnia and his alleged collusion with Bosnian Serb leader Dodik. See Zalan, E., 'MEPs seek probe into EU commissioner over Bosnia', *EU Observer*, 14 January 2022: <https://euobserver.com/world/154087> ('In a letter sent on Wednesday (11 January), MEPs wrote that a leaked internal commission document suggested that Várhelyi "openly colluded [with Dodik] in potentially breaking up Bosnia and Herzegovina"). A week before, the US imposed new sanctions on Mirolad Dodik for "significant corruption and destabilizing activities": Borger, J., 'US sanctions Bosnian Serb leader Mirolad Dodik for "destabilizing activities"', *The Guardian*, 5 January 2022.

<sup>404</sup> V-DEM, Democracy Report 2021, *op. cit.*, pp. 19, 22 and 23.

<sup>405</sup> Commission Communication on Article 7 TEU, *op. cit.*, p. 8.

<sup>406</sup> ECtHR, *Xero Flor v Poland*, App. no. 4907/18, 7 May 2021, CE:ECHR:2021:0507JUD000490718.

Notwithstanding the findings above and Article 2.2 of the Statute of the Venice Commission ("The member and substitute [...] shall have the qualifications required by the first paragraph of this article as well as the capacity and availability to serve on the Commission"), the Venice Commission is **yet to take any action** and to this date, the Venice Commission's website still refers to this individual as the Vice-President of Poland's Constitutional Tribunal, a body which the European Commission also correctly views as unlawfully composed and lacking any independence and therefore no longer a court within the meaning of EU law.

One may also refer to the Vice-Chair of the Sub-Commission for Constitutional Justice of the Venice Commission between 2019-2021 who was a Hungarian Constitutional Court justice. In October 2020, the Hungarian Parliament elected him as the new *Kúria* President for 9 years. The National Judicial Council, the judicial self-governing body, rejected his nomination in a non-binding 13:1 vote on account of his lack of any professional experience either as an ordinary judge or as a court executive.<sup>407</sup> For the same reasons he would not have qualified for *Kúria* President under the laws in force before his nomination, but two *ad hominem* legislative changes in 2019 made it possible for him to become the new president of the Supreme Court. On the one hand, the requirement of the five-year experience as an ordinary judge was extended to experience gained as a justice or a senior adviser in the Hungarian Constitutional Court or an international tribunal,<sup>408</sup> and on the other according to another tailor-made law, justices of the Hungarian Constitutional Court, upon their request, can now be appointed as ordinary judges without having to undergo the standard application procedure.<sup>409</sup> These moves were harshly **criticized** by the Executive Board of the European Network of Councils for the Judiciary (ENCJ),<sup>410</sup> and the Commission's 2020 ARoLR.<sup>411</sup> The new *Kúria* President was in any event **re-elected** as a Vice-Chair of the Sub-Commission for Constitutional Justice of the Venice Commission in December 2021.<sup>412</sup>

As long as the Venice Commission operates without an equivalent to the Article 255 TFEU panel<sup>413</sup> and fails to take action when its members have been complicit in manifestly irregular processes in gross defiance of the most basic understanding of the rule of law and/or behave in a manifestly unbecoming manner,<sup>414</sup> it **should not be formally involved** in the Commission's ARoLR on any permanent basis.

<sup>407</sup> Decision no. 120/2020 of 9 October 2020 of the National Judicial Council on the preliminary opinion on the candidate for the office of President of the *Kúria* (Hungarian Supreme Court), available at <https://orszagosbiroitanacs.hu/english>.

<sup>408</sup> Act XXIV of 2019.

<sup>409</sup> Act CXXVII of 2019.

<sup>410</sup> See ENCJ letter to the European Commission about rule of law concerns in Hungary dated 27 October 2020: "the ENCJ Board would like to point out that the most recent changes to the law that have made the appointment of the new President possible, have to be qualified as *ad hominem* legislation [...] There is, in the view of the Board, an increasing risk of state capture of the entire judiciary in Hungary. The President of the *Kuria* has far reaching powers to control the functioning of the *Kuria* as he is in charge of the case allocation plan, composition of the chambers and the panels [...] The recent appointment of the President of the *Kuria*, in the view of the Board, calls for immediate action from the European Commission to protect the Rule of Law and Judicial Independence in Hungary". The full text of the letter is publicly available: <https://pgwrk-websitemedia.s3.eu-west-1.amazonaws.com/production/pwk-web-encj2017-p/News/Letter%20ENCJ%20RoL%20Hungary%20EC%2027%20October%202020.pdf>

<sup>411</sup> European Commission, 2020 Rule of Law Report, Country Chapter on the rule of law situation in Hungary, pp. 5-6.

<sup>412</sup> 129<sup>th</sup> plenary session of the Venice Commission of the Council of Europe, 10-11 December 2021.

<sup>413</sup> For further analysis, see Alemanno, A., 'How Transparent Is Transparent Enough? Balancing Access to Information Against Privacy in European Judicial Selection', in Bobek, M., (ed), *Selecting Europe's Judges: A Critical Review of the Appointment Procedures to the European Courts*, Oxford University Press, 2015, and the information available on the Article 255 Committee's official website: <https://comite255.europa.eu/en/>

<sup>414</sup> See e.g. the statement made by the Undersecretary of State at Poland's Ministry of Justice and member of the Venice Commission alleging on 11 December 2021 that the CJEU judges "are linked to corrupt activities and trading in influence". Official Twitter account of Poland's Ministry of Justice: [https://twitter.com/MS\\_GOV\\_PL/status/1469648480809504774](https://twitter.com/MS_GOV_PL/status/1469648480809504774)

## 5.2. Scope and structure

### 5.2.1. Overall focus: Better linkage with other Article 2 TEU values

The European Commission is unlikely to change its mind regarding the European Parliament's DRF proposal which it has rejected on numerous occasions notwithstanding the Parliament's repeated calls to the contrary - at least in the short term. This sustained reluctance towards the extension of the ARoLR to an Article 2 TEU scrutiny makes an eventual combination of the ARoLR report with the annual reports on the application of the Charter – an ongoing exercise since 2010 – similarly unlikely.<sup>415</sup> One may therefore expect the Commission to continue to refuse to **expand the scope of the ARoLR to all EU values as provided for in Article 2 TEU**. And while the Commission did partially change its position regarding the Parliament's call for a new interinstitutional agreement, the Commission appears to favour using such an agreement only to codify existing interinstitutional cooperation and exchange of views "on the basis of the experience gained through the application of the European Rule of Law Mechanism".<sup>416</sup>

This suggests that the Commission will continue, at least for the foreseeable future, to approach the promotion and monitoring of Article 2 TEU values **separately** with *inter alia* an annual report for the rule of law; **an action plan for democracy** and a **new strategy for fundamental rights**. One may however note in passing the **disconnection** between the EU's *modus operandi* when it comes to internal versus external promotion and protection of Article 2 TEU values. To give a single example, the Commission and Council have adopted action plans *combining* human rights and democracy following the adoption of a new strategic framework on human rights and democracy in 2012 in the field of *external* relations. This time, the rule of law is *le parent pauvre* for no good reason, at least for no reasons we can understand.<sup>417</sup>

According to recital 6 of Regulation 2020/2092, "[r]espect for the rule of law is intrinsically linked to respect for democracy and for fundamental rights. There can be no democracy and respect for fundamental rights without respect for the rule of law and vice versa".<sup>418</sup> To better account of what is being done with respect of **democracy** and **fundamental rights**, considering the interconnected and mutual reinforcing nature of Article 2 TEU values and how rule of law backsliding invariably results in the undermining of democratic principles, scapegoating of minorities and violations of human rights,<sup>419</sup> and until our recommendation to turn the ARoLR in a comprehensive Article 2 TEU monitoring

<sup>415</sup> See European Commission, Annual reports on the application of the Charter, available at: [https://ec.europa.eu/info/aid-development-cooperation-fundamental-rights/your-rights-eu/eu-charter-fundamental-rights/application-charter/annual-reports-application-charter\\_en](https://ec.europa.eu/info/aid-development-cooperation-fundamental-rights/your-rights-eu/eu-charter-fundamental-rights/application-charter/annual-reports-application-charter_en). See also Communication from the Commission on its Strategy to strengthen the application of the Charter of Fundamental Rights in the EU, COM/2020/711 final.

<sup>416</sup> European Commission, Follow up to the European Parliament non-legislative resolution on the establishment of an EU Mechanism on Democracy, the Rule of Law and Fundamental Rights of 7 October 2020, SP(2020)686, 3 March 2021, p. 3.

<sup>417</sup> For further analysis and references, see Pech, L., Grogan, L., 'EU External Human Rights Policy', in Wessel, R., Larik, J., (eds), *EU External Relations Law. Text, Cases and Materials*, Hart Publishing, 2<sup>nd</sup> edition, 2020, p. 327-364.

<sup>418</sup> On the interconnectedness of Article 2 TEU values, see Carrera, S., Guild, E., Hernanz, N., *The Triangular Relationship between Fundamental Rights, Democracy and the Rule of Law in the EU: Towards an EU Copenhagen Mechanism*, Study for the LIBE Committee, European Parliament, PE 493.031, 2013; Carrera, S., Guild, E., Vosyliūtė, L., Bård, P., *Towards a Comprehensive EU Protection System for Minorities*, Study for the LIBE Committee, European Parliament, PE 596.802, 2017; J. Grogan and et al., *The crystallisation of a core EU meaning of the rule of law and its (limited) normative influence beyond the EU*, RECONNECT, Deliverable 7.3, 22 April 2021: <https://reconnect-europe.eu/wp-content/uploads/2021/04/D7.3.pdf>.

<sup>419</sup> See e.g. Wójcik A., Grabowska-Moroz, B., 'Reframing LGBT rights advocacy in the context of the rule of law backsliding. The case of Poland' (2021) 7(4) *Intersections. East European Journal of Society and Politics* 85-103 <https://intersections.tk.mta.hu/index.php/intersections/article/view/852> (this article clearly shows how specific elements



and enforcement mechanism is realised, it is suggested to **include both in the umbrella report and country reports**, where relevant, cross references to relevant actions and findings one may derive the EU's parallel efforts to promote and defend its founding values via internal-oriented instruments dedicated to democracy and human rights. Scrutiny over **judicial independence for example could extend to the evaluation of fair trial rights, access to justice, equality before the law and the evaluation of the principle of non-discrimination** in national jurisprudence. The fourth pillar on **"other institutional checks and balances"** could also possibly cover the independence and impartiality of members of legal professions other than the judiciary, measures taken against arbitrariness and abuse of power by public authorities and allegedly independent but captured regulatory authorities.

### 5.2.2. Pillar structure: A new civic space pillar

As previously outlined, the Commission has decided to focus on four main pillars: (i) the justice system; (ii) the anti-corruption framework; (iii) media pluralism and (iv), a "catch all" pillar entitled "other institutional checks and balances". In this regard journalists of the free press, academics, artists, civil society organisations, human rights defenders, whistle-blowers and others, who typically engage in public discussions, express political criticism or transmit messages uncomfortable to the powerful, should be protected. The public watchdog function of journalists and civil society organisations has also been acknowledged by the ECtHR and as a consequence they have been granted special protection in the Strasbourg jurisprudence.<sup>420</sup> Therefore we endorse the Parliament's call for the **media freedom pillar to be expanded to include all aspects of freedom of expression, including artistic freedom and academic freedom**. In addition, it is submitted that a **new pillar specifically dedicated to civic space** should be considered by the Commission with civic space to be understood broadly and cover any type of civic activism. The scrutiny may extend to relevant parts of the political rights of EU citizens in the Member States.

For the time being, only superficial attention has been paid to civic space related issues under the ARoLR's pillar on checks and balances, what's more at a time of increasingly pressure and shrinking space for independent civil society. As it has been noted by democracy experts, one of the common features in the way autocratisation unfolds across varying contexts is that "media and academic freedoms, and civil society, are typically repressed first".<sup>421</sup> This calls for more specific attention therefore in the ARoLR so as to reinforce its **preventive and early detection** features in this respect.

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of rule of law backsliding resulting in the capture of the national constitutional court and Prosecutor General's office make it easy for authorities to apply discriminatory legal instruments to limit the targeted minority's rights while also making it more difficult to use legal means to resist this application)

<sup>420</sup> See e.g. ECtHR, *Goodwin v. The United Kingdom*, no. 17488/90, 27 March 1996, para. 39; *Jersild v Denmark*, no 15.890/89, 23 September 1994, para. 31; *Magyar Helsinki Bizottság v Hungary*, no 18030/11, 8 November 2016, para. 164.

<sup>421</sup> V-DEM, Democracy Report 2021, *op. cit.*, p. 22.



### Box 3: European Civic Forum's recommendation

"Civil society actively promotes and strengthens a rule of law culture by sharing trustworthy information, promoting civic education, raising awareness and understanding of rule of law, countering discrimination and disinformation. Civil society contributes to the implementation of the rule of law in supporting and enabling access to justice through judicial and non-judicial mechanisms [...] By monitoring and keeping the powerful accountable, carrying out crucial litigation to challenge unlawful political decisions, galvanising and mobilising people to action – including through public demonstrations - they contribute to defending rule of law when it is under pressure. [...] We welcome in the 2021 report a better reporting on civic space challenges. However, the report does not duly connect the functioning of rule of law institutions with civil society activities and does not dedicate the same attention to civil society actors as it rightly does to journalists and the media landscape. The analysis of the situation for civil society in each member state is marginal in the report, limited to one or two paragraphs within the section dedicated to issues concerning checks and balances. There seems to be little understanding of civil society's multifaceted role in the rule of law framework beyond scrutiny and litigation.

**--> Recommendation # 3: The European Commission should establish a clearer link between the respect of the rule of law and the enabling environment for civic actors in Member States. It should recognise civic space as a rule of law pillar and dedicate a chapter to analysing the state of civil society space in each Member State as done for Media pluralism and media freedom."**

Source: European Civic Forum, *Civic space in the rule of law framework*, November 2021, p. 11.

While one must be mindful of avoiding the **enlargement reporting scheme's pitfalls** – the enlargement reports are now significantly more lengthy than before yet tend to obscure "the real picture by offering too much detail and too little clarity"<sup>422</sup> – adding a new civic space pillar does not have to make the sheer volume of the country reports excessively difficult to absorb. What matters, as emphasised before, is quality over quantity, contextual analysis capturing key and important developments rather than euphemistically phrased descriptive accounts that do not clearly capture the most serious threats and violations of the rule of law happening within the EU.

#### 5.2.3. Umbrella report: A new Article 7 state of play section highlighting systemic violations

"Looking at all Member States equally"<sup>423</sup> should not mean analysing the Member States in the same way regardless of whether the authorities of a specific Member State are engaged in systemic breaches of the rule of law by contrast to the situation of another Member State where only isolated breaches and no systemic pattern of backsliding can be identified. This is why it is suggested that **the ARoLR umbrella report** should at the very least offer a specific state of play section regarding the **countries subject to Article 7 proceedings**.

This **Article 7 section** should be used to outline **how the rule of law has been structurally undermined over time** to facilitate the consolidation of the EU's first electoral autocracy in **Hungary with Poland** having since become the world's top autocratising country in 2020. In addition, this Article 7 section could be used to present most recent developments in a transversal way and highlight the Council's (in)action in the face of them. Instead, the 2021 umbrella report and Hungary's country report

<sup>422</sup> Bieber, F., 'Why the EU's enlargement process is running out of steam', *LSE EUROPP blog*, 12 October 2020: <https://blogs.lse.ac.uk/europpblog/2020/10/12/49895/>.

<sup>423</sup> 2021 Rule of Law Report. The rule of law situation in the European Union, *op. cit.*, p. 1.

make virtually **no reference** to the ongoing Article 7 proceedings. Poland's country report is much better in this respect but still **fails to highlight** in a systemic way the continuing, repeated and deliberate violations of the Commission's own Article 7(1) recommendations as well as multiple orders and judgments of the Court of Justice. For the time being, anyone reading the ARoLR country report for Poland would struggle to understand what the Commission recommendations were, the extent to which they have been addressed or, on the contrary, continue to be violated, and the extent to which the situation has worsened since Article 7(1) procedure was activated in December 2017.

Table 29: References to Article 7(1) proceedings in the 2021 ARoLR

Umbrella report (The rule of law situation in the EU)	Hungary's country report	Poland's country report
<p>"In Hungary, the direction of change continues to be towards lowering previously existing safeguards. The justice system has been subject to new developments, for example with regard to the nomination of the new President of the Supreme Court (<i>Kúria</i>). This adds to existing concerns on judicial independence, which have been expressed also in the context of the Article 7(1) TEU procedure initiated by the European Parliament." (p. 8)</p> <p>"The Council remains seized in two procedures, brought by the Commission against Poland in 2017 and by the European Parliament against Hungary in 2018, with a view to determining that there is a clear risk of a serious breach of the Union's values. In September 2020, the Commission updated the Council on the latest developments in the areas covered by the reasoned proposals. In June 2021, the Council held hearings for both Hungary and Poland." (pp 28-29)</p>	<p>"However, as regards judicial independence, the justice system has been subject to new developments adding to existing concerns, expressed also in the context of the Article 7(1) TEU procedure initiated by the European Parliament" (Summary, p. 1)</p>	<p>"Reforms carried out since 2015 increased the influence of the executive and legislative powers over the justice system to the detriment of judicial independence and led the Commission to launch the procedure under Article 7(1) TEU, which is still ongoing" (Summary, p. 1)</p> <p>"This is the main focus of the Article 7(1) TEU procedure initiated by the Commission, which remains under consideration by the Council" (p. 3)</p> <p>"These irregularities in the appointment procedure of judges to the Constitutional Tribunal have been raised as a serious concern in the Reasoned Proposal adopted by the Commission under Article 7(1) TEU procedure" (p. 5)</p> <p>"Concerns over the independence and legitimacy of the Constitutional Tribunal, raised by the Commission under the Article 7(1) TEU procedure, have still not been resolved" (p. 6, in bold in the original)</p> <p>"This power has been subject to criticism including by the Venice Commission<sup>82</sup> and by the Commission in its Reasoned</p>

		<p>Proposal adopted under the Article 7(1) TEU procedure relating to the rule of law in Poland" (pp 11-12)</p> <p>"This new extraordinary appeal procedure, based on broad criteria, raises issues as regards the principle of legal certainty and is one of the concerns raised by the Commission in its Reasoned Proposal adopted under the Article 7(1) TEU procedure" (p. 27)</p>
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Source: Compiled by the authors based on the 2021 ARoLR

As previously emphasised, the ARoLR ought to refrain from using unnecessarily euphemistic language, and **clearly distinguish** between countries with **sporadic** instances of rule of law violations and those that introduced processes "through which elected public authorities deliberately implement governmental **blueprints** which aim to systematically weaken, annihilate or capture internal checks on power entrenching the long-term rule of the dominant party."<sup>424</sup> This is only possible if a contextual analysis is conducted and the various interrelated governmental steps are connected and trends are shown over longer periods of time. (For details see the subchapter on overall clarity, *infra*.)

Since illiberal regimes are qualitative different from constitutional democracies, one may wonder whether the same **indicators** make sense in relation to all Member States. Digitalisation in the justice sector or fast delivery of judgments for instance are only virtues if judgments are delivered by independent courts. Similarly, financing state institutions well is only to be praised if these institutions have not previously been subject to state capture and packed with individuals appointed based on their loyalty to the ruling party.

While one may understand why the Commission felt the political need to answer the "double standard" claim recurrently used by Orbán and Kaczyński that one should only **treat like cases alike**, there is no double standard when **treating unlike cases differently**. The Commission should therefore avoid treating similarly a non-democracy and a Member State on an autocratisation path and one which is not. Quantitative differences that are getting larger and more persistent over time at some point become qualitative differences. By failing to avoid this pitfall, we end up with a set of reports which, no matter how detailed and well intentioned they are, fail to provide a clear and correct big picture.

In addition, the Commission should avoid treating similarly or at least not distinguishing clearly between threats and violations of the rule of law which are of serious/systemic nature from those which are not. As outlined by the European Parliament, the Commission should avoid "presenting breaches of a different nature equally", which "risks trivialising the most serious breaches of the rule of law" and seek instead "to differentiate its reporting by **distinguishing between systemic breaches** of the rule of law **and individual, isolated breaches**".<sup>425</sup> In other words, the Commission should state "whether there were serious deficiencies, a risk of a serious breach or an actual breach of EU values in each of the

<sup>424</sup> Pech, L., Scheppele, K.L., 'Illiberalism Within: Rule of Law Backsliding in the EU' (2017) 19 *Cambridge Yearbook of European Legal Studies* 3.

<sup>425</sup> European Parliament resolution of 24 June 2021 on the Commission's 2020 Rule of Law Report, *op. cit.*, para. 4.

pillars analysed in the country chapters".<sup>426</sup> At the very least, and as argued above, the ARoLR ought to **assess in more depth and in a more holistic way** the evolution of the situation in the countries which are undergoing Article 7(1) TEU proceedings and do so over more than a mere period of 12 months but rather from the first steps indicating a backsliding pattern.

#### 5.2.4. New EU specific chapter

Building partly on the recommendation made by Sophie in 't Veld on 14 December 2021, it is suggested to introduce, in addition to the current umbrella report and the 27 country reports, a distinct **new specific (28th) chapter on the European Union** which would *inter alia* assess the situation in "relation to **separation of powers, accountability and checks and balances**".<sup>427</sup>

In light of our concerns above with respect to the Venice Commission and its members originating from backsliding and in some cases, no longer democratic countries, it would be better for this work to be done by the **EU Fundamental Rights Agency and/or a new panel or network of academic experts**. Another argument against "contracting out" this task is that "no external, non-EU mechanism would put [...] a heavy [enough] emphasis on the specificities of the EU legal system and the autonomy, or in other words the primacy, unity and effectiveness of EU law. According to the CJEU, the EU should not allow a third party to determine exclusively how European values are to be construed in the EU's multi-level constitutional system. And vice versa: the EU should be allowed to set higher standards than other international mechanisms. EU decision-makers could go further than what is prescribed by the ECHR"<sup>428</sup> and the Council of Europe in general.

In relation to the content of this suggested new EU specific chapter, our recommendation would be on the short run to follow the **same pillar structure** as foreseen for the Member States – including our suggestions with regard to the ARoLR's pillar structure – **with some adjustments**, where relevant, to reflect the EU's specific legal nature and more limited powers. For instance, there is no EU specific media sector as such. This does not mean however that there would be no EU developments to report as regards for instance the national application (and eventually EU enforcement actions in case of non- or incorrect application) of EU rules dealing with audio-visual media services or strategic lawsuits against public participation (SLAPPs). Other aspects could be more directly EU-focused with, for instance, an assessment of access to EU information/public documents. Our long term recommendation to extend the scrutiny to all Article 2 TEU values, with a special focus to democracy and fundamental rights, are applicable to the proposed EU chapter, too.

<sup>426</sup> *Ibid.*

<sup>427</sup> Draft opinion of the AFCD for LIBE on the Commission's 2021 Rule of Law Report, (2021/2180(INI)), Rapporteur: Sophie in 't Veld, 21 January 2022, para 8: "Highlights that constitutional checks and balances at EU level should be included in the report; commits to requesting a Venice Commission opinion on key principles of democracy in EU governance, in particular the separation of powers, accountability and checks and balances".

<sup>428</sup> Bárd, P., *Saving EU Criminal Justice: Proposal for EU-wide supervision of the rule of law and fundamental rights*, CEPS Papers in Liberty and Security in Europe 2018:1, p. 24. The quote above implicitly refers to the ECJ Opinion 2/13 of 18 December 2014, EU:C:2014:2454.

### 5.3. Effectiveness and follow-up

#### 5.3.1. Overall clarity: Better outlining of countries' rule of law adherence over time and cross-cutting trends

In order to make the Commission's ARoLR more effective, it must do a better job of **detecting and highlighting rule of law backsliding** which, as the Parliament has correctly noted, it fails to do in the absence *inter alia* of any "examination of each country's adherence to the rule of law over time"<sup>429</sup> and any distinction between countries "experiencing a "deliberate process of democratic and rule of law backsliding" and the countries whose authorities are not seeking to establish "(semi-)autocratic regimes based on the gradual annihilation of all checks and balances".<sup>430</sup> For instance, the 2020 and 2021 editions of the ARoLR still refuse to explicitly acknowledge that Hungary has ceased to be recognised as a consolidated democracy to become an electoral autocracy, or at the very least a hybrid regime according to many rule of law/democracy indexes.

To better outline countries' rule of law adherence over time, the ARoLR should include data/tables covering a **sufficiently long period of time** – ten years is suggested – to be referred in the main body of the umbrella report and possibly in an annex. The ARoLR should offer longitudinal data and analysis, looking at relevant variables over an extended period of time, so that one can observe relevant changes and trends. Such a method would in addition serve to assess whether Member States that otherwise do not cross red lines, respect their **obligation of non-regression**,<sup>431</sup> or whether there are any worrying trends showing a departure from existing rule of law standards. Should the Commission be reluctant to assess a Member State's adherence to the rule of law over time to avoid having to take a stand regarding whether a specific Member State has dismantled checks and balances so much that it can no longer be considered a democracy based on the rule of law, the ARoLR could at the very least offer a snapshot and transversal overview of the key EU-related findings one may find in the main **indexes** which aim to measure democracy/rule of law performance (democracy reports normally include also rule of law indicators).

It is recommended in particular to include, if only for information purposes, **V-DEM** data on the EU countries experiencing "autocratisation" and **World Justice Project's Rule of Law Index's** ranking of EU countries and findings especially in relation to the "constraints on government powers" benchmark, and more generally, a summary of the main findings concerning EU countries made by intergovernmental and non-governmental organisations specialising in monitoring compliance and respect for democracy, rule of law and human rights such as International **IDEA** ("Global state of Democracy Indices), the **World Bank** ("Worldwide Governance Indicators"), **Freedom House** ("Freedom in the World" and "Nations in Transit"), **Bertelsmann Stiftung** ("Bertelsmann Transformation Index").<sup>432</sup> In addition, the Commission should pursue the **further deepening of the EU Justice Scoreboard** with the view of developing it into a proper rule of law index as it is currently unable, due to its design and focus, to help detect rule of law backsliding.

<sup>429</sup> Resolution of 24 June 2021, recital E.

<sup>430</sup> *Ibid.*, para. 33.

<sup>431</sup> CJEU, C-896/19 *Repubblika*, 20 April 2021, EU:C:2021:311, Joined Cases C-83/19, C-127/19 and C-195/19, Cases C-291/19, C-355/19 and C-397/19, *Asociația 'Forumul Judecătorilor din România' et al.*, EU:C:2021:393, 18 May 2021, CLI:EU:C:2021:393

<sup>432</sup> While rule of law indices are a powerful tool to detect ills in the rule of law of EU, one must also be mindful of some of their methodological limitations especially if they are to be used to help with the EU's rule of law crisis as shown by A Jakab and L. A., Kirchmair, L., 'How to Develop the EU Justice Scoreboard into a Rule of Law Index: Using an Existing Tool in the EU Rule of Law Crisis in a More Efficient Way' (2021) 22 *German Law Journal* 936, pp. 944-947.

### 5.3.2. Overall effectiveness: Better linkage with other rule of law tools and procedures

As already recommended by the European Parliament, the Commission's main priority must be "to enforce [our emphasis] EU law when breaches of Article 2 TEU occur" and the "annual rule of law reports should mainly contribute to that end."<sup>433</sup> To do so, in addition to the already agreed forthcoming new country specific recommendations and to build on the recent proposal made by Sophie in 't Veld to include a new "**Application of EU law Scoreboard**" in the ARoLR<sup>434</sup> – each country report ought to include *direct* and non-euphemistically worded developments on **(non)compliance with not only CJEU orders and judgments but also national and ECtHR orders and rulings** which concern any issue relating to any of the ARoLR's pillars. We subscribe, in this respect, to the view that "the inclusion of overall levels of non-implementation of ECtHR judgments in the EU's rule of law review would therefore strengthen both systems. It would also be a logical and effective next step in the growing collaboration between the two institutions – a collaboration which is essential for protecting the rule of law in Europe".<sup>435</sup>

A **dedicated section regarding non-compliance with CJEU/ECtHR/national rulings** and developments of relevance in light of the EU Rule of Law Conditionality Regulation should therefore be seriously considered. It would be helpful to complement these developments with data and tables, including EU infringement action tables, possibly in an annex attached to the relevant country report. In this respect, the European Parliament should demand from the Commission that it provides clear information on the state of play in relation to each infringement it has previously launched and in relation to infringement judgments, information on whether the Commission considers them to comply with and if so, why. For the time being, the ARoLR transversal and country reports unfortunately fail to provide any useful information on non-compliance with CJEU orders and judgments with only tangential and scattered mentions. As such, they "fail to capture the emerging trend of resistance and hostility of Member State courts and governments against the CJEU and other international courts".<sup>436</sup> The Commission should also consider revising the input questionnaire it sends to Member States in this respect so as to ask them to specifically outline and evidence how they have addressed the concerns identified by the Commission in its previous rule of law reports and any eventual CJEU and ECtHR adverse rulings relating to the ARoLR's pillars.<sup>437</sup>

A report published in December 2021 by the Hungarian Helsinki Committee, which focuses on the **decade-long non-execution of judgments of Hungarian and European (CJEU and ECtHR) courts**, provides a good model for the European Commission to emulate.<sup>438</sup> The report offers compelling

<sup>433</sup> Resolution of 24 June 2021, op. cit., para. 63.

<sup>434</sup> Draft opinion of the AFCE for LIBE on the Commission's 2021 Rule of Law Report, (2021/2180(INI)), Rapporteur: Sophie in 't Veld., 21 January 2022.

<sup>435</sup> G. Stafford, and J.G., Jaraczewski, "J., 'Taking European Judgments Seriously: A Call for the EU Commission to Take Into Account the Non-Implementation of European Court Judgments in its Rule of Law Reports', Reports', *VerfBlog*, 24 January 2022: <https://verfassungsblog.de/taking-european-judgments-seriously/>.

<sup>436</sup> Ibid.

<sup>437</sup> The current template used by the Commission (see European Rule of Law Mechanism: input from Member States 2021 Rule of Law Report (Template), 20 July 2021: [https://ec.europa.eu/info/sites/default/files/rolm\\_ms\\_input\\_2021\\_final.pdf](https://ec.europa.eu/info/sites/default/files/rolm_ms_input_2021_final.pdf)), do not clearly require from national authorities that they explain and evidence how any eventual concern from the Commission have been addressed or any eventual response to adverse findings from national and European courts regarding any of the issues falling within the scope of the ARoLR. Instead, the 2021 template invited national authorities to inter alia outline any "progress made and developments with regard to the points raised" in the country chapter and any "significant development". It would be more helpful to ask national authorities to specifically outline how identified threats to the rule of law and established violations of EU law linked to the rule of law have been specifically addressed.

<sup>438</sup> Non-execution of domestic and international court judgments in Hungary, 2 December 2021: [https://helsinki.hu/en/wp-content/uploads/sites/2/2021/12/HHC\\_Non-Execution\\_of\\_Court\\_Judgments\\_2021.pdf](https://helsinki.hu/en/wp-content/uploads/sites/2/2021/12/HHC_Non-Execution_of_Court_Judgments_2021.pdf)



evidence that Hungarian authorities have been failing to implement national and European judgments as well as repeatedly disregarding national judgments. There is in addition already ample data regarding non-compliance with ECtHR judgments – Hungary's rate of *non-execution* of ECtHR leading cases in the last ten years (for a total of 55 leading judgments) is currently 81%<sup>439</sup> – and yet this crucial aspect is not highlighted and indeed not seriously done in the ARoLR to date. Yet, it would be difficult to think of a more basic and fundamental core benchmark to assess respect for the rule of law than public authorities' compliance with courts' judgments. As perfectly put by the Hungarian Helsinki Committee,

The implementation of domestic and international court judgments is one of the cornerstones of the rule of law. Without it, the systems will crumble. This is all the more so when state agencies are the ones that defy compliance with the judgments handed down by their own domestic courts, or when states start to tear up the fabric of international agreements by not complying with the judgments of international courts. Non-compliance with court judgments is not only a sign of and, at the same time, a factor contributing to the deterioration of the rule of law, but also leads to human rights violations that are left without remedy and that are possibly even recurring. The unwillingness of state authorities to accept domestic court rulings is not only detrimental to the independence of the judiciary, but also creates a perception in the public that judgments can be disregarded, which undermines general trust in the force of fair adjudication.<sup>440</sup>

And while violations of the ECHR as established in ECtHR rulings do not necessarily amount to violations of EU law, one may recall that the scope of the Commission's ARoLR is not limited to national situations falling within the scope of EU Law *stricto sensu* in line with the broader scope of Article 7 TEU. Furthermore, ECHR violations may also amount to violations of EU law and in particular EU requirements relating to the rule of law. In this context, we submit that "Article 19(1) TEU offers a bridge through which the European Commission could pursue the Council of Europe's judicial and non-judicial findings in relation to threats or violations of the principle of judicial independence as well as the treats and/or violations of judges' human rights which in turn undermine judicial independence. In other words, it is submitted that an EU infringement action could be directly motivated by the non-implementation" **of ECtHR judgments regarding judges** such as for instance the judgment of *Baka v Hungary* as "the sustained, long period of non-implementation by Hungarian authorities of *Baka* is enough evidence to show that Hungary is (deliberately) seeking to dissuade judges from speaking up to defend judicial independence and as such, is therefore failing to fulfil its (positive) obligation to protect judicial independence under Article 19(1) TEU."<sup>441</sup>

More generally speaking, non-execution of judgments such as the *Baka* ruling tends to invariably **prefigure further attempts** to systemically undermine judicial independence. And indeed, in the case of Hungary, this is what happened with most recently, the launch of disciplinary proceedings against a judge who referred judicial independence related questions to the Court of Justice and the suspicious dismissal of a Hungarian judge who had also previously "dared" doing the same in relation to EU asylum law.<sup>442</sup>

<sup>439</sup> See the database of the European Implementation Network (EIN): <https://www.einnetwork.org/hungary-echr>

<sup>440</sup> Non-execution of domestic and international court judgments in Hungary, *op. cit.*, p. 5.

<sup>441</sup> L. Pech, L., *The Concept of Chilling Effect. Its untapped potential to better protect democracy, the rule of law, and fundamental rights in the EU* (Open Society Foundations, March 2021), p. 31.

<sup>442</sup> See respectively Case C-564/19, *IS* (Illégalité de l'ordonnance de renvoi), EU:C:2021:949 and E. Zalan, "E., 'Hungarian judge claims she was pushed out for political reasons', reasons", *EU Observer*, 6 July 2021: <https://euobserver.com/democracy/152349> and most recently, question for written answer E-004700/2021 to the Commission by G. Delbos-Corfield (Verts/ALE), Isabel Wiseler-Lima (PPE), Bettina Vollath (S&D), Ramona Strugariu (Renew), Malin Björk (The Left) regarding Hungarian judge Gabriella Szabó.

### 5.3.3. Better follow up: Country-specific recommendations with mid-year compliance assessment and eventual urgent reporting option

The European Parliament has already shown the way by calling on the Commission to include in the ARoLR report **country-specific recommendations** to “address the concerns identified and remedy the breaches concerned, including deadlines for implementation, where appropriate, and benchmarks to be followed up on, including timelines, targets and concrete actions to be taken, in order to assist Member States in addressing the weaknesses identified in the report” with these recommendations “to be followed up on in subsequent annual or urgent reports”.<sup>443</sup> The recommendations should be targeted and specific enough for the Commission to follow up whether the requested changes have indeed been made. The ARoLR should avoid the pitfall of the European Semester, which ended up with CSRs that are too vague to be properly followed-up.<sup>444</sup>

The Parliament also crucially outlined the importance for the ARoLR (including the country-specific recommendations) to be better and directly aligned with **other rule of law tools** and procedures so that remedial action in particular could be more swiftly, consistently and effectively organised in situations where national authorities ignore if not openly violate relevant recommendations.<sup>445</sup> More generally speaking, the Parliament was also correct in our view to urge the Commission to make a more “robust use of **infringement procedures**, where appropriate, to prevent backsliding on the rule of law in national justice systems”.<sup>446</sup> Should the Commission fail to follow the procedures it foresees, beyond the deadline given to the Member State for implementing the recommendations, it should justify its failure to act.

The Parliament is yet however to clarify how the special “**urgent reports**” it has recommended in its Resolution of 24 June 2021 would precisely work in practice. To the best of our knowledge, the idea of urgent reports (similarly to the idea of country-specific recommendations in relation to Article 2 TEU values) derives from the Parliament’s 2016 proposal for a new DRF mechanism as reviewed by the Parliament in 2020:

6. Underlines that the Annual Monitoring Cycle must contain country-specific clear recommendations, with timelines and targets for implementation, to be followed up in subsequent annual or urgent reports; stresses that failure to implement the recommendations must be linked to concrete Union measures, including procedures under Article 7 TEU, infringement proceedings and budgetary conditionality once in force; [...]

18. Where the situation in one or several Member States portends imminent and serious damage to Union values, the Commission may, either on its own initiative or upon request by the European Parliament or the Council draft an urgent report on the situation. The Commission shall prepare the report in consultation with the Working Group. The Commission shall draft the urgent report without delay and make it public no later than two months following a request by the European Parliament or the Council. The findings of the urgent report shall be incorporated in the next Annual Report. The urgent report may specify recommendations aimed at addressing the imminent threat to Union values.<sup>447</sup>

<sup>443</sup> European Parliament resolution of 24 June 2021 on the Commission’s 2020 Rule of Law Report, *op. cit.*, para. 50.

<sup>444</sup> There are a number of factors behind the low impact of country specific recommendations of the European Semester. See Alcidi, C., Gros, D., *How to further strengthen the European Semester?*, In-depth analysis at the request of the European Parliament’s Economic and Monetary Affairs Committee, PE 602.114, November 2017.

<sup>445</sup> European Parliament resolution of 24 June 2021 on the Commission’s 2020 Rule of Law Report, *op. cit.*, para. 55.

<sup>446</sup> *Ibid.*

<sup>447</sup> European Parliament resolution of 7 October 2020 on the establishment of an EU Mechanism on Democracy, the Rule of Law and Fundamental Rights (2020/2072(INI)), Annex to the resolution, Proposal for an Interinstitutional Agreement on Reinforcing Union Values.

When working on the details, the test for triggering the urgent procedure should be whether the problem involves a serious danger; whether it results in the violation of individual rights on a mass scale; whether the moves are irreversible; whether they are systemic (smear campaigns, cutting the funding of NGOs, or scapegoating the whole civil society sector would belong here). Due to the gravity of potential consequences, a precautionary principle should be followed.

Next to the urgent reports or in lieu of them, the Parliament could request the Commission to present to it a **mid-year assessment of the state of compliance (or non-compliance)** with the ARoLR's country-specific recommendations. Should the Parliament choose to follow this path, it would then be advisable to request the Commission to also specify how non-compliance will be specifically addressed.

## 6. CONCLUSIONS

The swift development and densification of the **EU's rule of law toolbox** following the identification by José Barroso, then President of the European Commission, of a new type of 'threats to the legal and democratic fabric in some of our European states'<sup>448</sup> may be interpreted in both a **positive** and a **negative** way: 'it may be positively understood as the sign of a broad consensus regarding the critical importance of the rule of law and an increasing awareness of the existential nature of the threat that rule of law backsliding poses to the EU. Conversely, this evolution may be understood as a failure to fully confront those who have deliberately undermined the rule of law in their countries by instead focusing on a quasi-permanent new instrument creation cycle at the EU level.'<sup>449</sup>

One must acknowledge that the **resurgence of authoritarianism within the EU** itself was unexpected and that it is no easy task to confront national authorities engaged in rule of law backsliding when the **Council and the European Council** have repeatedly failed to either acknowledge the problem or match their strong rule of law rhetoric with actions. Indeed, in the case of the European Council, the Court of Justice was even forced to undo some of the damage it has done in respect of the Rule of Law Conditionality Regulation when it erroneously stated that only Article 7 TEU may be used to address breaches of the Unions values under Article 2 TEU and sought to insert a binding emergency brake aka "Orbán loop" into Regulation 2020/2092 via a recital.<sup>450</sup> Yet, it is the Commission which is first and foremost supposed to act as the Guardian of the Treaties. As such, the **Commission** may be criticised for having spent years stressing the EU's rule of law toolbox's alleged insufficiencies and seeking refuge in the creation of new tools to avoid having to enforce the tools it has. In this respect, we fully share the view recently expressed by Professor Kelemen: 'the **EU has always had in its possession the necessary tools to steer backsliding member states back towards democracy** – or at least to strongly **discourage any others** from following their lead. Unfortunately, **EU leaders have refused to apply these tools** ... Instead, partisan politics, economic interests, norms of non-intervention, and failure to appreciate the seriousness of the disease have together led EU leaders to embrace a fatal mixture of passivity, fecklessness, and appeasement.'<sup>451</sup>

Furthermore, when establishing its latest rule of law tool, the Commission has regrettably opted for a **narrower and weaker monitoring mechanism** than the one proposed in 2016 by the European Parliament. In light of the continuing deterioration of the situation and the fact that at least one EU Member State is arguably no longer a democracy while another one has essentially positioned itself 'in the outer margins of, or even outside, the EU's legal order',<sup>452</sup> the **European Parliament ought to continue pushing for improving the Commission's ARoLR and help its progressive transformation into the EU mechanism it first proposed in 2016**. In the meantime, multiple

<sup>448</sup> State of the Union 2012 Address, Speech/12/596, 12 September 2012.

<sup>449</sup> Pech, L., 'The Rule of Law' in Craig, P., Búrca, G. de, *The Evolution of EU Law* (2021, 3<sup>rd</sup> edition, OUP) 307, p. 337.

<sup>450</sup> See Case C-156/21, *op. cit.*, para. 159 ('contrary to Hungary's submission, supported by the Republic of Poland, in addition to the procedure laid down in Article 7 TEU, numerous provisions of the Treaties, frequently implemented by various acts of secondary legislation, grant the EU institutions the power to examine, determine the existence of and, where appropriate, to impose penalties for breaches of the values contained in Article 2 TEU committed in a Member State') and para. 283 ('despite the reference in recital 26 of that regulation to the European Council, Article 6 does not confer any role on the European Council in the procedure established by that regulation'). For further analysis, see Pech, L., 'No More Excuses: The Court of Justice greenlights the rule of law conditionality mechanism', *VerfBlog*, 16 February 2022: <https://verfassungsblog.de/no-more-excuses/>.

<sup>451</sup> Kelemen, R.D., 'European's authoritarian cancer: diagnosis, prognosis, and treatment' in FEPS, *Progressive Yearbook* 2022, 73, pp. 80 and 82.

<sup>452</sup> Editorial comments, 'Clear and present danger: Poland, the rule of law & primacy' (2021) 58 *Common Market Law Review* 1635.

recommendations have been made in this study to make the most out of the ARoLR while taking into account that the Commission is unlikely to welcome any fundamental change to its scope and structure in the short term.

From among the many weaknesses identified in this study the main problem with the ARoLR and the Commission's general stance, from our point of view, is that **more energy has arguably been spent on building and expanding the EU's rule of law toolbox than using it promptly, forcefully and in a coordinated manner**. A particularly emblematic example of this tendency to create new tools only to make no prompt and forceful use of them is the new Rule of Law Conditionality Regulation 2020/2092 adopted by the Council and the Parliament on 16 December 2020 following an initial proposal made by the Commission in May 2018. At the time of finalising this study, **the European Commission is yet to activate Regulation 2020/2092** on account of the alleged need to wait for the CJEU's judgments regarding the legality of the rule of law conditionality mechanism of the Regulation, which were issued on 16 February 2022, and the subsequent finalisation of implementation guidelines nowhere mentioned in the Regulation.<sup>453</sup> The Commission has now publicly committed itself to "act with determination" where the conditions of Regulation 2020/2092 are fulfilled.<sup>454</sup> Time will tell if this commitment will materialise anytime soon. One may recall in this respect that in 2019, the Commission similarly expressed its determination "to bring to the Court of Justice rule of law problems affecting the application of EU law, when these problems could not be solved through the national checks and balances" and to "pursue a strategic approach to infringement proceedings related to the rule of law, requesting expedited proceedings and interim measures whenever necessary".<sup>455</sup> As previously outlined in this study, strategic has since however been seemingly understood by the Commission as synonymous with parsimonious.

Be that as it may, the main issue has never been the lack of tools.<sup>456</sup> Rather, the main problems have been the **European Commission, the European Council and the Council of the EU's denial (feigned or otherwise) of the autocratic reality** and associated legal hooliganism in some Member States, coupled with a naïve belief in the virtues of dialogue with bad faith actors and concomitant recurrent **failure to promptly and forcefully enforce respect for the rule of law and other Article 2 TEU values** in a coordinated manner.<sup>457</sup> In addition to this general reluctance to confront rule of law backsliding and those engaged in the deliberate hollowing out of democratic institutions, there has been a tendency to hide a persistent lack of meaningful legal actions, and other legal, financial but also political consequences behind a façade of strong rhetoric, the creation of new tools and regular reporting. As observed by John Morijn (Netherlands Institute for Human Rights),

<sup>453</sup> For EU Advocate General Campos Sánchez-Bordona, this amounts to a de facto, and we would argue unlawful, suspension of the Regulation. See Opinion delivered on 2 December 2021 in Case C-156/21, *Hungary v European Parliament and Council*, EU:C:2021:974, fn. 49: "In December 2021 the guidelines had still not been adopted, and the application of the regulation is therefore, de facto, suspended."

<sup>454</sup> Statement by European Commission President Ursula von der Leyen on the judgments of the European Court of Justice on the General Conditionality Regulation, Statement/22/1106, 16 February 2022.

<sup>455</sup> Commission, *Strengthening the rule of law within the Union*, *op. cit.*, pp. 13-14.

<sup>456</sup> As one of the present authors observed in 2018, "the EU seems to be persistently engaged in a new-instrument creation cycle. Rather than acting decisively using existing tools in a mutually reinforcing and forceful way, there seems to always be a persistent temptation to blame the instruments available to either justify their non-inactivation, or their timid use. I am not sure for instance that even if the proposed mechanism to suspend EU funding on rule of law grounds were to be adopted that the Commission would end up using it forcefully. As the saying goes, a bad workman always blames his tools". See A. Wojcik, "A Bad Workman always blames his tools": An interview with Laurent Pech, *VerfBlog*, 28 May 2018: <https://verfassungsblog.de/a-bad-workman-always-blames-his-tools-an-interview-with-laurent-pech/>.

<sup>457</sup> Pech, L., Kochenov, D., *Strengthening the Rule of Law Within the European Union: Diagnoses, Recommendations, and What to Avoid*, RECONNECT Policy Brief, June 2019.

democratic decline has happened on our watch, against the background of countless COM reports, EP resolutions and Council conclusions. Our default focus on issuing ever more reports, and on inventing ever new tools and procedures has had a doubly detrimental effect. Not only has it failed to stop backsliding. It has lulled us into thinking we were addressing the problem. In reality, these political and policy efforts have had little impact. They have distracted from and delayed what was possible all along: using hard law.<sup>458</sup>

After a decade of democratic and rule of law backsliding, we are seeing increasing evidence of the slow **disintegration of the EU legal order, the authoritarian gangrenisation of the EU institutions and EU decision-making processes**, not to mention **increasing and open violations of the rulings of the CJEU and the ECtHR**, and yet there is still a **reluctance**, especially at the level of the **European Council** to face up to the reality that the EU is harbouring countries whose national authorities are *proactively* seeking to undermine the rule of law and *deliberately* violating the red lines recently mentioned by the President of the CJEU:

while the EU does not impose any particular model on the judicial systems of the Member States, it does lay down red lines. Respect for those red lines and for the rule of law in general is the foundation for mutual trust. The European project – and the solidarity among Member States that this project entails – depends on that trust.<sup>459</sup>

It was welcome in this respect to see the President of the European Commission stating that dialogue should not be considered an end in itself but lead to results, which is why “a **dual approach of dialogue and decisive action**” is to be pursued.<sup>460</sup> This dual approach is a step in the right direction but one may still argue that **dialogue should not always come first, but rather accompany immediate enforcement actions**, especially in situations where for instance orders and/or judgments of the CJEU and/or orders and judgments of national courts applying EU law are openly violated and national judges are persecuted and punished for applying EU requirements relating to the rule of law.

The survival of the EU as a community of laws and a community based on the rule of law, is very much dependent on whether EU institutions are capable of enforcing EU law, including the provisions enshrining the foundational values the European project is based on. As recently and forcefully stressed by the Court of Justice, “Article 2 TEU is not merely a statement of policy guidelines or intentions, but contains values which ... are an integral part of the very identity of the European Union as a common legal order, values which are given concrete expression in principles containing legally binding obligations for the Member States”,<sup>461</sup> and which the EU “must be able to defend”,<sup>462</sup> in particular when it comes to the rule of law “which forms part of the very foundations of the European Union and its legal order”.<sup>463</sup>

The EU must therefore make a much more efficient use of the response prong of its rule of law toolbox and employ its enforcement tools in a swift, systematic and consequential manner. Only such an approach has a chance to contain rule of law backsliding, prevent further proliferation of its detrimental

<sup>458</sup> Speech delivered at the European Parliament's interparliamentary committee meeting (ICM) on the rule of law in the EU, 9 December 2021: <https://www.europarl.europa.eu/thinktank/en/events/details/icm-on-the-situation-of-the-rule-of-law-/20211125MNP00901> with text of speech available here: <https://twitter.com/JMorijn/status/1468884472003186692>.

<sup>459</sup> Lenaerts, K., 'Constitutional relationships...', *op. cit.*, p. 11:

<sup>460</sup> 2021 State of the Union Address by President von der Leyen, 15 September 2021, Speech/21/4701 (bold and italics in the original).

<sup>461</sup> Case C-156/21, *op. cit.*, para. 232.

<sup>462</sup> *Ibid.*, para. 127.

<sup>463</sup> *Ibid.*, para. 128.



consequences to other Member States and have a deterrent effect. A thorough monitoring may accompany political, legal or financial actions/sanctions, but mere monitoring, in and of itself, will *not* help address deliberately organised systemic violations of the rule of law and other Article 2 TEU values. As one of the present authors previously put it, 'unless EU institutions make better use of their tools designed to respond to violations of EU law', the Commission's ARoLR runs the risk of turning 'into an autopsy of former democracies'.<sup>464</sup> After all, it is the coroner who gives the best diagnosis, if only too late.

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<sup>464</sup> See Petra Bárd, cited by EPRS, The European Commission's annual rule of law reports. A new monitoring tool, European Parliament, PE 698.891, January 2022, p. 6.

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This study, commissioned by the European Parliament's Policy Department for Citizens' Rights and Constitutional Affairs at the request of the LIBE and AFCE Committees, offers a comprehensive and critical assessment of the European Commission's Annual Rule of Law Report. It does so in a broad and holistic manner by assessing this new monitoring tool in light of the EU's Article 2 TEU monitoring and enforcement architecture. Multiple recommendations are offered in order to remedy the serious gaps and weaknesses identified in this study.

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