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WORKING DOCUMENT

on Establishment of an EU mechanism on democracy, the rule of law and fundamental rights - Scoreboard on Democracy, Rule of Law and Fundamental rights

Committee on Civil Liberties, Justice and Home Affairs

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Scoreboard on Democracy, Rule of Law and Fundamental rights

There are several instruments we can refer to when a EU Member State is not in line with EU laws, but what happens when a Member State, acting outside the scope of EU law, does not respect fundamental rights? **Art 7 TEU** is the only Treaty-based instrument which could be used by EU institutions to sanction Member States in case of a “serious and persistent breach” of EU values regardless of whether they are implementing EU law or not.

Art. 7, as the only comprehensive tool (including **prevention and penalty mechanisms**), is widely considered a ‘*nuclear option*’, so very difficult to trigger due to its political essence, which comes from powers given on political institutions. Council never activates it because countries seem too scared that this procedure might also be applied against them.

This tool has never been used, because of the high procedural thresholds, among which the requirement for a **4/5th majority in Council** to determine that there is a 'clear risk of a serious breach' and the requirement for the European Council to decide **by unanimity** whether there is 'a serious and persistent breach' of the EU values. In both cases Parliament's consent is required, by a **two-thirds majority of the votes cast**, representing an absolute majority of all Members (Art. 354(4) TFEU). To lower these high thresholds a Treaty amendment is required.

When **Art. 7** was conceived, there was a wide consensus on the defence of fundamental rights, which is not the case now and the aim was to address only systemic and gross violations of these rights - not any violation. The main problem is that deciding whether a breach is serious and persistent or not is under the current setting a political decision. Another concern is that art 7 gives the **Court of Justice of the EU** a limited role, because it may only review compliance with procedural rules but not the merits of Art. 7 decisions, according to art 269 TFEU.

The author's proposal for a Scoreboard on Democracy, rule of law and fundamental rights (hereinafter 'Democracy Scoreboard') aims at filling in the gap of “concrete actions” for the respect of fundamental rights and values in the EU. It does not mean to create a new mechanism but to complement it and create comprehensive framework for protection.

The main objectives are to:

- a) Solve remaining challenges related to fundamental rights in Europe and art. 7 TEU in particular;
- b) Overcome the issue of “double standards” (EU Member States expect other States to comply with EU values, but they don’t want to be judged on their domestic affairs);
- c) Propose a tool with monitoring features (to check the compliance of Member States with EU common values and respect for fundamental rights not only when implementing EU law, but also when they act autonomously) but also preventive and corrective ones.
- d) Raise awareness and promote the Charter, by making EU citizens able to use it and defend their rights, linking them with the defence of democracy and the rule of law (e.g. case of media freedom);

What is the Democracy Scoreboard?

The Democracy Scoreboard should be an information, and also an **evaluation, monitoring and alerting tool**, providing an overview of the compliance of Member States with art 2 TEU on the Union’s Values¹ and EU Charter .

¹ “The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of

Like the Justice Scoreboard, this tool should contribute to identifying potential shortcomings, improvements and good practices **with regard to democracy, rule of law and fundamental rights** through **annual country assessments**. It should be drawn up by the permanent Committee of independent experts (see below) in cooperation with Commission, Council and the Parliament (and the Fundamental Rights Agency).

In addition to the country assessment, which should be made available to the public on the Internet in a dedicated website along background documents, an **early warning system** should be set up with the main aim to alert the EU institutions in case a **risk of a breach** of EU common **values** is detected in a Member State.

Most importantly the Democracy Scoreboard should also monitor EU performance in respecting the rule of law and fundamental rights.

The scoreboard on Democracy **will complement** the scoreboard on Justice, and data provided by both of them should contribute to the European Semester process.

Content

The Democracy Scoreboard should:

1) Develop specific EU fundamental rights indicators to be incorporated in a **Rights-based indicator framework**. In the process of developing such indicators actors such as FRA (who is already developing indicators on the basis, inter alia, of the conceptual framework proposed by the UN Office of the High Commissioner for Human Rights), the European Court of Human Rights, the Council of Europe Commissioner of Human Rights and specific monitoring organs and mechanisms such as: the Group of States against corruption (GRECO), the Framework Convention for the Protection of National Minorities (FCNM), the European Charter for Regional or Minority Languages (ECRML) and the European Commission against Racism and Intolerance (ECRI)).

These indicators, which will be filled in with comparative, quantitative and qualitative data, will help assessing legislation and policies and their concrete effects on the lives of ordinary people, but also highlighting concerns that need to be further examined.

The Council of Europe is already carrying out monitoring of the compliance by Member States with their international obligations in fields such as protection of fundamental rights (freedom of expression, assembly and association), non-discrimination or the rule of law (democratic institutions, constitutional justice and ordinary justice, elections etc.). Monitoring is also performed by the European Commission via instruments such as the EU Justice Scoreboard and the Mechanism for Cooperation and Verification for Bulgaria and Romania. The Democracy Scoreboard should not overlap with the existing instruments but should draw elements (data, indicators) from them, where relevant.

2) Include an Early warning system with different stages of alerts

Currently we see clear limitations in the effectiveness of the existing reporting mechanisms on fundamental rights, because the reports in most cases are released only after a breach of EU values has already occurred.

We therefore need an alert system that is sensitive also to **the risk of a breach**; in order to prevent it from becoming a serious breach of EU values, and such an alert should be automatically triggered. If an alert is triggered, Member States must suspend the adoption of

law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail"

laws¹ or other measures that might disregard or breach fundamental rights.

3) **Complement the EU Framework to strengthen the rule of law**

The democracy scoreboard would be filling an important gap, because the existing European Commission framework to strengthen the rule of law cannot be triggered by individual breaches of fundamental rights and it only applies to the Rule of Law. We believe that dialogue with Member States, as soon as a risk of breach of fundamental rights is identified, is fundamental. The author agrees that the European Commission, as guardian of Treaties, must remain impartial, objective and an independent arbiter. That is why an external and independent body is needed.

Methodology

The Democracy Scoreboard **will not be a new mechanism**, but a tool, used by an independent monitoring body (see below) bringing together existing instruments (from FRA, Council of Europe and its Venice Commission, European Commission, European Parliament the Council of Europe, FRA, and relevant NGOs), promoting synergy and avoiding overlaps. The Scoreboard will rely on the cooperation among EU institutions and agencies; Member States and relevant institutions at national level, including judicial authorities, human rights institutions, equality bodies, ombudsmen and civil society; and relevant international institutions.

Input from the ECtHR and the Court of Justice of European Union would also be valuable, especially on **objective criteria** to define both the clear risk of a serious breach and a serious and persistent breach of EU values. This requires better coordination, enhanced cooperation and making full use of both existing legislative and non-legislative tools in the relevant areas.

Who should be in charge of this tool?

We propose the creation of an **independent monitoring body**, composed of representatives of Commission, Parliament, Council, FRA, and Council of Europe, and possibly NGOs, which should act as a “one-stop-shop”. This body, to be set up without Treaty revision, will gather all existing information and tools in a **unique EU report**.).

The **FRA** should be the agency leading this process, under the supervision of the European Commission as guardian of the treaties. Therefore **FRA's mandate** should be extended to increase its monitoring powers vis-à-vis the EU member states, and provide it with the necessary human and financial resources.

Due to the fact that the Fundamental Rights Agency currently monitors only those areas falling within the EU's competence and it analyses trends and needs across the EU without singling out individual Member States, a **permanent Committee of Independent experts**², non-partisan and evidence based, should be set up through an inter-institutional agreement. It could start working immediately and all the recommendations of this body should become binding for the EU Commission. The Committee of Experts should work as a preventive tool, acting **before** a country has breached a value and as a monitoring tool, to evaluate the seriousness of the breach, to envisage the dialogue with the Member State concerned **in line with the process of the EU Rule of law Framework**.

Include the Scoreboard in the context of the European Semester process

¹ The duration and consequences of suspending the adoption of law will be discussed at a later stage.

² The structure and peculiarity of this Committee and the appointment of its members will be discussed at a later stage.

Last year the Italian Presidency of the EU Council concluded that **“the safeguard of the rule of law in the framework of the EU treaties” should be put on the agenda of the Council once a year.**

As it is the case for the Scoreboard on Justice, data provided by the scoreboard on Democracy should contribute to the European Semester process in order to ensure the exchange of information at an inter-institutional level. This information could form the basis for the adoption of Country Specific Recommendations on the compliance with art.2 TEU by the EC, which then passes these to the Council of Ministers for eventual endorsement by the European Council. Member States should then incorporate this policy guidance into their annual budgets and other legislation.

We also believe that the European Parliament’s role in the whole process should be increased.

Different levels of sanctions

Depending on the level of seriousness of the breach and the degree of cooperation of the Member State(s) in question different level of preventive measures/sanctions could be envisaged. Possible ideas include proposals of **freezing EU funds** or asking the Member State in question to **freeze the national legislation/ acts/ decisions** which might represent a risk of a breach of EU values. The possibilities for CJEU to impose a fine or a lump sum on the Member State concerned could be explored as well.

Conclusion

To conclude, we need a comprehensive framework by bringing together all procedures available. Perhaps the possibility of Member States bringing action before the European Court of Justice against other Member states under art. 259 TFEU may be explored as a possibility to ensure enforcement of EU's values, but preference should go to a strong role for the European Commission as the guardian of the EU Treaties who can launch infringement procedures as per art 258 TFEU with the final say remaining with for the Court of Justice of the EU.