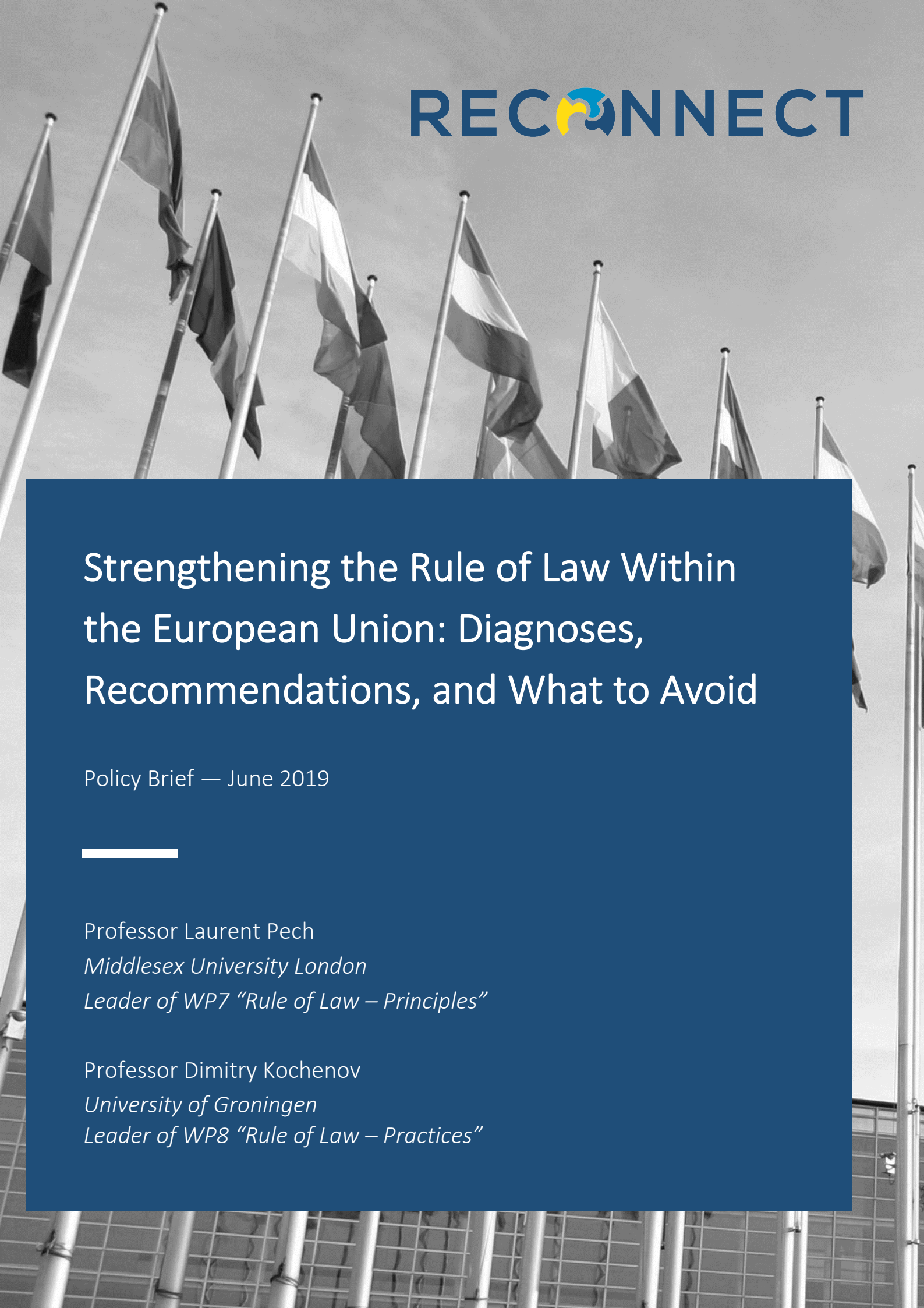

RECONNECT

Strengthening the Rule of Law Within the European Union: Diagnoses, Recommendations, and What to Avoid

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STRENGTHENING THE RULE OF LAW WITHIN THE EUROPEAN UNION

Diagnoses, Recommendations, and What to Avoid

I. DIAGNOSES

I.1 Our diagnosis regarding the rule of law situation in the EU

There is **increasing evidence of "rule of law backsliding" in the EU** in the past decade. By "rule of law backsliding" we mean "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".

A key feature 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 factually one-party states, where the peaceful rotation of power is made *de facto* virtually impossible through numerous manipulations which autocratic governments disguise as well-intentioned "reforms" which allegedly aim to improve efficiency, etc., in line with alleged practices from abroad.

Faced with "the systematic disabling of checks and balances in constitutional orders by a new generation of elected but autocratic leaders", EU institutions have struggled to cope with this unexpected challenge as the assumption has long been that the application of the pre-accession conditionality in the field of values – the Copenhagen criteria – would guarantee that no country would be admitted to the Union unless it is a consolidated democracy based on the rule of law, an accomplishment that appeared to preclude backsliding. This is a false assumption.

Consequently, insufficient attention has been paid by the Institutions and the "Masters of the Treaties" to the possibility that the presumption of ongoing compliance with EU values applied to all the Member States upon accession would not reflect reality. In the new context where this presumption does not hold, the threat of the progressive destruction of law by arbitrariness – rule of law rot – is real and present.

As the EU is a union based on the rule of law, this threat will eventually undermine the entire European project if it is not counteracted.

I.2 Our General Diagnosis regarding the EU's Rule of Law Toolbox

Contrary to what is often claimed, the EU's toolbox of measures to support and correct for rule of law rot is **already sufficiently comprehensive and sophisticated** in nature to, at the very least,

contain rule of law backsliding ***if*** **the full set of current instruments is used *promptly*, *forcefully* and in a *coordinated manner***.

For this to happen, we need each EU institution – including each national government acting in the Council and outside of the EU institutional framework in fora such as the Council of Europe, the OSCE, etc. but also bilaterally – to play its part now rather than either denying the severity of the problem or avoiding meaningful action today in the name of working on potentially more effective tools that could be used in the future.

This is not to say there is no room for some fine-tuning with respect to each existing instrument and how it is deployed. But rather than focusing on new tools that might be introduced through Treaty change (an unrealistic perspective when the institutions of democratic governance of one or more Member States have been captured by ruling parties which have been able to establish *de facto* autocratic regimes and do not shy away from repeatedly violating the EU principle of loyal cooperation, as is already the case today) or even through secondary legislation (only realistic to the extent that unanimity in the Council is not required), we focus here on the tools that already exist and that the EU can already employ – should it choose to do so.

The **only tool which is arguably missing** from the current toolbox is an **explicit and specific mechanism such as the one proposed by the Commission in May 2018** in its proposal for a regulation on the protection of the Union's budget in case of generalised deficiencies as regards the rule of law in the Member States. However, even on that issue, it is submitted that the EU already has tools available under the Common Provisions Regulation with which it could suspend the flow of structural funds to states that suffer serious deficiencies in terms of judicial independence and the rule of law when it comes to overseeing EU funded programs.

Looking beyond the EU's current toolbox, we would like to emphasise that while legal instruments may be deployed with some success, **the prevention of** (in some cases, further) **rule of law backsliding also requires unambiguous *political* leadership** which recognises the nature and the gravity of the current threat. This requires challenging the false claims to democratic legitimacy made by the governments in backsliding states when they have kept themselves in power by systematically undermining media freedom and conducting elections that may ostensibly appear free, but in reality are no longer fair. Indeed, the silence of most European leaders about the erosion of democracy and the rule of law in certain Member States – even as these developments have been widely publicised by international scholars and journalists as well as by various international non-governmental organisations and ratings agencies – is deeply concerning, if not striking.

II. RECOMMENDATIONS

The following recommendations are Treaty neutral, i.e., they do not require any Treaty amendment and are ready and available for immediate implementation without delay.

II.1 Possible improvements to existing instruments

II.1.1 Soft law instruments

THE COMMISSION'S RULE OF LAW FRAMEWORK
→ The Commission's Rule of law framework lacks a clear and reliable structure of action and is based on the misguided assumption that a discursive approach with would-be autocrats can work. To make this tool **more effective**, a set of **intermediary deadlines should be defined**, in this way there should be: • a period of "dialogue" lasting a maximum of six months before the Rule of Law Opinion is published following the activation of the framework; • a maximum of one Rule of Law Recommendation to be issued within the next two months; • compliance to be required within the following two months of an above-mentioned Recommendation being issued.
• Activation of Article 7 TEU (either paragraph 1 or paragraph 2, depending on the gravity of backsliding) should be officially made the default position in case of non-compliance with the specific recommendations made by the Commission and to be found in the Rule of Law Recommendation. Accelerated infringement actions of adequate breadth and depth as far as possible with applications for interim measures should also be also systematically considered.
• Access to all statements and positions produced or received by the Commission should be organised and centralised on a single webpage (*see also below for a similar recommendation regarding Article 7 TEU*).
• To avoid a situation where civil society groups may end up being attacked by national authorities whose actions have led to the activation of the Framework when they submit information to the Commission on their own motion, it would be better for the Commission to formally welcome and invite submissions from interested parties and make them available online.

EU JUSTICE SCOREBOARD

→ Both the content and breadth of the EU Justice Scoreboard have constantly improved since this tool was launched in 2013. The focus on judicial independence/legal safeguards and the increasing wealth of data on new pressing issues such as the authorities involved in disciplinary proceedings regarding judges is to be commended. A minor recommendation is to **make explicit where data gaps are due to the lack of national authorities' willingness to contribute to the scoreboard**. Naming these national authorities should be considered, in order to encourage wider participation.

→ As a replacement to blind reliance on the national submissions in all cases, a possibility of checking the information at hand should be built into the process to ensure the full comparability of the data across the Member States. To this end, the Commission might consider taking into account the information gathered by reliable professional associations like the International Bar Association, the European Network of Councils of the Judiciary and the European Judicial Network as well as the Venice Commission, in these assessments.

EUROPEAN SEMESTER PROCESS

→ The Commission should be commended for making a more comprehensive use of country-specific assessment carried out in the context of the European Semester process to highlight rule of law shortcomings in specific EU Member States. **More detailed country-specific recommendations in the area of the rule of law** and improvement of national justice systems should be considered with a particular **focus on the distinction between ordinary shortcomings and systemic violations** of the Rule of Law which reflect a deliberate "rule of law backsliding" strategy.

THE COUNCIL'S ANNUAL RULE OF LAW DIALOGUE

→ The Council's Annual Rule of Law Dialogue has so far been unhelpful if not counter-productive. The best outcome would be to put an end to this ineffective instrument adopted in 2014, as it merely offers a façade of action in the absence of critical engagement with the crucial issues underlying rule of law backsliding which threaten the integrity of the Union today.

→ Alternatively, transforming the dialogue into a peer-review procedure could succeed in making the current format more constructive. Rather than creating false expectations through the existing mechanism, however, the Council should focus on improving the way it deals with Article 7 TEU proceedings.

II.1.2 Treaty-based instruments

Article 258 TFEU (Infringement Actions) and Article 279 TFEU (Interim Measures)

The Commission should continue to further explore the untapped potential of **increasing and interconnected infringement actions** based on Articles 2, 4(3), and 19(1) TEU to defend judicial independence but also yet unexplored provisions such as Article 325 TFEU to combat state-sponsored corruption. To further improve the effectiveness of infringement actions, the following is recommended:

(i) The Commission should identify the rule of law problem explicitly by naming it a problem with judicial independence under Article 19(1) TEU or a systemic violation of the principle of sincere cooperation under Article 4(3) TEU. It **should not misconstrue or miscategorise the case** as something else, as happened in Case C-286/12 *Commission v Hungary*, the Hungarian early judicial retirement case, in which the framework of EU age discrimination law was discussed rather than the effort to undermine judicial independence. Correctly identifying the problem will give the Commission greater options and a clearer message of response to rule of law backsliding;

ii) To facilitate the proper identification of the legal issues, the Commission should look into the feasibility of a "rule of law one-stop shop" which could be used by natural and legal persons to **report evidence of rule of law backsliding and/or offer analysis of ongoing problematical developments**. This would not have to be necessarily limited to ongoing infringement actions or be formally linked to formal proceedings. To facilitate helpful input from others, the Commission might also make more transparent its own communications with the Member State in question and summarise, for instance, the legal arguments received from the Member State, when Article 2 TEU is at stake.

(iii) It should be understood that time is on the side of those dismantling the rule of law because problematic Member States can continue to make matters worse even as EU institutions draw out the deadlines for compliance with EU law. In order to prevent the completion of constitutional capture before any eventual ECJ ruling, **accelerated infringement actions should be the default position when a Member State openly violates the rule of law**.

(iv) The ECJ should engage with existing procedures to **prioritise these infringement actions** to prevent further harm being done by those in power before its rulings are issued.

(v) **Applications for interim measures** should be systematically considered by the Commission. Guidance for this can be taken from the position in Case C-411/17 *Commission v. Poland* (the Białowieża Forest case).

More generally speaking, what the Commission has achieved in Case C-619/19 to safeguard the independence of the Polish Supreme Court ought to be considered the new template to follow. Further improvements are possible in these actions to help the ECJ detect the patterns of issues, we recommend:

- → alleged infringements ought to be presented as a "package" to the extent possible so that the systematic nature of the rule of law violations are made clear to the Court;
- → more ambitiously, the Commission should consider the launch of "systemic infringement" actions based on Articles 2 and 4(3) TEU (in cumulation with an array of any other provisions in each concrete case) when the Commission recognises that a Member State is deliberately engaging in a systemic violation of EU principles and values and is thus not just infringing a particular narrow rule of EU Law.

As Professor Scheppele has argued, **systemic infringement actions point to a pattern of violations that adds up to more than the sum of the parts**. Systemic infringements also have the benefit of requiring "systemic compliance" upon a finding of a violation by the ECJ, in which the Commission would demand a restoration of the rule of law and not just some small adjustment to one piece of the bigger puzzle.

When assessing the compliance of the Member State subjected to the systemic infringement action, full account has to be taken of the effects of the compliance the state offers not only in the context of a particular violation of concrete provisions, but also in the general context of the rule of law backsliding, which such systemic compliance aims to tackle. As recommended above, **systematic consideration should also be given to possible interim measures**. It is furthermore recommended that where interim measures are found by the Commission's legal services not to be possible, a **summary of the legal reasoning of the Commission's legal services must be made publicly available**.

Member States Action under Article 259 TFEU

While the Member States concerned with the potential harmful effect of the on-going rule of law backsliding in the EU tend to write to the Commission asking for action and help, it is often forgotten that **Article 259 TFEU gives the Member States the opportunity to take action** even when the Commission does not support the claim that the law of the Union – including its values shared with the Member States – has been infringed.

Increasing the awareness of this provision, as well as the eventual shaming of the "good" Member States claiming the absence of tools at their disposal, could have a net positive effect in **counteracting the Rule of Law backsliding in the EU**. This is particularly so given the relative laxity of the standing rules for Member States under Article 259 TFEU, coupled with the potential breadth of its possible application and the level of its effectiveness. Such argument is supported by Case C-64/16 *Associação Sindical dos Juízes Portugueses* (the Portuguese Judges case) and Case C-619/18 *Commission v. Poland* (Independence of the Polish Supreme Court), as well as the interim measures in the Białowieża Forest case.

Article 7 TEU

- **Article 7 TEU provision should be used to its full potential to enhance its "crystallisation effect" following its activation**

Article 7 TEU enables the creation of an enabling environment in which key actors have to (re)interpret and apply existing concepts and instruments and concepts in a more forceful manner in light of the Article 7 diagnosis offered by the relevant activating authority. Having this objective in mind, several improvements could be made without having to revise the text of this Treaty provision:

(i) The activating authority must be systematically involved in Council discussions and formal hearings. In this respect, it beggars belief and is also utterly counter-productive that the European Parliament, in its capacity as activating authority under Article 7(1) TEU, is not formally involved in the pending procedure before the Council regarding Hungary in the same manner as the European Commission is in the pending procedure regarding Poland and that this situation has been justified on the back of an unwritten "legal opinion" of the Council Legal Service;

(ii) Any eventual oral contribution by the Commission, national government representatives, but also the Council Legal Service ought to be properly, comprehensively and systematically minuted;

(iii) The Council ought to organise the **systematic publication of any document submitted** to it (e.g. the Commission's "state of play" contributions which are submitted to the Council prior to each Article 7(1) hearing) and be made available on a single centralised "Article 7 Rule of Law Repository" preferably prior to their discussion.[1] This would enable interested parties to contribute to the discussion and avoid the circulation of possibly inaccurate or misleading claims;

(iv) **Minutes of Article 7 hearings** ("formal report on the hearing") **should be promptly finalised and systemically published** on the "Article 7 Rule of Law Repository" proposed above;

(v) More fundamentally, it is submitted that **Article 7 should not compel the participation of a Member State already subjected to Article 7(1) procedure** to another Article 7 procedure involving another Member State. In fact, safeguarding the *effet utile* of Article 7 calls for the exclusion of any Member State in any Article 7 procedure about another country to avoid political bargaining between two or more autocratic governments in the making;

(vi) Lastly, **Article 7(1) TEU should not be applied in a context where democratic and rule of law backsliding has moved beyond a mere threat** and instead amounts to a lived reality. In other words, applying Article 7(1) when the executive directly usurps its position by refusing e.g. to publish rulings of its Constitutional Tribunal and comply with injunctions from its Supreme Court – **must lead to the direct activation of Article 7(2)**.

[1] For a model, see this page curated by Professor Pech and Dr Grogan.

The Cooperation and Verification Mechanism

→ **The Cooperation and Verification Mechanism suffers from a lack of relevance, effectiveness and enforceability**

It has not proven to be as effective as was initially hoped in the absence of direct sanctions in a situation where progress is not achieved or, worse, when backsliding has been deliberately engineered. It also sends ambiguous messages, given that it both does not apply to all the Member States and has proved incapable of effectively preventing or then putting an end to rule of law backsliding in the countries it applies to.

Another shortcoming is the quality of the assessment sometimes made by the Commission (see e.g. this criticism, in our view warranted, of the last CVM report regarding Bulgaria and this recent analysis outlining how in the name of "reforming" accountability of top magistrates to "implement" CVM recommendations, Bulgarian authorities "will in fact endanger judicial independence in Bulgaria"). To prevent assessment seemingly disconnected from the rule of law reality, more transparency regarding what information is received, how the accuracy of the information is checked, which experts are used and compulsory consultations with relevant stakeholders should be organised.

As for the recent suggestion to potentially and provisionally replace the CVM with the Rule of Law Framework as far as Romania is concerned, it is submitted that more dialogue is not the way forward. Article 7 procedure coupled with infringement actions based on Article 4(3) TEU, Article 19(1) TEU and Article 325 TFEU would be a more effective course of action.

Article 70 TFEU

→ **On the basis of Article 70 TFEU, measures for an objective and impartial evaluation of the implementation of Union policies in the area of freedom, security and justice could be created, in order to facilitate the full application of the principle of mutual recognition.**

In Europe's area of criminal justice, the concept of mutual trust and the resulting automaticity of mutual recognition of judgments should be replaced by a legal landscape of earned trust. Such a regular health-check of EU Member States with regard to values underlying mutual trust could serve as the **basis for determining when criminal cooperation on the basis of mutual recognition-based laws is to be suspended**. National courts would not be burdened by determining on a case-by-case basis when to comply with mutual recognition-based laws, but could automatically freeze criminal cooperation and recognition of judgments in case another Member State fails to respect Article 2 TEU values. Such a mechanism would also indicate when problems are fixed and trust is to be reinstated.

In case of a lack of political will to rely on Article 70 TFEU, there is an alternative path to foster trust. Mutual trust could also be established by way of an **all-encompassing monitoring mechanism for the rule of law, democracy and fundamental rights**, including procedural guarantees, victims' rights and detention conditions. The mechanism described in the European Parliament's DRF Resolution could serve this purpose (see Part III for further comments on the proposed DRF mechanism). Progress could also be achieved without a new mechanism however. For instance, mutual recognition in EU criminal law could be limited by national judges by means of a proportionality test in a situation where criminal proceedings could risk violating individual rights.

To aid this, judicial authorities should be able to discuss in a **standardised consultation procedure the issue of proportionality**. Also, explicit mandatory grounds for refusal should apply if there is serious concern on the side of the executing authority that EU values are being violated in the issuing Member State.

The viability of these suggestions is proven by the fact the European co-legislators introduced the above tools in the 2014 Directive on the European Investigation Order. The EIO shows that the **EU law principles of mutual trust and recognition**, on the one hand, and **fundamental rights and proportionality exceptions**, on other hand, are **reconcilable and mutually reinforce each other**. The EIO shall serve as a good practice to be followed for all mutual recognition based pieces of EU law.

II.2 Reinforcing the EU's rule of law ecosystem

The Fundamental Rights Agency

→ *The mandate of the EU Fundamental Rights Agency should be revised in order to enable it to play a more meaningful role on the rule of law front.*

Such a revision does not necessarily entail an update of the relevant Regulation (which would require unanimity), but could happen in practice as a result of a more pro-active position of the FRA within the framework of its powers.

In addition, a **larger involvement of the FRA in the Commission's Rule of Law Framework** and a **formal role in the context of the Council's Annual Rule of Law Dialogue** (assuming the Council does not abolish this ineffective instrument) must be organised.

With respect to the proposed new rule of law mechanism to suspend EU funding, it is also not clear why the Commission for instance envisages "the use of external expertise from the Council of Europe" but makes no explicit mention of the FRA and the wealth of information / depth of the analytical skills, which the Agency has accumulated.

In addition, **respect for the rule of law should be explicitly included among the thematic areas mentioned in the FRA's multiannual framework**. A possible use of a new database known as **EFRIS** (European Fundamental Rights Information System) which aims to provide information gathered by different actors on the situation of fundamental rights on a country-by-country or right specific basis and a pilot of which is to be launched in 2019 could be possibly **expanded to include an overview on EU Member States' compliance with the whole set of Article 2 TEU values**.

Lastly, we would recommend that the FRA are explicitly given a role to play within the Article 7 TEU remit.

An EU Network of Independent Experts

→ *EU network of independent experts (to be attached to the EUFRA and/or EU Commission) should be created*

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. This network, which was set up by the Commission at the request of the European Parliament in 2002, was also supposed to be able to contribute to any Article 7 procedure prior or after it had been activated. It is difficult to understand why the network was discontinued when the EU FRA was established as this "created a gap in monitoring, because the mandate of the agency does not allow it to carry out the same task as the network".

This is why it is suggested to **reintroduce the EU network of independent experts but to give it this time an Article 2 mandate** so as to enable the network to look into issues beyond fundamental rights.

One problem which could be usefully countered with the establishment of this network would be what can be called "**comparative law gaslighting**". Whenever relevant, the Commission could request the network to quickly fact-check comparative law statements from a rogue Government which have a noted tendency to hide behind misrepresented foreign examples or case law to justify "reforms" which however end up deliberately undermining the rule of law.

The European Anti-Fraud Office

→ *The European Anti-Fraud Office [OLAF] should be strengthened and its findings publicly shared in situations of deliberate inaction*

At the moment, the EU's anti-fraud office has the power to investigate corruption in the use of EU funds, but upon conclusion of its investigations, it delivers the results to the Member States for further action, and prosecution if necessary. Not surprisingly, these files often do not lead to investigation or prosecution at national level. The Member States most likely to abuse EU funds often have governments implicated in these corruption schemes at the highest levels and, unsurprisingly, these governments are unlikely to prosecute themselves when OLAF hands them the evidence to do so.

One has to look no farther than the recent headlines in the tiny sliver of the Hungarian press that remains outside of government control to see a clear example. The Hungarian police just dropped the investigation into the government contracts that awarded EU funds to the prime minister's son-in-law, even though the EU's anti-fraud agency OLAF provided overwhelming evidence that the contracts had been awarded in an improper manner. **A tougher mechanism, not dependent on the willingness of Member States to investigate and prosecute, has been called for** in response (see EPPO below).

This does not mean however that the current functioning of OLAF cannot be improved. For instance, **OLAF findings of improprieties might be used** as part of the basis for the Commission to determine that "there is a serious deficiency in the

effective functioning of the management and control system of the operational programme" in an EU Member State and that therefore under Article 142(a) of the Common Provisions Regulation and that therefore payments of relevant European Structural and Investment Funds should be temporarily suspended.

Finally, in cases where OLAF has **overwhelming evidence** that the Member State does not act upon, **OLAF might consider making the file public**.

The European Public Prosecutor's Office

→ *Oversight of the European Public Prosecutor's Office should be a prerequisite for access to certain EU funds.*

The EPPO was designed and intended to become the independent and decentralised prosecution office of the EU. At this stage, the EPPO is due to start operating in 2020 and cover 22 EU Member States with Sweden soon to join the EPPO as well. Unsurprisingly, neither Hungary nor Poland decided to sign up as one of the founding states.[2]

It is submitted that the Commission should investigate means of **limiting access to EU funds for those EU Member States who do not sign up to the EPPO** or alternatively, creating incentives through additional EU funds made available for those who have signed up to the EPPO.

The Authority of European Political Parties and European Political Foundations

→ *The Authority of European Political Parties and European Political Foundations should ensure the EU political parties' commitment to Article 2 TEU values.*

To change the current incentives which tend to push European political parties towards looking the other way when it comes to their "bad apples" in order to maximise their influence and resources rather than a commitment to Article 2 TEU values, the introduction of a rule whereby if only one of the constituent national parties of European political parties is engaged in a systematic undermining of Article 2 TEU, then **funding for the whole European party may be suspended** until such time as it is addressed.

To further this end and more generally to aid the work of the Authority, **any citizen should be given direct access to it to report potential violation or complicity in the systematic violation of Article 2 TEU values**. Currently, a group of 50 citizens may only ask the President of the European Parliament to lodge with the Authority a request for verification of a specific European political party's compliance with Article 2 TEU.

This means however, and to give a single example, that currently any request from a group of 50 citizens concerning the

[2] It is worth noting in this respect that despite their proclaimed adherence to the 'will of the people', the Hungarian government has ignored the demand of the 470,000 people who have signed a petition asking Mr Orban's government to join the EPPO.

European People's Party's alleged lack of compliance with Article 2 TEU has to go through a President of the Parliament who belongs to the same political party. A first attempt to use this procedure has further revealed repeated abusive interpretation of relevant rules by the office of the President of the European Parliament. This is why it is recommended that the Commission proposes an amendment to Regulation 1141/2014 so as to enable any group of 50 citizens to submit a reasoned proposal directly to the Authority.

The Venice Commission

→ *With qualification, a more systematic involvement of the Venice Commission should be pursued*

The Venice Commission could be routinely asked to produce a report on relevant matters as soon as for instance, the Rule of Law Framework is activated – **but this more systematic involvement should *not* be sought until the Venice Commission itself strictly enforces its current eligibility requirements so as to prevent the appointment of manifestly unsuitable members**.

Despite having requirements which make clear that only *independent* experts who have achieved *eminence* through their experience in democratic institutions or by their contribution to the enhancement of law and political science can serve as individual members, we have the concrete example of an individual having been appointed to the Venice Commission despite the European Commission and a national court considering this individual to be an unlawfully appointed judge.

Another individual currently member of the Venice Commission was also found by a national court to have violated the principle of the presumption of innocence and yet suffered no consequences with respect to his membership of the Commission.

It is therefore urgent that the Venice Commission consider the establishment of a panel similar to the Article 255 TFEU panel and begin by taking the vetting of aspirant members seriously to preserve its prestige and authority.

National Parliaments

→ *Greater involvement of national actors, notably national parliaments, is needed.*

The idea of a **new inter-parliamentary dialogue**, as proposed by Israel Butler, should be considered as a way for the European Parliament to create "an interparliamentary rights dialogue directly with national parliaments as a way of helping to protect the EU's fundamental values".

We would further submit that the practice of **national parliaments examining rule of law compliance in other EU countries should be encouraged**. The French, Flemish and Dutch parliaments can be particularly commended in this respect. The practice of adopting motions condemning outrageous developments such as the Hungarian government's attacks on the Central European University, a practice which the Portuguese Parliament appears to have initiated, should also be encouraged.

Annual EU Justice Policy Event

→ *An EU Justice Policy annual event should be established.*

The success of the "Assises de la Justice" forum in 2013 suggests there is untapped demand for an annual event of a similar nature. This event could be organised to **share the findings of the proposed re-establishment of an EU Network of Independent Experts**. Alternatively, a revision of the format of the current annual colloquium on fundamental rights should be considered.

Should the idea of a specific rule of law forum be pursued, it is suggested that one of the key missions of this forum should be to invite members of beleaguered pro-democracy movements in states experiencing autocratisation so that civil society groups who are under attack, human rights activities or academics who are persecuted, as well as journalists who are driven out of work have a highly visible forum enabling them to publicise at the EU level what is happening in their states.

II.3 Legislative process prevent-type reform

Autocrat-Proofing EU Legislation

- Building up on what is already been done with respect to human rights, it is suggested that the Commission explores the extent to which EU legislative proposals could be made more "autocrat-proof" by systematically examining the means by which new EU platforms like the Schengen Information System (SIS) or the European Arrest Warrant (EAW) could be abused by autocratic authorities and adjusting draft legislation, in particular when it comes to remedies, accordingly. The case of Lyudmyla Kozlovska[3] illustrates how states can abuse their discretionary power to use the SIS II for entry bans, and the necessity of effective remedies against such decisions.
- A good practice is incorporated into Recital (12) of the framework decision on the EAW, which states that surrender of a requested person can be denied, when there are reasons to believe, that the warrant has been issued "for the purpose of prosecuting or punishing a person on the grounds of his or her sex, race, religion, ethnic origin, nationality, language, political opinions or sexual orientation, or that that person's position may be prejudiced for any of these reasons."
- The jurisprudence of the ECJ in the EAW cases of Case C-404/15 *Aranyosi* and *Case C-216/18 LM* has begun to recognize that Member States may fail to meet the conditions that make mutual trust possible but, in our view, it has been too gentle on Member States whose track records indicate more systemic flaws. Looking beyond the idea of autocrat-proofing of EU legislation, it is recommended that **new EU legislation should automatically include a suspension mechanism which is to be always activated in relation to any country subject to Article 7 proceedings**.

[3] The Hungarian government has been routinely entering into the SIS those who have been rejected for asylum claims so that other countries will not admit them. This is particularly problematic in light of the pending infringement action by the Commission against Hungary for, among other things, adding new conditions for refusal of asylum beyond those contained in EU law. The abusive use by Polish authorities of the SIS in the case of Lyudmyla Kozlovska is particularly striking in this respect and most likely a sign of things to come if the EU does not strongly and promptly react. In a nutshell, in August 2018, the President of the Open Dialog Foundation was deported from the EU territory to Ukraine as an "inadmissible alien" on the basis of a Polish entry ban reported into SIS II.

Combatting Electoral Fraud and Protecting EU-wide Democracy

→ Considering the holding of unfair parliamentary elections (and in at least one EU country twice in a row which has been since subject to Article 7 proceedings), we agree with the proposal made by András Jakab that "the European Parliament should try to defend itself from being infiltrated by MEPs with questionable democratic mandates" at the time of the verification of the credentials of newly elected MEPs so as to avoid seeing a Parliament comprised such MEPs with questionable commitments to fundamental EU values. **Infringement actions based on Articles 14(3) TEU and 39(2) of the Charter to combat electoral legislation biased in favour of the ruling party** – to the extent that they apply to European elections, ought to be considered as well.

→ As recommended by Rui Tavares, the Commission should also look into the feasibility of an **EU voting rights act** to protect the quality and integrity of electoral acts across the EU as the EU appears currently EU singularly unprepared for the prospect of increasingly fraudulent elections occurring in a Member State.

III. IMPROVING THE EU'S RULE OF LAW ENFORCEMENT CHAIN

In terms of preventing and containing rule of law backsliding on the basis of the EU's current toolbox, we submit that a **mutually reinforcing multifaceted, multidimensional and multilevel** "rule of law enforcement cocktail" – to borrow the expression from Professor Pech – should be considered the best way forward.

The underlying aim of this cocktail approach is to multiply the number of "pressure points" as far as the relevant "rogue government" is concerned. This means that **key actors must activate any relevant rule of law instrument available to them** and do so **in a coordinated manner** or at least in a way which is mindful of other actors' efforts. Each actor should also do what the Commission has started with its invitation for comments and feedback with respect to the issue of the rule of law within the EU. With respect to the most important actors currently seeking to address the issue, one can see room for improvement or good initiatives which could be expanded.

Oversight and Reporting by the European Parliament

→ With respect to the **European Parliament, one may recommend that it systematically organises country visits prior to and after the adoption of a rule of law resolution**. In this context, renewing the mandate and providing more resources to the Rule of Law monitoring group (ROLMG), chaired by Sophie in 't Veld (ALDE, NL) would also appear advisable. European Political Parties should also play their part and at the very least automatically suspend their national member parties when they are involved in a government subject to Article 7 proceedings.

Engagement of National Governments and National Courts

→ National governments should regularly emphasise their political support for the Commission as well as their legal support by intervening in relevant pending cases before the ECJ; initiate Article 259 actions when the Commission is not acting; publicise their statements and questions made in the context of ongoing Article 7 procedures as well as not shy away from freezing diplomatic relations. National parliaments should emulate what has been done, as previous noted, by the French, Flemish, Dutch and Portuguese parliaments.

→ National courts ought to systematically consider Article 267 referrals when doing so would enable the ECJ to review the functioning of EU mutual trust-based mechanisms in countries where the rule of law situation is deteriorating to a degree which undermines the functioning of those mechanisms.

Coordination with non-EU Bodies and Professional Networks

→ EU institutions should also aim to better coordinate and involve non-EU bodies from the Council of Europe, the OSCE, etc., while these bodies must do their part to prevent their capture or infiltration by autocratic elements. Professional networks (ENCJ, CCBE, AEJ, etc.), academics and civil society groups should review how they engage with each other so to as to be more reactive and increase the "weight" and impact of their interventions. For academics, we would submit that more active involvement and public engagement is required in order to fight conceptual misuse, institutional failure and make people better aware of the autocrats' playbook. Overall, the key goal for the "friends of the rule of law" should be to create a situation where the cost of rule of law problems in a few Member States becomes too exorbitant to be ignored by all of the other Member States.

Use of Existing Authority under the Common Provisions Regulation

→ Only one piece of the enforcement jigsaw is arguably missing: While it has been convincingly argued by Israel Butler, and Daniel Kelemen and Kim Lane Scheppele that – even without the Commission's new "generalised deficiencies" proposal – the current Common Provisions Regulation (CPR) already allows the Commission to suspend European Structural and Investment Funds (ESIFs) where a Member State does not uphold the rule of law, we would welcome the adoption of the Commission's proposed new mechanism to protect the EU budget.

→ That being said, it is imperative that those hoping for a new rule-of-law budget conditionality proposal to be established in the near future also emphasize that until any new mechanism is established, the Commission should use its existing authority under the CPR to suspend the flow of EU funds to rule of law backsliders where appropriate.

Introduction of Rule of Law Stress Tests

→ To strengthen the EU's anti-autocracy immunity system, it is recommended that the Commission look into the possibility of running regular "rule of law stress tests" similarly to what the European Banking Authority does for financial institutions. The key objective would be to assess the reaction capacities of the EU's multilevel architecture in the face of concrete problems related to the rule of law. These stress tests could work as follows:

(i) drafting a rule of law crisis scenario in a Member State;
(ii) inviting experts from all Member States to determine how existing backups would work, either in the form of a simulation or a "wargame" (experts assume different roles depending on the scenario)
(iii) evaluate the results on the basis of previously established measurable criteria (completeness of the resolution, complexity of mechanisms, etc.
(iv) the conclusions of these stress tests, with policy and other recommendations, should be published and made available to all relevant EU institutions and Member States. A further copy of country reports could be made available on the earlier proposed Article 7 Rule of Law Repository.

IV – WHAT IS TO BE AVOIDED

→ **Rushed, blue sky thinking schemes such as Manfred Weber's rule of law "plan" (in reality a mere op-ed) should be disregarded**

We have of course no objection to the greater involvement of experts, but a new panel of experts in and of itself should not be seen as a panacea to current dangers nor used as a reason to further delay action or to undermine the authority of the Commission by implying it lacks the independence or the expertise to make informed and objective calls regarding the rule of law situation at EU Member State level. In other words, it is recommended that the **Commission does not spend its limited time and resources on schemes which not only misdiagnose the problems but also imply that the current EU institutions**, including the Commission itself, **lack "professional independence"** but also call for changes which are as incompatible with the current Treaties as they are ill-advised.

One may mention here that the call for an "expert council" of only nine members (*ideal recipe to lead to a fruitless and prolonged discussion on how to select these nine members*) to be exclusively found "from the ranks of national supreme or constitutional courts and former judges from the European Court of Justice" (*lawyers, academics, civil society members need not apply apparently*), scholars with their "own investigative resources" (a non-starter), and the suggestion that in a situation where an adverse ruling of the ECJ in a "red card" situation is issued (*an undefined criterion*) "sanctions" proposed by the Commission could be stopped only "by a majority decision" of either the Parliament or the European Council (*leading therefore to a situation where a ruling of the ECJ could then essentially be disregarded by a majority vote*).

In short, it is crucial to disregard reform proposals requiring Treaty amendment and which appear designed more to excuse current inaction and pre-empt immediate action in the future than filling gaps in the EU's rule of law enforcement toolkit.

V – WHAT SHOULD BE PRIORITISED

→ **An overly ambitious revamping of the EU's rule of law toolbox should *not* be prioritised at this particular juncture when rule of law backsliding is both worsening and spreading**

This is not to say that an ambitious revamping would not be a good idea. But as we have shown, there is no need here to reinvent the wheel considering the 2016 proposal already made by the European Parliament under the leadership of Sophie in 't Veld, built on exhaustive academic research. This mechanism should be devised as a **regular, possibly annual supervision mechanism, based on contextual analysis of national laws and policies**. It should help EU institutions to determine if there is a systemic threat to the rule of law in a given Member State, and provide additional intelligence and authority to the European Commission in the consideration and initiation of infringement actions or in the determination of whether to activate Article 7.

Considering the gravity and deterioration of the situation on the rule of law front, it is however submitted that the EP proposal for a new comprehensive Democracy, Rule of Law and Fundamental Rights mechanism be **only implemented after the current episode of "rule of law backsliding" is first contained so as not to distract the Commission** from what should be its immediate priorities:

- To effectively conclude the infringement actions it has initiated to date;
- To initiate additional infringement actions on the basis of Article 19(1) TEU and/or Article 325 TFEU;
- To closely monitor any ECJ ruling finding a Member State to have violated Article 19(1) TEU and/or Article 325 TFEU; and last but not least,
- To work towards the adoption of its proposal on rule of law conditionality in the Union budget and ensure its prompt application.

To put it bluntly, and to summarise our position, it is not that we disagree with the need to upgrade if not entirely reform the EU's current rule of law toolbox but when the house is burning, it seems ill-advised if not negligently reckless to spend time discussing how to upgrade the fire extinguisher rather than promptly using whatever one has in hand in the most effective way.

VI – CONCLUSION

Now is not the time to remain silent about rule of law backsliding. But neither is it the time for a radical reformation of the EU's existing rule of law toolbox as this would distract from addressing immediate, pressing and fundamental problems which - however localised they may appear to be - are not merely problems affecting millions of EU citizens – but the Union as a whole, threatening its very functioning and existence.

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