A Response to the Commission Communication on further strengthening the rule of law within the Union

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June 2019

Key points:

The Commission, Council and European Parliament could consider the following measures to strengthen the rule of law within the Union:

- Promotion:
    - Fund civil society organisations (CSOs) to promote support for the values protected by Article 2 of the Treaty on European Union (democracy, the rule of law and fundamental rights);
    - Take legislative and other measures to support media independence and pluralism, and a sustainable financial model to support balanced, informed and high-quality private media.

- Prevention:
    - Create a rule of law review involving the Commission and Council by consolidating existing tools monitoring implementation of the rule of law under the European Semester and Justice Scoreboard and using this as the basis for a meaningful peer review system to replace the Council's rule of law dialogue;
    - Create an interparliamentary dialogue between the European Parliament and national parliaments;
    - Incorporate the assessments of existing international monitoring systems in the UN and Council of Europe in the information gathering process to avoid duplicating the work of these systems or weakening their international standing;
    - Fund CSOs to collect information on the state of implementation of Article 2 values at national level to provide supplementary information to feed into these two parallel mechanisms.

- Response:
    - Refine the rule of law framework, including by broadening its substantive scope to include the state of media independence and pluralism and civic space;
    - Deepen engagement with the Venice Commission and ODIHR to support response measures;
    - Create tools allowing for EU funding to continue to flow to innocent beneficiaries where measures to protect the EU budget have been taken;
    - Create a rule of law working party in the Council to assist in the preparation of hearings relating to Article 7;
    - Create a rule of law intergroup in the European Parliament;
    - Facilitate rule of law related infringement proceedings by clarifying relevant EU law through the creation of a fundamental rights index of EU legislation and by funding and building the capacity of CSOs to litigate points of EU law.

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Introduction

This paper is a response to the Commission's invitation to relevant stakeholders to contribute to the reflection process initiated by the Commission's Communication 'Further strengthening the rule of law within the Union'.[1] The Communication divides possible measures to better protect the rule of law into three categories: promotion, prevention and response. The paper will follow this structure.

Liberties shares the Commission's understanding of the rule of law. The rule of law is a broad principle that goes beyond merely requiring the existence of independent and impartial courts to ensure governments act within the limits of the law. It also includes the requirement that the law be created through a legitimate process that is based on fair, balanced and inclusive public debate (democratic pluralism). Furthermore, the substance of the laws in place should respect fundamental rights guarantees. The latter not only defend individuals from abuse but also allow all members of society to develop to their full potential and participate actively in social, economic and democratic life. Democracy, the rule of law and fundamental rights are among the values shared by the Member States and on which the EU is founded, as set out in Article 2 of the Treaty on European Union. As such, the paper will use the term 'rule of law' and 'Article 2 values' interchangeably. When the paper means to refer to a narrower concept of the rule of law denoting only the proper functioning and integrity of the judiciary, it will do so explicitly.

I. Promotion

This paper understands the term promotion to refer to measures that make it less likely for attacks against Article 2 values at national level to emerge or to succeed. Put otherwise, promotional measures are those that create resilience among the public against attempts to undo guarantees supporting the EU's founding values.

Governments can protect Article 2 values by creating appropriate laws and institutions and imbuing them with constitutional status. But events in several Member States show that even where a government lacks the majorities required to dismantle constitutional guarantees, it can still find ways to subvert or bypass these protections. Furthermore, governments can also create electoral conditions that make the supermajorities required for constitutional change more likely. Such conditions can include tampering with electoral boundaries, using public resources improperly for political campaigning, restricting freedom of assembly and association and acquiring control and influence over public and private media outlets.[2]

Ultimately, governments attacking constitutional protections will have to rely on public support for - or at least count on a lack of strong public opposition against - their retrogressive measures. It becomes easier for governments to garner public support, or diffuse meaningful opposition, under certain conditions: if public understanding of the rule of law, democratic pluralism and fundamental rights is low; if public information and debate about proposed retrogressive measures is biased and

uninformed; and if the public does not have the means to organise itself to voice their concerns. Put otherwise, to survive and flourish, laws and institutions that protect fundamental values must be grounded in a strong rule of law culture among the public.

Promotional activities to nurture a rule of law culture should focus on creating the conditions required to develop public resilience to attacks against the laws and institutions designed to protect them. First, the public needs to have a sufficient understanding of Article 2 values. This should go beyond a conceptual understanding and include a firm grasp of how individuals rely on and can actively exercise and uphold the rule of law, democratic pluralism and fundamental rights. Second, the public needs to make an informed evaluation about whether proposed reforms risk undermining Article 2 values. This requires them to receive balanced information and analysis about current affairs. Third, members of the public must have at their disposal the means to organise themselves and channel their views to government collectively.

Civil society organisations (CSOs) are well suited to carrying out the above measures, namely: public education, monitoring and public mobilisation. The Commission could dedicate funding under the Rights and Values programme to fund these activities at national level.[3] To maximise the potential contribution of CSOs to creating a rule of law culture, the Commission could dedicate funding to build the capacity of the sector to communicate effectively with the public. In particular, their ability to implement values-based framing techniques, to use available communications technologies and to develop effective communications strategies.[4] The Commission could collaborate with other EU bodies, international organisations and donors to develop guidelines, toolkits adapted to each Member State, designing and delivering training programmes and offer ongoing communications support. Partners for this work could include the Fundamental Rights Agency, the OSCE's Office for Democratic Institutions and Human Rights, EEA/Norway Grants, the Council of Europe as well as national human rights institutions. These entities could also contribute by playing a convening role in gathering CSOs for in-person meetings to share expertise and coordinate their work.

Finally, the Commission could contribute to the financial sustainability of the sector. The difficulties in finding long-term funding makes it harder for CSOs to plan ahead, hire and retain high quality staff and means staff have to engage in fundraising rather than their core work. The Commission could help to improve this situation by applying a presumption in favour of longer-term project grants and grants to cover operating costs rather than short-term project grants in its distribution of grants under the Rights and Values programme. To make funding more accessible for grassroots and national CSOs the Commission should also consider making grants to third parties for the purpose of redistribution to smaller CSOs and interpreting the EU's financial rules in such a way as to minimise disproportionate administrative burdens.

The Commission could also consider measures designed to nurture a healthy media environment as part of its efforts to support a rule of law culture. In particular, the EU could strengthen media independence and pluralism as well as the financial sustainability of the private media market. There is a considerable body of research examining why increasing numbers of voters are endorsing authoritarian political attitudes. In brief, when society is exposed to narratives designed to trigger anxiety over economic stability, security, traditional cultural rules and traditional social and economic hierarchies, a significant slice of voters adopt more authoritarian political attitudes. The prevalence in the media of anxiety-generating narratives is not the only factor behind the success of populist authoritarian parties, but it plays a substantial role. A number of factors is contributing to conditions that make the media inherently amenable to spreading these narratives.[5]

Public service media in some Member States has fallen under the control and influence of governments, making it susceptible to misuse as a vehicle for propagating fear-based narratives when populist authoritarian parties come to power. With respect to private media, there are significant problems with the current financial model that has difficulty sustaining good quality journalism.[6] The shift from traditional print media towards digitisation has meant that advertising revenue that formerly sustained media outlets has instead moved to news aggregator websites, such as Google and Facebook. The loss of revenue for traditional media outlets meant that many went out of business, allowing oligarchs to acquire media companies at little cost to serve their commercial and political agendas. Often these owners are allied to political movements and have helped to spread government propaganda. But even well-intentioned media outlets have propagated populist authoritarian narratives, frequently dedicating a disproportionate amount of coverage to authoritarian figures and messaging in order to survive economically. Controversial, fear-based and sensationalist content attracts more viewers, readers and, hence, revenue.

The Commission could consider reform of the EU's Audio-Visual Media Services Directive to include guarantees for the independence of public service broadcasters. To prevent owners of private media outlets becoming unduly influential in public debate, the Commission could revisit the way it interprets competition rules concerning the plurality of media ownership. For example, competition rules applied in the context of media ownership should be read in light of Article 11 of the Charter of Fundamental Right's guaranteeing freedom to receive and impart information and the freedom and pluralism of the media. As a way of making good quality media outlets more financially sustainable the Commission could: promote non-profit models for media outlets; create new sources of funding for independent journalism, for example through taxes on news aggregators like Google and Facebook; increase its own financial support for independent, high quality media by funding training on ethnical journalism and by giving grants to independent journalists or emerging non-profit media outlets.[7] Any financial support should

be administered independently of EU institutions to guarantee journalists' impartiality.

II. Prevention

This paper understands the idea of prevention to mean early intervention. That is, the ability of the EU institutions to take measures to diffuse emergent measures that threaten to undermine Article 2 values before they become systemic in nature. The Commission notes in its Communication that its ability to identify risks to the rule of law would be enhanced by deeper understanding of developments as they unfold at national level. The Commission also asks whether the information collected could form the basis for a regular dialogue between the EU institutions and Member States, and the extent to which this might take place through the further development of existing tools, such as the Justice Scoreboard and the European Semester. Accordingly, this section of the paper will examine what shape a regular monitoring and dialogue mechanism involving the EU institutions and national authorities might take.

Liberties agrees that an EU mechanism involving regular monitoring and dialogue would have several advantages and complement existing EU procedures designed to protect the rule of law. Existing EU mechanisms rely on political will to be activated, which opens them to attack for being used selectively. Additionally, these mechanisms can usually only be triggered once the situation has become so serious that it is difficult to reverse. A system of regular monitoring and dialogue would eliminate the risk that procedures are used selectivity because all Member States would be subject to review automatically. Given that dialogue could occur at regular intervals, this

would also ensure that potential problems are highlighted and discussed at EU level before they become acute.

This section of the paper will discuss on two issues. First, how a new EU mechanism could complement and add value to existing monitoring systems in place in the Council of Europe and the United Nations. Second, what forms new monitoring and dialogue mechanisms might take. The latter section will explore two possible complementary procedures: a rule of law review (involving the Commission and Council) and an interparliamentary dialogue (involving the European Parliament and national parliaments).

II.A. Relationship with existing international mechanisms

There already exist a number of mechanisms that monitor implementation by the Member States of legal standards underpinning democracy, the rule of law and fundamental rights. Broadly speaking, there are three layers of monitoring at UN level. First, all EU Member States are party to a number of UN fundamental rights treaties under which they are required to produce reports periodically on the state of implementation. The bodies responsible for monitoring implementation of these treaties are also often empowered to receive complaints from individuals concerning violations of their rights.[8] Second, all EU Member States are subject to monitoring by UN 'special procedures'. These are independent experts, or groups of experts, responsible for monitoring the implementation of particular rights or sets of rights. While 'special procedures' do not systematically monitor implementation across all countries, they may carry out country visits to investigate the state of implementation of the issues for which they are responsible. They also usually receive individual complaints, which they transmit to national governments, and to which states are expected to react.[9] Third, all EU Member States take part in a process of Universal Periodic Review (UPR) carried out at the UN's Human Rights Council over a four-and-a-half-year cycle. Under the UPR all members of the UN are reviewed by their peers for compliance with fundamental rights standards.[10]

At the Council of Europe, all EU Member States are subject to a number of monitoring systems. The European Court of Human Rights deals with complaints from individuals in relation to (mainly) civil and political rights,[11] while the European Committee of Social Rights deals with collective complaints from NGOs principally concerning violations of economic and social rights.[12] Other bodies monitor the broader situation of rights implementation in Member States, usually on a particular theme, such as the Committee for the Prevention of Torture,[13] the Commissioner for Human Rights,[14] the European Commission against Racism and Intolerance[15] and the European Commission for Democracy through Law (Venice Commission).[16]

All of these monitoring processes result in recommendations being made to the Member States on how to bring their laws and practices into line with Article 2 values. For the most part, even where members of a given monitor-

ing mechanism are appointed by governments, the members of the monitoring body are selected on the basis of their expertise and expected to act independently. The principal exception to this is the UPR, where states monitor each other in a peer review exercise, and governments are free to voluntarily accept (or not) recommendations made by their peers.[17]

This means that there is already a wealth of authoritative evidence, produced by monitoring systems to which Member States have consented and in which they actively participate. These assessments offer both the state of implementation of Article 2 values in each Member State, as well as recommendations on how to remedy shortcomings. The EU should avoid merely duplicating these processes. Because EU Member States are subject to a significant amount of monitoring, creating a new and overlapping EU reporting process may be counter-productive. For example, most countries, including EU Member States, are late (sometimes by a number of years) in sending their periodic reports to UN human rights treaty monitoring bodies. This can be due to several factors, including the burden placed on national administrations, which report to UN bodies on a number of human rights treaties. Because of this, the Office of the High Commissioner for Human Rights (OHCHR) of the UN is making efforts to rationalise and consolidate reporting.[18] A new EU reporting process that relies on a completely new monitoring exercise might tempt Member States to shift their resources away from UN and Council of Europe monitoring mechanisms. This could weaken the legitimacy of these bodies in the eyes of non-EU countries and provide governments with an excuse to stop participating in these mechanisms. This would prove detrimental to rights protection outside the Union and conflict with the external policy goals of the EU, which include defending and promoting human rights monitoring systems in the UN and Council of Europe.[19]

There are, however, ways that a new EU mechanism could complement and add value to existing international monitoring systems. The principal weakness of existing monitoring mechanisms at the UN and Council of Europe is their ability to ensure that governments implement their recommendations. There is no comprehensive data regarding the level of compliance with monitoring bodies' recommendations, but available research suggests that this is problematic.

It is thought that the body that achieves the best rate of compliance with its decisions is the European Court of Human Rights, the implementation of whose judgments is followed up and monitored by the Committee of Ministers of the Council of Europe.[20] However, no precise figure is available. Research concerning compliance with recommendations issued by the UN Human Rights Committee (the body responsible for monitoring implementation of the International Covenant on Civil and Political Rights), suggests that only around 12 per cent of its decisions on individual complaints are complied with.[21] Research relating to the UPR distinguishes between developed and developing countries, and finds that implementation of recommendations voluntarily accepted by developed governments sits at around 50 per cent.[22]

The EU could complement and add value to existing mechanisms without duplicating their functions by acting as a forum to facilitate implementation of existing monitoring bodies' recommendations. Because the EU wields greater political influence over its Member States than Council of Europe or UN mechanisms, governments are more likely to take measures to improve fundamental rights implementation when these are called for by the Union. This is probably due to two reasons.

First, criticism by the EU tends to attract far more national and international media attention than criticism by the UN or Council of Europe, which in turn can generate public and political pressure at national level. Second, where a Member State fails to uphold Article 2 values, which are supposed to reflect common standards, this can undermine trust between Member States. This in turn can mean that problematic governments find it harder to count on good will during law and policy-making processes. Given the extent and importance of issues on which EU governments cooperate, exposing serious problems with Article 2 values in the context of the EU institutions could harm a Member State's interests far beyond similar concerns raised at the UN or Council of Europe, which are international organisations with much softer powers. For these reasons, using the EU as a forum to follow up with Member States on the implementation of their Article 2 obligations would add value to existing monitoring mechanisms without duplicating the work that they carry out.

II.B. Possible future EU monitoring and dialogue mechanisms

A new EU monitoring and dialogue mechanism could adopt a variety of configurations. However, it should involve, at minimum, the following elements. First, the collection and analysis of information concerning each Member State in the form of a country report. Second, a discussion with national authorities concerning the country report. Third, the formulation of recommendations towards each Member State. Fourth, follow up on the implementation of these recommendations. This section will discuss the basic elements of a monitoring and dialogue system, namely: the sources of information on which country reports would be based, the substantive scope of such country reports, the body responsible for drawing up these reports, the body responsible for carrying out the dialogue and the manner in which recommendations are issued and follow up.

Ideally, the Commission would put forward a proposal to establish the 'DRF pact' outlined by the European Parliament.[23] This suggestion allowed for regular monitoring and dialogue that covered all Member States and involved all the institutions, by incorporating and upgrading the Commission's rule of law framework and the Council's rule of law dialogue. However, it appears that the Commission remains unlikely to make such a proposal, in part because it would still not meet with sufficient enthusiasm among governments in the Council. Accordingly, this paper will make an effort to make suggestions that are politically feasible, taking into account the different

levels of political will in the institutions. The remainder of part II of this paper will suggest two, potentially complementary, models. One involving the Commission and Council in a rule of law review and the other involving the European Parliament in an interparliamentary dialogue with national parliaments.

II.B.i. Rule of law review involving the Commission and Council

II.B.i.a. Sources of information

The Commission could follow the working method used to gather information for the EU Anti-Corruption report published in 2014. This included using information available from existing international monitoring mechanisms (such as the OECD, UN and Council of Europe) as well as data from other EU bodies and agencies and outside sources including national authorities, academic experts, think tanks and CSOs.

Based on the discussion in section II.A., it would be sensible to incorporate the findings and recommendations of existing international monitoring mechanisms into the country reports. The practical difficulty of drawing all this work together will be resolved by the FRA's repository of information from over 80 monitoring systems covering all Member States. This European Fundamental Rights Information System (EFRIS) is expected to be operational at the end of 2019.

The Commission also currently gathers information from various sources to draw up the Justice Scoreboard, which in turn feeds into its country reports under the European Semester.[24] The Justice Scoreboard is partly based on information collected by the Council of Europe's Commission for the Evaluation of the Efficiency of Justice. In addition, the Commission consults with bodies representing judiciaries (such as the European Network of Councils of the Judiciaries and the Association of the Councils of State and Supreme Administrative Jurisdictions of the EU), EU bodies and agencies (such as EIGE and EUROSTAT) but also external organisations like the World Economic Forum. Furthermore, the Commission has established a group of contact persons on national judicial systems to provide information and develop the content of the Justice Scoreboard, composed of two representatives from each Member State: one member of the judiciary and one member from the ministry of justice.[25]

The Commission may also dispose of further information on Member States under procedures designed to respond to potential or actual threats to Article 2 values, namely, the rule of law framework, the Cooperation and Verification Mechanism and Article 7. Including data gathered through these exercises would help to provide a stronger overview of developments at national level.

Despite having various sources of information at its disposal, the Commission notes that it would benefit from having more detailed information from the national level than is the case currently. The Commission could supplement

information from the EFRIS and the sources currently used for the Justice Scoreboard with further information from CSOs.

The Rights and Values programme could be used to fund CSOs to monitor and report on the implementation of fundamental values at national level. The Commission could emulate the approach that it has taken with regard to funding CSOs to monitor implementation of National Roma Integration Strategies.[26] The Commission could also draw inspiration from the methodology used to collect information under the EU Anti-Corruption Report, which included creating a network of local research correspondents drawn from research institutions and CSOs.[27] To ensure the comparability and robustness of the information delivered, the Commission could implement a rigorous tender process, adequate quality control and use standardised questionnaires to gather information.

In addition to written reports, the Commission could also make itself open to oral exchanges with CSOs, national human rights institutions and other bodies with credible information at national level, in the same way that the Commission receives information from Member State representatives in compiling the Justice Scoreboard. Again, it appears that there is precedent for this in the methodology used to draw up its Anti-Corruption Report, which included two workshops with national authorities, researchers, CSOs and business representatives.[28]

II.B.i.b. Scope of country report

The EFRIS, Justice Scoreboard and supplementary sources of information from national level will inevitably lead to a volume of data that is too large to use in its original form as the basis for a dialogue between the Council and the Member States. A country report could be drawn up to highlight the main findings for each Member State. As noted, ideally, the country report would cover the range of standards relevant for the implementation of Article 2 values in the round, as suggested in the European Parliament's resolution on the DRF pact. The most politically feasible approach, however, is likely to involve a gentle evolution of existing practices. The wording of the Commission's Communication as well as a leaked note concerning the Belgo-German initiative for a periodic peer review of the rule of law suggests that the Council is unwilling to contemplate a system of review that includes the full range of standards protected by Article 2 values.[29] The Commission's Communication refers to the possibility of building on the European Semester and the Justice Scoreboard. The latter include a focus on the rule of law but appear to interpret the concept more broadly than an enquiry into the health of the judiciary.

The Justice Scoreboard was established in 2013 as a tool to inform Member States and the EU about national judiciaries. The Scoreboard initially concentrated more on the efficiency of judicial systems with a focus on their role in creating a favourable climate for businesses and consumers.[30] Over time, the Justice Scoreboard has expanded its substan-

tive scope to include not only civil, commercial and administrative courts, but also criminal courts. The Scoreboard has also developed to include more in-depth indicators to measure judicial independence, including the perception of independence among the general public and commercial enterprises, procedures surrounding the appointment and dismissal and disciplining of judges and prosecutors and the independence of national judiciary councils. Further, the Scoreboard has expanded to include more detailed information concerning the ability of individuals to obtain an effective remedy before the courts, such as the length of proceedings, resourcing of national judiciaries and barriers to access to justice, such as the availability of legal aid and existence of court fees.[31]

The European Semester has also evolved in scope in recent years. It is a process through which Member States coordinate their economic and fiscal policies through an annual cycle.[32] At the start of the cycle, the Commission publishes, along with other documents, an 'Annual Growth Survey'. The latter outlines the priority areas that Member States are expected to address in their national reform programmes and stability or convergence programmes, which are presented to the Commission. The Commission then issues a country report, which includes its assessment of these programmes, based on consultation with relevant stakeholders and analysis of relevant information. The Commission also transmits a Recommendation to the Council containing recommendations for each Member State. The latter are adopted by the Council through reverse qualified majority voting.[33]

The Commission has included among the priorities identified in its Annual Growth Survey, the need for independent and efficient judicial systems, as well as the fight against corruption. These requirements concerning the judiciary have been included for several years as part of the structural reforms expected from Member States to facilitate economic growth and stability. In the 2018 Annual Growth Survey, the Commission for the first time expressly referred to the broader notion of 'full respect of the rule of law' as a priority. By the 2018 cycle, assessments of judicial effectiveness and independence were a regular feature of Commission country reports.[34] In the 2019 Annual Growth Survey the Commission has further developed its priorities to include the 'rule of law, effective justice systems and robust anti-corruption frameworks', which it clarified as 'the independence and efficiency of court systems as well as a comprehensive approach to fighting corruption, which combines prevention, effective prosecution and sanctions.' Furthermore, the Commission clarified that such measures should be complemented by 'transparency and integrity in the public sector, effective legal protection of whistle-blowers, the presence of independent media and more engagement with civil society.'[35] Similarly, the Commission's Communication on further strengthening the rule of law also notes that high level corruption, and attempts to weaken or pressure the media and civil society constitute warning signs that the rule of law is at risk.

These documents suggest that the Commission is prepared to engage in an assessment of Member States that incorporates elements

of Article 2 values that go beyond a narrow focus on the justice system. Accordingly, at minimum, the scope of country reports under a new rule of law review could be expected to cover topics of judicial independence, timely access to an effective remedy, anti-corruption, media independence and pluralism and the civic space. Liberties agrees that media independence and pluralism and a healthy civic space are key to upholding the rule of law. This is because these factors ensure informed and meaningful public debate, democratic participation and government accountability. While it may not be politically feasible to include all aspects protected by Article 2 values, the Commission could also consider including within the scope of country reports other issues that are within EU competence or closely bound up with democratic pluralism and current attacks against the rule of law.

It is a common practice among populist authoritarian governments to engage in discrimination against historically marginalised sections of society, such as ethnic minorities, women, LGBTI persons and migrants. Indeed, manipulating a sense of anxiety towards these groups is a deliberate tactic used to build support among voters.[36] The constitution and judiciary often find themselves under attack from governments with authoritarian agendas precisely because these institutions stand in the way of a programme of discriminatory laws and policies. Attacks on the legal and institutional framework that promotes and protects equality form an integral part of retrogressive reforms designed to dismantle the rule of law. Which is a cogent reason to include the theme of discrimination within the scope of country reports under the rule of law review.

There is also precedent for the Commission to report on Member State implementation of respect for equality. Country reports under the European Semester include some discussion of discrimination and social exclusion, at least in relation to the situation of Roma and to a lesser extent on gender equality and other grounds. Furthermore, equality and non-discrimination fall largely within EU competence, and the EU has been reporting on equality and discrimination in the Member States through the FRA and its own network of legal experts. Both of these bodies offer frequent overviews of developments at national level.[37]

Considering that the EU already collects and publishes information through the European Semester, its own network of experts and the FRA, and that discrimination against marginalised groups is a common tool among governments that are also attacking other elements of the rule of law, there is a strong case to be made for the scope of country reports to include equality and discrimination.

In addition, inclusion of some further measures of democratic pluralism could be contemplated. For example, governments that attack judicial independence are also likely to attempt to undermine the integrity of electoral systems as a means of maintaining power. Similarly, governments attempting to pressure CSOs can also be expected to place restrictions on looser civic movements by limiting the right to freedom of assembly. Including these elements within the scope of country reports would help

to provide a more holistic picture of whether the rule of law is at risk of systemic failures.

Country reports could be accompanied by a report summarising the observations of CSOs with relevant expertise. The latter summary report could be drawn up by the Commission or an independent body based on information submitted by any CSO within a given deadline. This is the practice in the UN's Universal Periodic Review, for example. Alternatively, the views of CSOs could be incorporated already into the country report, without the need for a separate CSO report. The country reports could contain provisional recommendations, which could be taken up, or not, by the Member States carrying out the review.

II.B.i.c. The body responsible for compiling the country reports

Ideally, country reports would be drawn up by an independent expert body which would make its reports directly available to the public to ensure that the process cannot be said to be subject to political selectivity. The Commission could, in theory, re-establish the network of independent experts on fundamental rights which compiled reports on the state of implementation of fundamental rights in the EU between 2003 and 2006 and was created through a Commission decision.[38]

The least politically controversial choice of body to compile the country reports would be the Commission itself, given that the Commission already has an established practice of drawing up such reports for the European Semester. An alternative compromise might be for the Commission to establish a group of independent experts to support the Commission to draw up the country reports, and for these country reports to be published after adoption by the Commission. This working method was followed, for example, to draw up the EU Anti-Corruption Report published by the Commission in 2014.[39]

In effect, the final 'country report' would amount to consolidating various existing assessments currently subsumed in other reports already published by the Commission and other EU bodies, into a standalone report on the rule of law. Bringing this information into a single report could help to create a more holistic picture of the situation and focus greater attention on the rule of law. The substantive scope, additional sources of information and level of detail could be expanded slightly to offer a more comprehensive overview of the situation at national level. In this sense the report would amount to an evolution of current practice through the Justice Scoreboard and European Semester, rather than the creation of a new mechanism.

II.B.i.d. Dialoguing body and relationship with response procedures

It is suggested that the body responsible for carrying out the dialogue with individual Member States should be the Council. As noted, it appears to be that monitoring mechanisms are most effective where they involve a stage of peer review among governments. The

rule of law review should examine individual country reports and replace the existing rule of law dialogue in the Council.

The Council's annual rule of law dialogue was introduced in 2014 with the stated aim of protecting the rule of law in the EU.[40] To date, there have been four such dialogues. The current practice is for the government holding the EU presidency to pick a topic, hold a preparatory expert meeting, prepare a background paper and then have a discussion of half a day or shorter in the General Affairs Council. The rule of law dialogue has focused on particular themes rather than individual Member States. Themes chosen so far have been digitisation (Luxembourg presidency, 2015),[41] the integration of migrants (Netherlands presidency, 2016),[42] disinformation (Estonian presidency, 2017)[43] and trust in public institutions (Austrian presidency, 2018).[44] The dialogues are occasions where ministers share experiences of challenges and successes on the topic in question. They are not designed to allow for any review of how governments are performing on the rule of law, there is no opportunity for governments to engage with each other about their track records, they do not tend to address thorny topics such as judicial or media independence, and there is no opportunity to address individualised recommendations to specific governments.

It would be difficult to conclude that the exercise has a tangible impact on the protection of Article 2 values. An opportunity to improve the rule of law dialogue came about under the Slovakian presidency of the EU in 2016, which conducted an evaluation.[45] However, there was insufficient will among governments to turn the dialogue into a meaningful process where governments review each other's performances, identify challenges, and address each other with recommendations. Another evaluation is due to take place before the end of 2019, which might allow for the dialogue to be developed into a more useful process. For a number of years, the Belgian government has been trying to convince other governments to convert the rule of law dialogue into a peer review mechanism, based on the example of the UN's Universal Periodic Review (described above).

Liberties published a paper with suggestions on how to improve the rule of law dialogue in 2015.[46] It is suggested that the rule of law review could effectively upgrade the existing dialogue along the following lines. Each Member State would be reviewed in turn on the basis of country reports prepared by the Commission as outlined above. Each Member State would be reviewed by its peers. The latter would raise both concerns and positive practices, ask questions of the Member State under review and make recommendations for further action. The exercise could be facilitated by a dedicated preparatory Council working party on the rule of law to prepare Member States (both those reviewing and those under review) for each review. The review process for each Member State would require adequate time for a meaningful discussion. For example, under the UPR procedure, half a day is allocated to discussion of the situation in each state. After this discussion an 'outcome' report is drawn up with a record of the discussion including recommendations made to the state under review. In a further half hour session, an

outcome report on each state is adopted, and the government under review has the opportunity to accept or note the recommendations made.[47] A similar procedure could be followed by the Council. The Council might consider running a one-year cycle, according to which fourteen Member States would be reviewed every six months, allowing all Member States to present their national situation annually. In successive cycles, Member States would be expected to include explanation of action taken to implement recommendations received during the previous cycle. While the recommendations themselves need not necessarily be legally binding, persistent refusal to act on recommendations and evidence of degrading performance would have consequences. Namely, to alert the Commission and Member States to emerging systemic and serious problems with the rule of law, leading to activation of the rule of law framework, measures to protect the Union's budget,[48] or the Article 7 procedure.

The rule of law review would serve as a preventive mechanism. As such, it would be important to ensure that the mechanism does not dilute or replace mechanisms designed to respond to actual or potential systemic or serious violations of Article 2 values such as the rule of law framework, measures to protect the Union's budget and the Article 7 procedure. This is not to say that individual country reports should not contain information gathered in the context of the rule of law framework, assessments relating to the protection of the Union's budget, or the Article 7 procedure. Rather, the rule of law review should not come to be treated as a substitute for these mechanisms, which have their own political and legal consequences.

II.B.ii. An Interparliamentary Dialogue

As noted, ideally, all three EU institutions would form part of one single overarching mechanism, as suggested in the European Parliament's (EP) resolution on the DRF pact. But given political constraints, there are two reasons in favour of creating an interparliamentary dialogue as a parallel procedure alongside the rule of law review as a medium-term solution.

First, the EP's resolution on the DRF pact suggests that there may be political will in the Parliament to create a monitoring and dialogue process that goes further than what is currently feasible for the Commission and Council. The advantage of the EP having its own procedure would be that it would be free to diverge from the more restrictive approach of the rule of law review. The EP could choose to create its own procedure and engage with Member States through national parliaments.

Second, having a dialogue between EP and national parliamentary bodies will bring added value to the rule of law review in the Council because of the nature, role and powers of parliamentary committees. It tends to be the role of parliamentary committees to hold the executive to account, especially considering that such committees contain members of parliament from opposition parties. Because of this, the interparliamentary dialogue would be inherently more likely to generate debate

between different parts of government and increase the chances that recommendations will receive some kind of follow up, for example, through hearings and parliamentary questions.

The Treaty on the Functioning of the EU and the EP's rules of procedure permit the EP to engage in regular parliamentary cooperation.[49] Given the good faith required for the process described below to function effectively, the EP would have to secure the agreement of national parliaments to carry out the exercise. Even if the agreement of all national parliaments is not forthcoming, the EP could still institute the dialogue with those parliaments that agree to take part. The agreement between the EP and national parliaments should include a commitment from the EP and national parliaments to take all steps reasonably within their fields of competence to follow up on concerns raised during the dialogue by both sides.

II.B.ii.a. Sources of information & compiling body

The EP resolution on the DRF pact indicates that the EP (unlike the Council) would be willing to monitor implementation of Article 2 values in the round. As such, the EP could use Commission country reports for its interparliamentary dialogue but would need to supplement these to the extent that they do not cover all standards associated with Article 2 values. Similarly, given the EP resolution on the DRF pact, the EP also appears prepared to use the full range of sources that will become available in the EFRIS as well as relying on information from CSOs. This may also go beyond what is acceptable in the Council.

Assuming that the European Parliament would compile its own country reports (which could build on the Commission's reports), it could give this task to the European Parliamentary Research Service (EPRS), or it could create an external group of independent experts to do so. The easiest way to do the latter could be through a simple tender procedure to contract a network of independent country experts, similarly to the manner in which the Commission established the network of independent experts on fundamental rights, noted above. The EPRS could also draw up a separate CSO paper on each country based on submissions made by CSOs for the purposes of the dialogue. The country report and the civil society summary report would together form the basis for the dialogue.

II.B.ii.b. Dialoguing body, format and follow up

A number of EP committees have areas of responsibility concerning democracy, the rule of law and fundamental rights. For example, although the Civil Liberties, Justice and Home Affairs (LIBE) committee often leads on reports, this is not always the case and the Constitutional Affairs (AFCO), Budgets (BUDG), Budgetary Control (CONT), Culture and Education (CULT), Women's Rights and Gender Equality (FEMM), and Legal Affairs (JURI) committees have all contributed to EP files on Article 2 values.[50] As such, the dialoguing body on the side of the EP could be a rule of law working group

with MEPs drawn from these committees. The EP's rule of law working group would then engage with its counterpart committee from the parliament of the Member State.[51] It would be for each national parliament to decide on the most appropriate committee, but presumably this would either be a European affairs committee, human rights committee or a mixture of both.

To have its greatest impact, the interparliamentary dialogue should take place at national level, in the parliament of the Member State under review. When EP delegations visit a Member State, this tends to attract national media attention. This in turn helps to stimulate public discussion much more than debates that take place in Brussels, to which not all national media outlets have easy access. Generating national debate among the general population would help to ensure some accountability for the government of the Member State under review, which could increase the impact of the dialogue.

Although country visits would impose a travel commitment on members of the EP's rule of law working group, it would greatly enhance the effectiveness of the dialogue. MEPs in the EP's rule of law working group could mitigate this burden by assigning smaller delegations of MEPs in the working group to different countries. This would mean that the entire working group would not have to travel to every Member State for every dialogue.

The EP could examine each Member State individually over a one or two-year cycle, with Member State reviews staggered throughout the review period. This would allow for adequate time to review each Member State, while also allowing each national parliament to take follow up measures between reviews. To allow the EP to keep track of emerging problems identified by the dialogue, it could be open to the working party to carry out a mid-term follow-up or carry out ad hoc country visits in response to developments requiring an urgent response.

The dialogue itself could be spread over four sessions spanning two days, allowing for a two-way exchange between the EP's working group and the national parliamentary committee. During the first session, the EP's representative body could discuss the country report and civil society report. MEPs would have speaking time to ask for clarification on matters of interest to them, either to request more details or enquire as to any efforts made by the government to address particular issues. During the second session, national parliamentarians could be given the opportunity, conversely, to raise their own concerns about the EU. In a third session, MEPs could address recommendations to national parliamentarians as to future action to remedy problems highlighted in the first session. In a fourth session, national parliamentarians could similarly address recommendations to the EP working group for further action at EU level.

In a follow-up written stage immediately after the dialogue meeting takes place, the national parliamentary body could communicate to the EP's rule of law working group what action it intends to take to follow up on the working group's recommendations. The EP and

national parliaments should take into account that parliamentary committees have varying degrees of power and may not be in a position to take implement specific remedial action like adopting legislation. Suitable follow up steps by the EP or national parliaments might include tabling debates, drafting parliamentary questions, producing reports, carrying out investigations and suggesting reforms. This follow-up document could form part of the dialogue in next cycle to review progress.

At the end of the review cycle of all Member States, the EP could compile a report collecting concerns about the EU gathered from all the dialogues. This report could also include an action plan for how the EP intends to follow up on issues raised. Where no follow-up action is possible, for example for reasons of lack of legal competence, the EP could explain this and justify its position.

As well as reviewing what national parliaments have done to make progress on the concerns expressed by the EP, the EP itself could use the outcomes of the dialogues as guidance on where to direct EU funding in future. For instance, if the EP identifies recurring concerns in several Member States, it could request the Commission to direct funding to CSOs working on these issues, to the extent that this is possible under existing funding programmes, or through the creation of new pilot projects.

II.B.iii. Relationship between parallel procedures

While having a rule of law review and an interparliamentary rights dialogue in parallel is not the tidiest arrangement, it may be the best that can be achieved in the current political climate. The institutions should at the very least develop means through which the different mechanisms can inform and strengthen each other, beyond merely sharing their reports and recommendations with each other. The following examples could be considered. First, a practice of coordination meetings while preparing the country reports where the Commission and relevant EP bodies share data, analysis and inform each other of points of concern on which they intend to focus. Second, the Commission might flag recommendations made to Member State executives during the rule of law review so that the EP's rule of law working party can raise these as points for national parliamentary committees to follow up. Third, the procedures could be timed in syncopation so that there is reasonably even spacing between the rule of law review and interparliamentary dialogue to ensure greater continuity of coverage.

III. Response

As noted, existing mechanisms at EU level designed to respond to systemic threats or actual persistent and serious violations of Article 2 values should remain unprejudiced by the creation of an interparliamentary dialogue or a rule of law review. Systems of regular monitoring and dialogue are designed to identify emerging problems early on so as to allow them to be remedied before they get to the point where they require the EU to use tools designed to respond to serious problems, such as the rule of law framework, Article 7 or infringement proceedings. This section will comment on the various possibilities raised by the Commission to improve the EU's 'response' to problems with the rule of law at national level.

III.A. Refinements to the rule of law framework, measures to protect the Union's budget, the Article 7 procedure and a European Parliament rule of law intergroup

III.A.i. Rule of law framework

Liberties agrees with the Commission's suggestion to refine the rule of law framework by issuing action plans, a timeline and technical support to accompany its recommendations. Liberties also agrees with the suggestion that the Commission should establish a clear time limit within which Member States are expected to address the Commission's concerns.

It can be questioned whether such refinements would make compliance with the Commission's recommendations more likely. If a situation in a Member State has reached the point where it has created systemic threats to the rule of law, it is likely that the government is acting in bad faith and such additional measures by the Commission are unlikely to prompt a recalcitrant government to change its position. Nevertheless, such steps could serve to make it clearer to the Member States in the Council that the Commission has done all it can to exhaust avenues for negotiation and cooperation and that there is nothing to be gained by prolonging negotiations under the rule of law framework. This in turn can help to create the political will in the Council to move ahead with proceedings under Article 7 and help the Commission or the European Parliament to justify a decision to activate Article 7.

A further refinement to the rule of law framework would be to ensure that the Commission's understanding of the rule of law is interpreted more broadly beyond a narrow focus on the state of the judiciary. As discussed above, the most recent Annual Growth Survey also refers to the independence of the media and relations with civil society. Similarly, the Commission's Communication on further strengthening the rule of law similarly makes reference to media pluralism and independence and the civic space as key to maintaining healthy democracies. If the rule of law framework is a precursory step to Article 7, then the substantive scope of the framework should include Article 2 values in the round, because this matches the scope of Article 7. But if this is not politically feasible, the Commission should at least con-

sider expanding the substantive scope of the framework to include media pluralism and independence and the civic space, as well as other closely related issues such as discrimination and the integrity of the electoral system and freedom of assembly, as discussed above.

The Commission Communication also asks whether the rule of law framework could be further improved by deepening engagement with specialised international organisations such as the Venice Commission and the OSCE's Office for Democratic Institutions and Human Rights (ODIHR). There have been numerous instances where discussions between the Commission and Member States have been aided by analyses of national legislation by the Venice Commission. However, it seems to be relatively rare for the Commission to request such opinions, even though the EU is entitled to do so.[52] Opinions issued in recent years by the Venice Commission on Member State legislative reforms concerning Article 2 values tend to be requested by bodies within the Council of Europe or the national government itself.[53] The Commission could establish a practice of formulating such requests as a matter of course in situations where the Commission has triggered or is assessing whether to trigger the rule of law framework. Presumably, if the Commission adopted such a practice it would result in greater demands being placed on the Venice Commission. The latter could request assistance from ODIHR to increase its capacity to issue opinions, given that ODIHR may produce joint opinions (and has done so in the past) with the Venice Commission.[54] If the Commission were to broaden the scope of the rule of law framework it could also informally request ODIHR to send election observation missions to Member States where there are reasons to question the integrity of the electoral system.[55]

III.A.ii. Protection of the Union's budget

The Commission's proposal on the protection of the Union's budget is yet to be adopted. This legislation would offer the EU a potent tool with which to protect the rule of law in situations where generalised deficiencies place the integrity of EU funds at risk. The potential weakness of the proposal is that it contains no effective means of ensuring that EU funds continue to flow to innocent beneficiaries once a decision is taken to pause the flow of EU funding to national authorities. While it is legally sound for the Commission to underline that national authorities remain responsible to ensure funds reach beneficiaries in this situation, such an argument is unlikely to be persuasive to the public. This would offer targeted governments an easy opportunity to turn public opinion against the EU. Liberties repeats its suggestion that where the flow of funds is stopped, the Commission should contemplate creating an executive agency to take direct management of a least some projects where this is practically feasible and innocent beneficiaries would otherwise be subject to undue hardship.[56]

III.A.iii. Article 7 proceedings

The Council could also consider a measure to improve the efficacy of Article 7 hearings in

the General Affairs Council. Currently, there does not appear to be a working party in the Council dedicated to preparing national ministers ahead of discussions. Creating a rule of law working party in the Council could help to address this as well as allowing for preparatory discussions at a more technical level to clarify points of contention. This could be the same working party that prepares the Council for the rule of law review described above.

III.A.iv. European Parliament rule of law intergroup

The European elections have produced an EP that will have greater difficulty responding to threats to Article 2 values. The overall number of MEPs belonging to parties or groups that threaten Article 2 values has increased. More importantly, inside the three largest political groups (the EPP, S&D group and ALDE), parties governing Member States that have been criticised by EP resolutions for threatening Article 2 values have grown in strength, size and/or status relative to the political groups that host them in the EP.[57] During the 2014-2019 term, the EP has criticised the leadership of: the Czech Republic and Romania (part of the ALDE group), Hungary (part of the EPP group), Malta, Romania and Slovakia (all part of the S&D group) and Poland (part of the ECR group).

Political groups tend to close ranks to protect their member parties from criticism. This practice is likely to become more common considering the increased influence of these parties in their host groups. Together with the growth in the overall number of MEPs inimical to Article 2 values overall, this will make it more difficult for the EP to gather the votes it needs to adopt resolutions targeting problems in specific Member States, and make it particularly difficult to activate Article 7, which requires a two-thirds majority.

Even though a large majority of MEPs in the EP belong to parties that ostensibly support Article 2 values, it will be difficult for them to coordinate to uphold the rule of law unless they are able to work across traditional political lines. The creation of an intergroup on the rule of law would facilitate cooperation and coordination across political group divisions. As noted (in II.B.ii.b.), rule of law protection is an issue that is not currently dealt with by a single committee in the EP. This can make coordination on the rule of law in the EP more difficult. An intergroup could provide an answer to this because it offers a forum and an infrastructure for MEPs from different political groups to meet regularly, exchange views and cooperate. An intergroup could, for example make it easier: for political groups to reach agreement on resolutions following debates (where there has been no report-writing process through parliamentary committees); for interested MEPs from all groups to be briefed regularly on situations of concern; to gather cross-group support for parliamentary questions; for greater coordination between groups on relevant legislative files; for cross-group statements and joint letters.

III.B. Rule of law-related legal proceedings

Member States' obligations relating to the protection of Article 2 values are often left implied or are not elaborated in great detail in primary and secondary EU law. The scope and consequences of these obligations do not always become apparent until specific legal provisions are read in light of particular articles of the Charter of Fundamental Rights. The Commission has tended to exercise a great deal of caution in deciding whether to initiate infringement proceedings on matters where the interpretation of EU law is not already clear. As such, the Commission has sometimes been slow to initiate infringement proceedings on matters related to the protection of Article 2 values. For example, commentators had argued for a number of years that there existed a substantive obligation on Member States in EU law to ensure the independence of their national courts.[58] But the Commission was not prepared to launch an infringement procedure based on this obligation (which happened recently against Poland)[59] until the law had been clarified by the European Court of Justice (ECJ) though a preliminary reference.[60] Having said this, the Commission has shown some recent signs that it may be prepared to adopt more teleological interpretations of the law. For instance, its infringement procedure against Hungary over legislation designed to restrict funding for rights and democracy groups.[61]

The Commission could consider two measures that could result in cases being brought more readily before the ECJ on Article 2-related issues. First, it could consider performing a fundamental rights index of EU law. This would involve analysing all areas of existing EU law with a view to identifying provisions pertinent to the protection of the rights protected in the Charter of Fundamental Rights. Take, for example, the notion of market dominance in the area of competition law as applied to the media market. Currently, this notion is used to protect consumers from abusive practices such as price fixing. But the concept of market dominance interpreted in light of Article 11 (on freedom of expression and media freedom and pluralism) of the Charter of Fundamental Rights arguably creates a legal obligation to analyse the dominance of media owners from the perspective of the plurality of public debate rather than market share in purely economic terms. In other words, EU competition law could be applied to promote greater media pluralism. Similar avenues could be explored in other areas of EU law. For example, a recent suggestion notes that the Commission could rely on Article 325 of the Treaty on the Functioning of the EU to combat corruption.[62]

The Commission could commission a fundamental rights index from external experts and include a process of peer review of the index by former ECJ judges. The purpose of the peer review would be for former judges to offer their views on the feasibility of suggested interpretations of EU law being accepted by the ECJ. Creating a fundamental rights index of EU law along these lines could help the Commission identify quickly which provisions of EU law could be applicable to emerging threats to Article 2 values, and whether such interpretations are likely to be accepted as robust legal interpretations by the ECJ.

A second measure that the Commission could take is to support legal action by CSOs. By bringing cases through the national courts that lead to preliminary references to the ECJ, CSOs could prompt the clarification of areas of EU law related to Article 2 values. This in turn could help provide legal clarity to the Commission to inform decisions over whether to begin infringement proceedings. Currently, CSOs do not make full use of EU law in the national courts as a means of protecting Article 2 values. This is partly because in-house expertise on EU law among rights and democracy CSOs, even those with considerable legal expertise, is low. Such CSOs tend to have expertise on national constitutional law and the European Convention on Human Rights rather than EU law. The Commission could improve the situation by directing funding towards training and capacity building among CSOs on EU law, perhaps under the Rights and Values programme. A further obstacle to cases being brought by CSOs is the lack of funding available for litigation. Even if CSOs have in-house expertise, it is common for them to also contract external lawyers to assist with cases. Although some lawyers offer CSOs 'low bono', rather than commercial, rates, these costs remain challenging to cover. The Rights and Values programme lists 'advocacy' among activities eligible for funding. The preamble of the Regulation establishing the programme lists litigation as an example of an advocacy activity.

Conclusion

This paper has offered the Commission suggestions as to how it could improve protection for Article 2 values both through top-down and bottom-up promotional, preventive and responsive measures. The EU institutions and national governments should also consider broader economic and social measures that address the root causes behind growing public support for or acquiescence to measures taken by governments to dismantle protection for Article 2 values. A recent paper by Liberties explores broader measures to address these causes including addressing growing socio-economic inequality, increasing contact between marginalised groups and the majority population and promoting civic education.[63] To secure Article 2 values in the long-run, such measures are an important compliment to measures improving the EU's tools to promote a rule of law culture and prevent and respond to potential and actual threats to the rule of law.

Notes

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6 Open Society Foundations, 'Mapping digital media in the European Union', October 2012.

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8 The International Covenant on Civil and Political Rights (999 UNTS 171), the International Covenant on Economic Social and Cultural Rights (993 UNTS 3), the Convention on the Elimination of All Forms of Racial Discrimination (660 UNTS 195), the Convention on the Elimination of Discrimination Against Women (1249 UNTS 13), the Convention Against Torture (1465 UNTS 85) and the Convention on the Rights of the Child (1577 UNTS 3).

9 For an overview of 'special procedures' see OHCHR website.

10 UN General Assembly Resolution 60/251, Human Rights Council, UN Doc. A/RES/60/251, 3 April 2006; Human Rights Council Resolution 5/1, Institution-building of the United Nations Human Rights Council, 18 June 2007. For further information and documentation see: http://www.upr-info.org/en.

11 Convention for the Protection of Human Rights and Fundamental Freedoms 1950, CETS 5, consolidated version.

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13 European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, 1987, CETS 126.

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53 Opinions issued by the Venice Commission are collected on its website.

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The Civil Liberties Union for Europe (Liberties) is a non-governmental organisation promoting and protecting the civil liberties of everyone in the European Union. We are headquartered in Berlin and have a presence in Brussels. Liberties is built on a network of national civil liberties NGOs from across the EU. Unless otherwise indicated, the opinions expressed by Liberties do not necessarily constitute the views of our member organisations.

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