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# **Communication from the European Commission on further strengthening the Rule of Law within the Union: state of play and possible next steps**

**CONTRIBUTION BY THE OPEN SOCIETY EUROPEAN POLICY INSTITUTE**

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## **Summary of recommendations**

### **PROMOTION**

1. The Commission should formally acknowledge that free civil society is essential for the rule of law.
2. EU action to strengthen rule of law within the Union should set a frame for EU action to respect, protect and promote civil society, in line with the recommendations presented by civil society itself.
3. As the new European Parliament takes shape following the European elections, the voice of national parliaments is essential to keep rule of law high on the political agenda moving forward. Its legitimacy is compounded if national parliaments join their voices.
4. Through COSAC<sup>1</sup>, national parliaments could set up a platform on the rule of law, together with the European Parliament to coordinate joint initiatives and act as a focal point for other EU institutions and civil society.
5. For peer review to serve as a way to encourage constructive criticism in the Council on rule of law issues within the European Union, the Council first needs to build ownership of the rule of law standards set out by the Council of Europe.
6. Regular rule of law reviews in the Council could feed into an EU inter-institutional action plan on rule of law.
7. Dedicated resources and better coordination are needed in the Council to build knowledge within the institution and to facilitate collective engagement in promoting and protecting the rule of law within the EU.

### **PREVENTION**

1. A common monitoring system assessing respect for the rule of law in member states and EU institutions would enhance the legitimacy and rigor of EU action on rule of law
2. An EU-wide information gathering mechanism would seek to highlight data the EU has compiled on the rule of law and bring them together under a common evaluative framework.
3. Piloting of the European Parliament proposals could prepare the ground for a wider Article 2 TEU monitoring that would reflect the interrelationship between fundamental EU values, including the rule of law, fundamental rights and democracy.
4. The Venice Commission and the EU Fundamental Rights Agency are key players for providing uniform data on rule of law to the EU institutions and the member states.
5. To strengthen the rule of law within the Union, the Commission must review its rule of law framework to build more transparency and accountability into the system.
6. The rule of law framework should include clear guidance on methodology, timeline, involvement of stakeholders, including outreach and feedback, communication on

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<sup>1</sup> The Conference of Parliamentary Committees for Union Affairs (COSAC) brings together the EU affairs committees of national Parliaments, as well as Members of the European Parliament.

elements of substance at regular intervals and systemic connections to other EU rule of law mechanisms.

7. The EU should pursue the inclusion of a strengthened requirement for rule of law conditionality in the new EU budget period as proposed by the Commission, with public reporting about assessments made of member states' rule of law situation and increased support to civil society and media working on corruption.

## **RESPONSE**

1. The Commission should develop specific guidance to flesh out how infringement proceedings can contribute to a value-driven EU policy.
2. The Commission should deploy appropriate resources to ensure that EU value-related infringements are effectively prioritised and build more transparency and accountability into the proceedings to strengthen their ability to uphold the values on which the Union is founded.
3. The Commission should pay particular attention to the preventive dimension of infringement proceedings related to the rule of law given the potentially irreversible consequences of a violation; in particular, it should consider recommending suspensive measures early on and be more proactive in requesting interim measures at the judicial stage.
4. A thorough critical evaluation of the article 7 procedure, grounded in recent experience, is needed to devise the operational steps that are urgently needed to respond to undermining of EU values, including rule of law, within the Union.
5. Under the leadership of the EU Presidency and in concertation with the Commission, Parliament and civil society, the Council should elaborate rules and a work plan that enable a structured follow-up to the reasoned proposals of the Commission and the Parliament.
6. In addition to regular rule of law reviews, extra meetings should be devoted to Council-led enforcement processes.

# 1. Introduction

The initiative of the Juncker Commission to issue a Communication on *Further strengthening the Rule of Law within the Union*<sup>2</sup> comes at the end of an institutional cycle marked by the actual use of EU mechanisms on the rule of law. For the first time, we have seen the activation of the rule of law framework and of article 7 TEU, as well as a series of ‘value-related’ infringement proceedings<sup>3</sup> to address rule of law deficiencies in member states. This initiative provides an opportunity for the current Commission to take stock of the institutional, political and legal developments witnessed during its term and to reflect back on the soundness of the EU processes, in order to secure solid ground for EU action on rule of law in the next period.

OSEPI welcomes the three-fold approach of the Communication around *promotion, prevention and enforcement* of the rule of law. Echoing the duty of states under international human rights law to “protect, promote and implement all human rights and fundamental freedoms”, it puts values and responsibility first and above considerations relating to EU competence and power dynamics. The inter-institutional and national perspectives, as well as the reference to the role played by the Council of Europe and civil society, that run throughout the draft, further suggest a refreshing outward looking and inclusive approach to the issue. Finally, we welcome the recognition from the outset of the Communication that the values of rule of law, democracy and fundamental rights are interlinked and mutually reinforcing.

Such premises echo the parameters proposed by civil society organisations for the debate on EU values.<sup>4</sup> They are important to avoid that disagreements between EU institutions about their competence to act take prominence over the joint responsibility of all EU institutions to work together towards the “Union's aim [...] to promote peace, its values and the well-being of its peoples” enshrined in Article 3(1) TEU. They further underpin the mission of loyal cooperation between all EU institutions and between EU institutions and the member states.<sup>5</sup>

- ✓ The Commission should ensure that the objective set out in article 3(1) TEU is spelled out in all future communications on strengthening the rule of law within the EU.

Those premises also point to key cross-cutting themes that the Commission needs to address as a matter of priority to strengthen the rule of law in the Union:

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<sup>2</sup> [Communication on Further strengthening the Rule of law within the Union](#), 3 April 2019.

<sup>3</sup> The expression was used by the 1<sup>st</sup> Vice-President in his presentation on Hungary before the European Parliament on 30 January 2019: “Rule of law and fundamental rights in Hungary, developments since September 2018”

<sup>4</sup> [A Fundamental Rights Strategy for the European Union](#), Open Society European Policy Institute (OSEPI), May 2014; [Amnesty International's contribution to the European Commission's public consultation on the Debate on the future agenda for Home Affairs policies: An open and safe Europe – what next?](#), Amnesty International, January 2014; [Strengthening the European Union's response to human rights abuses inside its own borders](#), Human Rights and Democracy Network (HRDN), August 2013; [Joint NGO statement on the upcoming European Commission Communication on safeguarding the rule of law in the EU](#), HRDN, March 2014.

<sup>5</sup> Article 13 (1) TEU: The Union shall have an institutional framework which shall aim to promote its values, advance its objectives, serve its interests, those of its citizens and those of the Member States, and ensure the consistency, effectiveness and continuity of its policies and actions.

Article 4(3) TEU: Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks, which flow from the Treaties.

- Ownership of rule of law standards by all EU institutions and member states
- Shared sense of purpose among EU institutions and member states
- Holistic approach to rule of law combining promotion, prevention and enforcement
- Interconnectivity between the various instruments of the EU's toolbox.

## **2. Promoting rule of law within the Union**

### **2.1 The role of civil society**

Across the globe, a consistent pattern is apparent. States governed by the rule of law have vigorous civil society organizations. By contrast, in countries where the rule of law is weak, civil society is weak, often because the space for civil society is highly restricted. This is more than a coincidence. Civil society organizations actively contribute to the protection of fundamental rights and the holding of governments to account. As such, their work constitutes an element of the rule of law.

As stated by Maina Kai, former UN Special Rapporteur on the rights to freedom of peaceful assembly and of association: “Civil society’s work in promoting the rule of law, holding governments and businesses accountable, establishing limits to the abuse of power, transforming power relationships and demanding redress is possibly its most recognisable role”.<sup>6</sup>

In times of crisis, civil society organisations are often the most ready and able to inform public opinion about the dangers of rule of law backsliding, and advocate for the rule of law in national and international fora. For this reason, they are often one of the first targets in efforts to undermine the rule of law.<sup>7</sup>

We welcome signs of acknowledgment of the role of civil society as a promoter and guardian of rule of law throughout the Commission’s Communication. However, the Commission has not yet explicitly acknowledged that civil society is essential for the rule of law itself.

- ✓ The Commission should formally acknowledge that a free civil society is essential for the rule of law.

Recognising a free civil society as constitutive of the rule of law obliges the EU and its member states to support and preserve its space to exist and work in full freedom as part of its effort to strengthen the rule of law within the EU.

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<sup>6</sup> Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kai, Human Rights Council, Thirty-fifth session 6-23 June 2017 (para.39)

<sup>7</sup> CEPS Research paper by Małgorzata Szuleka: [First victims or last guardians? The consequences of rule of law backsliding for NGOs: Case studies of Hungary and Poland](#), April 2018

At the end of last year, a roadmap for EU action in support of civil society was presented by a large group of civil society organisations, including EU networks, national organisations and private donors.<sup>8</sup>

This roadmap sets out five asks for the EU institutions:

1. Recognise and speak up for civil society, including by standing alongside targeted individuals and organisations.
2. Secure an enabling space for civil society, including through: a conducive legal and regulatory environment; smart and robust funding schemes for national NGOs promoting rule of law, including core funding for advocacy; and genuine engagement with civil society that values civic participation.
3. Monitor, document and analyse the trends regarding freedom of civil society in the EU, to assess regularly where to invest efforts at national and EU level.
4. Protect civil society from attacks, and offer effective protection schemes.
5. Take legal action to uphold the role of civil society organisations, including through a proactive value based approach to infringement proceedings.<sup>9</sup>

These recommendations were put together as the EU was witnessing direct attacks against the rule of law, including repression of civil society in Hungary and Poland, in violation of EU law.

- ✓ EU action to strengthen rule of law within the Union should include EU action to respect, protect and promote civil society, in line with the recommendations presented by civil society itself.

## **2.2 Involvement of national parliaments and role of the Conference of Parliamentary Committees for Union Affairs of Parliaments of the European Union (COSAC)**

This reflection on the rule of law launched by the Commission comes at a time when EU institutions are looking in different directions for action on the rule of law, putting to the test their capacity to unite citizens and governments around the founding values of the EU. In this context, national parliaments can act as a powerful spur in stimulating a European debate, as well as accountability of EU leaders. In a majority of member states, parliaments remain a democratic forum that is uniquely placed to bring the debate on EU values to citizens and to challenge their government actions to promote rule of law at EU level. Their involvement can only reinforce the action of the European Parliament, which has been at the forefront of defending EU values.

The Communication points to debates and resolutions on rule of law crisis in Hungary, Poland and Romania at the initiative of the French, Dutch and Belgian parliaments. These good practices should be encouraged and could be replicated across Europe to create a critical mass of political support for more action to promote rule of law within the EU.

- ✓ As the new European Parliament takes shape following the European elections, the voice of national parliaments is essential to keep rule of law high on the political

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<sup>8</sup> [Civil society on the frontline – 5 points for EU action](#)

<sup>9</sup> See above

agenda moving forward. Its legitimacy is compounded if national parliaments join their voices.

The Conference of Parliamentary Committees for Union Affairs of Parliaments of the European Union (COSAC), that meets twice a year in the country holding the Presidency of the Council, could act as a catalyst and take up the issue as a major agenda item. With the support of its secretariat in Brussels, the COSAC could keep track of the various parliamentary initiatives on rule of law in Europe, stimulate inter-parliamentary initiatives and collaborate with the European Parliament to make this work visible in the EU debate. Mixed parliamentary delegations to European countries could foster knowledge and a common rule of law culture.

Through COSAC, national parliaments could set up a platform on the rule of law, together with the European Parliament to coordinate joint initiatives and act as a focal point for other EU institutions and civil society.

### **2.3 Rule of law reviews in the Council**

The Communication refers to peer review between member states as a possible way to promote common EU approaches to the rule of law. The implicit acknowledgment that there is no common approach in the Council, is one of the challenges that the Commission must address. At this stage, we believe that the introduction of peer review alone risks exacerbating divergences between member states' approaches rather than bringing them together. As stated by the Council of Europe: "For the sake of fairness and credibility, the criteria used for the assessment should pre-exist the exercise and should be long-standing and recognized by all member states."<sup>10</sup>

- ✓ For peer review to serve as a way to bind member states and encourage constructive criticism in the Council on rule of law issues within the European Union, the Council first needs to build ownership of the rule of law standards set out by the Council of Europe.

One step towards enhancing a culture of rule of law would be to revisit the current rule of law dialogue in the Council. Instead of the current practice of holding an annual open-ended discussion around one theme, the Council would undertake a regular rule of law monitoring exercise based on reports from authoritative bodies on the state of rule of law within the Union, with a view to identifying priority areas for follow-up action. Such assessment could feed into an inter-institutional action plan on rule of law, mirroring the promising practices existing at national level in the area of fundamental rights.<sup>11</sup>

- ✓ Regular rule of law reviews in the Council could feed into an EU inter-institutional action plan on rule of law.

The reviews could encompass different levels of discussions:

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<sup>10</sup> Council of Europe's secretariat comment to the Communication from the Commission on further strengthening the rule of law within the Union.

<sup>11</sup> See 2014 FRA's proposal for an internal strategic framework on fundamental rights, page 14



1. Examination of general trends in the EU region: results should feed into the priority-setting exercise of the Council, providing guidance on rule of law issues to put forward on the EU agenda.
2. Examination of the situation in member states: to avoid political bias, such reviews could be based on a set rotation of states.
3. Examination of situations where international and European expert bodies identify a particular crisis or structural problem in one or several member states. Such discussion should seek to determine what preventive or enforcement mechanism can be activated at EU level.

Until now, the practice has been to discuss rule of law exclusively at the political level: COREPER and General Affairs Council (GAC). As for the negotiation of the Commission's legislative proposal on protecting the EU's financial interests from the risk of rule of law deficiencies, it is led by working groups in charge of budget and finance, with no formal involvement of Council working parties dealing with justice or social issues. It would be important to include tall relevant Council configurations in rule of law related discussion. It is also high time to enable and empower the working party on fundamental rights (FREMP) to become a strong actor that can properly assist and guide the Council's action on EU values, including rule of law.<sup>12</sup> Extra resources should also be made available within the Council's secretariat to prepare the ground for the discussions on rule of law in the Council. Furthermore, the Council should establish a clear line of communication with civil society to channel their input. Several good practices can be drawn from the systems put in place by UN and Council of Europe bodies in this regard.<sup>13</sup>

- ✓ Dedicated resources and better coordination are needed in the Council to build knowledge within the institution and to facilitate collective engagement in promoting and protecting the rule of law within the EU.

## **3. Preventing threats to the rule of law within the Union**

### **3.1 EU-wide monitoring of rule of law**

A uniform and objective mechanism for gathering data on respect for the rule of law by member states and EU institutions would have several advantages. It could:

- help the institutions converge on the means and methodologies for assessing compliance with rule of law
- serve as a common baseline in support of preventive and enforcement mechanisms for the rule of law

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<sup>12</sup> See related NGO recommendations in [Strengthening the European Union's response to human rights abuses inside its own borders](#), Human Rights and Democracy Network (HRDN), August 2013

<sup>13</sup> See for instance: [A Practical Guide for Civil Society – Universal Periodic Review](#), UN Human Rights Office of the High Commissioner

- redress the post-EU accession accountability gap and the perceived imbalance between the scrutiny applied to ‘old’ and ‘new’ member states.
- ✓ A common monitoring system assessing respect for the rule of law in member states and EU institutions would enhance the legitimacy and rigor of EU action on rule of law.

While some monitoring exists at EU level (Justice Scoreboard, European Semester, Cooperation and Verification Mechanism (CVM), rule of law Framework), none of them can function by itself as a comprehensive monitoring of rule of law within the Union. A dedicated and uniform system compiling relevant data from existing EU mechanisms would give more visibility to the analysis or information that is currently in the public domain but scattered over a number of different reports and processes. For example, it is no easy task to extract rule of law relevant information from the European Semester cycle of economic, fiscal and social policy coordination.

- ✓ Together with the authoritative assessments of the Council of Europe and UN monitoring bodies, compiling rule of law relevant EU data could serve to connect the different EU mechanisms together in a more coherent and purposeful way. An EU wide information gathering mechanism would seek to highlight data the EU has compiled on the rule of law and bring them together under a common evaluative framework.

While OSEPI would favour a broader Article 2 TEU focus for such a data gathering mechanism, a narrower focus on rule of law – as defined by the European Commission – would be a good first step. We would however, recommend parallel reflections on how to assess the interrelationship between the rule of law, fundamental rights and democracy. This could be explored through piloting of the European Parliament’s proposal for an EU Pact for democracy, the rule of law and fundamental rights (EU Pact for DRF).<sup>14</sup>

- ✓ Piloting of the European Parliament proposals could prepare the ground for a wider Article 2 TEU monitoring that would reflect the interrelationship between fundamental EU values, including the rule of law, fundamental rights and democracy.

Several suggestions have been made as to which body could such rule of law data gathering and framing. The European Fundamental Rights Agency (FRA) and the Council of Europe’s Venice Commission are obvious candidates considering their mandate and expertise. The work could also be assigned to new EU-independent expert body or contracted to the Venice Commission, through a partnership between the EU and the

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<sup>14</sup> [European Parliament resolution of 25 October 2016 with recommendations to the Commission on the establishment of an EU mechanism on democracy, the rule of law and fundamental rights \(2015/2254\(INL\)\)](#)

Council of Europe. Clear lines of communication with civil society should be established to channel their input.

- ✓ The Venice Commission and the EU Fundamental Rights Agency are key players for providing uniform data on rule of law to the EU institutions and the member states.

### **3.2 The Commission's rule of law framework**

The creation of the Commission's rule of law framework was an important step to blend the principle of rule of law in the EU's political, institutional and legal landscape. Its use as a 'pre-article 7' internal Commission assessment in the case of Poland conferred to it some credibility as a practical tool, but it failed as a prevention mechanism. Moreover, unclarity about the internal choices that led the Commission to act on Poland and not on Hungary, as well as what evidence was decisive and what led the Commission to define the scope of the exercise, puts in jeopardy its credibility as a reliable EU tool to prevent future threats to the rule law within the Union.

- ✓ To strengthen the rule of law within the Union, the Commission must review its rule of law framework to build more transparency and accountability into the system.

The recent warning issued by the Commission First Vice President to the Romanian government to upgrade the scrutiny ongoing under the Cooperation and Verification Mechanism (CVM) to the rule of law Framework<sup>15</sup> illustrates the opacity of the current system. There is indeed no information available on how the CVM monitoring is connected to the Framework, what are the thresholds to switch from one to another, what other avenues explored (for example infringement proceedings), what assessment is now being carried out by the Commission and the timeline of the process. The Romanian example also highlights the importance of corruption as a key issue to assess respect of rule of law, which needs further investment from the Commission.

In the absence of clear guidelines on what determines the choices made by the Commission, it is very difficult for external stakeholders, including civil society organisations, to know when and where to channel the information they have on emerging threats to the rule of law and what will be the impact of their contributions. There is not even a mention of civil society among the sources of expertise listed in the Framework. While recent history shows that inputs from NGOs were decisive in informing the Commission's work on Poland, there is no way to trace that collaboration or hold the Commission accountable for whether and how it has or will use these contributions.

- ✓ The rule of law framework should include clear guidance on methodology, timeline, involvement of stakeholders, including outreach and feedback, communication on elements of substance at regular intervals and systemic connections to other EU rule of law mechanisms.

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<sup>15</sup> <https://www.rferl.org/a/eu-warns-romania-of-legal-steps-over-moves-to-weaken-rule-of-law/29938077.html>

### **3.3 EU funds and rule of law**

The Commission’s proposal for a new regulation on the “Protection of the Union's budget in case of generalised deficiencies as regards the rule of law in the Member States” presented in May 2018 represents an innovative approach to strengthening the rule of law. It introduces rule of law safeguards to protect the integrity of the EU budget, and provides for financial sanctions such as suspension of EU funds, in cases where rule of law deficiencies in a member state threatens the sound management of EU funds. It provides a proportionate deterrent to governments tempted to undermine the rule of law by making clear that access to EU funding requires assurances that effective rule of law standards are in place. In this context: “The main task of the negotiations is [therefore] to put in place enforcing mechanisms that ensure that conditionality acts as a deterrent, and not leave the door open for escalation and the creation of a *fait accompli* by member states, such as in the case of Poland and Hungary.”<sup>16</sup>

As with other mechanisms, the proposal raises the issue of the monitoring of rule of law in member states. While it provides for some benchmarks, the proposal falls short of designing a transparent system for the monitoring carried out by the Commission that provides for the participation of civil society. The negotiators should take this opportunity to endorse the good practices identified in the field of monitoring. This new monitoring mechanism could subsequently be incorporated into a dedicated and streamlined monitoring mechanism (see Section 3.1).

The proposal further reinforces the need for increased financial support for civil society actors, including NGOs and investigating journalists, documenting and combating corruption, fraud and mismanagement of funds as a way to strengthen rule of law.

- ✓ The EU should pursue the inclusion of a strengthened requirement for rule of law conditionality in the new EU budget period as proposed by the Commission, with public reporting about assessments made of member states’ rule of law situation and increased support to civil society and media working on corruption.

## **4. Responding to threats to the rule of law**

### **4.1 Infringement proceedings**

Infringement proceedings (Article 258 TFEU) are an indispensable and remarkable enforcement tool, but a large untapped potential remains to be realised where EU values are violated in the field of application of Union law.

- ✓ The Commission should develop specific guidance to flesh out how infringement proceedings can contribute to a value-driven EU policy.

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<sup>16</sup> <https://institutdelors.eu/wp-content/uploads/2018/04/BreachesoftheRuleofLaw-Michelot-March18.pdf>

OSEPI has examined this untapped potential and put forward a series of recommendations to unleash it, focusing on infringements as a tool to enforce fundamental rights.<sup>17</sup> By promoting a more transparent, more proactive and more principled approach to value-related infringements, these recommendations contribute to strengthening the rule of law within the Union.

The series of legal actions launched by the Commission concerning rule of law and human rights in Hungary and Poland show a willingness of the Commission to make more use of infringements to enforce EU values.

The reflection process on rule of law within the Union provides the opportunity to set the groundwork for new practices within the next Commission, in line with the recommendations summarised below.<sup>18</sup>

1. In order to ensure that priority is effectively given to cases “raising issues of principle which have particularly far-reaching negative impact on citizens” as the Commission committed to<sup>19</sup>, the Commission should start collecting data on the role played by infringement proceedings in upholding the Charter of Fundamental Rights.
2. The communications on the handling of relations with the complainant in respect of the application of Union law, remain short of what is prescribed by the Council of Europe concerning the exercise of discretionary powers by administrative authorities. In a further update of these communications, the Commission could pledge to comply with the six “Basic Principles” listed in the Council of Europe’s Recommendation<sup>20</sup>.
3. The right of the complainant to have access to the documents related to the infringement procedure has been interpreted narrowly. The arguments justifying a refusal to provide access to the documents until the finalisation of the procedure should be reexamined. The result of the current practice is that the Commission may be deprived from a useful (and potentially decisive) source of information, allowing it to assess more rigorously the presentation of the facts by the member state concerned. The current practice is at odds with the status of the right of access to information held by public authorities as a human right. It also does not take into account the specific role of NGOs pursuing public interest objectives - particularly in the field of human rights - in ensuring transparency and accountability in the Commission’s exercise of its powers under Article 258 TFEU.

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<sup>17</sup> Infringement Proceedings as a Tool for the Enforcement of Fundamental Rights in the European Union, OSEPI, October 2017.

<sup>18</sup> For background, analysis and more details on the recommendations, please see the report (footnote above)

<sup>19</sup> “*The Commission is determined to use all the means at its disposal to ensure that the Charter is adhered to by the Member States when they implement Union law. Whenever necessary it will start infringement procedures against Member States for non-compliance with the Charter in implementing Union law. Those infringement proceedings which raise issues of principles which have particularly far-reaching negative impact for citizens will be given priority.*” See page 10, Strategy for the effective implementation of the Charter of Fundamental Rights by the European Union, Communication by the Commission, 2010.

<sup>20</sup> Recommendation N° R (80)2

4. Directives already systematically impose on the member states a duty to inform the Commission about the implementation measures they adopt. Building on this existing practice, the Commission could require that the information to be provided by the member state include a statement as to how fundamental rights and rule of law were taken into consideration in the choice of the implementation measures. This would allow the Commission to be alerted at an early stage where the implementation of EU legislation may raise fundamental rights or rule of law issues in certain domestic settings.
- ✓ The Commission should deploy appropriate resources to ensure that EU value-related infringements are effectively prioritized and build more transparency and accountability into the proceedings to strengthen their ability to uphold the values on which the Union is founded.

Infringement proceedings carry an important preventive dimension that can be effective in enforcing rule of law.

First, infringement proceedings present a major advantage that that they can operate preventively, i.e. forcing a State to comply with the requirements of EU law before specific measures are adopted that may affect individuals. This advantage is particularly important in the area of fundamental rights and the rule of law where, given the potentially irreversible consequences of a violation, compensation cannot be seen as equivalent to prevention.

In addition, the process itself is, to a large extent, geared toward prevention. The initial non-judicial stages of infringement proceedings allows room for negotiating some changes in the conduct of the State. In particular, the Commission may at this stage issue a recommendation that the State concerned should suspend a measure or adopt a particular conduct to put an end to the violation. It is not binding on the State but by choosing not to comply, it faces the risk of infringement proceedings leading to a finding of non-compliance. The Commission may also chose to impose very short deadlines for the State to respond to its warnings, therefore increasing the pressure on it to comply, so to avoid judicial proceedings. Finally, once the infringement action is filed before the Court, the Commission may request from the Court under that to avoid serious and irreparable harm, the Court grant provisional measures. In contrast to the recommendations that can be addressed during the first stage, such provisional measures are obligatory for the State concerned. As shown in the case of Poland<sup>21</sup>, such interim measures can be quite effective to stop rule of law violations.

- ✓ The Commission should pay particular attention to the preventive dimension of infringement proceedings related to the rule of law given the potentially irreversible consequences of a violation; in particular, it should consider recommending suspensive measures early on and be more proactive in requesting interim measures at the judicial stage.

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<sup>21</sup> [Poland must immediately suspend the application of the provisions of national legislation relating to the lowering of the retirement age for Supreme Court judges](#), Court of Justice of the European Union, Press Release No 159/18, 19-10-2018.

## 4.2 Article 7 TEU

The fact that article 7 TEU, which is commonly referred to as EU’s “nuclear option”, was activated for the first time in two cases in the last couple of years says a lot about the urgency of strengthening rule of law within the Union. This field requires urgent and substantive investment from all the EU institutions. This includes tacking the Article 7 process seriously as a tool to prevent and remedy serious threats and actual attacks on EU values within member states.

Considering the ongoing cases regarding Poland and Hungary, it is in our view undeniable that Article 7 TEU has shown its power to exert political pressure on the State concerned, but more research will be needed to understand how the pressure played out and in particular, how it increased the legitimacy and actual use of other preventive and enforcement EU tools, such as infringement proceedings.

In the meantime, the EU, with the Council in the forefront, is now struggling to make the Article 7 process a meaningful accountability process that serves to remedy the rule of law deficiencies on the ground, harming the full exercise of rights by the people.

- ✓ A thorough critical evaluation of the article 7 procedure, grounded in recent experience, is needed to help devise the operational steps that are urgently needed to respond to undermining of EU values, including rule of law, within the Union.

The following recommendations from the advocacy practice of civil society organisations<sup>22</sup> and expert legal analysis, provide some suggestions on how to strengthen the process ongoing in the Council. They were developed with a focus on the case of Hungary but are valid for Poland and any future article 7 case.

- The Council should ensure that hearings are held with representatives of the member state concerned, in a format that allows for an in-depth scrutiny of the situation in the member state concerned.
- To this end, the Council should elaborate rules on the conduct of the hearings to ensure that the timing and scope of interventions allow for a genuine exchange.
- The Council could also consider that ministers are supported by national experts on rule of law and fundamental rights during the hearings in the General Affairs Council.
- The Council could envisage thematic discussions focusing on the different issues of concern identified in the reasoned opinions that activated Article 7.
- The Council should seek the input of international and regional expert bodies, as well as civil society, in the preparation of the discussions and during (or in the margins of) the hearings, with a view to ensuring a thorough and impartial examination of the issues at stake based on the latest evidence available.

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<sup>22</sup> See for example NGO letters to the General Affairs Council on the Article 7 procedure concerning Hungary, [December 2018](#) and [April 2019](#).

- The EU Presidency of the Council should proactively lead in enabling the institutional process and securing a structured follow-up to the reasoned proposal.
  - The Presidency should further start working on the future steps the Council will need to consider, i.e. recommendations to the governments concerned, and/or a determination under Article 7.1 TEU.
  - The Council should engage with the Commission and the Parliament to elaborate a work plan on the way forward. Civil society should be consulted throughout the process and associated to the delivery of the work plan.
- ✓ Under the leadership of the EU Presidency and in concertation with the Commission, the Parliament and civil society, the Council should elaborate rules and a work plan that enable a structured follow-up to the reasoned proposals that activated Article 7.

Specific meetings should be dedicated to advancing Council-led processes, as we see now with article 7 TEU. More transparency about these discussions including on planning (timeline, entity responsible, substantive questions on the table) is needed. The good practice of regular feedback sessions from the Council and the Commission to the European Parliament, as we saw in the case of Hungary, should be endorsed by both institutions as a common practice. Similarly, the European Parliament should be invited to present its positions in the Council. A joint action plan by all EU institutions on rule of law action (see section 2.2) would help to build common ground and foster collaboration.

- ✓ In addition to regular rule of law reviews, extra meetings should be devoted to Council-led enforcement processes.

### **Note on the process launched by the Commission**

While OSEPI appreciates the call for an open debate launched by the Commission around its Communication via a press release<sup>23</sup> and informal targeted outreach to key stakeholders, we regret that the Commission did not organise an open consultation to gather the views of citizens and stakeholders. This appears at odds with the Commission's commitment under the Better Regulation Agenda to design EU policies and laws transparently, with evidence, and backed up by the views of citizens and stakeholders.<sup>24</sup> As a result, this Communication on the rule of law does not appear on the public list of ongoing consultations<sup>25</sup> despite being “a central pillar of our [EU's] vision for the future of Europe”.<sup>26</sup> There is no guarantee that the responses received by the Commission will be made public, which makes it difficult to hold the Commission accountable for the choices that it will be making to reach its conclusions at the end of June.

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<sup>23</sup> Ibid.

<sup>24</sup> The [Better Regulation Agenda](#).

<sup>25</sup> <https://ec.europa.eu/info/consultations>

<sup>26</sup> See footnote 1, p. 3.



- ✓ The Commission should ensure that all future rule of law related initiatives are formally opened to consultation of citizens and stakeholders. This would be a means to bridge the two portfolios of the first Vice-President in charge of Rule of Law, Fundamental Rights *and* Better Regulation and a concrete step to promote the rule of law among citizens and national stakeholders.

Furthermore, there is no information available on the next stage of this reflection process besides the general indication that “the Commission will return to the issue in June 2019 with its own conclusions and proposals [...] within the framework of the current Treaties”.<sup>27</sup> Without more details about the type of policy instrument the Commission intends to develop (legislative proposals, budgetary proposals, soft law measures, implementation guidelines, new Communication on the rule of law, reflection paper...), it is difficult to assess what arguments and evidence would most usefully contribute to the Commission’s reflection.

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<sup>27</sup> See footnote 1, p. 14.