
An EU mechanism on democracy, the rule of law and fundamental rights

Annex I -An EU mechanism on
democracy, the rule of law and
fundamental rights

STUDY

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AN EU MECHANISM ON DEMOCRACY, THE RULE OF LAW AND FUNDAMENTAL RIGHTS

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Abstract

This Research Paper provides an overview of the existing EU mechanisms which aim to guarantee democracy, the rule of law and fundamental rights within the EU itself, as set in Article 2 TEU. It analyses the scope of these mechanisms, the role of EU institutions and other relevant actors, and identifies gaps and shortcomings in the current framework. The Research Paper also includes illustrative case-studies on several key challenges, including the limits of infringement actions in addressing the threats to judicial independence in Hungary; the shortcomings of the Cooperation and Verification Mechanism in Bulgaria; and the consequences of a weak fundamental rights proofing of the Data Retention Directive. The Research Paper briefly examines the monitoring mechanisms existing at international level, including the UN and the Council of Europe before considering how the EU institutions interact to protect and promote Article 2 TEU values and the role of national authorities and individuals in fulfilling this objective. An analysis of the impact of the gaps and shortcomings identified in this Research Paper is also offered, with a particular focus on the principle of mutual trust, socio-economic development and fundamental rights protection. The impact on mutual trust is discussed in an illustrative case-study on the consequences of the unequal enforcement of the European Arrest Warrant framework decision. Finally, the Research Paper proposes and assesses a set of vertical and horizontal options in order to overcome these gaps and shortcomings

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Abbreviations

CFR	EU Charter of Fundamental Rights
CJEU	Court of Justice of the European Union
EAV	European Added Value
EAW	European Arrest Warrant
EU	European Union
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EU FRA	EU Fundamental Rights Agency
DRD	Data Retention Directive
PNR	Passenger Name Record
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union

Executive summary

Existing mechanisms to protect EU values

Different mechanisms and processes exist at EU level to promote, protect and safeguard EU values laid down in Article 2 TEU, in particular, democracy, the rule of law and fundamental rights¹. These include legally binding mechanisms such as Article 7 TEU, which allows relevant EU institutions to act in situations where there is 'a clear risk of a serious breach' of EU values by a Member State or where there is a *serious and persistent* breach of EU values laid down in Article 2 TEU; and the traditional infringement procedure set out in Articles 258 to 260 of the TFEU². There are also non-binding or soft law tools, including annual reports prepared by EU institutions covering matters related to Article 2 TEU values³. In 2014, both the European Commission and Council introduced two new additional mechanisms: the Commission adopted a new Rule of Law Framework⁴ and the Council committed itself to organising a new annual rule of law dialogue between Member States⁵. Data on respect for democracy, rule of law and fundamental rights in Member States is also collected by other international organisations including the Council of Europe (CoE) and the United Nations (UN), to which all EU Member States are parties. This data is used as a basis for monitoring Member States' compliance with Article 2 TEU values⁶.

Limitations of the current framework

Developments in some Member States have led to criticism regarding the EU's ability to act upon serious threats or breaches of EU values by Member States. Relevant examples include the situation of Roma minority rights in France in the summer of 2010, the measures adopted by Viktor Orbán's government in Hungary concerning for example the independence of the judiciary, as well as the non-respect for constitutional court judgments in Romania in 2012⁷. A number of non-governmental organisations, academics, foreign ministers, international organisations and representatives of EU institutions have stressed the need to address the limitations of the current EU framework, in particular to prevent any 'backsliding' of Article 2 TEU values in Member States that have recently acceded the EU.

¹ Article 2 TEU reads "The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail".

² For a full analysis of these provisions see Section 2.1.2 of this Research Paper.

³ For a full analysis of these tools see Section 2.1.3 and 2.14 of this Research Paper.

⁴ European Commission, Communication '[A new EU Framework to strengthen the Rule of Law](#)' of 19 March 2014, COM(2014) 158 final/2.

⁵ Council of the European Union, [Conclusions of the Council of the EU and the Member States meeting within the Council on ensuring respect for the rule of law](#) of 16 December 2014.

⁶ For more information on these mechanisms see Section 2.3 of this Research Paper.

⁷ Reding, V., '[The EU and the Rule of Law - What next?](#)', Speech at the Centre for European Policy Studies on 4 September 2013, SPEECH/13/677

Impacts

The impacts of the limitations of the existing EU mechanisms to promote and protect Article 2 TEU values can be assessed in political, social and economic terms. First, this can have a negative impact on mutual trust among Member States. If a Member State is taking actions threatening Article 2 TEU values, which may affect their citizens living in this Member State and cross-border knock-on effects, and the EU mechanisms are unable to address this situation, other Member States, businesses and EU citizens may question the trustworthiness of that Member State and of the EU system as a whole. This could undermine the legitimacy of the EU mechanisms to uphold Article 2 TEU values. For instance, the uneven implementation of the European Arrest Warrant in Member States results in the non-execution of these warrants. This had a cost of EUR 215 million between 2004 and 2009⁸.

At the same time, socio-economic studies show that societies in which democracy, the rule of law and fundamental rights are guaranteed and respected tend to attract more investment and benefit from higher social and economic welfare standards⁹. There is also a correlation between Article 2 TEU values and the financial market, which is most visible during financial crises. For instance, the ECB, the IMF and the EU Commission have jointly urged Greece to consider rectifying not only its economic shortcomings, but also its rule of law deficit¹⁰.

Finally, the limited ability of EU mechanisms to sustain Article 2 TEU values has an impact on fundamental rights. According to 2015 data from the European Court of Human Rights, the three fundamental rights more commonly violated in EU countries are the right to a fair trial, the right to timely proceedings and the right to legal remedies¹¹. These are also fundamental rights intrinsically related to democracy and the rule of law since one of their underlying core principles is the right of access to justice, which entails the right to fair and timely proceedings¹².

Remaining concerns

Despite the body of EU instruments and processes to uphold Article 2 TEU values, serious concerns remain with respect to their effectiveness. The Commission's Rule of Law Framework was activated for the first time in response to the constitutional crisis in Poland¹³. While it is too early to evaluate the effectiveness of this mechanism in

⁸ European Parliamentary Research Service, 2013, '[Revising the European Arrest Warrant](#)', p. 7.

⁹ Olson, M., 1993, [Dictatorship, democracy, and development](#), American Political Science Review; and Olson, M., 2000, 'Power and Prosperity: Outgrowing Communist and Capitalist Dictatorships', Basic Books, New York; Olson, M., 1993, [Dictatorship, democracy, and development](#), American Political Science Review; and Olson, M., 2000, 'Power and Prosperity: Outgrowing Communist and Capitalist Dictatorships', Basic Books, New York.

¹⁰ Wennerström, E. & Valter, Å, 2015, [The Rule of Law in Times of Financial Crises: How EU Rule of Law Correlates with the Market](#), Scandinavian Studies in Law, Vol. 60, p. 395 et seq.

¹¹ ECtHR, '[Violations by Article and respondent State. 2015](#)'.

¹² Wennerström, E., and Valter, Å, 2015, [The Rule of Law in Times of Financial Crises – How EU Rule of Law Correlates with the Market](#), Scandinavian Studies in Law, Vol. 60, pp. 621-622

¹³ Brunsden, J., for Financial Times, '[Leaked: Timmermans letter to Warsaw](#)', 13 January 2016.

addressing Article 2 TEU crises, efforts at EU level so far seem to have fallen short of effectively ensuring Member States' full compliance with these values. They also do not seem to have deterred parties having won parliamentary elections from engaging in 'constitutional capture' strategies, which aim to systematically weaken national checks and balances in order to entrench their power and implement what has been labelled 'illiberal' agendas'¹⁴. The first edition of the Council's rule of law dialogue on 17 November 2015 did not lead to any concrete measures to address some of the challenges identified above. The dialogue left it largely to Member States to identify their own shortcomings and advance solutions through a confidential process of self-reflection¹⁵.

Proposed solutions

Against this background, officials, academics and civil society groups have proposed a range of solutions. A number of these proposed solutions, which aim to review existing provisions and mechanisms, empower existing institutions, and/or establish new ones, are listed below¹⁶:

Measures that would require Treaty change

- **Compulsory exit proposal:** Amending the Treaties to include a new provision which would enable the expulsion of any Member State having systematically and repeatedly infringed EU values. The Treaties currently only foresee voluntary withdrawal from the EU¹⁷.
- **Amending Article 51(1) of the EU Charter of Fundamental Rights:** This Article establishes that its provisions only bind national authorities when they are implementing EU law, and this proposal suggests to make all fundamental rights "directly applicable in the Member States", including the right to effective judicial review (Article 47 of the Charter)¹⁸.
- **Amending Article 7 TEU:** Article 7 could be rewritten to foresee a more balanced inter-play between the Council and the European Parliament and lower decision-making thresholds.
- **Reverse Solange doctrine:** This proposal suggests enabling national courts, in a situation where human rights are systematically violated in their own Member State, to invite the CJEU to consider the legality of national actions in light of Article 2 TEU. The CJEU currently lacks the jurisdiction to do so¹⁹.

¹⁴ Müller, J-W., 2013, *Safeguarding Democracy inside the EU. Brussels and the Future of the Liberal Order*, Transatlantic Academy Paper Series; Zalan, E., for EU Observer, '[How to build an illiberal democracy in the EU](#)', 8 January 2016.

¹⁵ Butler, I., for Liberties EU, '[The Rule of Law Dialogue: 5 Ideas for Future EU Presidencies](#)', 23 December 2015.

¹⁶ Kochenov, D. and Pech, L., 2015, *Monitoring and Enforcement of the Rule of Law in the EU: Rhetoric and Reality*, European Constitutional Law Review, vol. 11, issue 3, p. 526.

¹⁷ Closa, C., and Kochenov, D. (ed.), 2015, '[Reinforcing the Rule of Law Oversight in the European Union](#)', in Werner Schröder (ed.), *Strengthening the Rule of Law in Europe: From a Common Concept to Mechanisms of Implementation*, Hart Publishing, Oxford, 2015 (forthcoming), p. 30.

¹⁸ Reding, V., '[The EU and the Rule of Law – What next?](#)', Speech/13/677, 4 September 2013.

¹⁹ Von Bogdandy, A., et al, 2012, *Reverse Solange – Protecting the Essence of Fundamental Rights against EU Member States*, 49 Common Market Law Review, p. 489.

- **Creation of a new EU institution:** Establishing a new EU monitoring body, a 'Copenhagen Commission' tasked with monitoring the enforcement of Article 2 TEU values²⁰. Alternatively, this task could be delegated the Council of Europe's Venice Commission²¹.

Horizontal options (addressed at all Member States)

- **Improvement of the Council's annual Rule of Law dialogue:** A set of recommendations, which do not entail legislative changes, have been made to improve the Council's rule of law dialogue²². These essentially relate to choosing a specific topic and increasing the time for the dialogue, as well as requesting Member States to prepare 'country fiches' based on the recommendations of the UN and the Council of Europe and 'country notes' gathering the recommendations resulting from the dialogue with proposals to address these. A seminar could also be held prior to the dialogue to determine the issues to discuss and facilitate the preparation of Member States. A public follow-up system to monitor compliance with the recommendations could also be set up²³.
- **New inter-parliamentary dialogue fostered by the European Parliament:** This new dialogue could take the form of a bi-annual cycle of dialogues between the LIBE Committee and the counterpart national parliamentary committees²⁴.
- **New monitoring cycle to be established via an Inter-institutional Agreement (IIA):** This proposal aims to ensure better coordination between the Commission, the Council and the European Parliament. The agreement among these institutions could take a similar form to the initiative on Better Regulation. This IIA would set up a new monitoring cycle on Member State compliance with Article 2 TEU, involving other actors, such as the EU Fundamental Rights Agency²⁵. It would include a scoreboard to be used to determine the activation, if need be, of vertical options.

²⁰ Kochenov, D., Pech, L. (2015) [Upholding the Rule of Law in the EU: On the Commission's 'Pre-Article 7 Procedure' as a timid step in the right direction](#), European University Institute Working Papers, Department of Law, p. 10.

²¹ Buquicchio, G., President of the Venice Commission, Speech at the *Assises de la Justice* Conference on "[What role for Justice in the European Union](#)" organised by the European Commission, 21 November 2013.

²² Butler, I., for Liberties.eu, '[The rule of law dialogue: five ideas for future EU presidencies](#)', December 2015; Butler, I., for E-Sharp, '[Wary EU governments hold first rights talks](#)', December 2015.

²³ Butler, I., for Liberties.eu, '[The rule of law dialogue: five ideas for future EU presidencies](#)', December 2015; Butler, I., for E-Sharp, '[Wary EU governments hold first rights talks](#)', December 2015.

²⁴ Butler, I., for Liberties.eu, 2016, '[How the European Parliament can protect the EU's fundamental values: An interparliamentary rights dialogue](#)'.

²⁵ European Parliament, Resolution of 10 June 2015 on the situation in Hungary, (2015/2700(RSP)), [P8_TA-PROV\(2015\)0227](#), paragraph 12; European Parliament resolution of 2 July 2013 on the situation of fundamental rights: standards and practices in Hungary (pursuant to the European Parliament resolution of 16 February 2012) (2012/2130(INI)), [P7_TA\(2013\)0315](#), paragraph 79; European Parliament, Report on the situation of fundamental rights: standards and practices in Hungary (pursuant to the European Parliament resolution of 16 February 2012) (2012/2130(INI)),

Vertical options (aimed to address a situation in a particular Member State):

- **Systemic infringement actions:** This option primarily entails a new approach under the existing infringement procedure on the basis of which the Commission would present a 'bundle' of infringement cases to the CJEU in order to present a clear picture of systemic non-compliance with Article 2 TEU. This option could include subtracting any EU funds that the concerned Member State may have been entitled to receive²⁶.
- **Improvement of the Commission's Rule of Law Framework:** Without legislative changes, this mechanism could be amended to introduce more clarity in the criteria and benchmarks which govern the activation of the framework. More transparency as regards the dialogue to be held between the concerned Member State and the Commission, including the publication of any 'rule of law opinion' issued by the Commission, may also be recommended²⁷.
- **Empowerment of national actors:** This option would entail launching EU-funded capacity-building programmes targeted at national courts, civil society organisations and other institutions to better protect democracy, the rule of law and fundamental rights in Member States²⁸. Setting up new financing programmes would however most likely require legislative change.

Assessment of options

Since no instruments are available to precisely and scientifically quantify the costs of non-adherence or the benefits of adherence to democracy, the rule of law, and fundamental rights, the quantitative estimates presented in this Research Paper relate only to immediate economic costs of the selected options. Social, political and economic gains that can be achieved through the application of the proposed options are assessed in terms of addressing the negative impacts observed in the situations where Article 2 TEU values have not been fully respected. These can affect specific groups of stakeholders or society at large, as well as the economies of the Member States and the EU as a whole.

All the options proposed have the potential to contribute to a better economic development, better access to democracy and fundamental rights and increase in trust between Member States, the citizens and the EU institutions. While some differences among the options regarding the economic, social and political dimensions have been noted, at this stage there is no clear indication that one of them is preferable compared to

[PE 508.211v04-00](#); Reding, V., '[The EU and the Rule of Law – What next?](#)', Speech at the Centre for European Policy Studies on 4 September 2013, SPEECH/13/677; [Letter of the Foreign Ministers of Denmark, Finland, Germany and the Netherlands to the President of the European Commission](#) (6 March 2013).

²⁶ Scheppele, K.L., 'Enforcing the Basic Principles of EU Law through Systemic Infringement Actions', in Closa, C. and Kochenov, D. (eds.), *Reinforcing the Rule of Law Oversight in the European Union* (Cambridge University Press, 2016); Scheppele, K.L., '[What Can the European Commission Do When Member States Violate Basic Principles of the EU European Union? The Case for Systematic Infringement Actions](#)', contribution no. 45 at the *Assises de la Justice* 2013.

²⁷ Kochenov, D. and Pech, L., 2015, [Monitoring and Enforcement of the Rule of Law in the EU: Rhetoric and Reality](#), *European Constitutional Law Review*, vol. 11, issue 3, 511-540.

²⁸ Butler, I., for E-Sharp, '[Wary EU governments hold first rights talks](#)', December 2015, pp. 10-11.

the others. Some options may entail higher costs than others. For instance, while the improvement of the Council's annual rule of law dialogue could be expected to entail immediate costs of EUR 2.9 million annually, empowering national actors through an EU-funded capacity building programme could cost EUR 330,000 per Member State. No forecast of costs has been made in relation to improving the Commission's Rule of Law Framework, since these costs would depend on the number and severity of the issues to be addressed by this instrument. A combination of horizontal and vertical options would arguably be more effective than applying just one of the options.

1 Introduction

The European Parliament has initiated a Legislative Own-Initiative Report (L-INI) on the establishment of an EU mechanism on democracy, the rule of law and fundamental rights. This L-INI was triggered by the European Parliament's Resolution of 10 June 2015 on the situation in Hungary²⁹. In this Resolution, the European Parliament urged the European Commission to

*"[...] carry out an impartial, yearly assessment on the situation of fundamental rights, democracy and the rule of law in all Member States, indiscriminately and on an equal basis, involving an evaluation by the EU Agency for Fundamental Rights, together with appropriate binding and corrective mechanisms, in order to fill existing gaps and to allow for an automatic and gradual response to breaches of the rule of law and fundamental rights at Member State level; instruct its Committee on Civil Liberties, Justice and Home Affairs to contribute to the development and elaboration of this proposal in the form of a legislative own-initiative report to be adopted by the end of [2015];"*³⁰

In December 2015, the European Parliament reiterated this call in another Resolution regarding the situation in Hungary³¹.

As stated in Article 1 Treaty of the European Union (TEU)³², the Member States confer on the Union competences to attain the objectives they have in common. The adoption of legally binding norms on the basis of the European treaties has given rise to mutually interdependent legal relations linking the EU and its Member States with each other³³. Furthermore, the EU legal structure is based on the fundamental premise that Member States share a set of common values on which the EU is founded, as stated in Article 2 TEU³⁴. These core values include democracy, the rule of law and respect for fundamental rights. Under Article 49 TEU³⁵, only States which respect these values and are committed to promoting them may apply to become a member of the EU.

²⁹ European Parliament, Resolution of 10 June 2015 on the situation in Hungary, (2015/2700(RSP)), [P8_TA-PROV\(2015\)0227](#), paragraph 12.

³⁰ *Ibidem*

³¹ European Parliament, Resolution of 16 December 2015 on the situation in Hungary (2015/2935(RSP)) [P8_TA-PROV\(2015\)0461](#).

³² Article 1 TEU: "By this Treaty, the High Contracting Parties establish among themselves a European Union, hereinafter called 'the Union' on which the Member States confer competences to attain objectives they have in common. This Treaty marks a new stage in the process of creating an ever closer union among the peoples of Europe, in which decisions are taken as openly as possible and as closely as possible to the citizen."

³³ See CJEU (Full Court), [Opinion 2/13](#), Opinion of the Court (Full Court) of 18 December 2014, ECLI:EU:C:2014:2454., paragraphs 167-168.

³⁴ Article 2 TEU: The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.

³⁵ Article 49 TEU: "Any European State which respects the values referred to in Article 2 and is committed to promoting them may apply to become a member of the Union. The European

At its most basic level, *democracy* can be defined as a form of government in which the supreme power is vested in the people and exercised by them directly or indirectly through a system of representation usually involving periodically held free elections³⁶. *Rule of law* can be rudimentarily understood as the situation in which everyone, including national institutions, submit to, obey and are regulated by law³⁷. *Fundamental rights* are the group of rights inherent to all human beings³⁸. These will be examined in-depth in Section 2.1 of this Research Paper.

In recent years, serious concerns have been raised with respect to some EU Member States' adherence to the values laid down in Article 2 TEU. A number of national governments have for instance implemented a number of legal changes which may be viewed as not compatible with EU values such as the rule of law. Individual Member States' departures from the EU values have knock-on effects on the EU as a whole. This relates to the *all-affected principle* linked to the inter-penetration and mutual interdependence between Member States³⁹. This mutual-dependence occurs at two levels – among EU citizens and Member States. Firstly, every EU citizen has an interest in not being faced with an illiberal Member State in the EU, since that State is in a position to participate to the definition of the general political directions and priorities of the EU via the European Council and the adoption of EU legally binding acts via the Council of the EU. As such, it will at least indirectly participate in governing the lives of all EU citizens. If one or more Member States change their standards regarding the rule of law or democracy, this necessarily and automatically affects the decisions in and by other Member States as well.

This *all-affected principle* relates to the principles of mutual trust, solidarity and sincere cooperation. Regarding the first of these principles, every Member State is equally interested in ensuring that other Member States do not free-ride, which would undermine the genuine nature of the EU and the internal market⁴⁰. The interdependency between the Member States works in such a way that the EU requires Member States to safely presume that every single one of them is at least as good as any other in terms of

Parliament and national Parliaments shall be notified of this application. The applicant State shall address its application to the Council, which shall act unanimously after consulting the Commission and after receiving the consent of the European Parliament, which shall act by a majority of its component members. The conditions of eligibility agreed upon by the European Council shall be taken into account.

The conditions of admission and the adjustments to the Treaties on which the Union is founded, which such admission entails, shall be the subject of an agreement between the Member States and the applicant State. This agreement shall be submitted for ratification by all the contracting States in accordance with their respective constitutional requirements”.

³⁶ Oxford Law Dictionary, Cambridge Dictionary, Merriam-Webster Dictionary.

³⁷ *Ibidem*.

³⁸ UN, World Conference on Human Rights, [Vienna Declaration](#), (25 June 1993), Part I, paragraph 5.

³⁹ Closa, C., and Kochenov, D. (ed.), 2015, '[Reinforcing the Rule of Law Oversight in the European Union](#)', in Werner Schröder (ed.), *Strengthening the Rule of Law in Europe: From a Common Concept to Mechanisms of Implementation*, Hart Publishing, Oxford (forthcoming), p. 5. See also Müller, J.W., 2015, [Should the EU Protect Democracy and the Rule of Law Inside Member States?](#), *European Law Journal*, Vol. 21, Issue 2, pp. 141-160.

⁴⁰ Closa, C., and Kochenov, D. (ed.), 2015, '[Reinforcing the Rule of Law Oversight in the European Union](#)', in Werner Schröder (ed.), *Strengthening the Rule of Law in Europe: From a Common Concept to Mechanisms of Implementation*, Hart Publishing, Oxford, 2015 (forthcoming).

democracy, human rights and rule of law standards⁴¹. Thus, as highlighted by the Court of Justice of the EU (CJEU) in its Opinion 2/13, under the premise of mutual trust, Member States infer that these values, as set in Article 2 TEU, will be “recognised and, therefore, that the law of the EU that implements them will be respected”⁴².

In addition to the principle of mutual trust, Member States are expected to cooperate among themselves and with the institutions of the European Union in order to uphold Article 2 TEU values. Taking into account that under the *all-affected principle*, an action taken by a certain Member State may impact all other Member States and their citizens, it is in the best interest of all of them to ‘sincerely cooperate’ to prevent and, if need be, proactively address those situations in which a threat to the core values of the Union and its stability may have emerged⁴³. This principle of sincere cooperation is closely inter-related to the principle of solidarity, which is also one of the core values in Article 2 TEU⁴⁴.

Moreover, while this Research Paper does not specifically focus on this matter, the question of the EU’s external credibility, as a global promoter of democracy, the rule of law and fundamental rights, is also relevant. Indeed, the EU’s external standing and authority can be undermined if the EU does not live up to its self-proclaimed adherence to its own values at home. This has potentially wide reaching consequences. Firstly, this raises the problem of the potential disconnect between the EU’s internal and external policies and mechanisms dedicated to the promotion of its foundational values (for example, a disconnect between the Commission’s internal rule of law framework and the EU’s external strategic framework which focuses, by contrast, on human rights and democracy). Critics have argued that such a disconnection exists, which has led in turn to repeated accusations of ‘double standards’ and an inconsistent treatment of third countries⁴⁵. Secondly, a problem of incoherence between the EU’s external policies themselves may be noted⁴⁶. This may give the impression of a piecemeal, insufficiently integrated approach and a reluctance of the EU to subject itself to any meaningful external and independent monitoring as regards its own compliance with EU values⁴⁷.

Democracy, the rule of law and respect for fundamental rights are values common to all Member States, and Article 2 TEU recognises this⁴⁸. While it can be argued that Article 2 TEU is vague in the sense that neither defines the fundamental values it proclaims nor does it make clear the obligations they entail for Member States, the core substance of the principles of democracy, the rule of law and respect for fundamental rights may be

⁴¹ *Ibidem*.

⁴² CJEU, [Opinion 2/13](#) of the Court (Full Court) of 18 December 2014, ECLI:EU:C:2014:2454, paragraph 168.

⁴³ Article 4(3) TEU.

⁴⁴ Article 2 TEU provides in its second sentence that: “These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, **solidarity** and equality between women and men prevail” (emphasis added).

⁴⁵ Pech, L., 2016, [The EU as a global rule of law promoter: the consistency and effectiveness challenges](#), Asia Europe Journal, Springer, Vol. 14, Issue 1.

⁴⁶ *Ibidem*.

⁴⁷ *Ibidem*.

⁴⁸ Müller, J.W., 2013, [Safeguarding democracy inside the EU. Brussels and the future of liberal order](#), Transatlantic Academy, Paper Series, No. 3.

derived from other provisions of EU primary law or EU secondary legislation as well as other EU primary materials and international law instruments⁴⁹. In light of this and taking into account the increasing challenges to protect and promote these values outside but also within the EU, key institutions and actors at all levels of governance, but also citizens, representative associations and the civil society at large have all called to ensure that the EU and its Member States uphold the values laid down in Article 2 TEU⁵⁰.

Structure of this Research Paper

Considering the challenges and the shortcomings highlighted above, the European Parliament, in June 2015, on the basis of a legislative own-initiative (L-INI), called on the Commission to establish “an EU mechanism on democracy, the rule of law and fundamental rights in order to better ensure compliance with and enforcement of the Charter and Treaties” and instructed the involvement of the Committee on Civil Liberties, Justice and Home Affairs for this purpose⁵¹. This Research Paper has been drafted in support of the European Added Value Assessment that accompanies the L-INI. It therefore supports any future legislative process, which requires that any legislative act be justified in accordance with the principles of subsidiarity and proportionality⁵². In making such determination, an impact assessment of the proposed act shall be carried out to conclude whether the objective of the act “can be better achieved at Union level”. This has to be justified by “qualitative and, wherever possible, quantitative indicators”⁵³.

The **aim** of this Research Paper is therefore to contribute to the European Added Value Assessment part of the L-INI process by ascertaining the need for a new EU mechanism to uphold democracy, the rule of law and fundamental rights, and if so, the potential added value of such a mechanism.

To this end, Section 2 of this Research Paper **examines the existing EU legal and policy framework** on democracy, the rule of law and fundamental rights based on desk research and consultation with Senior Experts⁵⁴ and key stakeholders. This Section includes, in particular, the European Commission’s Rule of Law Framework adopted in 2014⁵⁵ and the dialogue held between Member States in the Council with the view of promoting and safeguarding the rule of law⁵⁶. The Research Paper also examines the respective roles of

⁴⁹ For more information see Section 2.

⁵⁰ FRA, 2013, ‘[The European Union as a Community of values: safeguarding fundamental rights in times of crisis](#)’.

⁵¹ European Parliament, Resolution of 10 June 2015 on the situation in Hungary, (2015/2700(RSP)), [P8_TA-PROV\(2015\)0227](#), paragraph 12.

⁵² Article 5 TEU and [Protocol \(No 2\) on the Application of the Principles of Subsidiarity and Proportionality](#).

⁵³ Article 5 of Protocol (No 2).

⁵⁴ Laurent Pech, Professor of European Law and Head of the Law and Politics Department of Middlesex University (London) and Erik Wennerström, Director General of the Swedish National Council for Crime Prevention (*Brottsförebyggande rådet – Brå*).

⁵⁵ European Commission, Communication ‘[A new EU Framework to strengthen the Rule of Law](#)’ of 19 March 2014, COM(2014) 158 final/2.

⁵⁶ Council of the European Union, [Conclusions of the Council of the EU and the Member States meeting within the Council on ensuring respect for the rule of law](#) of 16 December 2014.

the different institutions at EU level and the interplay between the EU, the Council of Europe (including the remaining issue of EU accession to European Convention on Human Rights) and the UN in this area, as well as the role played by national authorities, including national courts. The Research Paper also encompasses the perspective of EU citizens and residents, including a review of the case-law of the CJEU on the rights inherent to EU citizenship. It also briefly addresses the external dimension of the topic of this Research Paper by looking at the EU as an exporter of values.

Section 2.1.3 provides a critical **assessment of the European Commission's new Rule of Law Framework** according to the following criteria: relevance, comprehensiveness, effectiveness, efficiency, objectivity, impartiality, accountability, clarity and transparency.

Section 4 of the Research Paper **identifies key shortcomings and gaps** in the current EU framework in order to establish possible steps that the EU could take towards bridging the identified gaps. To illustrate these gaps and their impacts, four case-studies have been carried out to provide an in-depth understanding of several examples of specific shortcomings in the EU framework, the related social, economic and political impacts on individuals, companies, Member States and the EU itself. These case-studies were selected following desk research and consultation with the Senior Experts and the European Parliament, with the primary aim of exploring different types of shortcomings both at Member State and EU levels as well as how the existing EU mechanisms may be used.

Section 5 provides an **analysis of possible options to remedy the identified gaps**. This includes an assessment of solutions proposed by different stakeholders, including EU institutions, academics, civil society groups as well as an assessment of the **potential added value at EU level** of establishing a new EU mechanism on democracy, the rule of law and fundamental rights. The social, economic and political costs and the benefits of the proposed solutions are analysed.

Table 1 below provides an overview of the key concepts that will be discussed in Section 2 of this Research Paper, and which is dedicated to the main mechanisms which are currently in force to uphold Article 2 TEU values. The elements of these core values are also listed in **Table 1**.

Table 1 Key concepts

Article 2 TEU values	<i>Democracy</i>	<i>Rule of Law</i>	<i>Fundamental Rights</i>
	• Separation and balance of powers (the legislative, executive and judiciary: each branch can independently carry out its own respective function) • Independence of the judiciary • Pluralistic system of political parties and organisations • Accountability and transparency • Free, independent and pluralistic media • Respect for political rights	• Legality • Legal certainty • Prohibition of arbitrariness of the executive • Independent and impartial courts • Effective judicial review including respect for fundamental rights • Equality before the law	• Universal • Indivisible • Interdependent • Interrelated Fundamental rights have been divided into three generations: • First-generation human rights (“blue” rights) are fundamentally civil and political rights. • Second-generation human rights are economic, social and cultural rights. • Third-generation human rights (“green” rights) are fundamental rights which have been recognised in the latest times including, for instance, the right to self-determination, the right to a healthy environment and the right to data protection.

Article 7 TEU and the Commission's Rule of Law Framework	<i>Systemic threat to the rule of law (Commission Rule of Law Framework):</i>	<i>Clear risk of a serious breach (Article 7(1) TEU):</i>	<i>Serious and persistent breach (Article 7(2) TEU):</i>
	"Situations where the authorities of a Member State are taking measures or are tolerating situations which are likely to systematically and adversely affect the integrity, stability or the proper functioning of the institutions and the safeguard mechanisms established at national level to secure the rule of law"⁵⁷. Some general examples are provided of what might satisfy the threshold for action: 'the political, institutional and/or legal order of a Member State as such, its constitutional structure, separation of powers, the independence or impartiality of the judiciary or its system of judicial review including constitutional justice where it exists, must be threatened – for example, as a result of the adoption of new measures or of widespread administrative practices of public authorities and lack of domestic redress.'⁵⁸	The concept of risk was introduced by the Nice Treaty to allow the Union to take preventive action and it is therefore a "specific creature of the Union legal system".⁵⁹ The risk must go beyond specific situations – unlike individual infringements – and concern a more systematic problem⁶⁰. However, as a risk, it remains "within the realm of the potential". But the requirement for it to be "clear" excludes purely contingent risks⁶¹. This mechanism allows the EU to send a warning signal to an offending Member State before the risk materialises into a breach and positions the EU institutions in a constant surveillance mode to prevent this from happening⁶².	This concept comes from public international law and has been widely discussed in international instruments⁶³. It requires the risk to have actually materialised⁶⁴. To determine the seriousness of the breach a variety of criteria will have to be taken into account, including the purpose and the result of the breach. The result of the breach might concern any one or more fundamental values. However, a simultaneous breach of several values could evidence the seriousness of the breach⁶⁵. The persistence of the breach requires, by definition, that it has lasted some length of time. However, the fact that a Member State has repeatedly been condemned for the same type of breach over a period of time by an international court such as the ECHR or by non-judicial international bodies such as the Parliamentary Assembly of the Council of Europe or the United Nations Commission on Human Rights and has not

⁵⁷ European Commission, Communication '[A new EU Framework to strengthen the Rule of Law](#)' of 19 March 2014, COM(2014) 158 final/2, p. 6.

⁵⁸ *Ibidem*, p. 7.

⁵⁹ European Commission, [Communication from the Commission to the Council and the European Parliament on Article 7 of the Treaty on European Union - Respect for and promotion of the values on which the Union is based](#), /* COM/2003/0606 final */ , point 1.4.

⁶⁰ *Ibidem*, point 1.4.1.

⁶¹ *Ibidem*, point 1.4.2.

⁶² *Ibidem*.

			demonstrated any intention of taking practical remedial action is a factor that could be taken into account ⁶⁶ .
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⁶³ European Commission, [Communication from the Commission to the Council and the European Parliament on Article 7 of the Treaty on European Union - Respect for and promotion of the values on which the Union is based](#), /* COM/2003/0606 final */ , point 1.4.

⁶⁴ *Ibidem*, point 1.4.2.

⁶⁵ *Ibidem*, point 1.4.4.

⁶⁶ *Ibidem*, point 1.4.3.

2 EU legal and policy framework

Key findings

- Article 2 TEU provides that democracy, rule of law and fundamental rights are values which are common to the EU Member States and ones on which the EU is based. However, Article 2 TEU does not explicitly define these notions nor does it elaborate on the obligations they entail for Member States. Their meaning and scope can nevertheless be deduced from EU law and policies pertaining to democracy, rule of law and fundamental rights.
- There are many mechanisms at EU and international levels which aim to guarantee and promote democracy, the rule of law and fundamental rights.
- A variety of actors tend to be involved in these mechanisms, with different competences and mandates. However, the principle of sincere cooperation binds both EU institutions and Member States.
- The case-law of the CJEU has been essential in consolidating fundamental rights and the rights inherent to EU citizenship.
- Within the EU, one may distinguish between the mechanisms which are enshrined in the Treaties (Article 7 TEU, the infringement procedure laid down in Articles 258-260 TFEU, and the peer review mechanism laid down in Article 70 TFEU) and 'soft-law' mechanisms, which can be themselves divided between two categories: First, there are soft-law mechanisms of a general scope which aim to address all Member States equally (the Commission's Rule of Law Framework and the Council's annual Rule of Law dialogue). Second, there are soft-law mechanisms of limited scope, either because they address a specific topic (fundamental rights, corruption and effectiveness of justice systems) or because they address a specific country (the Cooperation and Verification mechanism).
- Gaps and shortcomings have been identified for all of these mechanisms, including the high thresholds required to trigger the mechanism (Article 7 TEU), a lack of clarity regarding the concepts used and triggering factors (Commission's Rule of Law Framework), excessively limited scope (annual fundamental rights reports, EU Justice Scoreboard, CVM, etc.) or lack of legally binding outcomes (peer reviews of Article 70 TFEU, anti-corruption report).
- Three cross-cutting issues underlie all of these limitations: (1) lack of clarity, (2) lack of coherence and consistency and (3) relative uncertainty on the extent of EU powers and the respective role of the main EU institutions when it comes to guaranteeing compliance with Article 2 TEU values at Member State level.

This section provides an overview of the existing EU legal and policy instruments that may be used to monitor and assess Member State compliance with the values laid down in Article 2 TEU such as democracy, the rule of law and fundamental rights. It provides a brief description of these instruments and highlights their main limitations.

While the main focus is on the protection of values within the borders of the EU, this is an issue that cannot be analysed entirely independently from the EU's role in promoting these values abroad, as set out in Article 21 TEU⁶⁷. This section therefore also briefly

⁶⁷ Article 21 TEU reads as follows: "The Union's action on the international scene shall be guided by

describes EU instruments dedicated to the external promotion of the EU's fundamental values. It provides a broad overview of relevant bodies and mechanisms of the Council of Europe and the United Nations as well as national mechanisms.

2.1 Overview of existing EU mechanisms (Internal dimension)

2.1.1 EU values

(i) Article 2 TEU

'The Union is founded on the values of respect for **human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities**. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.' *Article 2 TEU*

Article 2 TEU⁶⁸ sets out the values upon which the European Union (EU) is founded on. These values, which include **democracy, the rule of law and respect for fundamental rights**, are common to all Member States.

The first symbolic references to these values were included in the preamble of Maastricht Treaty in 1992 which asserts that Member States confirm "their attachment to the principles of liberty, democracy and respect for human rights and fundamental freedoms and of the rule of law." Article 11 TEU and Article 177(2) TEC subsequently assigned to the EU's foreign and security policy and the EC's policy of development cooperation, respectively, the same objective of developing and consolidating democracy and the rule of law as well as respect for human rights. Article 6(1) TEU of the 1999 Amsterdam Treaty states that "The Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States. The current text of Article 2 TEU (ex-Article 6(1) TEU) was modified by the Treaty of Lisbon, adding human dignity, equality and the rights of persons belonging to minorities to this list and renamed these principles 'values'⁶⁹. The Treaty of Lisbon reiterated that these values are common to the Member States while also

the principles which have inspired its own creation, development and enlargement, and which it seeks to advance in the wider world: democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, and respect for the principles of the United Nations Charter and international law. The Union shall seek to develop relations and build partnerships with third countries, and international, regional or global organisations which share the principles referred to in the first subparagraph. It shall promote multilateral solutions to common problems, in particular in the framework of the United Nations."

⁶⁸ [Treaty on European Union and the Treaty on the Functioning of the European Union](#), O.J. 2012/C 326/01 (26 October 2012).

⁶⁹ Pech, L., 2009, [The Rule of Law as a Constitutional Principle of the European Union](#), Jean Monnet Working Paper Series No. 4/2009.

referring to 'a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.'

The promotion of the Article 2 TEU values remains one of the main aims of the EU – both internally and abroad⁷⁰. Within the EU, compliance with EU values and their promotion is also a legal obligation for the Member States. In principle, Member States should refrain from acting in a way that could jeopardise this aim either through positive or negative actions⁷¹. In case of a 'serious and persistent breach by a Member State' of Article 2 TEU values, Article 7 TEU allows the Council of the EU to suspend certain rights of a Member State, including voting rights in the Council of the EU. Regarding the external dimension of the EU, Article 3(5) TEU establishes that "in its relations with the wider world, the EU shall uphold and promote its values and interests and contribute to the protection of its citizens". The coherent promotion, protection and implementation of democracy, the rule of law and respect for fundamental rights inside the EU is a key factor for external actors in considering the EU as a legitimate actor and fostering trust⁷².

The scope of Article 2 TEU

The EU may only act within the limits of its competences conferred by the Treaties and, as stated in Article 4(2) TEU⁷³, must respect national identities of Member States, inherent in their political and constitutional structures. This 'national identity' clause may be invoked by the Member States challenging the validity of an EU act or as a justification for a failure to fulfil obligations under EU law⁷⁴. Under this clause, it might be argued that it is the competence of Member States to design instruments to uphold Article 2 TEU values.

Nevertheless, the values of Article 2 TEU inform the way the EU pursues its objectives, and how EU institutions exercise their powers⁷⁵. Member States are also obliged to "assist

⁷⁰ Article 3(1) and (5) TEU.

⁷¹ Editorial comments, 'Safeguarding EU values in the Member States – Is something finally happening?' [2015] 52 *Common Market Law Review*, 619–628.

⁷² Article 21 TEU; Pech, L., 2016, [The EU as a global rule of law promoter: the consistency and effectiveness challenges](#), Asia Europe Journal, Springer, Vol. 14, Issue 1.

⁷³ Article 4(2) TEU provides: 'The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. It shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security. In particular, national security remains the sole responsibility of each Member State.'

⁷⁴ Leczykiewicz, D., for UK Constitutional Law Blog, ['The 'national identity clause' in the EU Treaty: a blow to supremacy of Union law?'](#), 21 June 2012.

⁷⁵ See, for instance, Council of the European Union, ['Guidelines on methodological steps to be taken to check fundamental rights compatibility in the Council's preparatory bodies'](#), Doc. 10140/11, 18 May 2011; and European Commission, Commission Staff Working Paper ['Operational Guidance on taking account of Fundamental Rights in Commission Impact Assessments'](#) (SEC(2011)0567), 6 May 2011. These examples were mentioned in the Editorial comments, 'Safeguarding EU values in the Member States – Is something finally happening?' [2015] 52 *Common Market Law Review*, p. 619.

each other in carrying out tasks which flow from the Treaties”⁷⁶. This duty of sincere cooperation is not confined to areas falling under EU law. Likewise, Article 7 TEU, the prevention and sanctions mechanism for Article 2 TEU violations, is not confined to the scope of application of EU law⁷⁷. The EU is mandated to use Article 7 TEU if a Member State is in a persistent breach of the fundamental values also in matters where Member States act autonomously. EU primary law therefore does not exclude the provisions of Article 2 TEU from its supervisory task nor does it restrict the CJEU’s jurisdiction in relation to Article 2 TEU⁷⁸. EU primary law bestows a strong and multi-layered mandate on the Union to ensure that Article 2 TEU values are observed in each Member State⁷⁹.

The lack of definitions in Article 2 TEU⁸⁰ could lead to difficulties in determining when Article 2 TEU is breached. Any EU oversight of Member States’ observance of Article 2 TEU would seem therefore to require ‘further articulation of its substance.’⁸¹ Some definitional issues relating to Article 2 TEU are discussed below.

Defining democracy, the rule of law and respect for fundamental rights

The concepts of democracy, the rule of law and fundamental rights may be said to be dynamic if not ‘famously elusive’ concepts, whose boundaries may remain relatively unclear⁸². In the European Treaties, these concepts are usually mentioned together, which at the very least shows their interconnection and interdependence in the context of the EU legal framework. Accordingly, any debate on how to strengthen Member States’ compliance with Article 2 TEU should start from the premise that democracy, the rule of law and fundamental rights are mutually reinforcing principles whose relationship may be described as triangular⁸³.

There is however some disagreement among stakeholders concerning which of these three values may be considered the most fundamental one. For the European Union

⁷⁶ Article 4(3) TEU.

⁷⁷ European Commission, COM/2003/0606 final, [Communication from the Commission to the Council and the European Parliament on Article 7 of the Treaty on European Union - Respect for and promotion of the values on which the Union is based](#), 15 October 2003, p. 7.

⁷⁸ Editorial comments, ‘Safeguarding EU values in the Member States – Is something finally happening?’ [2015] 52 *Common Market Law Review*, p. 621.

⁷⁹ Hillion, C., 2016, [Overseeing the rule of law in the European Union. Legal mandate and means](#), SIEPS European Policy Analysis, Vol. 1, pp. 1-2.

⁸⁰ See COREPER, [doc 10168](#) on Council Conclusions on fundamental rights and rule of law and on the Commission 2012 Report on the Application of the Charter of Fundamental Rights of the European Union, 10168/13, 29 May 2013, point 9. See also Address by Ireland’s Minister of State for Disability, Older People, Equality and Mental Health, Kathleen Lynch TD at the 4th Annual FRA Symposium: Promoting the Rule of Law in the EU, 7 June 2013, Vienna, p. 6 – Ireland then held the Presidency of the EU Council. See the Editorial comments, ‘Safeguarding EU values in the Member States – Is something finally happening?’ [2015] 52 *Common Market Law Review*, p. 619.

⁸¹ Editorial comments, ‘Safeguarding EU values in the Member States – Is something finally happening?’, *Common Market Law Review*, Vol. 52, No. 3, June 2015, p. 619.

⁸² FRAME, 2014, [‘Critical analysis of the EU’s conceptualization and operationalization of the concepts of human rights, democracy and rule of law’](#), p. iii.

⁸³ This relationship is examined in detail in a study published by the European Parliament, 2013, [‘The triangular relationship between fundamental rights, democracy and rule of law in the EU: Towards an EU Copenhagen Mechanism’](#), p. 59.

Agency for Fundamental Rights (FRA), human rights should be considered the overarching concept. For the Commission's DG Justice, the overarching concept would appear to be the rule of law, while other stakeholders may feel that democracy is the glue that binds the three elements together⁸⁴. The new Rule of Law Framework established by the European Commission however considers the values of Article 2 TEU from the perspective of the rule of law⁸⁵.

This debate may nonetheless be largely unnecessary to the extent that Article 2 TEU values are inextricably linked. The fundamental freedoms of expression and association are the preconditions for political pluralism and democratic process, whereas democratic control and separation of powers are essential to sustain an independent judiciary and the rule of law, which in turn are required for effective protection of human rights⁸⁶. This should also be taken into account when looking at a long-term solution to ensure full compliance with these values within the EU.

(ii) Democracy

Democracy in the Member States takes a variety of forms including direct versus representative democracy. Nevertheless, democracy is commonly based on the principle of equality among people entitled to political self-determination⁸⁷.

Various international documents, including recognised international soft law, offset out the core components of democracy. In 2004, the UN General Assembly adopted a resolution setting out seven 'essential elements' of democracy⁸⁸:

- Separation and balance of power – the legislative, executive and judiciary power are distributed in such a way to ensure that each branch can independently carry out its own respective function;
- Independence of the judiciary;
- A pluralistic system of political parties and organisations;
- Respect for the rule of law;
- Accountability and transparency;
- Free, independent and pluralistic media;

⁸⁴ Democracy Reporting International, '[From commitment to action: Fundamental values in EU Member States](#)', Report on an expert roundtable on legal mechanisms and reforms of EU law, Berlin, 30 January, 2014.

⁸⁵ European Commission, Communication '[A new EU Framework to strengthen the Rule of Law](#)' of 19 March 2014, COM(2014) 158 final/2, pp. 3-4.

⁸⁶ [Regulation \(EC\) No 1889/2006](#) of the European Parliament and of the Council of 20 December 2006 on establishing a financing instrument for the promotion of democracy and human rights worldwide, OJ (2006) L 386/1, Recital 8 of the Preamble.

⁸⁷ European Parliament, 2013, '[The triangular relationship between fundamental rights, democracy and rule of law in the EU: Towards an EU Copenhagen Mechanism](#)', p. 33.

⁸⁸ Democracy reporting International, '[International consensus: essential elements of democracy](#)' (Report, October 2011), p. 5.

- Respect for human and political rights; e.g., freedoms of association and expression; the right to vote and to stand in elections.

This definition does not strive to be exhaustive; rather, its goal is to define the basic minimal requirements necessary for a State to be considered democratic. The resolution addresses two distinct aspects of democracy: ‘vertical accountability’ which relates to how a State interacts with its people and ‘horizontal accountability’ which relates to how State institutions interact and how they are constructed and organised⁸⁹.

At EU level, the idea of representation is expressed in Article 10 TEU. It states that the EU is founded on representative democracy (Article 10(1) TEU). Parliamentary democracy in the EU is adapted to its specific needs. In accordance with the basic premise of dual legitimation, elections provide two lines of democratic legitimation in the EU. These lines are institutionally represented by the European Parliament, whose legitimacy derives from the direct elections of its Members by the totality of the Union’s citizens, and by the Council and the European Council, whose legitimation is based on the Member States’ democratically organised peoples or national parliaments (Article 10(2) TEU)⁹⁰.

The principle of democracy has also been interpreted and applied by the Court of Justice of the European Union (CJEU)⁹¹. The CJEU has understood this principle in a way which is respectful of the two sources of democratic legitimacy at EU level: the Member States and the peoples of Europe. The Court of Justice’s case-law offers ample evidence that the principle of democracy is not limited to protecting parliamentary prerogatives⁹², but also encompasses other forms of governance, e.g. the achievement of consensus by social partners⁹³. The EU judiciary therefore has a responsibility to make sure that those other forms of governance remain as democratic as possible. Furthermore, this principle, like all EU constitutional principles, must be read in light of societal changes. The principle of democracy at EU level has also been relied upon by the CJEU to strengthen transparency,

⁸⁹ *Ibidem*, p. 6.

⁹⁰ Von Bogdandy, A., 2012, [The European Lesson for International Democracy: The Significance of Articles 9 to 12 EU Treaty for International Organizations](#), European Journal of International Law 23 (2), 315-334.

⁹¹ The CJEU’s practice in this regard has been extensively analysed by Koen Lenaerts, the current President of the CJEU. See Lenaerts, K., 2013, [The principle of democracy in the case law of the European Court of Justice](#), International and Comparative Law Quarterly/Volume 62/Issue 02/April 2013, pp. 271-315.

⁹² CJEU cases such as *Roquette Frères v Council* ([Case C-138/79](#), Judgment of the Court of 29 October 1980 *Roquette Frères v Council*, ECLI:EU:C:1980:249), *Les Verts* ([Case 294/83](#), Judgment of the Court of 23 April 1986, *Les Verts v Parliament*, ECLI:EU:C:1986:166), *Chernobyl* ([Case C-70/88](#), Judgment of the Court of 22 May 1990, *Parliament v Council*, ECLI:EU:C:1990:217), and *Titanium Dioxide* ([Case C-300/89](#), Judgment of the Court of 11 June 1991, *Commission v Council*, ECLI:EU:C:1991:244) demonstrate that the CJEU has endeavoured to protect the powers that the Treaties have conferred on the European Parliament.

⁹³ In *UEAPME v. Council* ([Case T-135/96](#), Judgment of the Court of First Instance (Fourth Chamber, extended composition) of 17 June 1998, *UEAPME v Council*, ECLI:EU:T:1998:128), the EGC stressed that the EU principle of democracy does not oppose dialogue among social partners.

with the view of enhancing the democratic legitimacy of the EU by providing sufficient means for EU citizens to hold their representatives accountable⁹⁴.

The issue of further increasing the democratic legitimacy of the EU has been discussed at each key stage of the process of European integration. To address the 'democratic deficit' thesis, the Masters of the Treaties have primarily sought to grant more powers to the European Parliament and extend the areas in which it has joint decision-making powers with the Council of EU⁹⁵. Under the current EU legal framework, provisions on democratic principles of EU are enshrined in Articles 9 to 12 TEU.

⁹⁴ See Lenaerts, K., 2004, *"In the Union we trust": Trust-enhancing principles of Community law*, 41 Common Market Law Review 317.

⁹⁵ For example, Article 16(1) TEU reads as follow: "The Council shall, jointly with the European Parliament, exercise legislative and budgetary functions. It shall carry out policy-making and coordinating functions as laid down in the Treaties".

(iii) The rule of law

The rule of law has become a dominant organisational paradigm of modern constitutional law and is commonly recognised as a key principle at national and international levels to regulate the exercise of public power⁹⁶. The rule of law ensures that all public authorities act within the constraints of law, in accordance with the values of democracy and fundamental rights, and under the control of independent and impartial courts⁹⁷.

The first judicial reference to the rule of law in the EU was made by the Court of Justice in its judgment *Les Verts v Parliament*⁹⁸, which referred to the EU as a 'Community based on the rule of law.' Since then, multiple references have been made to the rule of law in the Treaties. Initially, these references were largely symbolic. However, subsequent and successive treaty amendments reinforced the constitutional significance of the rule of law and made clear that this principle had both an internal and external dimension⁹⁹.

The rule of law is, for instance, a prerequisite for membership of the EU¹⁰⁰. It has therefore played a significant role in the enlargement process of the EU. The so-called Copenhagen criteria were established in 1993 as a means of assessing whether Candidate States were eligible to accede to the EU. They include compliance with the values in Article 2 TEU, including the rule of law. "Membership requires that the candidate country has achieved *stability of institutions* guaranteeing democracy, the rule of law, human rights, respect for and protection of minorities..." and can be divided into the following sub-criteria: respecting the supremacy of law, the separation of powers, judicial independence, procedural fundamental rights, and taking active measures to counter corruption¹⁰¹.

On 11 March 2014, the EU Commission issued the Communication "A new EU Framework to strengthen the Rule of Law" in which it offers a working definition of the rule of law. The definition draws on principles set out in the case-law of the CJEU and the European Court of Human Rights (ECtHR) and reports written by the Council of Europe's Commission for Democracy through Law, better known as the Venice Commission. The table below provides the EU Commission's non-exhaustive list of the principles enshrined in the notion 'rule of law'¹⁰², and compares it to the previous list of sub-elements offered by the Venice Commission.

⁹⁶ European Commission, COM(2014) 158 final/2, Communication from the Commission to the European Parliament and the Council: [A new EU Framework to strengthen the Rule of Law](#) (19 March 2014), p. 2-4.

⁹⁷ *Ibidem*.

⁹⁸ CJEU, [Case 294/83](#) Judgment of the Court of 23 April 1986 *Les Verts v Parliament*, ECLI:EU:C:1986:166, paragraph 23.

⁹⁹ Pech, L., 2012/13, [Rule of law as guiding principle of the European Union's external action](#), Asser Institute Centre for the Law of EU External Relations Working Papers, p. 9.

¹⁰⁰ Article 49 TEU.

¹⁰¹ Wennerström, E., and Valter, Å, 2015, [The Rule of Law in Times of Financial Crises – How EU Rule of Law Correlates with the Market](#), Scandinavian Studies in Law, Vol. 60, p. 622.

¹⁰² European Commission, Communication '[A new EU Framework to strengthen the Rule of Law](#)' of 19 March 2014, COM(2014) 158 final/2, p. 4. European Commission, Communication '[A new EU Framework to strengthen the Rule of Law](#)' of 19 March 2014, COM(2014) 158 final/2, p. 4.

Table 2 Comparison between the rule of law-definitions of the Venice Commission and the EU Commission¹⁰³

European Commission	Venice Commission
• Legality • Legal certainty • Prohibition of arbitrariness of the executive • Independent and impartial courts • Effective judicial review including respect for fundamental rights • Equality before the law	• Legality • Legal certainty • Prohibition of arbitrariness • Access to justice before independent and impartial courts, including judicial review of administrative acts • Respect for human rights • Non-discrimination and equality before the law

According to the European Commission, the rule of law entails compliance with the six legal principles listed above (see Table 2). They stem from the constitutional traditions common to most European legal systems and define the core meaning of the rule of law within the context of the EU legal order. The EU Commission's understanding of the rule of law is similar to the understanding of the Venice Commission, but a number of minor differences may be highlighted¹⁰⁴:

- The European Commission specifies that it is the executive branch of government that shall be prohibited from demonstrating arbitrariness, whereas the Venice Commission makes no such restriction;
- The EU Commission refers to fundamental rights while the Venice Commission refers to human rights;
- The European Commission leaves out non-discrimination as a component of the rule of law. However, it can be interpreted that equality before the law encompasses non-discrimination.

Some criticism has been expressed as regards the core elements identified by the European Commission; for example, the principle of equality before the law is usually thought to be included in the broader notion of fundamental rights. However, the European Commission has distinguished between the two in its 2014 Communication. Other sub-components are also arguably missing from the list, such as the principle of accessibility of the law, the principle of the protection of legitimate expectations, and the principle of proportionality¹⁰⁵.

¹⁰³ Wennerström, E., and Valter, Å, 2015, [The Rule of Law in Times of Financial Crises – How EU Rule of Law Correlates with the Market](#), Scandinavian Studies in Law, Vol. 60, pp. 621-622.

¹⁰⁴ *Ibidem*, p. 622.

¹⁰⁵ Kochenov, D., and Pech, L., 2015, [Monitoring and Enforcement of the Rule of Law in the EU: Rhetoric and Reality](#), European Constitutional Law Review, vol. 11, issue 3, pp. 512-540.

The CJEU and the ECtHR have stated that the above-mentioned principles are not purely formal and procedural requirements. They are the vehicle for ensuring compliance with and respect for democracy and human rights. Hence, the rule of law may be said to be a constitutional principle with both formal and substantive components¹⁰⁶.

(iv) Fundamental Rights

While there has been much discussion on how the concept of *fundamental rights* should be understood, including regarding its scope and the distinction with *human rights*, there is an international consensus that fundamental rights are “universal, indivisible and interdependent and interrelated”¹⁰⁷. Fundamental rights are those inherent to all human beings.

The protection of fundamental rights was not explicitly included in the founding Treaties of the European Communities. The CJEU was then in the forefront of European Community fundamental rights protection. In the 1969 *Stauder* case¹⁰⁸, the CJEU already referred to fundamental rights as being part of the general principles of Community law¹⁰⁹. Since then, the notion of general principles of law as guaranteed by the ECHR and resulting from the constitutional traditions common to the Member States, has been used extensively by the CJEU in developing its fundamental rights jurisprudence. The Treaty of Lisbon has also confirmed that the protection of human rights is a founding element of the EU and an essential component of the development of the supranational European area of freedom, security and justice¹¹⁰.

EU fundamental rights were codified in the EU Charter of Fundamental Rights (the Charter)¹¹¹. The Charter was proclaimed at the Nice European Council on 7 December 2000 and became legally binding with the entry into force of the Treaty of Lisbon on 1 December 2009¹¹². Article 6(1) TEU states that “the rights, freedoms and principles set out in the Charter (...) shall have the same legal value as the Treaties”. Since the Charter became legally binding¹¹³, the number of CJEU cases referring to the Charter has considerably increased¹¹⁴. In particular, the number of decisions quoting the Charter has risen from 43 in 2011 to 210 in 2014. When addressing questions to the CJEU (preliminary

¹⁰⁶ European Commission, Communication ‘[A new EU Framework to strengthen the Rule of Law](#)’ of 19 March 2014, COM(2014) 158 final/2, p. 4. European Commission, Communication ‘[A new EU Framework to strengthen the Rule of Law](#)’ of 19 March 2014, COM(2014) 158 final/2, p. 4.

¹⁰⁷ Sheeran, S., and Sir Nigel Rodley (eds.), *Routledge Handbook of International Human Rights Law* (Routledge Taylor and Francis Group, London and New York, 2013); De Schutter, O., *International Human Rights Law* (Cambridge University Press, 2014); Buergenthal, T., *International Human Rights in a Nutshell* (3th ed., St. Paul, Minn.: West Publishing Co., 2009).

¹⁰⁸ CJEU, [Case 29/69](#) Judgment of the Court of 12 November 1969 *Erich Stauder v City of Ulm – Sozialamt*, ECLI:EU:C:1969:57.

¹⁰⁹ European Parliament, 2015, ‘[Fundamental Rights in the European Union](#)’, p 3-4.

¹¹⁰ European Parliament, 2015, ‘[Fundamental Rights in the European Union](#)’, p 3-4.

¹¹¹ [Charter of Fundamental Rights of the European Union](#), OJ C 326, 26.10.2012, p. 391–407.

¹¹² Website of the European Commission, ‘[EU Charter of Fundamental Rights](#)’.

¹¹³ Article 6(1) TEU.

¹¹⁴ FRA, 2012, ‘[Bringing the Charter to life – opportunities and challenges of putting the EU Charter of Fundamental Rights into practice](#)’, Copenhagen seminar report, p. 9.

rulings) in 2014, national courts submitted 43 requests containing a reference to the Charter¹¹⁵.

The Charter's provisions are addressed to the EU institutions, bodies, offices and agencies with due regard for the principle of subsidiarity, as well as to the national authorities but only when they are implementing EU law (Article 51(1) CFR)¹¹⁶. The Charter therefore binds EU institutions, bodies, offices and agencies in all activities that fall within the scope of their respective spheres of competence. This directly limits the competences of the Commission, the CJEU and the EU Fundamental Rights Agency (EU FRA):

- **Competence of the Commission:** Under Article 51(1) of the Charter, the Commission can only bring infringement actions for violations of fundamental rights by Member States when they can be said to be implementing EU law. In 2014, the Commission referred to the Charter of Fundamental Rights in 11 infringement cases. Five of the 11 cases relate to asylum and migration¹¹⁷.
- **Competence of the CJEU:** Under Article 51(1) of the Charter, CJEU competence is also limited to cases in which EU law is being or has been implemented. Therefore, human rights-based claims can be brought only on violations concerning the implementation of EU law¹¹⁸. The notion of 'implementation' has however been broadly understood in the *Fransson* case, as discussed below.
- **Competence of the FRA:** The mandate of the Agency for Fundamental Rights is also limited. The FRA was set up to "provide the relevant institutions, bodies, offices and agencies of the Community and its Member States *when implementing Community law* with assistance and expertise relating to fundamental rights in order to support them when they take measures or formulate courses of action *within their respective spheres of competence* to fully respect fundamental rights"¹¹⁹. The FRA provides its services to EU institutions and national stakeholders either at the request of these or on its own initiative¹²⁰. However, when acting on its own initiative, it can only do so in accordance with the Multiannual Framework. This Framework specifies thematic areas in a five-year framework, which fall broadly under different chapters of the Charter of Fundamental Rights¹²¹. The FRA may nevertheless carry out tasks not limited to these specific themes if requested by EU institutions.

¹¹⁵ European Commission, '[Staff Working Document on the application of the EU Charter of Fundamental Rights in 2014](#)', of 8 May 2015, SWD(2015) 99 final.

¹¹⁶ FRA, 2012, '[Bringing the Charter to life – opportunities and challenges of putting the EU Charter of Fundamental Rights into practice](#)', Copenhagen seminar report, p. 6.

¹¹⁷ European Commission, '[Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – 2014 report on the application of the EU Charter of Fundamental Rights](#)', COM(2015) 191 final, 8 May 2015.

¹¹⁸ Article 51(1) CFR.

¹¹⁹ Council of the European Union, '[Council Regulation \(EC\) No 168/2007 of 15 February 2007 establishing a European Union Agency for Fundamental Rights](#)', OJ L 53, 22.2.2007, Article 2, p. 1–14.

¹²⁰ *Ibidem*.

¹²¹ Website of FRA, '[Areas of work](#)'.

While Article 51(1) of the Charter seems to clearly define the competences of EU institutions, bodies, offices and agencies, it is more difficult to determine precisely when EU Member States are bound by it¹²². The CJEU has nonetheless held that the Charter is a constitutive part of ‘the national constitutional traditions’ of the Member States. In the case *Fransson*¹²³, the CJEU clarified that ‘outside the scope of EU law’, national authorities and courts remain free to apply national standards of protection of fundamental rights, provided that the level of protection offered by the Charter, as interpreted by the CJEU, and the primacy, unity and effectiveness of EU law are not compromised¹²⁴. However, the Court added that regarding national legislation falling out of the scope of EU law, when the CJEU has been requested to give a preliminary ruling, it can “provide all the guidance as to interpretation needed in order for the national court to determine whether that legislation is compatible with the fundamental rights” set in the Charter¹²⁵.

The principal aim of the Charter is to reaffirm “the rights as they result, in particular, from the constitutional traditions and international obligations common to the Member States, the TEU, the Community Treaties, the European Convention on Human Rights, the Social Charters adopted by the Community and by the Council of Europe and the case-law of the CJEU and of the ECtHR”¹²⁶. According to Article 52(3) of the Charter, rights in the Charter that correspond to rights guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) have the same meaning and scope. This does not, however, prevent EU law from granting more extensive protection. Where the Charter rights are based on the TFEU and the TEU, they must be exercised under the conditions, and within the limits, defined by those Treaties (Article 52(2) of the Charter)¹²⁷.

While all EU Member States are parties to the ECHR, the EU as an international body is not itself a party. Accession of the EU to the ECHR is foreseen in the Convention itself¹²⁸. After the CJEU declared in Opinion 2/94¹²⁹ that the EU did not have competence to join the ECHR¹³⁰, a new provision - Article 6(2) TEU - was introduced in the TEU to provide explicitly for the EU to accede to the ECHR. In 2010 the EU Commission and the Steering Committee for Human Rights of the Council of Europe (CDDH) started formal

¹²² FRA, 2012, ‘[Bringing the Charter to life – opportunities and challenges of putting the EU Charter of Fundamental Rights into practice](#)’, Copenhagen seminar report, p. 6.

¹²³ CJEU, [Case C-617/10](#), Judgment of the Court (Grand Chamber) of 26 February 2013, *Åklagaren v. Hans Åkerberg Fransson*, ECLI:EU:C:2013:280.

¹²⁴ *Ibidem*, paragraph 29. See also Peers, S., Hervey, T., Kenner, J., and Ward, A., *The EU Charter of Fundamental Rights. A commentary* (Hart Publishing, Oxford, 2014) pp. 1415 et seq.

¹²⁵ *Ibidem*, paragraph 19. See also Peers, S., Hervey, T., Kenner, J., and Ward, A., *The EU Charter of Fundamental Rights. A commentary* (Hart Publishing, Oxford, 2014) pp. 1415 et seq.

¹²⁶ CJEU, [Case 540/03](#), Judgment of the Court (Grand Chamber) of 27 June 2006 *European Parliament v Council of the European Union*, ECLI:EU:C:2006:429, paragraph 38.

¹²⁷ FRA, 2012, ‘[Bringing the Charter to life – opportunities and challenges of putting the EU Charter of Fundamental Rights into practice](#)’, Copenhagen seminar report, p. 5.

¹²⁸ Article 59(2) ECHR.

¹²⁹ CJEU, [Opinion 2/94](#), Opinion of the Court of 28 March 1996 Accession by the Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms, ECLI:EU:C:1996:140.

¹³⁰ *Ibidem*.

negotiations to facilitate this process¹³¹. On 10 June 2013, the Council of Europe, in collaboration with the EU, issued the “Draft revised agreement on the accession of the European Union to the Convention for the Protection of Human Rights and Fundamental Freedoms”¹³². However, on 18 December 2014 the CJEU issued Opinion 2/13¹³³ concluding that “[t]he agreement on the accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms is not compatible with Article 6(2) TEU or with Protocol No 8”¹³⁴. With Opinion 2/13 EU accession to the ECHR is still in process. The CJEU therefore remains the final interpreter of fundamental rights in the EU¹³⁵.

One of the main concerns is that the accession to the ECHR could have an adverse effect on the specific characteristics and autonomy of EU law¹³⁶.

The consequences of EU accession to the ECHR mainly pertain to the autonomy of EU law¹³⁷. If it were to become a party to the ECHR, the EU, including the CJEU, would be subject to review by the ECtHR, a body which is external to the EU¹³⁸. The Strasbourg Court would be entitled to review the CJEU judgments on human rights grounds and the CJEU would have to expressly accept guidance from the ECtHR and follow its jurisprudence¹³⁹.

This would not however imply a major change to the place the ECtHR jurisprudence occupies within the EU¹⁴⁰. While the CJEU has general jurisdiction, the ECtHR has

¹³¹ Website of the Council of Europe, ‘[Accession of the European Union to the European Convention on Human Rights](#)’.

¹³² Council of Europe, ‘[Draft revised agreement on the accession of the European Union to the Convention for the Protection of Human Rights and Fundamental Freedoms](#)’, 47+1(2013)008rev2, 10 June 2013.

¹³³ CJEU, [Opinion 2/13](#) of the Court (Full Court) of 18 December 2014, ECLI:EU:C:2014:2454.

¹³⁴ *Ibidem*, paragraph 258.

¹³⁵ Kokott, J., and Sobotta, C., 2015, [Protection of fundamental rights in the European Union: on the relationship between EU fundamental rights, the European Convention and National Standards of Protection](#), Yearbook of European Law, pp. 2-3; Nergelius, J., 2015, [The accession of the EU to the European Convention on Human Rights. A critical analysis of the Opinion of the European Court of Justice](#), Swedish Institute for European Policy Studies, pp. 46-47; Halberstam, D., 2015, [“It's the Autonomy, Stupid!” A Modest Defense of Opinion 2/13 on EU Accession to the ECHR, and the Way Forward](#), University of Michigan, Public Law and Legal Theory Research Paper Series, Paper No. 342, p. 14.

¹³⁶ CJEU, [Opinion 2/13](#) of the Court (Full Court) of 18 December 2014, ECLI:EU:C:2014:2454, paragraph 258.

¹³⁷ *Ibidem*, paragraphs 179-200 and 258.

¹³⁸ *Ibidem*, paragraph 181; Kokott, J., and Sobotta, C., 2015, [Protection of fundamental rights in the European Union: on the relationship between EU fundamental rights, the European Convention and National Standards of Protection](#), Yearbook of European Law; Wennerström, E., ‘EU accession to the European Convention on Human Rights – the creation of a European Legal Space for Human Rights?’ in Nergelius, J., and Kristoffersson, E., *Human Rights in contemporary European Law*, Swedish Studies in European Law, Vol. 6 (Hart Publishing, 2015).

¹³⁹ Kokott, J., and Sobotta, C., 2015, [Protection of fundamental rights in the European Union: on the relationship between EU fundamental rights, the European Convention and National Standards of Protection](#), Yearbook of European Law; Wennerström, E., ‘EU accession to the European Convention on Human Rights – the creation of a European Legal Space for Human Rights?’ in Nergelius, J., and Kristoffersson, E., *Human Rights in contemporary European Law*, Swedish Studies in European Law, Vol. 6 (Hart Publishing, 2015).

¹⁴⁰ Kokott, J., and Sobotta, C., 2015, [Protection of fundamental rights in the European Union: on the](#)

specialised jurisdiction¹⁴¹ and remains the main interpreter of fundamental rights in Europe¹⁴². Should the CJEU decide to contradict the jurisprudence, it should do so with a strong and persuasive justification¹⁴³; however, this has not happened to date¹⁴⁴. Under Article 52(3) of the Charter, its meaning and scope shall be interpreted according to the ECtHR's jurisprudence. However, the CJEU has discretion on whether to take this case-law into account¹⁴⁵, in accordance with Article 6(2) TEU which provides that "accession shall not affect the Union's competences as defined in the Treaties"¹⁴⁶. For the time being the CJEU relies and refers to the jurisprudence of the ECtHR as a reliable source when construing and implementing fundamental rights¹⁴⁷, and does not so to the case-law of the EU General Court, the EFTA Court or national courts¹⁴⁸. Furthermore, Article 6(3) TEU states that "Fundamental rights, as guaranteed by the European Convention [...] shall constitute general principles of the Union's law"¹⁴⁹. The jurisprudence of the ECtHR may therefore generally be used in the enforcement of the EU Charter¹⁵⁰.

The *co-respondent mechanism* (CRM) envisioned under the Accession Agreement of the EU to the ECHR raises related issues¹⁵¹. Under this mechanism, individuals would be able to bring actions against Member States directly before the ECtHR for infringements of the ECHR in implementing EU legislation¹⁵². The EU would be held accountable together with the concerned Member State¹⁵³. "To permit the ECtHR to rule on such a question would be tantamount to conferring on it jurisdiction to interpret the case-law of the Court of Justice"¹⁵⁴. The CJEU stated in its Opinion 2/13 that it would be necessary for the

[*relationship between EU fundamental rights, the European Convention and National Standards of Protection*](#), Yearbook of European Law, pp. 2-6.

¹⁴¹ *Ibidem*, p. 6.

¹⁴² *Ibidem*.

¹⁴³ *Ibidem*.

¹⁴⁴ *Ibidem*, p. 7.7

¹⁴⁵ *Ibidem*, pp. 4-6; Nergelius, J., 2015, [*The accession of the EU to the European Convention on Human Rights. A critical analysis of the Opinion of the European Court of Justice*](#), Swedish Institute for European Policy Studies, pp. 46-47.

¹⁴⁶ Article 6(2) TEU.

¹⁴⁷ Kokott, J., and Sobotta, C., 2015, [*Protection of fundamental rights in the European Union: on the relationship between EU fundamental rights, the European Convention and National Standards of Protection*](#), Yearbook of European Law, pp. 4-6.

¹⁴⁸ *Ibidem*, p. 7.

¹⁴⁹ Article 6(3) TEU.

¹⁵⁰ Kokott, J., and Sobotta, C., 2015, [*Protection of fundamental rights in the European Union: on the relationship between EU fundamental rights, the European Convention and National Standards of Protection*](#), Yearbook of European Law, p. 4; Nergelius, J., 2015, [*The accession of the EU to the European Convention on Human Rights. A critical analysis of the Opinion of the European Court of Justice*](#), Swedish Institute for European Policy Studies, pp. 46-47.

¹⁵¹ CJEU, [*Opinion 2/13*](#) of the Court (Full Court) of 18 December 2014, ECLI:EU:C:2014:2454, paragraphs 215 – 248.

¹⁵² *Ibidem*; Wennerström, E., 'EU accession to the European Convention on Human Rights – the creation of a European Legal Space for Human Rights?' in Nergelius, J., and Kristoffersson, E., *Human Rights in contemporary European Law*, Swedish Studies in European Law, Vol. 6 (Hart Publishing, 2015).

¹⁵³ Wennerström, E., 'EU accession to the European Convention on Human Rights – the creation of a European Legal Space for Human Rights?' in Nergelius, J., and Kristoffersson, E., *Human Rights in contemporary European Law*, Swedish Studies in European Law, Vol. 6 (Hart Publishing, 2015).

¹⁵⁴ CJEU, [*Opinion 2/13*](#) of the Court (Full Court) of 18 December 2014, ECLI:EU:C:2014:2454,

Court to intervene in this mechanism regarding both primary and secondary legislation. This would be done in a similar way as when the CJEU intervenes in preliminary rulings under EU law. The CJEU would therefore intervene before the ECtHR issues a decision and without the need for the exhaustion of domestic remedies. This is required “for the purpose of ensuring the proper functioning of the judicial system of the EU” and to preserve the powers of the EU and its institutions, as required by Article 2 of Protocol No 8 EU¹⁵⁵.

EU accession to the ECtHR could also threaten the principle of mutual trust among EU Member States, according to the CJEU¹⁵⁶. The EU is founded on the assumption that all of its Member States have set in place safeguards to uphold the common values of the Union, particularly in areas pertaining to the area of freedom, justice and security¹⁵⁷. The ECHR does not however set out such an obligation of mutual trust. EU accession would therefore entail that Member States would have to ensure among themselves, and not only towards the other Contracting Parties, that other legal systems sufficiently safeguard fundamental rights¹⁵⁸.

Mutual trust among Member States could also be at risk under the *Bosphorus* doctrine¹⁵⁹. Under this doctrine, the ECtHR is competent to monitor the acts of Member States which relate to fulfilling their obligations as members of other international organisations¹⁶⁰. This includes verifying that the concerned measures protect fundamental rights at least in an equivalent way to the Convention¹⁶¹. However, the *Bosphorus* doctrine is only applicable if international obligations do not offer an “equivalent” protection to the one provided under the Convention. “Equivalent” in this context has been interpreted as “comparable” by the ECtHR, which is easily achievable by the protection granted under the EU Charter, considering that the Charter generally covers the same rights as the Convention¹⁶². Taking this into consideration, the ECtHR may only intervene to examine EU law in two situations: (a) when there is a manifest substantial violation of the ECHR or (b) when the EU Charter has not been implemented and the situation has not been remedied by the competent monitoring mechanisms¹⁶³.

Another concern is how the EU would fit into the Council of Europe Committee of Ministers¹⁶⁴. The baseline for EU accession to the ECHR is the “principle of equality or

paragraph 239.

¹⁵⁵ *Ibidem*, paragraphs 237 – 238.

¹⁵⁶ *Ibidem*, paragraphs 191 – 194.

¹⁵⁷ *Ibidem*.

¹⁵⁸ *Ibidem*.

¹⁵⁹ This doctrine enables the ECHR to monitor Member States when they act on obligations as members of other international organisations, such as the EU and the UN.

¹⁶⁰ Kokott, J., and Sobotta, C., 2015, [*Protection of fundamental rights in the European Union: on the relationship between EU fundamental rights, the European Convention and National Standards of Protection*](#), Yearbook of European Law, p. 7.

¹⁶¹ *Ibidem*, p. 8.

¹⁶² *Ibidem*, pp. 4, 8-9.

¹⁶³ *Ibidem*, pp. 9-10.

¹⁶⁴ Wennerström, E., ‘EU accession to the European Convention on Human Rights – the creation of a European Legal Space for Human Rights?’ in Nergelius, J., and Kristoffersson, E., *Human Rights in contemporary European Law*, Swedish Studies in European Law, Vol. 6 (Hart Publishing, 2015).

equal footing”, meaning that the EU would become a single Contracting Party “with one voice instead of 28 votes”¹⁶⁵. This would prevent the EU from blocking decisions of the Committee of Ministers when it scrutinises the EU or its Member States in cases implementing EU law¹⁶⁶. All 28 Member States are members of the Council of Europe and in line with the *Bosphorus* doctrine¹⁶⁷, the ECtHR still has competence to monitor the acts of Member States fulfilling their obligations as members of other international organisations¹⁶⁸.

Finally, in relation to Common Foreign and Security Policy (CFSP) matters, the CJEU only has jurisdiction, under Article 24(1) TEU, to ensure compliance with Article 40 TEU and assess the legality of certain decisions as set out in Article 275(2) TFEU¹⁶⁹. However, the specific scope of this jurisdiction has not been established¹⁷⁰, which could lead to inconsistent interpretation of EU law by Member States in this area¹⁷¹. Accession to the ECHR could lead the ECtHR to “be empowered to rule on the compatibility with the ECHR of certain acts, actions or omissions performed in the context of the CFSP, and notably of those whose legality the Court of Justice cannot, for want of jurisdiction, review in the light of fundamental rights. Such a situation would effectively entrust the judicial review of those acts, actions or omissions on the part of the EU exclusively to a non-EU body, albeit that any such review would be limited to compliance with the rights guaranteed by the ECHR”¹⁷².

¹⁶⁵ *Ibidem*.

¹⁶⁶ *Ibidem*.

¹⁶⁷ This doctrine enables the ECHR to monitor Member States when they act on obligations as members of other international organisations, such as the EU and the UN.

¹⁶⁸ Kokott, J., and Sobotta, C., 2015, [Protection of fundamental rights in the European Union: on the relationship between EU fundamental rights, the European Convention and National Standards of Protection](#), Yearbook of European Law, p. 7.

¹⁶⁹ Arts. 24(1) TEU and 275 TFEU. CJEU, [Opinion 2/13](#) of the Court (Full Court) of 18 December 2014, ECLI:EU:C:2014:2454, paragraphs 249 - 258.

¹⁷⁰ CJEU, [Opinion 2/13](#) of the Court (Full Court) of 18 December 2014, ECLI:EU:C:2014:2454, paragraph 251.

¹⁷¹ Halberstam, D., 2015, [“It's the Autonomy, Stupid!” A Modest Defense of Opinion 2/13 on EU Accession to the ECHR, and the Way Forward](#), University of Michigan, Public Law and Legal Theory Research Paper Series, Paper No. 342, p. 36. CJEU (Grand Chamber), Judgment of the Court of 3 September 2008 *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities*, ECLI:EU:C:2008:461. The core of this case revolved on whether a UN Security Council resolution should take precedence over EU law. Kadi, identified as a possible supporter of Al-Qaida was sanctioned by the UN Security Council by freezing his assets. This sanction was transposed as a Regulation in the EU, which was challenged before the EU Courts. The Grand Chamber decided not to review the Regulation since this would result in the revision of the Security Council's measure. However, in appeal, the CJEU considered that since all EU legislation has to respect fundamental rights, the lawfulness of the UN's sanction would not be questioned by reviewing the Regulation. The CJEU concluded that ‘obligations imposed by an international agreement cannot have the effect of prejudicing the constitutional principles of the EC Treaty’. It has thus been considered that this judgment could be used to review Security Council measures in the future. See Kokott, J., and Sobotta, C., 2012, [The Kadi case – constitutional core values and international law – finding the balance?](#), The European Journal of International Law, Vol. 23, no. 4.

¹⁷² CJEU, [Opinion 2/13](#) of the Court (Full Court) of 18 December 2014, ECLI:EU:C:2014:2454, paragraphs 254 and 255. See also Halberstam, D., 2015, [“It's the Autonomy, Stupid!” A Modest Defense of Opinion 2/13 on EU Accession to the ECHR, and the Way Forward](#), University of Michigan, Public

(v) Concluding remarks

Article 2 TEU does not explicitly define or prescribe specific obligations for EU Member States, but these principles have been interpreted in EU primary and secondary law, the CJEU case-law and the multiple documents produced by EU institutions when assessing candidate countries' compliance with EU *acquis*¹⁷³ and the *Copenhagen criteria*. International law instruments and courts, in particular the ECtHR, have also interpreted the notions of democracy, rule of law and fundamental rights. Within the framework of the UN, for instance, a definition of the essential elements of democracy, including the rule of law and human rights, was adopted by the UN General Assembly¹⁷⁴. A working definition of rule of law can also be found in the Commission's Communication on the Rule of Law Framework. Fundamental rights are also clearly set out in the Charter of Fundamental Rights of the European Union and the ECHR and the CJEU and ECtHR have by now largely clarified their meaning and scope. There is however room for further clarity and the EU should consider, for instance, adopting a single all-encompassing document offering the EU's set of standards in these areas.

It remains that the key meaning of the values laid down in Article 2 TEU, and the core elements contained within them, can already be easily derived from EU law. It may be argued that EU action may actually benefit from a lack of precise, specific definitions of its values¹⁷⁵. For instance, the fact that there was no detailed definition of the rule of law in the official documents of the European Commission regarding the evaluation mechanism to monitor Bulgaria's and Romania's compliance with Article 2 TEU values - the Cooperation and Verification Mechanism (CVM)¹⁷⁶ - can be seen as an advantage. It provided the flexibility to adjust the precise recommendations to the specific issues, such as the rule of law crisis in Romania in 2012¹⁷⁷.

Ultimately, however, it may be virtually impossible to activate Article 7 TEU or initiate infringement proceedings on the basis of Article 2 TEU values in the absence of relevant working definitions and some further clarifications of national obligations stemming from Article 2 TEU. Further guidance in this respect would therefore be welcome¹⁷⁸. Such guidance could be provided by the EU Institutions, taking into account the input of other

Law and Legal Theory Research Paper Series, Paper No. 342, pp. 39-40.

¹⁷³ The EU *acquis* consist of thirty-five chapters, two of which are said to constitute the EU rule of law *acquis*: Chapter 23 'Judiciary and fundamental rights' and Chapter 24 'Justice, freedom and security'. See UK Government, 2014, '[Review of the balance of competences between the UK and the EU - EU enlargement](#)'.

¹⁷⁴ UN General Assembly, Resolution '[Enhancing the role of regional, subregional and other organizations and arrangements in promoting and consolidating democracy](#)', A/RES/59/201, 23 March 2005. See also Democracy reporting International, '[International consensus: essential elements of democracy](#)' (Report, October 2011). Democracy Reporting International, '[In need of new tools: protecting democracy in EU Member States](#)', Briefing Paper 39, July 2013.

¹⁷⁵ FRAME, 2014, '[Critical analysis of the EU's conceptualization and operationalization of the concepts of human rights, democracy and rule of law](#)', p. 48.

¹⁷⁶ See Section 2.1.4 (i) of this Research Paper.

¹⁷⁷ For more information see Carp, R., '[The Struggle for the Rule of Law in Romania as an EU Member State: The Role of the Cooperation and Verification Mechanism](#)', Utrecht Law Review, 31 January 2014.

¹⁷⁸ *Ibidem*.

key actors and stakeholders, including EU FRA, the Venice Commission, civil society and the general public. Furthermore, research on the meaning and scope of Article 2 TEU could be undertaken by a special committee working closely with EU FRA and the Venice Commission and taking into account feedback from civil society groups and general public¹⁷⁹.

¹⁷⁹ Von Bogdandy, A., Antpöhler, C., and Ioannidis, M., 2016, [*Enforcing EU values: Reverse 'Solange' and a systemic deficiency committee*](#), SSRN, pp. 14-19.

2.1.2 Mechanisms set out in the TEU and TFEU

Table 3 below shows an overview of the mechanisms set out in the TEU and the TFEU which will be examined and assessed in this Section.

Table 3 Mechanisms set out in EU primary law

Tool	Scope	Actors involved and role	Limitations
Article 7 TEU	Establishes a preventive and reactive mechanism to protect EU values.	• Member States: proposal (1/3) • European Commission: proposal • European Parliament: consent • Council of the European Union: adopts a decision on: (a) the existence of a clear risk of a serious breach (Article 7(1) TEU): 4/5 (b) the existence of a serious and persistent breach (Article 7(2) TEU): unanimity (c) the suspension of certain of the rights of the Treaties (Article 7(3) TEU): qualified majority.	• Lack of enforceability: conditions for applying these mechanisms are almost impossible to fulfil (e.g. unanimity of the European Council required to determine the existence of a serious and persistent breach by a Member State); • Lack of clarity: Notions of "clear risk of a serious breach" and of "serious and persistent breach" have not been clearly defined; • Dominant political understanding of this provision as constituting a 'nuclear option' not to be triggered
Articles 258 - 260 TFEU	Under the infringement procedure, the Commission (258 TFEU) and Member States (259 TFEU) can bring Member States having failed to fulfil an obligation under the Treaties before the CJEU. If the CJEU finds this to be the case, the State concerned shall be required to take the necessary measures to comply with the	• Commission: a reasoned opinion may be adopted and if the concerned Member State does not comply with it within the indicated timeframe, the Commission may bring the matter before the CJEU	• Limited scope: Infringement actions are understood to only allow for the investigation of specific violations of EU law on a case-by-case basis. The infringement procedure, as understood and applied by the Commission, cannot be used to investigate a situation of systemic violation of EU values.

Tool	Scope	Actors involved and role	Limitations
	judgment of the Court (260TFEU).	- Member States: (1) may bring the matter before the Commission and CJEU (2) the concerned Member State can submit observations - CJEU has the jurisdiction to require Member States to fulfil their obligations under the Treaty and may impose financial sanctions in cases of non-compliance.	
Article 70 TFEU	Under peer reviews, the Commission and Member States collaborate to conduct 'peer reviews' or evaluations of Member State implementation of the EU policies in the area of freedom, security and justice.	- European Commission: proposal - Council: to conduct evaluation with Member States - European Parliament and national parliaments are informed of the results.	- Limited scope: to the evaluation of implementation of EU policies with regard to the area of freedom, security and justice, although this area is, in fact, quite broad; - Lack of enforceability: non-binding recommendations; - Lack of clarity regarding how the Commission should carry out its role.

Article 7 TEU: A preventive and reactive mechanism to protect EU values¹⁸⁰

Article 7 TEU is the only specific EU provision dedicated to the protection of EU values in any EU Member States. It establishes both a preventive mechanism and a reactive one. They do not however have to be used chronologically, that is, Article 7(1) does not have necessarily to be used before Article 7(2) as they aim to address two different situations. The two mechanisms laid down in Article 7 TEU are outlined in **Table 4** below.

Table 4 Article 7 TEU

Article 7(1) TEU benchmarks (preventive mechanism)	Article 7(2) TEU benchmarks (sanctioning mechanism)
(1) clear risk of a serious breach	(1) serious and persistent breach
(2) proposal by one third of the Member States, by the Parliament or the Commission;	(2) proposal by one third of the Member States or by the Commission
(3) the assent of the Parliament (i.e. a two-thirds majority of the votes cast, representing a majority of its members); and	(3) assent of the Parliament (i.e. a two-thirds majority of the votes cast, representing a majority of its members); and
(4) hear the concerned Member State	(4) observations of the concerned Member State
(5) a majority of four-fifths of the Council's members	(5) European Council acting by unanimity
Result: The Council may address recommendations to the concerned Member State	Result: The Council, acting by a qualified majority, may decide to suspend certain of the rights deriving from the application of the Treaties to the Member State in question, including the voting rights of the representative of the government of that Member State in the Council (Article 7(3) TEU)

While the preventive mechanism, set out in Article 7(1) TEU, can be activated only where there is a '**clear risk of a serious breach**' of Article 2 TEU by a Member State, Article 7(2) TEU provides for the eventual adoption of sanctions in a situation where a '**serious and persistent breach**' by a Member State has been established by the European Council¹⁸¹.

The activation of the preventive mechanism is aimed at sending a warning signal to an offending Member State and places the EU institutions under an obligation to maintain constant surveillance¹⁸². Under the preventive mechanism, the Council of the EU has a

¹⁸⁰ Article 7 TEU.

¹⁸¹ Article 7(2) TEU.

¹⁸² European Commission, [Communication from the Commission to the Council and the European Parliament on Article 7 of the Treaty on European Union - Respect for and promotion of the values on which the Union is based of 15 October 2003](#), COM/2003/0606 final, p. 7.

discretionary power to determine whether there is a clear risk of a serious breach of the EU fundamental values, that is, excluding 'purely contingent risks from the scope of the preventive mechanism'¹⁸³. To make such determination, the following conditions have to be met: (1) proposal by one third of the Member States, by the Parliament or by the Commission; (2) the assent of the Parliament (i.e. a two-thirds majority of the votes cast, representing a majority of its members); and (3) a majority of four-fifths of the Council's members¹⁸⁴.

In order to apply the 'reactive' mechanism laid down in Article 7(2) TEU, the breach of EU values must be serious and persistent, and must therefore go beyond individual violations of fundamental rights, the rule of law or other values laid down in Article 2 TEU¹⁸⁵. This mechanism has two phases¹⁸⁶: (1) determination of the existence of a serious and persistent breach of EU values by a Member State (by unanimity of the European Council after the consent of the European Parliament has been obtained)¹⁸⁷; and (2) suspension of Member State rights deriving from the Treaties, *including* (but not limited to) voting rights (by decision of the qualified majority of the Council)¹⁸⁸.

As the Council in the preventive mechanism, the European Council has also a wide margin of discretion to determine the existence of a serious or persistent breach under the sanctioning mechanism¹⁸⁹. Once the European Council has determined the seriousness and persistence of the breach, it may decide to impose sanctions, but it is not obliged to do so. It shows that the decision to apply Article 7 TEU is highly political in nature¹⁹⁰. Furthermore, as the European Council and Council represent the Member States, they are naturally reluctant to act against one of them. In addition to high procedural thresholds, this is one of the reasons explaining why Article 7 TEU has not yet been activated.

¹⁸³ *Ibidem*.

¹⁸⁴ Article 7(1) TEU reads as follows: "On a reasoned proposal by one third of the Member States, by the European Parliament or by the European Commission, the Council, acting by a majority of four fifths of its members after obtaining the consent of the European Parliament, may determine that there is a clear risk of a serious breach by a Member State of the values referred to in Article 2. Before making such a determination, the Council shall hear the Member State in question and may address recommendations to it, acting in accordance with the same procedure."

¹⁸⁵ European Parliament, '[Member States and the rule of law. Dealing with a breach of EU values](#)' (March 2015), p. 4.

¹⁸⁶ Article 7(2) TEU reads as follows: "The European Council, acting by unanimity on a proposal by one third of the Member States or by the Commission and after obtaining the consent of the European Parliament, may determine the existence of a serious and persistent breach by a Member State of the values referred to in Article 2, after inviting the Member State in question to submit its observations."

¹⁸⁷ Parliament consent is obtained by a two-thirds majority of the votes cast and absolute majority of Members.

¹⁸⁸ Article 7(3) TEU reads as follows: "Where a determination under paragraph 2 has been made, the Council, acting by a qualified majority, may decide to suspend certain of the rights deriving from the application of the Treaties to the Member State in question, including the voting rights of the representative of the government of that Member State in the Council. In doing so, the Council shall take into account the possible consequences of such a suspension on the rights and obligations of natural and legal persons."

¹⁸⁹ European Commission, '[Communication from the Commission to the Council and the European Parliament on Article 7 of the Treaty on European Union - Respect for and promotion of the values on which the Union is based of 15 October 2003](#)', COM/2003/0606 final, p. 5-6.

¹⁹⁰ *Ibidem*.

Despite many calls¹⁹¹ and situations¹⁹², which may have arguably warranted the activation of Article 7 TEU, the stringent conditions for activating either Article 7(1) or 7(2) TEU, together with the relative incertitude considering what constitutes “a clear risk of a serious breach” or “a serious and persistent breach”, have prevented any application of this Treaty provision¹⁹³. This has also led to the EU being criticised for an apparent lack of political will to effectively uphold EU fundamental values¹⁹⁴. However, in the current political context, the use of Article 7(2) would not even be an option as some Member States have publicly expressed that they would block any such move by the EU¹⁹⁵.

It has also been argued that EU intervention under Article 7 should be based on decision of the Council which is fully amenable to judicial review by the CJEU. This would arguably reduce the risk of discretionary and opportunistic decisions, as well as make it more likely that Member State would trigger Article 7(1) or (2), and adopt recommendations or sanctions against their peers. The CJEU has, however, a very limited mandate in this regard. According to Article 269 TFEU, it can only be called upon by the Member State concerned to review the procedural requirements stipulated in Article 7 TEU but not the substantive issues¹⁹⁶. Should Article 7 TEU be activated, this means that there is no possibility to review the decision that there is a serious and persistent breach of common values or a clear risk of such a breach¹⁹⁷.

¹⁹¹ For example, when it was revealed that several EU Member States and some Candidate Countries colluded in the running of secret CIA prisons after 9/11. The ECtHR recently found that Poland had knowingly abetted unlawful imprisonment of Guantánamo-bound detainees at a secret prison run by the CIA in 2002-03: *Al Nashiri v Poland*, App no 28761/11 (2014). This is the first time an EU Member State has been held in breach of the ECHR for enabling the US authorities to subject individuals to torture and ill-treatment on its territory.

¹⁹² Since 2009, the Commission has been confronted on several occasions with crisis events in some EU countries, which revealed specific rule of law problems. As ex-Vice-President of the European Commission Viviane Reding mentioned in her speech from 4 September 2013, they include notably the Roma crisis in France in summer 2010; the Hungarian crisis that started at the end of 2011; and the Romanian rule of law crisis in the summer of 2012 (Reding, V., ‘[The EU and the Rule of Law – What next?](#)’, Speech at the Centre for European Policy Studies on 4 September 2013, SPEECH/13/677).

¹⁹³ Wennerström, E., 2014, [The EU Commission Defines the Rule of Law and a Mechanism for applying it inside the EU](#), *Europarättslig tidskrift* No 3, p. 618: “with enlargement, the sheer number of Member States in the Council probably made the nuclear option that Article 7 represents even more nuclear, and unrealistic – if the mechanisms appeared steep in a Council with 15 Member States, at 27 Member States the prospects of its use must have appeared staggering.”

¹⁹⁴ European Parliament, ‘[Report on the situation of fundamental rights in the European Union](#)’ (2012).

¹⁹⁵ Hungarian PM Viktor Orbán said he would block any sanctions the EU would want to impose on Poland because of breaches to the rule of law. “That would require full unanimity and Hungary will never support any sort of sanctions against Poland,” he was quoted as saying by Reuters. See EUObserver, ‘[Orban: Hungary would veto sanctions on Poland](#)’, 8 January 2016. See however Scheppele, K.L., for Politico.eu, ‘[EU can still block Hungary’s veto on Polish sanctions](#)’, 11 January 2016, for the argument that EU institutions could trigger Article 7(1) with respect to both Hungary and Poland. This would then remove either state’s vote from the EU law-making process as no state already under Article 7(1) tutelage should be able to vote on Article 7(2) sanctions

¹⁹⁶ European Parliament, ‘[Member States and the rule of law. Dealing with a breach of EU values](#)’ (March 2015), p.3.

¹⁹⁷ European Commission, [Communication from the Commission to the Council and the European Parliament on Article 7 of the Treaty on European Union - Respect for and promotion of the values](#)

Under Article 7 TEU, the Commission can activate any of the two mechanisms with regard to non-compliance of Article 2 TEU by a Member State. There is also the option of using Article 7 sequentially: 1) the preventive mechanism in case of a ‘clear risk of a serious breach’ and/or 2) the sanction mechanism in the case of a ‘serious and persistent breach’ by a Member State¹⁹⁸. In case of ‘systemic threats to the rule of law’, the Commission can also resort to the ‘soft law’ mechanism established in 2014, i.e. the Rule of Law Framework (see Section 2.1.3).

Generally speaking, a number of key concepts mentioned in these mechanisms have not been sufficiently clarified for the Member States to fully understand their obligations and the consequences of non-compliance with these obligations. The key concept for activating the Rule of Law Framework is ‘systemic threat’¹⁹⁹. However, a clear definition of ‘systemic threat’ is not provided, nor is a differentiation with ‘systematic violation’ made²⁰⁰. To activate the preventive mechanism under Article 7 TEU²⁰¹, the threshold is the existence of a “clear risk of a serious breach” of Article 2 TEU and for Article 7 TEU sanctioning mechanism²⁰², the existence of a “serious and persistent breach”. The Commission has not explained or established criteria to distinguish these from a “systemic threat to the rule of law” which is required to activate the new Framework²⁰³. Table 1 in this report provides definitions for these concepts. The interrelation between them is further discussed when assessing the Commission’s Rule of Law Framework in Section 2.1.3 of this Research Paper and in Annex 2. Figure 1 below sums up the different concepts mentioned in the Commission’s Rule of Law Framework and in Article 7 TEU. While they are presented in a particular order, with the pre-Article 7 procedure presented first, it is important to recall that strictly speaking, EU institutions and in particular the Commission, remain entitled not to rely on them sequentially. In other words, and for instance, the Commission may decide to immediately submit a proposal to trigger Article 7(2) TEU, should the situation justify it, without first activating either the rule of law framework and/or Article (7)1 TEU.

[on which the Union is based](#), COM/2003/0606 final, 15 October 2003, p. 7.

¹⁹⁸ Article 7(1) and (2) TEU.

¹⁹⁹ European Commission, Communication ‘[A new EU Framework to strengthen the Rule of Law](#)’ of 19 March 2014, COM(2014) 158 final/2, p. 6.

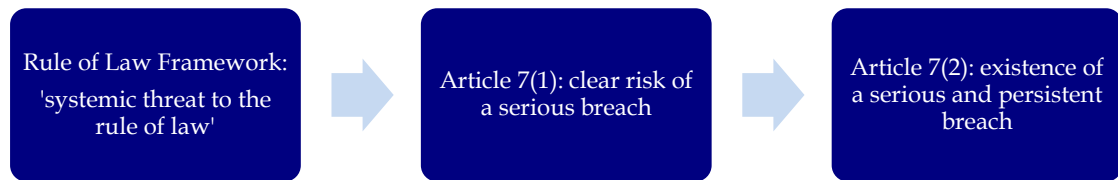
²⁰⁰ Kochenov, D. and Pech, L., 2015, ‘Monitoring and Enforcement of the Rule of Law in the EU: Rhetoric and Reality’, *European Constitutional Law Review*, vol. 11, issue 3, p. 532-533; Kochenov, D., and Pech, L., 2015, [Upholding the Rule of Law in the EU: On the Commission’s ‘Pre-Article 7 Procedure’ as a timid step in the right direction](#), European University Institute Working Papers, Department of Law, p. 12.

²⁰¹ Article 7(1) TEU.

²⁰² Article 7(2) TEU.

²⁰³ Kochenov, D. and Pech, L., 2015, [Monitoring and Enforcement of the Rule of Law in the EU: Rhetoric and Reality](#), *European Constitutional Law Review*, vol. 11, issue 3, pp. 532-533; Kochenov, D., and Pech, L., 2015, [Upholding the Rule of Law in the EU: On the Commission’s ‘Pre-Article 7 Procedure’ as a timid step in the right direction](#), European University Institute Working Papers, Department of Law, p.12.

Figure 1 Different triggering concepts used in the Rule of Law Framework and Article 7 TEU



Articles 258-260 TFEU: The infringement procedure

Infringement actions may be initiated by the Commission (Article 258 TFEU) or by a Member State (Article 259 TFEU), when a Member State has failed to comply with its obligations under the EU Treaties²⁰⁴. In practice, there are only a very limited of examples of infringement actions initiated by an EU Member State against another Member State²⁰⁵ and the majority of these procedures are initiated by the Commission.

Three main types of infringements of EU law may be distinguished: failure to notify the Commission on time of its measures to transpose a directive; lack of compliance of national legislation with EU law requirements; and when EU law is not applied correctly or not applied at all by national authorities²⁰⁶.

Infringements of EU law may be detected through the Commission's own investigations. They can also be brought to the attention of the Commission via complaints or petitions from EU citizens, businesses, NGOs or other organisations. The Commission always seeks to first resolve the matter with the Member State informally in order to avoid the need for a formal infringement procedure. If the Member State does not agree with the Commission or fails to implement a solution to rectify the suspected violation of EU law, the Commission may send a letter of formal notice to the Member State, requesting an explanation within a given time limit. If the Member State's response is unsatisfactory or it does not reply at all, the Commission may send a reasoned opinion. Should the Member State not comply with the reasoned opinion, the Commission may bring the matter before the CJEU²⁰⁷.

If the Member State does not take the necessary steps to comply with the CJEU judgment, the Commission may continue the infringement procedure under Article 260(2) TFEU and refer the Member State to the CJEU again after having sent a letter of formal notice.

²⁰⁴ Kochenov, D., 2015, *Biting Intergovernmentalism: The Case for the Reinvention of Article 259 TFEU to Make It a Viable Rule of Law Enforcement Tool*, The Hague Journal of the Rule of Law, Vol. 7, pp. 153-174.

²⁰⁵ *Ibidem*.

²⁰⁶ European Commission, Report '[Monitoring the application of Union law 2014 Annual Report](#)', COM(2015) 329 final, p.6.

²⁰⁷ *Ibidem*.

In that case, the Commission may propose, and the CJEU impose, financial sanctions (lump sum and/or penalty payment)²⁰⁸.

The Treaty of Lisbon introduced specific proceedings for cases where a Member State does not communicate the measures for transposing a directive to the Commission. In such a case, the CJEU may impose fine on the Member State concerned from the date of the first judgment on the failure to fulfil an obligation²⁰⁹.

The Commission has suggested that its recourse to infringement actions have enabled a successful resolution of a number of 'rule of law crises'²¹⁰. For example, French policy regarding the deportation of Roma people was amended after the Commission threatened to initiate infringement proceedings²¹¹; Hungary reviewed its legislation following its defeat before the CJEU²¹² on the lowering of the mandatory retirement age for judges; and the 2012 Romanian constitutional crisis linked to the Prime Minister's attempt to remove the President from office²¹³ came to an apparent end.

Proceedings based on Articles 258 and 259 TEU are limited to specific and concrete violations of EU law and the Commission has never initiated an infringement action to remedy a violation of EU values. The infringement procedure cannot be used to address matters that go beyond the EU competence, and are not designed to resolve structural and persistent problems²¹⁴. Recent developments suggest that infringement actions are not effective when it comes to addressing a situation where breaches of EU law may form

²⁰⁸ *Ibidem*.

²⁰⁹ EUR-lex, Summaries of EU legislation: '[Proceedings for failure to fulfil an obligation](#)' (8 October 2010) EUR-lex 12008E258.

²¹⁰ "I consider that the Commission has been rather successful in dealing with these often very difficult and complex cases", see Reding, V., '[The EU and the Rule of Law – What next?](#)', Speech at the Centre for European Policy Studies on 4 September 2013, SPEECH/13/677.

²¹¹ The French government's attempt in summer 2010 to secretly implement a collective deportation policy aimed at EU citizens of Romani ethnicity despite contrary assurances given to the Commission that Roma people were not being singled out.

²¹² The Hungarian government's attempt in 2011 to undermine the independence of the judiciary by implementing an early mandatory retirement policy; CJEU, [Case C-286/12](#), Judgment of the Court (First Chamber) of 6 November 2012 *European Commission v Hungary*, ECLI:EU:C:2012:687: The lowering of the retirement age for Hungarian judges constitutes unjustified discrimination on grounds of age. As a result, Hungary brought its Constitution back in line with EU law as requested by the Commission. Since then many other measures have been taken potentially contributing to "a systemic deterioration in the rule of law and fundamental rights" in Hungary. It includes concerns about the freedom of expression, including academic freedom, human rights of migrants, asylum seekers and refugees, restrictions and obstructions to the activities of civil society organisations, rights of people belonging to minorities, including Roma, Jews and LGBTI, the functioning of the constitutional system, the independence of the judiciary, and many allegations of corruption and conflicts of interest. See European Parliament, Resolution of 16 December 2015 on the situation in Hungary: follow-up to the European Parliament Resolution of 10 June 2015', [P8_TA-PROV\(2015\)0461](#).

²¹³ The Romanian government's failure to comply with key judgments of the national constitutional court in 2012.

²¹⁴ Kochenov, D., and Pech, L., 2015, [Upholding the Rule of Law in the EU: On the Commission's 'Pre-Article 7 Procedure' as a timid step in the right direction](#), European University Institute Working Papers, Department of Law, p. 4.

part of a deliberate plan to set up an illiberal regime²¹⁵. An infringement action is also not possible in a situation where national authorities have merely announced a policy which is hardly compatible with EU values. For instance, Hungary's Prime Minister has advocated the establishment of an 'illiberal state' and referred to Putin's Russia and Communist China as two possible models to follow, which suggest a deliberate strategy to dismantle the institutions and essential features traditionally associated with a democratic constitutional order based on the rule of law²¹⁶. On this sole basis, the Commission cannot, however, initiate any infringement action against Hungary as this call, notwithstanding its obvious incompatibility with the letter and spirit of Article 2 TEU²¹⁷, does not in and of itself represent a breach of a specific EU rule. As previously noted, infringement actions are limited to specific and concrete violations of EU law and cannot be used to address a general pattern of violation of EU values (this could however justify the activation of Article 7 TEU and the more recently adopted rule of law framework), or specific violations which do not fall within the scope of EU law²¹⁸ (which again could however be addressed via Article 7 TEU or the rule of law framework).

The case-study below provides an insight into how the EU has approached one specific issue in Hungary, i.e. the lowering of the retirement age for judges. It also highlights the wider implications of addressing the issue as one specific violation of EU law (through infringement proceedings) rather than as a systematic threat to the rule of law (under the Commission's Rule of Law Framework)²¹⁹.

Case-study 1: Hungary	Lack of effective enforcement of the existing EU mechanisms
Problem	As highlighted by the European Parliament in its resolution adopted in

²¹⁵ Kochenov, D., and Pech, L., 2015, *Upholding the Rule of Law in the EU: On the Commission's 'Pre-Article 7 Procedure' as a timid step in the right direction*, European University Institute Working Papers, Department of Law, p. 4.

²¹⁶ "We are parting ways with western European dogmas, making ourselves independent from them [...] We have to abandon liberal methods and principles of organising a society. The new state that we are building is an illiberal state, a non-liberal state." Viktor Orbán, speech given on 26 July 2014[15].

²¹⁷ Zalan, E., for EU Observer, 'How to build an illiberal democracy in the EU', 8 January 2016. In this piece, the author presents seven steps that conduct to 'illiberal democracies': "(1) winning an election by promising nothing concrete, but old glory, (2) dismantle constitutional checks and weaken other institutions set up to keep an eye on you, (3) take control of the state media and squeeze private media hard, (4) take control of finances, reign in oligarchs, investors and banks, (5) discredit the opposition and Western critics, (6) create an enemy or enemies, and (7) rewrite election rules". The term 'illiberal democracy' was coined by Fareed Zakaria, who first introduced this term in the article 'The Rise of Illiberal Democracy', Foreign Affairs, Nov/Dec 1997. Müller, J.-W., 2015, *Should the EU protect democracy and the rule of law inside Member States*, 21(2) European Law Journal 141; von Bogdandy, A., and Sonnevend, P., (eds.), *Constitutional Crisis in the European Constitutional Area. Theory, Law and Politics in Hungary and Romania* (Hart, 2014).

²¹⁸ Kochenov, D., and Pech, L., 2015, *Upholding the Rule of Law in the EU: On the Commission's 'Pre-Article 7 Procedure' as a timid step in the right direction*, European University Institute Working Papers, Department of Law, p. 4.

²¹⁹ European Parliament, Resolution of 16 December 2015 on the situation in Hungary (2015/2935(RSP)) [P8 TA-PROV\(2015\)0461](#).

Case-study 1: Hungary	Lack of effective enforcement of the existing EU mechanisms
description	December 2015, recent developments, initiatives and measures taken by the Hungarian Government 'have led to serious systematic deterioration in the situation as regards the rule of law and fundamental rights [...]'²²⁰. Various concerns have been raised concerning Hungary. A few examples²²¹, are provided below: – <u>Concerns related to the respect for democracy</u>: Since 2010²²², Viktor Orbán's Government pushed through far-reaching legal changes in a manner evoking concerns, as they were often adopted in great haste, in a manner lacking transparency and with little or no consultation with domestic or international stakeholders. – <u>Concerns related to the respect for the rule of law</u>: Due to its governing majority in the National Parliament (<i>Országgyűlés</i>), since 2010 a new constitutional act, the Fundamental Law (<i>Alaptörvény</i>), and over 600 new laws have been adopted. A number of these new laws, introducing major changes to the country's institutional and legal order, are cardinal laws (<i>sarkalatos törvény</i>)²²³, making it challenging for any future governments having simple majority to amend them. – <u>Concerns related to the respect for fundamental rights</u>: Many fundamental rights-related concerns have been raised including about the human rights of migrants, asylum seekers and refugees; restrictions and obstructions to the activities of civil society organisations and the rights of people belonging to minorities, including Roma, Jews and LGBTI. This case study focuses only on one selected issue (retirement age for judges), which has triggered action at EU level. This example demonstrates the limits of infringement proceedings to address the specific issue and highlights other, broader concerns with regard to the independence of judiciary in Hungary²²⁴.

²²⁰ *Ibidem*.

²²¹ European Parliament, Resolution of 16 December 2015 on the situation in Hungary (2015/2935(RSP)) [P8_TA-PROV\(2015\)0461](#) and European Parliament, Resolution of 3 July 2013 on the situation of fundamental rights: standards and practices in Hungary (pursuant to the European Parliament resolution of 16 February 2012) (2012/2130(INI)), [P7_TA\(2013\)0315](#); [Report by Nils Muiznieks](#), Council of Europe Commissioner for Human Rights, following his visit to Hungary, from 1 to 4 July 2014.

²²² Orbán Viktor's Government has been in power since 2010. In 2010, the Viktor Orbán led centre-right conservative party, Hungarian Civic Alliance (FIDESZ), won the absolute majority of seats in the first round of elections. In the second round FIDESZ and its collation partner, the Christian Democratic People's Party (KDNP) won enough seats to achieve two-thirds majority in the Parliament. In 2014 the FIDESZ-KDNP alliance preserved its majority with Viktor Orbán remaining the Prime Minister.

²²³ Pursuant to Article T(4) of the Fundamental Law, 'Cardinal Acts shall be Acts, for the adoption or amendment of which the votes of two-thirds of the Members of the National Assembly present shall be required'.

²²⁴ In her speech in the European Parliament Plenary Session on 2 December 2015, Commissioner Jourova listed the infringement proceedings in place against Hungary. For the whole list of proceedings see Jourova, V., Intervention in the Plenary Session of 2 December 2015, point 17. '[Situation in Hungary: follow-up to the European Parliament Resolution of 10 June 2015](#)'.

Case-study 1: Hungary	Lack of effective enforcement of the existing EU mechanisms
	<u>Retirement age for judges</u>²²⁵ Concerns have been raised about the independence of the Hungarian judiciary and the role of courts as ‘checks and balances’ to the political power following the adoption of measures leading to the re-structuring and re-staffing of courts. One of the measures, which lowered the retirement age for judges from 70 to 62 years, resulted in the forced retirement of approximately 230 judges²²⁶ including judges in the highest positions. This, as highlighted by the International Bar Association’s Human Rights Institute (IBAHRI)²²⁷, created a ‘political capture’, given that new judges were appointed by one individual, i.e. the president of the National Judicial Office (<i>Országos Bírószági Hivatal</i>), whose appointing powers and independence from the Government were questioned <i>inter alia</i> by the European Commission²²⁸.
What has been done?	Since 2010, the EU has provided a variety of responses to the worrying developments in Hungary, including on the issue of retirement age for judges. As a response to the lowering of the mandatory retirement age for judges, in January 2012 the European Commission decided to launch an infringement procedure against Hungary²²⁹. The case was handled by the Court of the Justice of the EU (CJEU) in the form of an expedited procedure (i.e. procedure dealt with within a short time). The CJEU in its judgment²³⁰ from 6 November 2012 upheld the European Commission’s assessment and ruled that the rules in question were incompatible with the relevant EU <i>acquis</i> prohibiting age discrimination at the workplace. Neither the CJEU nor the European Commission found objective and proportionate justification for the lowering of the retirement age.
Remaining concerns	As this case study illustrates, the Hungarian reform lowering the retirement age for judges prompted a reaction from the European Commission, in the form of an infringement procedure. As highlighted by the International Bar Association’s Human Rights Institute (IBAHRI), despite the legislative changes that followed, the situation of judges in Hungary remained somewhat unsatisfactory. The implementation of the reforms lagged behind, as a result of which some judges decided to <i>inter alia</i> seek legal remedies from the European Court of Human Rights (ECtHR). Moreover, most judges decided to remain in retirement instead of returning to their previous

²²⁵ Hungarian Helsinki Committee, Hungarian Civil Liberties Union, Mérték Media and Eötvös Károly Policy Institute ‘[Disrespect for European Values in Hungary 2010-2014](#)’.

²²⁶ HVG, ‘[56 fired judges decided to continue their works](#)’ (56 kirúgott bíró folytathatja a munkáját), 7 May 2013.

²²⁷ IBAHRI, ‘[Still under threat: the independence of the judiciary and the rule of law in Hungary](#)’, 10 December 2015.

²²⁸ European Commission Press Release Database, ‘[Hungary - infringements: European Commission satisfied with changes to central bank statute, but refers Hungary to the Court of Justice on the independence of the data protection authority and measures affecting the judiciary](#)’, 25 April 2012.

²²⁹ European Commission Press Release Database, ‘[European Commission closes infringement procedure on forced retirement of Hungarian judges](#)’, 20 November 2013.

²³⁰ CJEU, Case [C-286/12](#), Judgment of the Court (First Chamber) of 6 November 2012 *European Commission v. Hungary*, ECLI:EU:C:2012:687.

Case-study 1: Hungary	Lack of effective enforcement of the existing EU mechanisms
	positions. Consequently, one can conclude that the infringement procedure did not manage to overcome the issue entirely²³¹. The contested measure, however, was only one of the measures undermining the independence of the Hungarian judiciary. These other measures (e.g. premature termination of the mandate of the head of the Supreme Court, decreased competence of the Constitutional Court, appointing power centralised in the hand of the head of the National Judicial Council), which also received some attention from the European Commission, were not followed up by infringement proceedings. As the previous Commissioner for Justice Viviane Reding noted, despite 'broader concerns about the independence of the judiciary', the European Commission could not go ahead due to its lack of legal competence to do so²³². Measures other than infringement proceedings, which also were aimed at addressing the situation of the Hungarian judiciary, have also shown some limitations. For example: 1. At EU level, the European Parliament has issued many resolutions²³³ calling upon Hungary to ensure the independence of its national judiciary. Despite the repeated concerns, the independence of the Hungarian judiciary may be said to be 'still under threat'²³⁴. 2. In 2013 Ms Navanethem Pillay²³⁵, UN High Commissioner for Human Rights, urged Hungary to reinforce the independence of its judiciary²³⁶. 3. The Council of Europe's Venice Convention²³⁷ on various occasions called upon the Hungarian Government to adopt provisions reinstating the independence of the Hungarian judiciary²³⁸. 4. The ECtHR's Chamber ruled in its judgment of 27 May 2014 that the dismissal of the head of the Hungarian Supreme Court, Mr András Baka, violated the right to access justice as he could not challenge the termination of his mandate. Moreover, the ECtHR found that his unlawful dismissal was mainly due to the 'criticism that he had publicly expressed in his professional capacity on the legislative reforms concerned'. Therefore, his right to freedom

²³¹ IBAHRI, '[Still under threat: the independence of the judiciary and the rule of law in Hungary](#)', 10 December 2015.

²³² Euractiv, '[EU to drop Hungary bank case, uphold action over judiciary](#)', 25 April 2012.

²³³ Examples are: Resolutions of 10 June 2015 on the situation in Hungary, 3 July 2013 on the situation of fundamental rights: standards and practice in Hungary, 16 February 2012 on the recent political developments in Hungary, 10 March 2011 on media law in Hungary.

²³⁴ IBAHRI, '[Still under threat: the independence of the judiciary and the rule of law in Hungary](#)', 10 December 2015.

²³⁵ UN Human Rights Commissioner between 2008-2014.

²³⁶ UN News Centre, '[Hungary must revoke amendment threatening judicial independence - UN rights chief](#)', 18 June 2013.

²³⁷ The European Commission for Democracy through rule of law (Venice Commission) is the Council of Europe's advisory body on constitutional matters. [Website](#) of the Venice Commission.

²³⁸ [Opinion](#) on the Cardinal Acts on the Judiciary that were amended following the adoption of Opinion CDL-AD(2012)001 on Hungary, adopted by the Venice Commission at its 92nd Plenary Session (Venice, 12-13 October 2012); and [Opinion](#) on the Fourth Amendment to the Fundamental Law of Hungary Adopted by the Venice Commission at its 95th Plenary Session, Venice, 14-15 June 2013.

Case-study 1: Hungary	Lack of effective enforcement of the existing EU mechanisms
	of expression was breached. The Hungarian Government has since requested for the case to be brought before the Grand Chamber of the ECtHR²³⁹. As the EU struggles to address the challenges in Hungary, including the threats to judicial independence, EU citizens have launched a European Citizenship Initiative²⁴⁰, calling on the European Commission to trigger Article 7 TEU in order to safeguard the European values set out in Article 2 TEU. To conclude, some of the critical issues highlighted by the European Parliament have not yet been resolved in Hungary. There is therefore a need to consider the use of additional EU mechanisms. The Commission's Rule of Law Framework is for instance meant to address 'situations where the authorities of a Member State are taking measures or are tolerating situations which are likely to systematically and adversely affect the [...] proper functioning of the institutions and the safeguard mechanisms established at national level to secure the rule of law'²⁴¹. As an example of systematic threats to the rule of law – necessary to trigger the new framework, the Commission refers to 'the political, institutional and/or legal order of a Member State as such, its constitutional structure, separation of powers, the independence or impartiality of the judiciary or its system of judicial review including constitutional justice where it exists, must be threatened – for example, as a result of the adoption of new measures or of widespread administrative practices of public authorities and lack of domestic redress'²⁴². This is allegedly a problem which recently emerged in Poland and which explains why the European Commission has activated for the first time its rule of law framework with the view of assessing Poland's adherence to the rule of law after the Polish President Duda refused to swear in three judges of the Constitutional Court²⁴³. However, with respect to Hungary, Commissioner Jourova recently explained that the Framework will only be activated where infringement proceedings and national 'rule of law safeguards' cannot effectively address the relevant problems. While the Commission will keep scrutinising the situation in Hungary, conditions to launch the Framework are said to not to be currently met as the situation would allegedly be addressed through infringement and pre-infringement proceedings²⁴⁴.
Analysis of impact	The rules introduced in Hungary have had an impact on the independence of the Hungarian judiciary, potentially affecting citizens and businesses and, of course, the judges who either left and or stayed in their previous positions.

²³⁹ ECtHR, '[Grand Chamber hearing concerning premature termination of the President of the Hungarian Supreme Court's mandate](#)', 17 June 2015; ECtHR, '[Grand Chamber hearing concerning premature termination of the President of the Hungarian Supreme Court's mandate](#)', 17 June 2015.

²⁴⁰ [Website](#) of the "Wake up Europe!" initiative.

²⁴¹ European Commission, Communication '[A new EU Framework to strengthen the Rule of Law](#)' of 19 March 2014, COM(2014) 158 final/2, p. 6.

²⁴² *Ibidem*, p.7.

²⁴³ Cerulus, L., and Cienski, J., for Politico '[Report: Commission to probe Poland's rule of law](#)', 10 January 2016.

²⁴⁴ Jourova, V., Intervention in the Plenary Session of 2 December 2015, point 17. '[Situation in Hungary: follow-up to the European Parliament Resolution of 10 June 2015](#)'. Information collected through consultation with stakeholders (European Commission, 15 January 2016).

Case-study 1: Hungary	Lack of effective enforcement of the existing EU mechanisms
	Regarding the judges, around 230 judges were forced into premature retirement²⁴⁵ following the adoption of the legal reforms. On 20 November 2013, the European Commission announced the formal closure of the infringement procedure against Hungary for the forced retirement of judges and noted that it was satisfied with the outcome of the proceedings, as Hungary managed to bring in line its legislation with EU law²⁴⁶. More precisely, on 11 March 2013, the Hungarian Parliament adopted a new law²⁴⁷ introducing the gradual lowering of the retirement age for judges to 65 years of age²⁴⁸ over a period of 10 years²⁴⁹. The law also granted the possibility for prematurely retired judges to be reinstated. The judges were also entitled to receive compensation for the remuneration loss suffered while not working. They could also choose to remain in retirement. According to the media²⁵⁰, 56 judges asked to be reinstated and 173 judges sought compensation²⁵¹. IBAHRI, whilst welcoming the legislative change, noted that the legislative amendments were implemented with significant delay, which ultimately pushed some judges into a legal action against Hungary before the ECtHR. Moreover, some judges could not uphold their previous positions, thus opted to accept the financial compensation only. For example, out of 17 removed court presidents, only four managed to return to their previous positions. Considering the above, IBAHRI concluded that the remedial actions taken by Hungary were not entirely satisfactory²⁵². Very little information is available on the social impacts of the contested reform. It is argued, though, that as a result of this reform forcing older and generally more senior judges into retirement, the governing majority was able to replace a large part of the judiciary's leadership²⁵³. Some concerns were also raised that the loss of experience as a result of the removal of senior judges might have had a negative consequence on the performance of the national judiciary²⁵⁴. These concerns, however, could not be substantiated, as

²⁴⁵ Prior to the legislative reform judges had an option to retire at the age of 62. Judges could decide to remain in office until they reached 70 years of age.

²⁴⁶ European Commission, '[European Commission closes infringement procedure on forced retirement of Hungarian judges](#)', 20 November 2013.

²⁴⁷ [Act XX of 2013](#) on legal amendments concerning the upper age limit to be applied in certain justice related legal relationships (2013. évi XX. Törvény az egyes igazságügyi jogviszonyokban alkalmazandó felső korhatárral kapcsolatos törvénymódosításokról).

²⁴⁸ In Hungary the standard retirement age differs depending on the date of birth of the individual.

²⁴⁹ Regarding this point it is noted that the law was adopted prior to the official closure of the infringement procedure. This is partially due to the fact that while the infringement procedure was on-going the Constitutional Court in its decision ruled about the unconstitutionality of the provisions implementing the Fundamental Law's requirements on the lowering of the retirement age for judges. Constitutional Court Decision [no. 33/2012](#). (VII. 17.) (33/2012. (VII. 17.) AB határozat).

²⁵⁰ The desk research did not reveal official data in this respect.

²⁵¹ HVG, '[56 fired judges decided to continue their works](#)' (56 kirúgott bíró folytathatja a munkáját), 7 May 2013.

²⁵² IBAHRI, '[Still under threat: the independence of the judiciary and the rule of law in Hungary](#)', 10 December 2015.

²⁵³ Transparency International, 2014, '[Undermining constitutionality](#)'.

²⁵⁴ International Bar Association's Human Rights Institute (IBAHRI), 'Courting Controversy: the Impact of the Recent Reforms on the Independence of the Judiciary and the Rule of Law in

Case-study 1: Hungary	Lack of effective enforcement of the existing EU mechanisms
	there is a lack of information regarding the age and competences of ‘newcomer’ judges. As explained above, the removal of judges was only one of the measures that was claimed to impede the independence of the Hungarian judiciary. Additional concerns were raised <i>inter alia</i> about the powers of the National Judicial Office’s President to appoint judges and transfer court cases, the premature removal of the Supreme Court’s Head and the appointment of Constitutional Court judges, whose constitutional competences were cut back. This may result in a decrease in objectiveness of rendering judgments and the increased risk of corruption²⁵⁵. The European Commission has expressed concerns about the possible weakening of judicial independence in Hungary²⁵⁶. The Commission’s main concern was that measures in Hungary would have negative implications on the application of EU law in the country. Weakened judiciary independence may have certain negative impacts, including on the country’s economic growth. Judicial independence is a major growth-enhancing factor as it allows for the better protection of economic rights. As the European Commission highlighted ‘[...] greater judicial independence produces more impartial and predictable outcomes since no party can put any pressure on the judge’. The World Justice Forum Rule of Law index concerning ‘Constraints on Government Powers’ ranks countries granting them scores in a scale from 1 to 24. In 2015, Hungary’s ranking was lowered to the lowest regional score (24 out of 24). As part of other sub-factors (including whether Government powers are effectively limited by the legislature), this factor measures whether the judiciary has the independence and ability in practice to exercise effective checks on the Government²⁵⁷.

Article 70 TFEU: Evaluation mechanisms within the framework of the area of freedom, security and justice

Article 70 TFEU allows the Council, on a proposal from the Commission, to adopt measures for collaboration between the Commission and the Member States to conduct so-called ‘peer reviews’ or evaluations of Member State implementation of the EU policies in the **area of freedom, security and justice** (AFSJ)²⁵⁸.

Hungary’.

²⁵⁵ Transparency International, 2012, ‘[Judiciary on manual override](#)’.

²⁵⁶ European Parliament of 16 December 2015 on the situation in Hungary (2015/2935(RSP)) [P8_TA-PROV\(2015\)0461](#) and Resolution of 3 July 2013 on the situation of fundamental rights: standards and practices in Hungary (pursuant to the European Parliament resolution of 16 February 2012) (2012/2130(INI)), [P7_TA\(2013\)0315](#); [Report by Nils Muižnieks](#), Council of Europe Commissioner for Human Rights, following his visit to Hungary, from 1 to 4 July 2014.

²⁵⁷ World Justice Project, ‘[Rule of Law Index 2015](#)’, p. 161. See also World Justice Project, ‘[Rule of Law Index 2015 – Hungary](#)’.

²⁵⁸ Article 70 TFEU provides that “without prejudice to Articles 258, 259 and 260 [infringement procedure] the Council may, on a proposal from the Commission, adopt [...] arrangements for Member States, in collaboration with the Commission, to conduct objective evaluations of the

Member States carry out these evaluations with the support of the Commission. The role of the Commission is to oversee the procedures, ensure their objectivity and consistency and vest peer reviews with a certain moral standard to be taken into account by Member States since the results of peer reviews are not binding²⁵⁹. However, Article 70 TFEU does not describe how the Commission should carry out this role. Nonetheless, it can be construed that, as an executive body of the EU and guardian of the Treaties, the Commission will guide the Member States in establishing the priorities to be examined through the peer review procedure, to make sure that there is an open and multilateral dialogue between the parties involved and that the Member States adhere to the resulting recommendations²⁶⁰.

Evaluations are not triggered under the suspicion that an infringement has been committed; instead, they have a periodic character and aim at identifying best practices and obstacles to cooperation. Evaluations are carried out in an impartial and objective way²⁶¹, including sending questionnaires, carrying out country visits and elaborating a compliance assessment. These evaluations are multilateral, involving third parties such as Frontex. The evaluation is not confidential, although some information might be treated as such if appropriate.

Evaluations result in a compliance assessment of whether the Member States are in compliance with ASFJ policies and include recommendations on how to ensure such compliance, including, where applicable, examples of best practices. These recommendations are non-binding and judicial review is therefore not possible. The

implementation of the Union's policies" in the area of freedom, security and justice. See also Andersen, S., 2014, 'Non-binding Peer Evaluation within an Area of Freedom, Security and Justice' in Holzhaacker, R.L., Paul Luif, P., *Freedom, Security and Justice in the European Union: Internal and External Dimensions of Increased Cooperation after the Lisbon Treaty*, Springer Science & Business Media, p. 35.

²⁵⁹ Andersen, S., 'Non-binding Peer Evaluation within an Area of Freedom, Security and Justice' in Holzhaacker, R.L., Paul Luif, P., *Freedom, Security and Justice in the European Union: Internal and External Dimensions of Increased Cooperation after the Lisbon Treaty* (Springer Science & Business Media, 2014) pp. 44-45; Moxham, L. and Stefanelli, J., 2013, [Safeguarding the rule of law, democracy and fundamental rights: a monitoring model for the European Union](#), Bingham Centre for the Rule of Law, p. 22; Hirsch-Ballin, E., 2015, [Mutual trust: the virtue of reciprocity. Strengthening the acceptance of the rule of law through peer review](#), Tilburg Law School Legal Studies Research Paper Series, No. 14/2015, p. 9.

²⁶⁰ Andersen, S., 'Non-binding Peer Evaluation within an Area of Freedom, Security and Justice' in Holzhaacker, R.L., Paul Luif, P., *Freedom, Security and Justice in the European Union: Internal and External Dimensions of Increased Cooperation after the Lisbon Treaty* (Springer Science & Business Media, 2014) pp. 44-45.

²⁶¹ Andersen, S., 'Non-binding Peer Evaluation within an Area of Freedom, Security and Justice' in Holzhaacker, R.L., Paul Luif, P., *Freedom, Security and Justice in the European Union: Internal and External Dimensions of Increased Cooperation after the Lisbon Treaty* (Springer Science & Business Media, 2014), pp. 29-30; Moxham, L. and Stefanelli, J., 2013, [Safeguarding the rule of law, democracy and fundamental rights: a monitoring model for the European Union](#), Bingham Centre for the Rule of Law, p. 22; Hirsch-Ballin, E., 2015, [Mutual trust: the virtue of reciprocity. Strengthening the acceptance of the rule of law through peer review](#), Tilburg Law School Legal Studies Research Paper Series, No. 14/2015, p. 9.

results and content of such examination are notified to the European Parliament and national parliaments²⁶².

There is little information available on how such peer reviews are carried out in practice. Peer reviews have been used, for instance, to monitor and assess the implementation in Member States of the European Arrest Warrant, mutual assistance in criminal matters²⁶³ and the Schengen acquis²⁶⁴. In coordination with the Member State under investigation and the Commission, Member States draft reports for the Council to adopt a final position²⁶⁵ determining whether the Member State is (1) compliant, (2) can improve, or (3) is not-compliant. In the last two cases, the Member State has to elaborate an action plan to bridge the gaps with the Schengen rules which is assessed and monitored by the Commission in its implementation. Where serious deficits are identified, the Commission may visit the concerned Member State²⁶⁶. The European Parliament has also called for the Council and the Commission to carry out a comprehensive evaluation of the European Agenda on Security through the mechanism of peer reviews²⁶⁷.

Taking into account that in a territory without borders the actions adopted by one Member State may have consequences for others, this peer review mechanism is key to fostering mutual trust²⁶⁸. From the perspective of the protection of Article 2 TEU values, Article 70 TFEU applies to the evaluation of implementation of EU policies with regard to the area of freedom, security and justice. This is a very large policy area which covers matters ranging from freedom of movement, asylum and immigration to judicial and police cooperation, fight against terrorism, organised crime and human trafficking, as

²⁶² Andersen, S., 'Non-binding Peer Evaluation within an Area of Freedom, Security and Justice' in Holzhaecker, R.L., Paul Luif, P., *Freedom, Security and Justice in the European Union: Internal and External Dimensions of Increased Cooperation after the Lisbon Treaty* (Springer Science & Business Media, 2014), pp. 31; 34-36.

²⁶³ Information on areas where peer reviews have been used can be found in the of the judicial library of the European Judicial Network.

²⁶⁴ [Council Regulation \(EU\) No 1053/2013](#) of 7 October 2013 establishing an evaluation and monitoring mechanism to verify the application of the Schengen acquis and repealing the Decision of the Executive Committee of 16 September 1998 setting up a Standing Committee on the evaluation and implementation of Schengen, OJ L 295, 6.11.2013, p. 27-37.

²⁶⁵ Andersen, S., 'Non-binding Peer Evaluation within an Area of Freedom, Security and Justice' in Holzhaecker, R.L., Paul Luif, P., *Freedom, Security and Justice in the European Union: Internal and External Dimensions of Increased Cooperation after the Lisbon Treaty* (Springer Science & Business Media, 2014), p. 36.

²⁶⁶ *Ibidem*.

²⁶⁷ European Parliament, [Resolution of 9 July 2015 on the European Agenda on Security \(2015/2697\(RSP\)\)](#), P8_TA-PROV(2015)0269, paragraph 13.

²⁶⁸ Andersen, S., 'Non-binding Peer Evaluation within an Area of Freedom, Security and Justice' in Holzhaecker, R.L., Paul Luif, P., *Freedom, Security and Justice in the European Union: Internal and External Dimensions of Increased Cooperation after the Lisbon Treaty* (Springer Science & Business Media, 2014), p. 30; [Council Regulation \(EU\) No 1053/2013 of 7 October 2013 establishing an evaluation and monitoring mechanism to verify the application of the Schengen acquis and repealing the Decision of the Executive Committee of 16 September 1998 setting up a Standing Committee on the evaluation and implementation of Schengen](#), OJ L 295, 6.11.2013, paragraph (11); [Council Directive 2011/70/Euratom of 19 July 2011 establishing a Community framework for the responsible and safe management of spent fuel and radioactive waste](#), OJ L 199, 2.8.2011, p. 48-56, paragraph 40.

well as issues related to the rights of EU citizens²⁶⁹. Hence, peer reviews can be used to carry out evaluations of Member States' compliance in all of these matters which might contribute to assess the situation of democracy, rule of law and fundamental rights at national level. The information gathered through these evaluations could be used, for instance, in the first step of the Rule of Law Framework mechanism, where the Commission can rely on information "received from available sources and recognised institutions"²⁷⁰.

²⁶⁹ EUR-lex, Summaries of EU legislation, '[Justice, freedom and security](#)'.

²⁷⁰ European Commission, Communication '[A new EU Framework to strengthen the Rule of Law](#)' of 19 March 2014, COM(2014) 158 final/2, p. 7.

2.1.3 General soft law mechanisms

(i) Mechanisms aimed at Member States

This Section examines and assesses two general soft law mechanisms aimed at all Member States. An overview of their scope, key actors involved and their limitations is shown in **Table 5** below.

Table 5 General soft law mechanisms aimed at Member States

Tool	Scope	Actors involved and role	Limitations
Commission's Rule of Law Framework	A primarily preventive mechanism to uphold the core values of democracy, rule of law and fundamental rights as set in Article 2 TEU within the EU. The Rule of Law Framework aims to address emerging threats to the rule of law before they escalate.	• The Commission only has the power to decide the activation of this mechanism • The European Parliament and the Council have to be informed at every stage and on the results • FRA, the Council of Europe, the Organisation for Security and Co-operation in Europe (OSCE) and other stakeholders: the Commission may rely on the information gathered by them to carry out the 'rule of law' assessment.	• Lack of comprehensiveness: only covers the rule of law; • Lack of clarity in the benchmarks and definitions to trigger the Framework, which could affect the objectivity and effectiveness of the Framework; • Lack of balance of powers and accountability: only the Commission has the discretion to decide when this mechanism should be activated; • Lack of transparency due to the confidential nature of the discussions with the concerned Member State; • Lack of dissuasive power: no sanctions are foreseen in the Framework; • While it has just been activated against Poland, its effectiveness in dealing with systemic threats to the rule of law remains uncertain.

Tool	Scope	Actors involved and role	Limitations
Council's Annual Rule of Law Dialogue	A dialogue among all Member States within the Council to promote and safeguard the rule of law in the framework of the Treaties. The dialogue is to be based on "the principles of objectivity, non-discrimination and equal treatment of all Member States" and to be "conducted on a non-partisan and evidence-based approach".	• Council • National governments	• Lack of effectiveness: ability to deliver concrete results is doubtful; • Lack of clarity on how this dialogue is supposed to be organised and how evidence will be collected and shared; • Lack of a well-defined structure to guide the dialogue and how topics of discussion ought to be selected; • Lack of sufficient time to carry out a meaningful dialogue; • Dialogue runs the risk of taking the form of successive monologues in absence of a clear procedure whereby Member States could make observations on their peers and suggest recommendations.

The Commission's Rule of Law Framework

In response to assertions that the current EU mechanisms and procedures “have not always been appropriate in ensuring an effective and timely response to threats to the rule of law”²⁷¹, the Commission, in March 2014, adopted ‘A new Framework to strengthen the Rule of Law’ (hereinafter – the Rule of Law Framework)²⁷². The main objective of this Framework is to “[...] resolve **future threats to the rule of law** in Member States **before** the conditions for activating the mechanisms foreseen in Article 7 TEU would be met”. The framework aims to fill a gap between political persuasion, via sustained discussion with the Member State concerned, and targeted infringement actions on the one hand, and Article 7 TEU on the other hand.

The afore-mentioned examples of ‘rule of law crisis’ (including the Roma crisis in France in summer 2010; the Hungarian crisis that started at the end of 2011; and the Romanian rule of law crisis in the summer of 2012) have caused concerns about Member State compliance with Article 2 TEU post-EU accession. In these cases, the Commission used political persuasion and infringement proceedings to address relevant problems²⁷³. To a certain extent it may be said to have achieved short-term victories but not to have always secured a long-term resolution of the problems as demonstrated by the continuing calls for activating the rule of law framework against Hungary (see case study above).

The Rule of Law Framework is designed as a dialogue with the concerned Member State, based on equal treatment and an objective and thorough assessment of the situation at stake. Through this Framework, the Commission may indicate to the concerned Member State which actions it must take to address the systemic threat which would have been previously identified by the Commission, thereby avoiding any recourse to Article 7 TEU²⁷⁴.

This Framework allows the Commission, at its own discretion, to decide if an issue raised with regard to a certain Member State by the European Parliament, other Member States, civil society groups or EU citizens, amounts to a systemic threat to the rule of law. The Framework organises a process consisting of three stages²⁷⁵:

²⁷¹ Andersen, S., ‘Non-binding Peer Evaluation within an Area of Freedom, Security and Justice’ in Holzhaecker, R.L., Paul Luif, P., *Freedom, Security and Justice in the European Union: Internal and External Dimensions of Increased Cooperation after the Lisbon Treaty* (Springer Science & Business Media, 2014), p. 30; [Council Regulation \(EU\) No 1053/2013 of 7 October 2013 establishing an evaluation and monitoring mechanism to verify the application of the Schengen acquis and repealing the Decision of the Executive Committee of 16 September 1998 setting up a Standing Committee on the evaluation and implementation of Schengen](#), OJ L 295, 6.11.2013, paragraph (11); [Council Directive 2011/70/Euratom of 19 July 2011 establishing a Community framework for the responsible and safe management of spent fuel and radioactive waste](#), OJ L 199, 2.8.2011, p. 48-56, paragraph 40. See also Parliamentary Assembly, Council of Europe, ‘European Union and Council of Europe human rights agendas: synergies not duplication!’, Doc 13321 of 2 October 2013.

²⁷² European Commission, Communication ‘[A new EU Framework to strengthen the Rule of Law](#)’ of 19 March 2014, COM(2014) 158 final/2, pp. 6, 7.

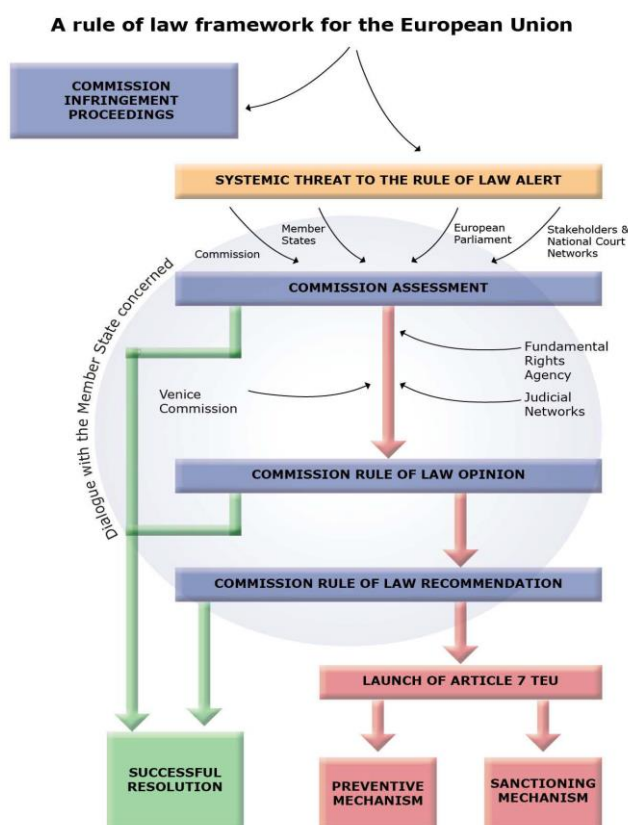
²⁷³ Reding, V., ‘[The EU and the Rule of Law – What next?](#)’, Speech at the Centre for European Policy Studies on 4 September 2013, SPEECH/13/677.

²⁷⁴ European Commission, Communication ‘[A new EU Framework to strengthen the Rule of Law](#)’ of 19 March 2014, COM(2014) 158 final/2, p. 7.

²⁷⁵ *Ibidem*, p. 7-8.

- (i) **Assessment:** The Commission is supposed to undertake fact-finding missions and analysis to determine whether there are clear indications of a systemic threat to the rule of law, in which case it may issue a reasoned “rule of law opinion” following an exchange of views between the Commission and the concerned Member State. The Member State is expected to cooperate under the duty of sincere cooperation provided in Article 4(3) TEU.
- (ii) **Recommendation(s):** based on the dialogue with the concerned Member State and any additional evidence on which the Member State can also comment, the Commission shall may issue recommendations if there is “objective evidence of a systemic threat and that the authorities of that Member State are not taking appropriate action to redress it”. These recommendations may also indicate specific ways to address the situation.
- (iii) **Follow up:** “If there is no satisfactory follow-up to the recommendation by the Member State concerned within the time limit set, the Commission will assess the possibility of activating one of the mechanisms set out in Article 7 TEU”²⁷⁶.

*Figure 2 Overview of the rule of law framework adopted by the Commission*²⁷⁷:



²⁷⁶ *Ibidem*, p. 8.

²⁷⁷ *Ibidem*, Annex II, p. 8.

It is important to note that the Framework is not designed to be triggered by individual breaches of fundamental rights or by individual instances of miscarriage of justice. These cases should be dealt with by the national judicial systems, and in the context of the control mechanisms established under the ECtHR to which all EU Member States are parties²⁷⁸.

A number of shortcomings concerning this Rule of Law Framework have been raised. First, the Commission would not have put forward clear criteria for activating the Framework. In the absence of any clearly pre-defined benchmarks, the new procedure may therefore end up as unworkable as Article 7 TEU. Second, the Commission has reserved for itself the power to trigger the 'pre-Article 7 TEU procedure', which means that only the Commission has the discretion to decide when this new mechanism ought to be activated. Considering the increased politicisation of the Commission following the implementation of the so-called *Spitzenkandidaten* process to design the new President of the Commission in 2014, this discretion may result in the activation or conversely, the non-activation of the framework for reasons of political convenience. Finally, the confidential nature of the whole discussion between the Commission and the Member State is likely to prevent a 'name-and-shame' environment from crystallising and thus reduce the effectiveness of the Framework²⁷⁹.

The following assessment is based on the criteria of **relevance, comprehensiveness, effectiveness, objectivity, impartiality, efficiency, clarity, accountability and transparency**. The definitions of these criteria (see Annex 2) are based on literature research, including the OECD DAC Principles for Evaluation Development Assistance²⁸⁰ and the Glossary of Key Terms in Evaluation and Results Based Management²⁸¹, as well as the definitions of these criteria by the World Bank²⁸². They have been selected based on desk research, consultation with Senior Experts for this study and taking into consideration their correlation with the objectives of the Rule of Law Framework. Furthermore, the recommendations from the European Parliament and the Council of the European Union have also been taken into consideration for the selection of the criteria to assess the Commission's Rule of Law Framework.

Both the European Parliament and the Council of the EU, as explained below, have indicated several characteristics to take into account when devising any new EU level mechanism aiming at ensuring compliance with Article 2 TEU. In its July 2013 Resolution regarding the situation in Hungary with respect to fundamental rights²⁸³, the European

²⁷⁸ *Ibidem*, Annex II, p. 6.

²⁷⁹ Kochenov, D. and Pech, L., 2015, [Monitoring and Enforcement of the Rule of Law in the EU: Rhetoric and Reality](#), European Constitutional Law Review, vol. 11, issue 3, pp. 532-533.

²⁸⁰ OECD, Development Assistance Committee, ['Principles for evaluation of development assistance'](#) (1991).

²⁸¹ OECD, ['Glossary of key terms in evaluation and results based management'](#) (2002).

²⁸² World Bank, Independent Evaluation Group, ['Guidelines for reviewing World Bank implementation completion and results reports'](#) (last updated 1 August 2014) and ['Sourcebook for evaluating global and regional partnership programs'](#).

²⁸³ European Parliament, Resolution of 3 July 2013 on the situation of fundamental rights: standards and practices in Hungary (pursuant to the European Parliament resolution of 16 February 2012)

Parliament recommended that such a mechanism should be independent from political influence, swift and effective; operate in full cooperation with other international bodies; regularly monitor respect for fundamental rights, the state of democracy and the rule of law in all Member States, while fully respecting national constitutional traditions; conduct such monitoring uniformly in all Member States to avoid any risks of double standards; warn the EU at an early stage about any risks of deterioration of the values of Article 2 TEU; issue recommendations to the EU institutions and Member States on how to respond and remedy any deterioration of the values enshrined in Article 2 TEU²⁸⁴.

In another Resolution dedicated to the situation in Hungary²⁸⁵, the Parliament called on the Commission “to present a proposal for the establishment of an EU mechanism on democracy, the rule of law and fundamental rights, as a tool for compliance with and enforcement of the Charter and Treaties as signed by all Member States relying on common and objective indicators, and to carry out an impartial, yearly assessment on the situation of fundamental rights, democracy and the rule of law in all Member States, indiscriminately and on an equal basis, involving an evaluation by the EU Agency for Fundamental Rights, together with appropriate binding and corrective mechanisms, in order to fill existing gaps and to allow for an automatic and gradual response to breaches of the rule of law and fundamental rights at Member State level; instructs its Committee on Civil Liberties, Justice and Home Affairs to contribute to the development and elaboration of this proposal in the form of a legislative own-initiative report to be adopted by the end of the year.”²⁸⁶

The Council has also called on the Commission “to take forward in 2013 a process of inclusive dialogue, debate and engagement with all Member States, EU institutions as well as all relevant stakeholders” on the “possible need for and possible shape of (collaborative and systematic) methods or initiatives to better safeguard fundamental values, in particular the rule of law and the fundamental rights of persons in the Union”. Such a dialogue would “develop an agreed understanding of what any initiative in this area would entail, including of the problems to be addressed, as well as questions of methodology and indicators”; “make full use of existing mechanisms”; “focus on shared universal values”; “consider the full range of possible models, stressing the need for approaches that could be accepted by all Member States by consensus”; “any future initiative in this area that might be agreed would apply in a transparent manner, on the basis of evidence objectively compiled, compared and analysed and on the basis of equality of treatment as between all Member States”²⁸⁷.

(2012/2130(INI), [P7_TA\(2013\)0315](#).

²⁸⁴ *Ibidem*, point 81.

²⁸⁵ European Parliament, Resolution of 10 June 2015 on the situation in Hungary (2015/2700(RSP), [P8_TA-PROV\(2015\)0227](#).

²⁸⁶ *Ibidem*, point 12.

²⁸⁷ See Council of the European Union, [Council conclusions on fundamental rights and rule of law and on the Commission 2012 Report on the Application of the Charter of Fundamental Rights of the European Union, Justice and Home Affairs Council](#) Meeting in Luxembourg on 6 and 7 June 2013; and Committee on Civil Liberties, Justice and Home Affairs, MEP Louis Michel, [Working Document I](#) on the situation of fundamental rights in the European Union in 2012, 21 June 2013.

One may however note that the Council's Legal Service has since defended the view that the rule of law applies as a value of the EU only in the areas in which the EU has been granted competence and, thus, that EU monitoring mechanisms would only be possible if limited to these areas. To cite from the legal opinion issued in November 2014, there would be *'no legal basis in the Treaties empowering the institutions to create a new supervision mechanism of the respect of the rule of law by the Member States, additional to what is laid down in Article 7 TEU'*.²⁸⁸ A more in-depth discussion on the competence of the Commission to adopt the rule of law framework can be found in Annex 2 of this Research Paper. Suffice it to say at this stage that the opinion of the Council's Legal Service has been severely criticised²⁸⁹.

Notwithstanding the issue of the Commission's competence to adopt the rule of law framework, both the Parliament and Council share the view that, as a minimum, an EU mechanism for upholding EU values within the EU should involve the key stakeholders, be objective as regards evidence, which is collected, assessed and evaluated in the same manner for all Member States, and ensure transparency. Based on these considerations, questions for informing the assessment criteria were developed for assessing the Commission's Rule of Law Framework. These are presented in Annex 3, together with an in-depth assessment of the Framework.

The **main findings** of this assessment are summarised below:

- The Commission's Rule of Law Framework appears to be **relevant** since it allows the Commission to react when there are specific indications of a 'systemic threat to the rule of law' and, if necessary, to provide specific recommendations to the Member State concerned²⁹⁰.
- The Framework seems **comprehensive**. Despite the Framework being criticised for not directly encompassing the other fundamental values enshrined in Article 2 TEU, the Commission's communication makes it clear that the rule of law must be understood as being "intrinsically linked to respect for democracy and for fundamental rights: there can be no democracy and respect for fundamental rights without respect for the rule of law and vice versa."²⁹¹
- The **effectiveness** of the Framework has yet to be determined as it was only activated for the first time last January²⁹². However, it contains certain features

²⁸⁸ Council Legal Service, '[Ensuring respect for the rule of law in the European Union](#)', Doc. 15206/14 (14 November 2014).

²⁸⁹ Kochenov, D. and Pech, L., 2015, [Monitoring and Enforcement of the Rule of Law in the EU: Rhetoric and Reality](#), European Constitutional Law Review, vol. 11, issue 3; Hillion, C., 2016, [Overseeing the rule of law in the European Union. Legal mandate and means](#), SIEPS European Policy Analysis, Vol. 1; Besselink, L., '[The Bite, the Bark and the Howl: Article 7 TEU and the Rule of Law Initiatives](#)' in Jakab, A., and Kochenov, D., (eds.), *The Enforcement of EU Law and Values: Methods against Defiance* (OUP, 2016)

²⁹⁰ Timmermans, F., '[The European Union and the Rule of Law](#)', Keynote speech at Conference on the Rule of Law, Tilburg University, 1 September 2015.

²⁹¹ European Commission, Communication '[A new EU Framework to strengthen the Rule of Law](#)' of 19 March 2014, COM(2014) 158 final/2, pp. 3-4.

²⁹² This Framework was activated for the first time on 13 January 2016 with regard to Poland.
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that can potentially hinder its effective application. First, this new Framework relies on the idea that a dialogue between the Commission and a Member State taking measures which breach the rule of law, sometimes even consciously, will have positive results²⁹³. The Framework has also been criticised for not being sufficiently **dissuasive** by failing, for instance, to indicate what would happen if the Member State concerned does not accomplish the Commission's 'rule of law recommendation'²⁹⁴. Second, there is a lack of information on how the fact-finding and assessment will be carried out by the Commission²⁹⁵. Finally, the lack of pre-defined benchmarks and a more concrete definition of what might constitute a 'systemic threat' to the rule of law might also affect the effectiveness of the Framework.

- Pre-established benchmarks and clearer definitions would enhance the **objectivity** of the Framework. The fact that the Framework is to apply in the same way to all Member States does not sufficiently ensure the objectivity of the Framework.²⁹⁶ Commissioner Vera Jourova has, however, clarified that "the Rule of Law Framework will be activated where there are clear indications of a systemic threat to the rule of law in a Member State, in particular in situations which cannot be effectively addressed by the infringement procedure and if the 'rule of law safeguards' which exist at national level no longer seem capable of effectively addressing these threats. These national 'rule of law safeguards' refer to all judicial and constitutional mechanisms and safeguards which aim to ensure the protection of democracy and fundamental rights in a Member State." Taking this into consideration, the Commissioner concluded that "concerns about the situation in Hungary are being addressed by a range of infringement procedures and pre-infringement procedures, and that the Hungarian justice system has also a role to play." Therefore, "the conditions to activate the Rule of Law Framework regarding Hungary are at this stage not met." However, the Commissioner added that the situation in Hungary would continue to be closely scrutinised²⁹⁷. The more formalised participation of other actors, such as the Venice Commission, the European Parliament and the Council, as well as national stakeholders, may nevertheless enhance the objectivity of the Framework and preempt criticism that it could be activated for reasons of political convenience rather than purely legal ones.

²⁹³ Kochenov, D. and Pech, L., 2015, *Monitoring and Enforcement of the Rule of Law in the EU: Rhetoric and Reality*, European Constitutional Law Review, vol. 11, issue 3, pp. 532-533; Kochenov, D. and Pech, L., 2015, *Upholding the Rule of Law in the EU: On the Commission's 'Pre-Article 7 Procedure' as a timid step in the right direction*, European University Institute Working Papers, Department of Law, pp. 12-13.

²⁹⁴ Fekete, B., 'New European Commission Framework to strengthen and protect the rule of law in Member States', Hungarian Academy of Sciences.

²⁹⁵ *Ibidem*.

²⁹⁶ European Commission, Communication 'A new EU Framework to strengthen the Rule of Law' of 19 March 2014, COM(2014) 158 final/2, p. 6.

²⁹⁷ Jourova, V., Intervention in the Plenary Session of 2 December 2015, point 17. 'Situation in Hungary: follow-up to the European Parliament Resolution of 10 June 2015'. Information collected through consultation with stakeholders (European Commission, 15 January 2016).

- The **impartiality** of the Framework may be said to be ensured by the duty of acting independence, which is imposed on the Commission by the Treaties. The Commission shall not “seek or take instructions from any Government or other institution, body, office or entity”²⁹⁸. The appointment procedure of the members of the Commission, through a rotation system, also ensures the impartiality of this body: first, by providing the principle of equal footing among Member States and, secondly, by requiring the demographic and geographic representative character of the Commission²⁹⁹. Furthermore, Article 245 TFEU also requests members of the Commission “to refrain from any action incompatible with their duties”³⁰⁰. The impartiality of the Commission is also required under the Staff Regulations³⁰¹ and the Code of Conduct.³⁰² Breaching this obligation might lead to disciplinary and financial sanctions³⁰³. It has also been suggested that an independent ‘Systemic Deficiency Committee’ be established to monitor Member States compliance with Article 2 TEU and which would be in a position to trigger the activation of the Framework by the Commission and that could prevent any challenges to the impartiality of the Commission to be raised³⁰⁴. This Committee is further analysed in Section 4.1.2 of this Research Paper.
- Currently, it is difficult to assess the real **efficiency** of the Framework as it has just been activated for the first time. However, its design as a “crisis mechanism”³⁰⁵ allows it to be triggered easily and rapidly by the Commission at an early stage with the view of preventing a systemic threat to the rule of law from materialising into an actual systemic breach of the rule of law³⁰⁶.
- The Framework is **clear** because it sets forth a straightforward and comprehensive definition of the rule of law, drawing on the case-law of the ECHR and the CJEU. Furthermore, it clearly provides the four principles on which the Framework is based and how it is to be applied in practice³⁰⁷. Moreover, despite the lack of definition of ‘systemic threat’, the Framework does

²⁹⁸ Article 17(3) second paragraph TEU.

²⁹⁹ Article 244 TFEU.

³⁰⁰ Article 245 TFEU.

³⁰¹ [Regulation No 31 \(EEC\), 11 \(EAEC\)](#), laying down the Staff Regulations of Officials and the Conditions of Employment of Other Servants of the European Economic Community and the European Atomic Energy Community, OJ P 045 14.6.1962, p. 1385.

³⁰² European Commission, [Code of Conduct for Commissioners](#), C(2011) 2904 final, 20 April 2011.

³⁰³ [Regulation No 31 \(EEC\), 11 \(EAEC\)](#), laying down the Staff Regulations of Officials and the Conditions of Employment of Other Servants of the European Economic Community and the European Atomic Energy Community, OJ P 045, 14 June 1962, Articles 22 and 51, Annex IX Disciplinary proceedings.

³⁰⁴ Von Bogdandy, A., et al., 2012, *Reverse Solange – Protecting the Essence of Fundamental Rights Against EU Member States*, 49 Common Market Law Review, pp. 489–519.

³⁰⁵ Information collected through consultation with stakeholders (European Commission, 15 January 2016).

³⁰⁶ Meijers Committee, [Letter to Commissioner Reding: Note on the Commission Communication “A new EU Framework to strengthen the Rule of Law”](#), Ref. CM1406, 15 June 2014.

³⁰⁷ European Commission, Communication ‘[A new EU Framework to strengthen the Rule of Law](#)’ of 19 March 2014, COM(2014) 158 final/2, pp. 7-8.

foresee what situations may be considered as such by providing a list of examples³⁰⁸.

- The **accountability** of the Framework is ensured through its compliance with the principle of **cooperation** and **institutional balance** since it provides that “the European Parliament and the Council will be kept regularly and closely informed of progress made in each of the stages”³⁰⁹. With regard to the involvement of other stakeholders, the Communication recognises the need to draw on the expertise of the EU Agency for Fundamental Rights or the Council of Europe³¹⁰. The Commission will, “as a rule and in appropriate cases”, seek the advice of the Council of Europe and/or its Venice Commission (it has just done so in the case of Poland), and will coordinate its analysis with them in all cases “where the matter is also under their consideration and analysis”. Furthermore, although it has been argued that there is no **legal basis** for the Commission to launch the Framework (see for instance the Opinion of the Council Legal Service³¹¹), the Commission has convincingly argued that, as guardian of the Treaties, it is competent to monitor compliance with Article 2 TEU³¹². Furthermore, its competence may be said to logically derive from Article 7 TEU itself, since under this provision the Commission can already bring to the attention of the Council the existence of a risk to Article 2 TEU values³¹³.
- Regarding the **transparency** of the Framework, the Communication states that the launching of the Commission assessment and the sending of its opinion will be made public, but the content of the exchanges with the Member State concerned will, as a rule, be kept confidential, in order to facilitate the quick resolution of the situation³¹⁴. Some have considered, however, that the procedure would have a “far more persuasive power – and ensure a more accurate picture of the situation – if all the Member States, the European Parliament, human rights bodies including the EU Agency for Fundamental Rights and civil society organisations were involved in this dialogue”³¹⁵.

³⁰⁸ *Ibidem*, pp. 6-7.

³⁰⁹ *Ibidem*, p. 8

³¹⁰ *Ibidem*, p. 9.

³¹¹ Council of the European Union, Opinion of the Legal Service [10296/14](#), 27 May 2014, paragraph 24.

³¹² European Commission, Communication ‘[A new EU Framework to strengthen the Rule of Law](#)’ of 19 March 2014, COM(2014) 158 final/2, p. 6; and Kochenov, D. and Pech, L., 2015, [Upholding the Rule of Law in the EU: On the Commission’s ‘Pre-Article 7 Procedure’ as a timid step in the right direction](#), European University Institute Working Papers, Department of Law, pp. 1-2.

³¹³ Article 7 TEU and Kochenov, D. and Pech, L., 2015, [Monitoring and Enforcement of the Rule of Law in the EU: Rhetoric and Reality](#), European Constitutional Law Review, vol. 11, issue 3, pp. 532-533; Kochenov, D. and Pech, L., 2015, [Upholding the Rule of Law in the EU: On the Commission’s ‘Pre-Article 7 Procedure’ as a timid step in the right direction](#), European University Institute Working Papers, Department of Law.

³¹⁴ European Commission, Communication ‘[A new EU Framework to strengthen the Rule of Law](#)’ of 19 March 2014, COM(2014) 158 final/2, p. 6.

³¹⁵ Butler, I., ‘[EU Still Failing to Protect Fundamental Rights](#)’, Open Society European Policy Institute - Open Society Foundations, 12 March 2014.

- The **added value** of the Framework is that it offers the possibility to the Commission and the concerned Member State to promptly discuss and address concerns in a relatively informal manner before more formal procedures, with legally binding outcomes, are eventually initiated. It therefore provides the Commission with an additional option which may help it preventing a “rule of law crisis” from escalating³¹⁶.

The Council’s annual rule of law dialogue

A few months after the Commission adopted its Rule of Law Framework, the Council of the EU (the Council) took the decision to establish an annual rule of law ‘dialogue among all Member States within the Council’, based ‘on principles of objectivity, non-discrimination, and equal treatment of all Member States’ and to be ‘conducted on a non-partisan and evidence-based approach’. Similarly to the new Commission’s Rule of Law Framework, the Council’s dialogue has been devised to complement existing tools³¹⁷.

From a legal point of view, the Council’s dialogue proposal seems to reflect the view that the Commission’s Rule of Law Framework is not compatible with the principle of conferred competences (Article 5 TEU) as well as the Treaty provision providing for the respect of national identities of Member States inherent in their fundamental political and constitutional structures (Article 4(2) TEU)³¹⁸. However, there are certain indicators of the Council’s tacit acceptance of the Commission’s Rule of Law Framework, such as the presence of the Council in the debates surrounding the launch of the Commission’s Rule of Law Framework in response to the constitutional crisis in Poland. This tacit acceptance can also be construed from the Council’s general support and references to the Legal Service opinions. However, the Council did not refer to the Legal Service’s opinion in its conclusions on the annual rule of law dialogue³¹⁹.

For the Council’s first annual rule of law dialogue, held in Brussels on 17 November 2015, the Luxembourg presidency aimed to create a safe, non-judgemental environment where governments felt comfortable opening up to each other³²⁰. The Ministers exchanged views on their experiences on the issue of the rule of law, which was however understood as a set of rather disconnected topics. Indeed, the dialogue revolved around six main topics: the fight against terrorism following the attacks in Paris; assessment of enforcement of decisions on migration policies; the Presidents’ report on completing Economic and Monetary Union; the completion of the single market; the UK plans for a referendum; and relations with Russia and the situation in Ukraine³²¹. Member State

³¹⁶ *Ibidem*.

³¹⁷ Council of the European Union, [Conclusions of the Council of the EU and the Member States meeting within the Council on ensuring respect for the rule of law of 16 December 2014](#), p. 3.

³¹⁸ Kochenov, D., and Pech, L., 2015, [Upholding the Rule of Law in the EU: On the Commission’s ‘Pre-Article 7 Procedure’ as a timid step in the right direction](#), European University Institute Working Papers, Department of Law, p. 13.

³¹⁹ Council of the European Union, [Conclusions of the Council of the EU and the Member States meeting within the Council on ensuring respect for the rule of law of 16 December 2014](#), p. 3.

³²⁰ Butler, I., for E-Sharp, [‘Wary EU governments hold first rights talks’](#), December 2015.

³²¹ Website of the Council of the European Union, [General Affairs Council of 17-18 November 2015, Main Results](#).

representatives were reportedly open and self-reflective, but did not go so far as to comment on each other's rights records. The meeting was therefore more a series of monologues than a true dialogue. In addition, the range of issues governments raised was so broad that there was little chance to delve into detail³²².

Setting up this mechanism as a dialogue has been criticised. In other areas where tools of the same nature are used, such as dialogues with non-EU countries, dialogues have proven to be rather ineffective. For instance, the EU has set up close to forty 'human rights dialogues' with third countries to promote its values abroad, but the EU preference for this discursive method has been questioned, as evidence of substantial and concrete achievements is thin on the ground³²³.

Be that as it may, the first annual rule of law dialogue held within the Council did not seem to deliver many tangible results. Commentators have therefore suggested that specific themes be set and that recommendations already made by the UN and Council of Europe to Member States be used as a starting point for discussions. Finally, governments should be prepared to accept recommendations from their peers and report back to the Council on progress³²⁴. Furthermore, although the Council establishes that the dialogue will be based in evidence, information on how this has been ensured in practice and who is responsible for this remains unavailable³²⁵.

³²² Butler, I., for E-Sharp, '[Wary EU governments hold first rights talks](#)', December 2015.

³²³ European Parliament, Resolution of 16 December 2010 on the Annual Report on Human Rights in the World 2009 and the European Union's policy on the matter (2010/2202(INI), [P7_TA\(2010\)0489](#), paragraph 157.

³²⁴ Butler, I., for E-Sharp, '[Wary EU governments hold first rights talks](#)', December 2015.

³²⁵ Kochenov, D., and Pech, L., in EU Law Analysis, '[From bad to worse? On the Commission and the Council's rule of law initiatives](#)', 19 January 2015.

(ii) **Mechanisms aimed at EU institutions**

Table 6 below shows an overview of the general soft law mechanisms which are aimed at the EU institutions. These mechanisms will be examined and assessed in this Section.

Table 6 General soft law mechanisms aimed at EU institutions

Tool	Scope	Actors involved and role	Limitations
Strategy for the effective implementation of the Charter of Fundamental Rights by the European Union	- To guarantee that at every step - from the EU legislative process to the application of EU law at the national level - the rights and principles of the Charter are taken into account; - To improve EU citizens' understanding of fundamental rights protection within the EU, providing them with concrete information on possible remedies and the role of the Commission in this field; - To monitor - through presenting Annual Reports - the progress achieved regarding the Charter's application.	The Commission	- Limited scope: Only covers fundamental rights - Lack of enforceability: Non-binding tool
Better Regulation Guidelines and Toolbox	A "check list" for the Commission's staff and support units carrying out impact assessments. Focus on what fundamental rights might be affected by a specific proposal and how they should be taken into account in each of the methodological steps.	The Commission, in particular, staff dealing with impact assessments	Lack of effectiveness: The implementation in practice of the Better Regulation is still to prove its effectiveness.
Guidelines on methodological	Context and methodological guidance for the Council preparatory bodies in the	The Council and its preparatory	Lack of effectiveness: The implementation in practice of the Better Regulation is still to

Tool	Scope	Actors involved and role	Limitations
steps to be taken to check fundamental rights compatibility at the Council's Preparatory Bodies'	process of checking compliance with fundamental rights in connection with the proposals under discussion at the relevant Council preparatory bodies.	bodies	prove its effectiveness.
European Parliament Impact Assessment Handbook	Guidance for committees in using the EP impact assessment services.	The European Parliament	• Lack of effectiveness: The implementation in practice of the Better Regulation is still to prove its effectiveness.

Fundamental rights proofing of EU legislative proposals

The EU institutions have acted to integrate the Charter of Fundamental Rights more effectively in their policy-making and legislative processes ever since the entry into force of the Lisbon Treaty³²⁶.

In 2010, the European Commission adopted the ‘Strategy for the effective implementation of the Charter of Fundamental Rights by the European Union’ (‘the Strategy’)³²⁷. One of its three objectives³²⁸ is to include and consider the rights and principles of the Charter in all the stages of the EU legislative process, including the implementation of the EU *acquis*.

To this end, in 2011, the Commission issued the ‘Operational Guidance on taking account of Fundamental Rights in Commission Impact Assessments’³²⁹. It offers a “check list” for the Commission’s staff and support units carrying out impact assessments. These guidelines focus on what fundamental rights might be affected by a specific proposal and how they should be taken into account in each of the methodological steps of these assessments³³⁰. The Operational Guidance were incorporated in the ‘Better Regulation Guidelines’³³¹ adopted in May 2015. These aim to ensure that the proposals of the European Commission “meet policy goals at minimum cost and deliver maximum benefits to citizens, businesses and workers while avoiding all unnecessary regulatory burdens”³³². The Better Regulation Guidelines form part of a Better Regulation Package adopted by an inter-institutional agreement to enhance and ensure cooperation between the European Commission, the Council and the European Parliament in the policy cycle³³³ for the effectiveness of EU action in achieving its goals³³⁴.

Through its seven chapters, the Guidelines set principles, targets and measures for each of the steps of the policy cycle, from the preparation of proposals, including planning and impact assessments, to their adoption, implementation and monitoring.³³⁵ The Guidelines are accompanied by a ‘Toolbox’³³⁶, which offers additional guidance in the implementation of the Better Regulation. Of particular interest is Tool 24 which, under Chapter III ‘How to identify impacts in impact assessments, evaluations and fitness checks’, aims at ensuring that fundamental rights are respected in all acts and initiatives

³²⁶ FRA, 2012, [‘Bringing the Charter to life – opportunities and challenges of putting the EU Charter of Fundamental Rights into practice’](#), Copenhagen seminar report, pp. 10-11.

³²⁷ European Commission, Communication from the Commission [‘Strategy for the effective implementation of the Charter of Fundamental Rights by the European Union’](#) of 19 October 2010, COM(2010) 573 final.

³²⁸ The other two are raising awareness of the Charter and follow-up on the implementation of the Charter through Annual Reports.

³²⁹ Commission Staff Working Paper, [‘Operational Guidance on taking account of Fundamental Rights in Commission Impact Assessments’](#), SEC(2011) 567 final.

³³⁰ *Ibidem*.

³³¹ Website of the European Commission, [‘Better Regulation. Guidelines’](#).

³³² Website of the European Commission, [‘Better Regulation. Guidelines. Introduction’](#).

³³³ European Commission, [‘Provisional text of the proposed interinstitutional agreement on better regulation’](#).

³³⁴ Website of the European Commission, [‘Better Regulation’](#). European Commission, [‘Communication from the Commission to the European Parliament and the Council: Proposal for an Interinstitutional Agreement on Better Regulation’](#), COM(2015)216 final, 19 May 2015.

³³⁵ Website of the European Commission, [‘Better Regulation Guidelines’](#).

³³⁶ Website of the European Commission, [‘Better Regulation Toolbox’](#).

of the Commission. Tool 24 provides guiding principles to follow in the analysis of fundamental rights in the Commission's Impact Assessments³³⁷.

The Better Regulation Guidance and Toolbox seem to solve some of the old concerns regarding the Operational Guidance. In reference to consultation, the Better Regulation launches the platform "Lighten the load-have your say" to offer an open forum for anyone to express their concerns or suggestions for improvement on a specific proposal or piece of legislation³³⁸. After the adoption of a proposal, the Commission will hold an twelve-week consultation to gather views and observations which will then be sent to the other EU institutions to facilitate their appraisal work³³⁹. A four-week consultation is also foreseen for delegated and implementing acts which will be announced well in advance for enhancing stakeholders to prepare their contributions. This could perhaps be linked to the highly technical nature of these acts. The added value of this consultation is yet to be determined overall, taking into account the increase in the workload that it will involve for the Commission³⁴⁰.

The Better Regulation proposes a closer interplay among the EU Institutions. Under this closer cooperation, the Commission would share the data of its impact assessments with the European Parliament and the Council³⁴¹, which would use this data as the starting point for their future work³⁴². However, each of the institutions is competent for establishing how to organise their impact assessment work, although always cooperating with the other institutions to improve the methodology and coherence of impact assessments³⁴³. The Commission's impact assessments may be revised *motu proprio* or at the request of the European Parliament or the Council³⁴⁴. Moreover, the concern about the wider public not being able to have access to the deliberations considerations on the potential impact of fundamental rights³⁴⁵ is also addressed by the Better Regulation, which foresees that the result of the interplay among the EU Institutions will be made public and used for future evaluation work³⁴⁶.

Greater involvement from Member States is also foreseen under the Better Regulation. "The REFIT platform offers a channel to discuss transposition and implementation measures with Member States." This platform will be composed of 20 high level experts from business and civil society and one representative of each Member State and will be

³³⁷ Website of the European Commission, '[Better Regulation Toolbox. Tool 24](#)'.

³³⁸ Renda, A., 2015, [Too good to be true? A quick assessment of the EC's new Better Regulation Package](#), CEPS, p. 4.

³³⁹ *Ibidem*, p. 8.

³⁴⁰ Website of the European Commission, '[Better Regulation Guidelines. Stakeholder consultation](#)', part 4.

³⁴¹ European Commission, [Provisional text of the proposed interinstitutional agreement on better regulation, paragraph 13](#); Renda, A., 2015, [Too good to be true? A quick assessment of the EC's new Better Regulation Package](#), CEPS, p. 7.

³⁴² European Commission, [Provisional text of the proposed interinstitutional agreement on better regulation, paragraph 10a](#).

³⁴³ *Ibidem*, paragraph 11.

³⁴⁴ *Ibidem*, paragraph 10b.

³⁴⁵ Butler, I., 2012, [Ensuring compliance with the Charter of Fundamental Rights in legislative drafting: the practice of the European Commission](#), European Law Review, p. 410.

³⁴⁶ Renda, A., 2015, [Too good to be true? A quick assessment of the EC's new Better Regulation Package](#), CEPS, p. 8.

chaired by the First Vice-President of the Commission³⁴⁷. For this same purpose, the Commission has committed to issue implementation plans accompanying the Directives and might request Member States in especially complex cases to explain their 'transposition strategy'. The Commission will also carry a compliance test in two steps: "a formal transposition check" and "more substantive conformity checks"³⁴⁸.

The Better Regulation also set far more guidelines on 'ex-post' evaluation and includes a debate between the three EU Institutions to assess what worked and what did not regarding a specific legislative act³⁴⁹.

Finally, the Better Regulation replaces the Impact Assessment Board by a permanent, full-time Regulatory Scrutiny Board. This will be comprised of "one Chair, three 'internal' members and three members recruited with fixed-term contracts on the basis of their specific academic competence and expertise "via rigorous and objective selection procedures". All members are subject to the obligations of independence and impartiality, including abstaining from any impact assessment, evaluation or fitness check where they might have a conflict of interest³⁵⁰.

The Council of the European Union also adopted in 2011 the 'Guidelines on methodological steps to be taken to check fundamental rights compatibility at the Council's Preparatory Bodies'³⁵¹, last updated in 2014³⁵². These Guidelines offer similar guidance as the Commission's document to the Council's preparatory bodies, e.g. the Council Legal Service, national experts and the Working Party on Fundamental Rights, Citizens Rights and Free Movement of Persons (FREMP)³⁵³. These Guidelines also call upon the Council preparatory bodies to take into account the work of the FRA on specific thematic topics³⁵⁴.

The European Parliament also has procedures in place for fundamental rights scrutiny of legislation through its systematic appraisal of Commission impact assessments (more than 100 between June 2012 and December 2014)³⁵⁵. IA of substantive amendments (covering 25 amendments between June 2011 and now³⁵⁶ are based on a request of the coordinators of a Parliamentary committee and are commissioned by the Impact Assessment and European Added Value Directorate of the European Parliamentary Research Service. In 2012, following an own-initiative report adopted the previous year, the Parliament established the specialised Directorate for Impact Assessment and European Added Value. This Directorate has an Ex-Ante Impact Assessment Unit which

³⁴⁷ *Ibidem*, pp. 8, 11.

³⁴⁸ *Ibidem*, p. 10.

³⁴⁹ *Ibidem*, p. 11.

³⁵⁰ *Ibidem*, p. 6.

³⁵¹ Council of the European Union, 'Guidelines on methodological steps to be taken to check fundamental rights compatibility at the Council's preparatory bodies', Doc No. 10140/11, 18 May 2011.

³⁵² Council of the EU, [Doc. 5377/15](#).

³⁵³ FRA, 2012, '[Bringing the Charter to life – opportunities and challenges of putting the EU Charter of Fundamental Rights into practice](#)', Copenhagen seminar report, p.11.

³⁵⁴ *Ibidem*.

³⁵⁵ European Parliament, '[Ex-ante Impact Assessment work in the European Parliament. Initial appraisals of European Commission Impact Assessments July 2014 – June 2015](#)', pp. 194-196. .

³⁵⁶ *Ibidem*.

synthesises the Commission's Impact Assessments and pinpoints where there is room for improvement³⁵⁷. The Parliament has also adopted a Handbook on Impact Assessments³⁵⁸ which sets the key principles governing impact assessments and offers parliamentary committees guidance on assessing and using Commission Impact Assessments³⁵⁹ and criteria for analysing the impact of substantive Parliament amendments³⁶⁰. The Handbook includes a "check-list" on the key components of an impact assessment³⁶¹. With this Handbook, the Parliament aims to "improve the degree of consistency in the way the parliamentary committees deal with impact assessments"³⁶².

There is also a possibility to consult the Parliament's legal service or to request an opinion from EU FRA³⁶³. For instance, EU FRA issued an opinion on the proposal for a Directive on the use of Passenger Name Record (PNR) data for the prevention, detection, investigation and prosecution of terrorist offences and serious crime³⁶⁴. Furthermore, in 2009, the European Parliament Rules of Procedure were amended to entitle a specific committee, a political group or, at least, 40 MEPs to refer a proposal – or parts of it – to the LIBE Committee where issues of conformity with the Charter arise³⁶⁵. In addition, at the end of legislative processes, if there are any amendments that could have an impact on fundamental rights, the Commission may also launch a dialogue with the Council and the Parliament³⁶⁶.

The transparency of some of the procedures described above has been questioned since some do not include a public consultation stage, which leads to a lack of public awareness on the Charter and the fundamental rights declared therein³⁶⁷. The Charter does not indicate the mechanism to uphold the fundamental rights it sets out, which does not facilitate the work of the EU institutions and national authorities in including, promoting and protecting fundamental rights through their policies³⁶⁸.

The case study below on the insufficient fundamental rights proofing in EU legal acts (prior to changes introduced by the Better Regulation), provides a good example of the risks of not undertaking a comprehensive human rights impact assessment of legislative proposals.

³⁵⁷ *Ibidem*.

³⁵⁸ European Parliament, Conference of Committee Chairs, [Impact Assessment Handbook – Guidelines for Committees](#) (updated November 2013).

³⁵⁹ *Ibidem*, part II.

³⁶⁰ *Ibidem*, part III.

³⁶¹ *Ibidem*, Annex.

³⁶² *Ibidem*, paragraph 6.

³⁶³ FRA, 2012, '[Bringing the Charter to life – opportunities and challenges of putting the EU Charter of Fundamental Rights into practice](#)', Copenhagen seminar report, p.11.

³⁶⁴ FRA, 2011, '[Opinion on the Proposal for a Directive on the use of Passenger Name Record \(PNR\) data for the prevention, detection, investigation and prosecution of terrorist offences and serious crime COM\(2011\)32 final](#)', Doc. 1/2011.

³⁶⁵ FRA, 2012, '[Bringing the Charter to life – opportunities and challenges of putting the EU Charter of Fundamental Rights into practice](#)', Copenhagen seminar report, p.11.

³⁶⁶ Website of the European Commission, '[What is the EU doing to implement the Charter?](#)'.

³⁶⁷ FRA, 2012, '[Bringing the Charter to life – opportunities and challenges of putting the EU Charter of Fundamental Rights into practice](#)', Copenhagen seminar report, pp. 8-9, 11.

³⁶⁸ *Ibidem*, pp. 5-6.

Case study 2: Insufficient fundamental rights proofing of EU legal acts

The 2006/24/EC Data Retention Directive (DRD)³⁶⁹ was adopted by qualified majority of the Council of the European Union on 21 February 2006. Ireland and the Slovak Republic voted against the adoption of the Directive³⁷⁰.

The Directive aimed to 'harmonise Member States' provisions on the obligations of the providers of publicly available communications services, of public communications services or of public communications networks with respect to the retention of certain data which are generated or processed by them, in order to ensure that the data are available for the purpose of the investigation, detection and prosecution of serious crime, as defined by each Member State in its national law'³⁷¹. The Directive was issued primarily as a reaction to the terrorist attacks in Madrid of 11 March 2004 and London of 7 July 2005³⁷².

When the Directive was adopted, there was no overarching Treaty provision on data protection (as today is Article 16 TFEU). The Charter of Fundamental Rights was not yet binding and, under the Treaty of Nice, there was not sufficient legal basis for the EU to harmonise criminal investigation tools³⁷³. Hence, the EU had to resort to the general harmonisation clause of former Article 95 TEC (today Article 114 TFEU) to regulate the legal framework applicable to communications services. This was based on the 1995 EU Data Protection Directive – deemed to be vague and technical – and the variety of rules adopted by some Member States.³⁷⁴ Although the debate was already ongoing about the need to make these rules consistent and coherent, the terrorist attacks triggered the adoption of the DRD³⁷⁵, not without discussions and opposition from certain MEPs, members of the Commission and the Council.

The Directive required Member States to establish a system of retention of telecommunications data for a period of six months to two years³⁷⁶. The Directive also extensively defined the data to be retained³⁷⁷. However, the Directive did not develop in detail the conditions that the Member States' legislation had to meet as regards the access to data, protection of the data, remedies, liability or the organisation of supervisory authorities³⁷⁸. Furthermore, the Directive introduced the option to postpone the implementation of the Directive to Internet data up to one year and a half after the transposition deadline³⁷⁹. This option was used by many Member States³⁸⁰.

³⁶⁹ European Parliament and Council of the European Union, [Directive 2006/24/EC](#) of the European Parliament and of the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC, OJ L 105. (Hereinafter, DRD).

³⁷⁰ CJEU, [Case C-301/06](#) Judgment of the Court (Grand Chamber) of 10 February 2009 *Ireland v. Parliament and Council*, ECLI:EU:C:2009:68, paragraph 23.

³⁷¹ *Ibidem*, Article 1(1).

³⁷² Boehm, F., and Cole, M.D., 2014, '[Data retention after the Judgement of the Court of Justice of the European Union](#)', pp. 10-11.

³⁷³ *Ibidem*.

³⁷⁴ *Ibidem*, pp. 10-11.

³⁷⁵ *Ibidem*, pp. 10-12.

³⁷⁶ Articles 3 and 6 DRD.

³⁷⁷ Article 5 DRD.

³⁷⁸ Boehm, F., and Cole, M.D., 2014, '[Data retention after the Judgement of the Court of Justice of the European Union](#)', p. 12.

³⁷⁹ Article 15(3) DRD.

³⁸⁰ Boehm, F., and Cole, M.D., 2014, '[Data retention after the Judgement of the Court of Justice of the European Union](#)', p. 13.

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Several of the transposing measures were challenged before the constitutional and administrative courts of Member States, namely in Bulgaria, Romania, Germany, Cyprus and the Czech Republic, on the basis **that they were in violation of fundamental rights**³⁸¹. In some cases, Member States did not even transpose the DRD, which led to fines such as the one of EUR 3 million paid by Sweden. However, none of the courts sought the advice of the CJEU³⁸².

Ireland, supported by Slovakia, brought a case before the CJEU on the basis that the DRD was “not adopted on an appropriate legal basis” and, thus, asked the court to annul the Directive³⁸³. Ireland argued that the legal basis of the Directive should be founded in Title VI of the EU Treaty (third pillar) rather than in Article 95 EC (first pillar) for the “main or predominant objective [...] is to facilitate the investigation, detection and prosecution of crime”³⁸⁴. However, the CJEU dismissed the action seeing that the legal basis was correct. The Court considered that the premise of the Directive, as stated in its preamble, “is the existence of legislative and technical disparities among national provisions on the matter”³⁸⁵, which could have severe **economic implications for service providers**³⁸⁶. The Directive did not aim to introduce measures under Title VI of the EU treaty³⁸⁷ and “regulates operations which are independent of the implementation of any police and judicial cooperation in judicial matters”³⁸⁸.

On 11 August 2006, the Irish NGO ‘Digital Rights’ brought an action before the High Court of Ireland challenging national and administrative instruments on the retention of data³⁸⁹. A similar class action was brought by more than 11,000 Austrian citizens before the Austrian Constitutional Court³⁹⁰. In these cases both courts raised questions to the CJEU on the compatibility of the DRD with fundamental rights. The CJEU joined the cases in July 2013 and issued a judgment annulling the DRD on 8 April 2014³⁹¹ as it considered the DRD to be in **breach of Articles 7 and 8 of the Charter of Fundamental Rights** of the European Union³⁹².

This case study aims to illustrate the impacts of the insufficient fundamental rights proofing in the adoption of the DRD, as well as the impacts that derived from the annulment of the DRD after its transposition to almost all Member States.

Impact of the CJEU judgment

For individuals

³⁸¹ *Ibidem*.

³⁸² *Ibidem*.

³⁸³ *Ibidem*, p. and CJEU, [Case C-301/06 Ireland v. Parliament and Council](#), ECLI:EU:C:2009:68, paragraphs 1 and 24.

³⁸⁴ CJEU, [Case C-301/06](#) Judgment of the Court (Grand Chamber) of 10 February 2009 *Ireland v. Parliament and Council*, ECLI:EU:C:2009:68, paragraph 28.

³⁸⁵ *Ibidem*, paragraph 66.

³⁸⁶ *Ibidem*, paragraph 68.

³⁸⁷ *Ibidem*, paragraph 84.

³⁸⁸ *Ibidem*, paragraph 83.

³⁸⁹ CJEU, [Joined cases C-293/12 and C-594/12](#) Judgment of the Court (Grand Chamber) of 8 April 2014, *Digital Rights Ireland Ltd (C-293/12) v Minister for Communications, Marine and Natural Resources and Others and Kärntner Landesregierung (C-594/12) and Others*, ECLI:EU:C:2014:238, paragraph 17.

³⁹⁰ *Ibidem*, paragraph 19.

³⁹¹ Boehm, F., and Cole, M.D., 2014, ‘[Data retention after the Judgement of the Court of Justice of the European Union](#)’, p. 20.

³⁹² CJEU, [Joined cases C-293/12 and C-594/12](#) Judgment of the Court (Grand Chamber) of 8 April 2014, *Digital Rights Ireland Ltd (C-293/12) v Minister for Communications, Marine and Natural Resources and Others and Kärntner Landesregierung (C-594/12) and Others*, ECLI:EU:C:2014:238, paragraphs 23-69.

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- Fundamental rights under Article 7 and 8 of the Charter protected
- However, other EU data retention measures still in place could entail a risk to the rights of public and private actors, specifically the access of law enforcement authorities to Eurodac, the Entry-Exit System (EES), the Visa Information System or the Shengen Information System II³⁹³
- Unjustified retention of data based on vague criteria which are not defined and which violate the fundamental rights of individuals³⁹⁴
- The “perception of liberty” (“*Freiheitswahrnehmung*”) of the individuals limits the margin for any other data retention measure, including at EU level³⁹⁵

At Member State level

- The CJEU did not provide any guidance on the consequences that the annulment could entail at national level³⁹⁶. Many Member States considered reassessing their national data retention systems³⁹⁷, to determine whether they complied with Articles 7 and 8 of the Charter³⁹⁸. This might result in invalidating the transposing legislation, as in the case of Austria and Slovenia, which led to the deletion of retained data³⁹⁹. Other Member States, such as UK, have adopted measures to avoid companies from deleting data⁴⁰⁰. Member States may also need to adopt new rules⁴⁰¹. Since the CJEU declared the DRD void, there is a legal *vacuum* that Member States may fill with their own legislative measures⁴⁰². However, the amendment of existing transposing legislation will be examined carefully by the courts⁴⁰³.
- Another option for Member States is not to change the existing framework until measures at EU level are adopted to clarify the situation⁴⁰⁴. In these cases, not amended national

³⁹³ Boehm, F., and Cole, M.D., 2014, ‘[Data retention after the Judgement of the Court of Justice of the European Union](#)’, pp. 87-88.

³⁹⁴ *Ibidem*, p. 88.

³⁹⁵ *Ibidem*.

³⁹⁶ Boehm, F., and Cole, M.D., 2014, ‘[Data retention after the Judgement of the Court of Justice of the European Union](#)’, pp. 41 and 48. EUROJUST, [Eurojust’s analysis of EU Member States’ legal framework and current challenges on data retention](#), 26 October 2015. Council of the European Union, [Situation in the Member States following the “Data Retention Judgment” – State of play](#), Doc. 11747/1/15, 26 October 2015, points 6, 7.

³⁹⁷ Boehm, F., and Cole, M.D., 2014, ‘[Data retention after the Judgement of the Court of Justice of the European Union](#)’, p. 41. EUROJUST, [Eurojust’s analysis of EU Member States’ legal framework and current challenges on data retention](#), 26 October 2015. Council of the European Union, [Situation in the Member States following the “Data Retention Judgment” – State of play](#), Doc. 11747/1/15, 26 October 2015, points 6, 7.

³⁹⁸ *Ibidem*, p. 49. EUROJUST, [Eurojust’s analysis of EU Member States’ legal framework and current challenges on data retention](#), 26 October 2015. Council of the European Union, [Situation in the Member States following the “Data Retention Judgment” – State of play](#), Doc. 11747/1/15, 26 October 2015, points 6, 7.

³⁹⁹ *Ibidem*.

⁴⁰⁰ Boehm, F., and Cole, M.D., 2014, ‘[Data retention after the Judgement of the Court of Justice of the European Union](#)’, p. 55. EUROJUST, [Eurojust’s analysis of EU Member States’ legal framework and current challenges on data retention](#), 26 October 2015. Council of the European Union, [Situation in the Member States following the “Data Retention Judgment” – State of play](#), Doc. 11747/1/15, 26 October 2015, points 6, 7.

⁴⁰¹ *Ibidem*.

⁴⁰² Boehm, F., and Cole, M.D., 2014, ‘[Data retention after the Judgement of the Court of Justice of the European Union](#)’, p. 48.

⁴⁰³ *Ibidem*, p. 49.

⁴⁰⁴ *Ibidem*.

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transposing measures may be challenged before national courts to settle their compatibility with Articles 7 and 8 of the Charter through the procedures foreseen in national law⁴⁰⁵, as in the case of the Irish High Court requesting the CJEU to clarify matters on the transfer of data to third countries⁴⁰⁶. Another option would be for individuals to bring complaints before the ECtHR against national legislation which has not been amended under the current situation (this happened for instance in the *Snowden* case)⁴⁰⁷. Furthermore, infringement actions under Articles 258-260 TFEU can be launched against Member States that have decided not to change their transposing legislation⁴⁰⁸.

- Another option for individuals (rather than resorting to their national courts or to the ECtHR) is to resort to the European Ombudsman. This was the case of a German citizen who filed a complaint with the Commission alleging that Germany had not transposed Directive 2002/58 as amended in 2009 and that this resulted in restricting his rights to be informed on the data stored in relation to him, as foreseen under Article 15(1) of the Directive. However, the Commission sent the complainant a ‘pre-closure letter’ informing him that the case would be dismissed. The complainant considered that the Commission’s decision was unreasoned and, thus, resorted to the European Ombudsman who recommended the Commission either “resume its investigation into the infringement complaint” or “provide adequate explanations to justify why it considers that no further action is needed”⁴⁰⁹. The Commission finally decided to continue with the infringement case but, in the view of the Ombudsman, failed to provide “a comprehensive and thorough explanation as to why it did not consider” that further action was needed⁴¹⁰.
- Impact on the effectiveness of criminal investigations and prosecutions is at stake, particularly regarding the reliability and admissibility of electronic communication data as evidence⁴¹¹.

At EU level

- No legislation at EU level obliging Member States to have or keep data retention regimes⁴¹². Although the e-Privacy Directive (Directive 2002/58/EC) establishes rules on the processing of personal data in the electronic communication sector, it provides for the right of the confidentiality of communications (Article 5), and service providers have the duty to delete traffic data once it is no longer necessary for the purpose of transmission of a communication, save it is processed meeting certain requirements and only for the purposes of subscriber billing and interconnection payments. Article 15 of this Directive enables Member States to restrict the rights and obligations of the Directive for specific purposes, including “to safeguard the prevention, investigation, detection and prosecution of criminal offences”. The DRD aimed to harmonise the national data retention regimes existing under Article 15 of the e-Privacy Directive⁴¹³.

⁴⁰⁵ *Ibidem*, p. 50.

⁴⁰⁶ *Ibidem*, p. 52.

⁴⁰⁷ *Ibidem*.

⁴⁰⁸ *Ibidem*, p. 53.

⁴⁰⁹ EU Ombudsman, [Case 995/2011/KM](#), Draft recommendation of the European Ombudsman in the inquiry into complaint 995/2011/KM against the European Commission, 21 May 2014.

⁴¹⁰ EU Ombudsman, [Case 995/2011/KM](#), Decision of the European Ombudsman closing the inquiry into complaint 995/2011/KM against the European Commission, 30 June 2015.

⁴¹¹ Council of the European Union, [Retention of electronic communication data – General debate](#), 146777/15, 25 November 2015, point 5.

⁴¹² Boehm, F., and Cole, M.D., 2014, ‘[Data retention after the Judgement of the Court of Justice of the European Union](#)’, p. 41.

⁴¹³ Council of the European Union, ‘[Collecting E-evidence in the digital age – the way forward – Preparation of the Council meeting \(Justice Ministers\)](#)’, Doc. 13689/15, 4 November 2015, point 7.

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- Since the annulment of the CJEU had immediate effect, the Commission ended all proceedings against Member States based on the non-transposition of the DRD⁴¹⁴.
- Possible incompatibility of the CJEU judgement with other data retention measures (Passenger Name Record, terrorist finance tracking programmes, Eurodac, Entry-Exit System and Smart Borders, measures in the law enforcement sector)⁴¹⁵ which calls for the definition of “serious crime” as the CJEU used this criterion in the judgment to justify the retention of data⁴¹⁶.
- Impact in the effectiveness of cross-border and international judicial cooperation in criminal matters⁴¹⁷.

Concluding remarks

This case study demonstrates the importance of assessing the fundamental right impact of EU legislation. It illustrates the serious adverse consequences for individuals, companies, Member States and the EU itself stemming from the adoption of the DRD. This situation could have been avoided if a **careful assessment** and **wider consultation** process had been carried out prior to the adoption of this Directive. The Council is currently debating the judgment of the CJEU⁴¹⁸, which might reflect the dissenting voices on the matter whether the DRD was an “emergency legislation” which responded to a terrorist threat or whether, or whether on the other hand, the assessment on the impact on fundamental rights was insufficient.

⁴¹⁴ Boehm, F., and Cole, M.D., 2014, '[Data retention after the Judgement of the Court of Justice of the European Union](#)', p. 41.

⁴¹⁵ *Ibidem*, Part E.

⁴¹⁶ *Ibidem*, p. 88.

⁴¹⁷ Council of the European Union, [Retention of electronic communication data – General debate](#), Doc. 146777/15, 25 November 2015, point 5.

⁴¹⁸ *Ibidem*.

(iii) Reporting Mechanisms covering EU institutions and Member States

Under the umbrella of general EU soft mechanisms which aim to guarantee compliance with Article 2 TEU values, this Section will analyse the reporting mechanisms covering both EU institutions and Member States. An overview of these mechanisms, their scope, the actors involved in them and their limitations, is available in **Table 7** below.

Table 7 General soft law mechanisms: reporting mechanisms covering EU institutions and Member States

Tool	Scope	Actors involved and role	Limitations
European Commission Annual Report on the Application of the Charter of Fundamental Rights	The annual report monitors progress in the areas where the EU has powers to act, showing how the Charter has been taken into account in actual cases, notably when new EU legislation is proposed.	The European Commission	• Lack of comprehensiveness: The report does not provide a detailed assessment of the fundamental rights situation in each Member State. • Lack of enforceability: This reporting mechanism does not foresee a follow-up procedure.
European Council conclusions on fundamental rights and the rule of law	A dialogue among all Member States within the Council to promote and safeguard the rule of law in the framework of the Treaties.	The Council and Member States	• Lack of enforceability: Non-binding tool • Lack of coordination and overlaps with other monitoring tools; • Lack of comprehensiveness: Limited to the analysis of rule of law-related issues when Member States are applying EU law.
European Parliament's Annual Report on the Situation of Fundamental Rights in the EU	Resolution on the fundamental rights situation in the EU by theme. It offers a political forum with visibility and is important in exerting political pressure on Member States in areas of concern.	The European Parliament	• Lack of enforceability: The recommendations provided in this report are not legally binding. • No systematic monitoring on whether or how the recommendations have been

Tool	Scope	Actors involved and role	Limitations
and other reports			followed-up by Member States.
FRA reports, including the Annual Report on Fundamental Rights	Expertise relating to fundamental rights provided to the relevant institutions, bodies, offices and agencies of the EU and its Member States when implementing EU law	EU FRA	• Competence limitation and lack of enforceability: limited agency's mandate - FRA has only a supporting role in the EU legislative process

European Commission's Annual Report on the Application of the Charter of Fundamental Rights of the EU

Follow-up on the implementation of the Charter through Annual Reports is another objective of the Commission's 2010 'Strategy for the effective implementation of the Charter of Fundamental Rights by the European Union'⁴¹⁹.

Annual Reports on the implementation of fundamental rights and freedoms enshrined in the Charter have been prepared since 2010⁴²⁰. The Annual Reports cover both EU actions and developments at Member State level. This tool enables a yearly debate with the European Parliament and the Council and fosters a dialogue between the EU institutions and citizens⁴²¹. The Annual Reports inform the public on their fundamental rights and the available means of redress for cases when their rights are violated by an EU institution or national authority⁴²².

Annual Reports are based on information from citizens' letters, case-law of the CJEU and questions and petitions addressed to the European Parliament⁴²³. These Reports highlight the key priorities for the Commission in the policy and legislative initiatives of the previous year and the progress made. The accompanying document to the Report contains individual examples of the implementation of the Charter at EU and national level⁴²⁴.

The Report does not provide a detailed assessment of the fundamental rights situation in each Member State but rather provides an analysis of specific problematic situations across the EU and puts forward recommendations⁴²⁵. The analysis and recommendations focus on the scope of EU competence in line with Article 51(1) of the Charter, which addresses Member States "when they are implementing Union law". The reporting mechanism does not foresee a follow-up procedure on the recommendations; however, the subsequent report may focus on those situations previously highlighted as problematic⁴²⁶.

European Council's conclusions on fundamental rights and the rule of law

As explained above, in drafting the Annual Report on the implementation of the Charter, the European Commission exchanges opinions with the Council. In view of the Annual Report, the Council adopts a set of conclusions. The June 2013 conclusions⁴²⁷ highlighted

⁴¹⁹ Website of the European Commission, '[What is the EU doing to implement the Charter?](#)'.

⁴²⁰ European Parliament, 2013, '[The triangular relationship between fundamental rights, democracy and rule of law in the EU: Towards an EU Copenhagen Mechanism](#)', p. 20-21; and Website of the European Commission, '[EU Charter of Fundamental Rights. Annual Report](#)'.

⁴²¹ *Ibidem*.

⁴²² *Ibidem*.

⁴²³ *Ibidem*.

⁴²⁴ *Ibidem*.

⁴²⁵ European Parliament, 2013, '[The triangular relationship between fundamental rights, democracy and rule of law in the EU: Towards an EU Copenhagen Mechanism](#)', p. 21.

⁴²⁶ *Ibidem*.

⁴²⁷ Council of the European Union, '[Council conclusions on fundamental rights and rule of law and on the Commission 2012 Report on the Application of the Charter of Fundamental Rights of the](#)

the importance of continuing to prioritise the implementation of the Charter at EU and national level, including both the legislative and the justice processes. The Council's conclusions provided that the principles and recommendations of the Annual Report should be implemented taking into consideration the contributions of the FRA⁴²⁸.

The Council also emphasised that EU accession to the ECHR is key to "further enhance coherence in human rights protection in Europe, increase judicial dialogue and improve the consistency of case-law"⁴²⁹.

This annual exchange of views on the Commission's annual report on the application of the Charter is limited to the analysis of fundamental rights-related issues when Member States are applying EU law.

European Parliament's Annual Report on the Situation of Fundamental Rights in the EU and other reports

Since 1993, the European Parliament has adopted on a yearly basis a resolution on the fundamental rights situation in the EU. This resolution is based on a report prepared by a rapporteur of the Committee on Civil Liberties, Justice and Home Affairs (LIBE Committee), which is subsequently voted on in plenary. The Annual Resolution covers the situation of fundamental rights in the EU by theme. Each year, the key subjects are adapted to focus on the most relevant fundamental rights matters⁴³⁰.

These Resolutions typically contain general orientations and conclude by raising institutional questions, for example, on the accession of the EU to the ECHR or setting a more comprehensive and coherent framework of cooperation with the Council of Europe⁴³¹. Finally, the Report also provides recommendations⁴³².

While the European Parliament's reports play an important role in exerting political pressure, they are not legally binding. In addition, no systematic monitoring is foreseen on whether or how the recommendations provided in the reports are followed-up on⁴³³.

Nonetheless, the European Parliament Resolutions are a key instrument to analyse situations of concern to the EU. For instance, the Louis Michel report on fundamental rights in 2012 stressed that it was "essential for the European Union, its institutions and Member States to guarantee respect for the common European values set out in Article 2 TEU, that all the instruments currently provided for in the treaties in this regard urgently need to be applied and implemented, and that where necessary amendments to the

[European Union, Justice and Home Affairs Council](#) Meeting in Luxembourg on 6 and 7 June 2013.

⁴²⁸ *Ibidem*, paragraphs 1-4.

⁴²⁹ *Ibidem*, paragraph 5.

⁴³⁰ European Parliament, 2013, '[The triangular relationship between fundamental rights, democracy and rule of law in the EU: Towards an EU Copenhagen Mechanism](#)', p. 22.

⁴³¹ Moxham, L. and Stefanelli, J., 2013, '[Safeguarding the rule of law, democracy and fundamental rights: a monitoring model for the European Union](#)', Bingham Centre for the Rule of Law, p. 15.

⁴³² European Parliament, 2013, '[The triangular relationship between fundamental rights, democracy and rule of law in the EU: Towards an EU Copenhagen Mechanism](#)', p. 51.

⁴³³ *Ibidem*, p. 13-14.

treaties should be prepared”⁴³⁴. The report also highlighted “that the obligation to fulfil the Copenhagen criteria does not lapse after accession but remains incumbent on the Member States”⁴³⁵. It urged the creation of a new ‘Copenhagen mechanism’ to ensure the respect, protection and promotion of Article 2 TEU values. The report indicated features of such mechanism, stating that it should be binding and automatically activated by the Commission⁴³⁶.

The European Parliament has also been essential in promoting the defence and enforcement of the core values of Article 2 TEU and in calling the Commission to adopt measures to this regard in other reports. Specifically, the Rui Tavares report of 2013⁴³⁷ and the June 2015 Resolution⁴³⁸ have called upon the Commission to adopt measures to ensure Hungary’s full compliance with Article 2 TEU values and also to establish a mechanism on democracy, the rule of law and fundamental rights⁴³⁹. The 2015 Resolution is the basis for the Legislative Initiative Report and the accompanying European Added Value Assessment, which this Research Paper supports.

EU Fundamental Rights Agency’s Annual Activity Report and other reports

The objective of the European Union Agency for Fundamental Rights (FRA) is to provide the EU institutions, bodies, offices and agencies and its Member States, when implementing EU law, with assistance and expertise relating to fundamental rights⁴⁴⁰. To do this, EU FRA performs the following main tasks: collecting and analysing information and data; providing assistance and expertise; communicating and raising rights awareness⁴⁴¹.

⁴³⁴ European Parliament, 2014, [‘Report on the situation of fundamental rights in the European Union \(2012\)’, 2013/2078\(INI\)](#), paragraph 5.

⁴³⁵ *Ibidem*.

⁴³⁶ European Parliament, 2014, [‘Report on the situation of fundamental rights in the European Union \(2012\)’, 2013/2078\(INI\)](#), paragraph 9.

⁴³⁷ European Parliament, Resolution of 3 July 2013 on the situation of fundamental rights: standards and practices in Hungary (pursuant to the European Parliament resolution of 16 February 2012) (2012/2130(INI)) [P7_TA\(2013\)0315](#).

⁴³⁸ European Parliament, Resolution of 10 June 2015 on the situation in Hungary (2015/2700(RSP)) [P8_TA-PROV\(2015\)0227](#).

⁴³⁹ *Ibidem*, paragraph 12.

⁴⁴⁰ Council of the European Union, [Council Regulation \(EC\) No 168/2007 of 15 February 2007 establishing a European Union Agency for Fundamental Rights](#), OJ L 53, 22.2.2007, Article 2, p. 1–14. Toggenburg, G., 2013, [Fundamental Rights and the European Union: how does and how should the EU Agency for Fundamental Rights relate to the EU Charter of Fundamental Rights?](#), EUI Department of Law Research, Paper No. 13; Toggenburg, G., 2008, *The role of the new EU Fundamental Rights Agency: Debating the “sex of angels” or improving Europe’s human rights performance?*, European Law Review, Issue 3; Von Bogdandy, A., and Bernstorff, J., 2009, *The EU Fundamental Rights Agency within the European and International Human Rights Architecture: the legal framework and some unsettled issues in a new field of administrative law*, 46 Common Market Law Review.

⁴⁴¹ Council of the European Union, [Council Regulation \(EC\) No 168/2007 of 15 February 2007 establishing a European Union Agency for Fundamental Rights](#), OJ L 53, 22.2.2007, Article 4, p. 1–14. Toggenburg, G., 2013, [Fundamental Rights and the European Union: how does and how should the EU Agency for Fundamental Rights relate to the EU Charter of Fundamental Rights?](#), EUI Department of Law Research, Paper No. 13; Toggenburg, G., 2008, *The role of the new EU Fundamental Rights*

The FRA engages in legal and social science research to pinpoint best practices within the EU and to identify areas where there remains work to be done to meet internationally accepted standards⁴⁴². It typically produces EU comparative reports based on a thematic approach. The thematic areas are set out in a five-year Multi-annual Framework and fall broadly under different chapters of the Charter of Fundamental Rights⁴⁴³.

On 11 March 2013, the Justice and Home Affairs Council of the European Union, following a proposal of the European Commission and after consulting the European Parliament, adopted the agency's current Multi-annual Framework. The Council's Decision states the following nine areas for FRA's work: access to justice; victims of crime; information society and, in particular, respect for private life and protection of personal data; Roma integration; judicial cooperation, except in criminal matters; rights of the child; discrimination on all grounds; immigration and integration of migrants, visa and border control and asylum; racism, xenophobia and related intolerance⁴⁴⁴.

A yearly overview of the FRA's work is provided in its Annual Report which provides a comparative overview of the results from the monitoring of the situation on fundamental rights in EU Member States⁴⁴⁵. Data in the Report is provided by the FRA's network of researchers (FRANET), NGOs and from the FRA's 28 liaison officers at national level⁴⁴⁶. For each area the Annual Activity Reports identify 'key developments', 'promising practices' and details on the activities that the Agency has carried out in that specific area.

Agency: Debating the "sex of angels" or improving Europe's human rights performance?, European Law Review, Issue 3; Von Bogdandy, A., and Bernstorff, J., 2009, *The EU Fundamental Rights Agency within the European and International Human Rights Architecture: the legal framework and some unsettled issues in a new field of administrative law*, 46 Common Market Law Review.

⁴⁴² Website of FRA, '[FRA research: Providing robust, comparable data and analysis](#)'. Toggenburg, G., 2013, *Fundamental Rights and the European Union: how does and how should the EU Agency for Fundamental Rights relate to the EU Charter of Fundamental Rights?*, EUI Department of Law Research, Paper No. 13; Toggenburg, G., 2008, *The role of the new EU Fundamental Rights Agency: Debating the "sex of angels" or improving Europe's human rights performance?*, European Law Review, Issue 3; Von Bogdandy, A., and Bernstorff, J., 2009, *The EU Fundamental Rights Agency within the European and International Human Rights Architecture: the legal framework and some unsettled issues in a new field of administrative law*, 46 Common Market Law Review.

⁴⁴³ Website of FRA, '[Areas of work](#)'.

⁴⁴⁴ Website of FRA, '[Multi-Annual Framework 2013-2017](#)'. Toggenburg, G., 2013, *Fundamental Rights and the European Union: how does and how should the EU Agency for Fundamental Rights relate to the EU Charter of Fundamental Rights?*, EUI Department of Law Research, Paper No. 13; Toggenburg, G., 2008, *The role of the new EU Fundamental Rights Agency: Debating the "sex of angels" or improving Europe's human rights performance?*, European Law Review, Issue 3; Von Bogdandy, A., and Bernstorff, J., 2009, *The EU Fundamental Rights Agency within the European and International Human Rights Architecture: the legal framework and some unsettled issues in a new field of administrative law*, 46 Common Market Law Review.

⁴⁴⁵ European Parliament, 2013, '[The triangular relationship between fundamental rights, democracy and rule of law in the EU: Towards an EU Copenhagen Mechanism](#)', p. 15. Toggenburg, G., 2013, *Fundamental Rights and the European Union: how does and how should the EU Agency for Fundamental Rights relate to the EU Charter of Fundamental Rights?*, EUI Department of Law Research, Paper No. 13; Toggenburg, G., 2008, *The role of the new EU Fundamental Rights Agency: Debating the "sex of angels" or improving Europe's human rights performance?*, European Law Review, Issue 3; Von Bogdandy, A., and Bernstorff, J., 2009, *The EU Fundamental Rights Agency within the European and International Human Rights Architecture: the legal framework and some unsettled issues in a new field of administrative law*, 46 Common Market Law Review.

⁴⁴⁶ *Ibidem*.

They also comprise an 'outlook section' on challenges ahead. These reports cover the EU level and Member States and relevant developments in the Council of Europe and the UN⁴⁴⁷.

The FRA Annual Reports follow up on problematic issues highlighted in previous reports. These reports are also used to identify areas of concern which might lead to new research, issues brought up with governments or raised at the Council meetings by the FRA Director. However, there is no systematic, state-by-state follow-up mechanism for the FRA's findings, given its thematic approach. The FRA's mandate is limited to covering national situations falling within the scope of EU law. Thus, the agency cannot monitor how national governments implement all applicable international obligations in the area of fundamental rights. Finally, no sanctions, direct or indirect, may be applied as a follow-up to the findings of the FRA's annual or any other reports⁴⁴⁸.

⁴⁴⁷ European Parliament, 2013, '[The triangular relationship between fundamental rights, democracy and rule of law in the EU: Towards an EU Copenhagen Mechanism](#)', p. 16.

⁴⁴⁸ *Ibidem*.

2.1.4 Soft law mechanisms of limited scope

This Section examines EU soft law mechanisms which aim to guarantee compliance with EU values but which have a limited scope. **Table 8** below shows an overview of these mechanisms.

Table 8 Soft law mechanisms of limited scope

Tool	Scope	Actors involved and role	Limitations
CVM	Special mechanism to evaluate the progress made by Romania and Bulgaria in complying with specific EU benchmarks in the areas of judicial reform and the fight against corruption and organised crime	• Member States (Romania, Bulgaria) • The Commission: Responsible for assessing progress and identifying any necessary measures to be taken • The European Parliament and the Council: hold debates on the Commission's reports and progress achieved	• Lack of comprehensiveness: country-specific tool (only used with Bulgaria and Romania); • Lack of relevance: It addresses pre-accession-related and supposedly transitional situations, and is therefore not suitable for addressing a threat to Article 2 TEU values in all EU Member States; • Lack of effectiveness: problems to be addressed through CVM persist (e.g. corruption - see case study on Bulgaria); • Lack of dissuasive power/enforceability: no sanctions.
European Semester	Annual economic policy management tool set up to analyse national plans developed to achieve the targets of Europe 2020	The Commission	• Lack of democratic legitimacy; • Lack of objectivity: quality of the assessment of the countries' results; • Limited scope: due to its focus on economic governance, it does not examine impact on the protection of Article 2 TEU values; • Lack of enforceability: the sanctioning arm of

Tool	Scope	Actors involved and role	Limitations
			this mechanism has never been used.
Justice Scoreboard	An informative and comparative tool which provides objective, reliable and comparable data on the functioning of justice systems in all Member States.	• The Commission • The Council of Europe Commission for the Evaluation of the Efficiency of Justice (CEPEJ), Eurostat, the World Bank, World Economic Forum and the World Justice Project: data used from these sources, among others.	• Lack of relevance: It does not fully assess compliance with the rule of law, nor does it evaluate adherence to democracy and protection of fundamental rights; • Limited scope: (i) It is based only on quantitative data, not include a qualitative examination; (ii) It does not consider penal, administrative and constitutional justice; (iii) It offers little information on how the judiciary is positioned in an overall system of separation and balance of powers; • Lack of enforceability (non-binding).
Anti-corruption report	The report highlights problems and good practices related to corruption. It focuses on cross-cutting issues of particular relevance at the EU level, as well as selected issues specific to each Member State. It provides non-binding recommendations.	• The Commission • Group of experts in collaboration with existing oversight mechanisms - the Council of Europe Group of States against Corruption (GRECO), the OECD's Working Group on Bribery and the Mechanism for the Review of Implementation of UN Convention against Corruption (UNCAC): provide data	• Limited scope: report does not cover EU institutions; • Lack of enforceability (non-binding); • Lack of effectiveness: corruption continues to be a source of major concern.

(i) Country-specific mechanisms

Cooperation and Verification Mechanism for Romania and Bulgaria

The Cooperation and Verification Mechanism (CVM) is a special mechanism established in 2006 to evaluate the progress made by Romania and Bulgaria following their entry into the EU on 1 January 2007. Progress reports on both countries are published every six months by the Commission. Areas concerned include judicial reform and fight against corruption in Bulgaria and Romania, as well as fight against organised crime for Bulgaria only⁴⁴⁹. No such mechanism has been established with regard to other Member States.

In two Decisions adopted in December 2006 – one for Bulgaria⁴⁵⁰ and another for Romania⁴⁵¹, the Commission adopted a series of parameters to evaluate progress made in these areas⁴⁵². The three common benchmarks to both reports were⁴⁵³:

- To ensure a more transparent and efficient judicial process. Report and monitor the impact of the new civil, administrative and criminal legislation.
- To continue to conduct professional, non-partisan investigations into allegations of high-level corruption.
- To take further measures to prevent and fight against corruption, in particular within local government.

The Decisions also set specific benchmarks for each country.⁴⁵⁴ Both countries have the obligation to report on the progress made regarding these benchmarks to the Commission by 31 March each year (starting from March 2007) and until the objectives of the CVM are achieved. In gathering relevant information, the Commission may provide technical assistance and organise expert missions to Bulgaria and Romania.⁴⁵⁵ In parallel,

⁴⁴⁹ European Parliament, 2013, '[The triangular relationship between fundamental rights, democracy and rule of law in the EU: Towards an EU Copenhagen Mechanism](#)', pp. 15-16; Vachudova, M.A. and Spendzharova, A., 2012, [The EU's Cooperation and Verification Mechanism: Fighting Corruption in Bulgaria and Romania after EU Accession](#), Swedish Institute for European Policy Studies, European Policy Analysis, Issue 2012:1epa; Carp, R. 2014, [The Struggle for the Rule of Law in Romania as an EU Member State: The Role of the Cooperation and Verification Mechanism](#), *Utrecht Law Review*, Vol. 10, No. 1, p. 1-16, 2014.

⁴⁵⁰ European Commission, [Commission Decision establishing a mechanism for cooperation and verification of progress in Bulgaria to address specific benchmarks in the areas of judicial reform and the fight against corruption and organised crime of 13 December 2006](#), C(2006) 6570 final.

⁴⁵¹ European Commission, [Commission Decision establishing a mechanism for cooperation and verification of progress in Romania to address specific benchmarks in the areas of judicial reform and the fight against corruption of 13 December 2006](#), C(2006) 6569 final.

⁴⁵² Website of the European Commission, '[Mechanism for cooperation and verification for Bulgaria and Romania, Assessing ongoing progress by Bulgaria and Romania](#)', last update 21 January 2015.

⁴⁵³ European Commission, [Commission Decision establishing a mechanism for cooperation and verification of progress in Bulgaria to address specific benchmarks in the areas of judicial reform and the fight against corruption and organised crime of 13 December 2006](#), C(2006) 6570 final and European Commission, [Commission Decision establishing a mechanism for cooperation and verification of progress in Romania to address specific benchmarks in the areas of judicial reform and the fight against corruption of 13 December 2006](#), C(2006) 6569 final, Annexes.

⁴⁵⁴ *Ibidem*.

⁴⁵⁵ *Ibidem*.

the Commission carries out an evaluation, communicating to the European Parliament and the Council its observations and findings at least every six months⁴⁵⁶.

In January 2016, the latest reports were issued. In these reports the Commission considered that “the monitoring process of the CVM (...) continues to provide valuable support for the reforms” in Bulgaria and Romania⁴⁵⁷. Whilst Commissioner Timmermans asserted that, in 2015, in Bulgaria important amendments were taken in 2015 to reform the judiciary, “[n]ow it is time to move to the next stage by turning the strategies on judicial reform and the fight against corruption into action on the ground and delivering concrete results”⁴⁵⁸. Regarding Romania, Commissioner Timmermans indicated that he was “encouraged to see that Romania continues to make reforms and the positive trend continued in 2015”. He added that “[t]hese efforts must be stepped up in 2016, in particular to prevent corruption and ensure that judges can continue to do their job properly”⁴⁵⁹.

The evaluation by the Commission, with input by DG Home Affairs, DG Justice, and OLAF, relies on a set of different sources (apart from reports submitted by the governments of Bulgaria and Romania), such as indicators developed by the Council of Europe, the OECD and UN agencies and research by experts and academics. The examination also includes a comparative analysis with other Member States. Bulgaria and Romania can make observations to this examination and both the European Parliament and the Council hold debates on the reports and progress⁴⁶⁰.

Although the CVM does not provide for sanctions, the Accession Treaty of Bulgaria and Romania included three safeguards to remedy obstacles that could arise following their accession: an economic clause (Article 36), an internal market clause (Article 37) and a justice and home affairs clause (Article 38). However, these safeguards were limited in time – since they could only be activated within the first three years of accession (from 2007 until 2010) – and also limited as a last resort option. These clauses and related sanctions (including suspension of rights granted by the Union law) were never set in motion. The only remaining option left was to adopt actions restricting EU funding, which was implemented to Bulgaria in 2008⁴⁶¹.

⁴⁵⁶ *Ibidem*, Article 2.

⁴⁵⁷ European Commission, ‘[Commission reports on progress in Bulgaria under the Co-operation and Verification Mechanism](#)’, 27 January 2016; and European Commission, ‘[Commission reports on progress in Romania under the Co-operation and Verification Mechanism](#)’, 27 January 2016.

⁴⁵⁸ European Commission, ‘[Commission reports on progress in Bulgaria under the Co-operation and Verification Mechanism](#)’, 27 January 2016.

⁴⁵⁹ European Commission, ‘[Commission reports on progress in Romania under the Co-operation and Verification Mechanism](#)’, 27 January 2016.

⁴⁶⁰ European Parliament, 2013, ‘[The triangular relationship between fundamental rights, democracy and rule of law in the EU: Towards an EU Copenhagen Mechanism](#)’, p. 15. Vachudova, M.A. and Spendzharova, A., 2012, *The EU's Cooperation and Verification Mechanism: Fighting Corruption in Bulgaria and Romania after EU Accession*, Swedish Institute for European Policy Studies, European Policy Analysis, Issue 2012:1epa; Carp, R. 2014, *The Struggle for the Rule of Law in Romania as an EU Member State: The Role of the Cooperation and Verification Mechanism*, *Utrecht Law Review*, Vol. 10, No. 1, p. 1-16, 2014.

⁴⁶¹ European Parliament, 2013, ‘[The triangular relationship between fundamental rights, democracy and rule of law in the EU: Towards an EU Copenhagen Mechanism](#)’, pp. 15-16. Vachudova, M.A.

Based on the Acts of Accession for Romania and Bulgaria, these mechanisms address pre-accession-related and therefore transitional situations. They are therefore not suitable for addressing a threat to the rule of law in all EU Member States⁴⁶². Even then, for instance, regarding Croatia's accession, no such mechanism was used. When asked whether a similar monitoring mechanism to the CVM would be applied, Commissioner Füle asserted that "[w]e are so focused on the quality of accession negotiations that speculation about an eventual monitoring mechanism does not have any place [...]. I am not in the business of running an accession process that requires such a mechanism"⁴⁶³. It was considered that Croatia had shown sufficient efforts, such as prosecuting and sanctioning senior politicians and bankers on corruption charges, to meet the accession criteria and, hence, any continuous monitoring was not deemed necessary⁴⁶⁴.

Case-study 3: Bulgaria	Limitations of the Cooperation and Verification Mechanism (CVM)
Problem description	Bulgaria (and Romania) applied for EU membership in 1995. The negotiations for accession started in 2000 and concluded in 2004. The Accession Treaty was signed in April 2005. On 26 September 2006, the European Commission issued a monitoring report concluding that "both countries were sufficiently prepared to carry the obligations of EU membership". However, "[i]mprovements need to be made in particular in the reform of their public administration, the functioning of their judicial system, and the fight against corruption"⁴⁶⁵. When Bulgaria and Romania officially joined the EU in 2007, the main concern of EU Member States was corruption and organised crime as challenges to the rule of law⁴⁶⁶. Therefore, in two Decisions adopted in December 2006 – one for Bulgaria⁴⁶⁷ and another for Romania⁴⁶⁸, the Commission adopted a series of parameters to evaluate progress made in these issues:⁴⁶⁹ the Cooperation and Verification Mechanism (CVM). Under this instrument, both countries are required to report to the Commission by 31 March each year (the first time was on March 2007) on the

and Spendzharova, A., 2012, *The EU's Cooperation and Verification Mechanism: Fighting Corruption in Bulgaria and Romania after EU Accession*, Swedish Institute for European Policy Studies, European Policy Analysis, Issue 2012:1epa; Carp, R. 2014, *The Struggle for the Rule of Law in Romania as an EU Member State: The Role of the Cooperation and Verification Mechanism*, *Utrecht Law Review*, Vol. 10, No. 1, p. 1-16, 2014.

⁴⁶² European Commission, Communication 'A new EU Framework to strengthen the Rule of Law' of 19 March 2014, COM(2014) 158 final/2, p. 6.

⁴⁶³ EurActiv.com, 'Füle: I'll make sure Croatia joins EU without monitoring', 30 March 2010.

⁴⁶⁴ *Ibidem*; EurActiv.com, 'Croatia's accession and the rule of law', 1 July 2013.

⁴⁶⁵ European Commission Press Release Database, 'Two new members join the EU family' (Brussels, 28 December 2006).

⁴⁶⁶ European Parliament, 2013, 'The triangular relationship between fundamental rights, democracy and rule of law in the EU: Towards an EU Copenhagen Mechanism', p. 98.

⁴⁶⁷ European Commission, *Commission Decision establishing a mechanism for cooperation and verification of progress in Bulgaria to address specific benchmarks in the areas of judicial reform and the fight against corruption and organised crime* of 13 December 2006, C(2006) 6570 final.

⁴⁶⁸ European Commission, *Commission Decision establishing a mechanism for cooperation and verification of progress in Romania to address specific benchmarks in the areas of judicial reform and the fight against corruption* of 13 December 2006, C(2006) 6569 final.

⁴⁶⁹ European Commission, *Mechanism for cooperation and verification for Bulgaria and Romania*.

Case-study 3: Bulgaria	Limitations of the Cooperation and Verification Mechanism (CVM)
	progress made on corruption and organised crime and the measures adopted to combat them⁴⁷⁰. No sanctions are formally foreseen in the follow-up to the publication of the CVM report. The only sanction which the European Commission could have imposed on Bulgaria for not making sufficient progress in the areas of concern was applied in 2008 by linking the progress to EU funding⁴⁷¹. This has had negative consequences on the country, as highlighted in the section below. The reporting obligation under the CVM will continue until the goals set by the CVM are fulfilled⁴⁷². The 2015 Reports for both Bulgaria and Romania highlight the fact that there is still room for progress and improvement to attain the goals of the CVM⁴⁷³. The Commission has therefore announced the intention to continue monitoring under the CVM for an indeterminate length of time⁴⁷⁴. This case study further explores the use of the CVM with respect to Bulgaria, where the CVM helps to ensure that the key reforms stay high on the Bulgarian political and public agenda⁴⁷⁵. Indeed, the reform process is stimulated and supported by the continuous dialogue between Commission services and Bulgarian authorities.
Remaining concerns	The monitoring conducted by the CVM will end if and when the Commission decides that Bulgaria meets all the benchmarks. In the 2012 report on Bulgaria⁴⁷⁶, the Commission announced the suspension of the CVM till the end of 2013. This decision was motivated by the opportunity to give the country enough time to address the identified critical deficiencies and show the results of the implementation of the necessary reforms. Although the CVM is usually considered a useful tool by experts and by the local population⁴⁷⁷, corruption and judicial independence are still noted as challenges in Bulgaria in the 2014 country specific recommendations of the European Semester of economic policy coordination⁴⁷⁸. According to the 2014 Flash Eurobarometer 406⁴⁷⁹,

⁴⁷⁰ *Ibidem*, Article 1.

⁴⁷¹ European Commission, [Report on the management of EU funds in Bulgaria](#) of 23 July 2008.

⁴⁷² European Parliament, 2013, '[The triangular relationship between fundamental rights, democracy and rule of law in the EU: Towards an EU Copenhagen Mechanism](#)', p. 9.

⁴⁷³ European Commission, [Report from the Commission to the European Parliament and the Council on progress in Bulgaria under the Co-operation and Verification Mechanism](#) of 28 January 2015, COM(2015) 36 final; and European Commission, [Report from the Commission to the European Parliament and the Council on progress in Romania under the Co-operation and Verification Mechanism](#) of 28 January 2015, COM(2015) 35 final.

⁴⁷⁴ European Commission, [Report from the Commission to the European Parliament and the Council on progress in Bulgaria under the Co-operation and Verification Mechanism](#) of 28 January 2015, COM(2015) 36 final; and European Commission, [Report from the Commission to the European Parliament and the Council on progress in Romania under the Co-operation and Verification Mechanism](#) of 28 January 2015, COM(2015) 35 final. European Parliament, 2013, '[The triangular relationship between fundamental rights, democracy and rule of law in the EU: Towards an EU Copenhagen Mechanism](#)', p. 98.

⁴⁷⁵ European Commission, [Statement by the European Commission on the CVM before the European Parliament's plenary session on 13 March 2013](#), p. 2.

⁴⁷⁶ European Commission, [Report from the Commission to the European Parliament and the Council on Progress in Bulgaria under the Cooperation and Verification Mechanism](#) of 18 July 2012, COM(2012) 411 final, p. 20.

⁴⁷⁷ European Parliament, 2013, '[The triangular relationship between fundamental rights, democracy and rule of law in the EU: Towards an EU Copenhagen Mechanism](#)', p. 9.

⁴⁷⁸ Council of the European Union, [Council Recommendation on the National Reform Programme](#)

Case-study 3: Bulgaria	Limitations of the Cooperation and Verification Mechanism (CVM)
	97% and 96% of all respondents in Bulgaria, respectively, perceive corruption and the existing shortcomings in the judicial system as important problems in the country. As regards corruption, although positive steps have been taken in the General Prosecution to prioritise anti-corruption efforts, the shortcomings of the current anti-corruption system (absence of a centralised structure aimed at monitoring and combating corruption; insufficient use of risk assessments) have led to few final convictions. Moreover, the Bulgarian Criminal Code is regarded as inadequate to combat ‘high level’ corruption (only few initiated cases concerned individuals in high-level positions)⁴⁸⁰. In the first CVM report for Bulgaria, the number of successful prosecutions and convictions was described as a “tangible measure of success” of the CVM in the country⁴⁸¹. As a result, Bulgaria strengthened its already solid law enforcement institutions without taking effective measures to put them under parliamentary scrutiny and independent judicial review. The choice to link the number of convictions to the success of the CVM in Bulgaria was deeply criticised for several reasons⁴⁸². First, the Bulgarian criminal justice system already counts a very high rate of convictions. Second, by enhancing the specialised powers of law enforcement institutions (e.g. through the creation of specialised criminal court for organised crime and the adoption of a new law on confiscation of illegal assets), Bulgaria faced serious risks with regard to upholding fundamental rights. Although these measures were taken in response to the CVM, many civil society organisations in Bulgaria, worried by the government playing ‘tough on crime’, contested them as violating fundamental rights.⁴⁸³ Furthermore, while between 2009 and 2010 an increasing number of indictments for organised crime were registered in the country, this trend was not sustained between 2011 and 2012 when most of these cases resulted in acquittals⁴⁸⁴. Another remaining concern in Bulgaria regards the independence, accountability and integrity of the judiciary. According to the 2015 Report for Bulgaria, the main issues raised by stakeholders in this regard are: the structure of the Supreme Judicial Council (SJC) which does not guarantee different degrees of autonomy for judges and prosecutors within judicial councils⁴⁸⁵; and the insufficient

[2014 of Bulgaria and delivering a Council opinion on the Convergence Programme of Bulgaria](#) of 8 July 2014, OJ 2014/C, 247/02.

⁴⁷⁹ European Commission, [Flash Eurobarometer 406, The Cooperation and Verification Mechanism for Bulgaria and Romania - second wave](#), October 2014. European Commission, [Flash Eurobarometer 406, The Cooperation and Verification Mechanism for Bulgaria and Romania - second wave](#), October 2014.

⁴⁸⁰ European Commission, [Report from the Commission to the European Parliament and the Council on progress in Bulgaria under the Co-operation and Verification Mechanism](#) of 28 January 2015, COM(2015) 36 final.

⁴⁸¹ European Commission, [Report from the Commission to the European Parliament and the Council on Bulgaria’s progress on accompanying measures following Accession of 27 June 2007](#), COM (2007) 377 final.

⁴⁸² European Parliament, 2013, [‘The triangular relationship between fundamental rights, democracy and rule of law in the EU: Towards an EU Copenhagen Mechanism’](#), p. 91.

⁴⁸³ *Ibidem*.

⁴⁸⁴ *Ibidem*.

⁴⁸⁵ In Bulgaria, judges, prosecutors and investigating magistrates belong to a single professional corpus of “magistrates”.

Case-study 3: Bulgaria	Limitations of the Cooperation and Verification Mechanism (CVM)
	implementation of court judgments (including the problem of convicted criminals having been able to escape justice)⁴⁸⁶. The CVM may be considered a useful tool able to stimulate necessary reforms in the light of Article 2 TEU and in particular, rule of law related benchmarks.⁴⁸⁷ However, it cannot be considered as entirely effective given that despite constant monitoring, Bulgaria still faces problems with regard to corruption and judicial independence. Furthermore, as highlighted below, the CVM has been used, arguably improperly, by some Member States to deny Bulgaria (and Romania) the right to enter the Schengen zone⁴⁸⁸.
Analysis of impact	According to Freedom House⁴⁸⁹, an independent watchdog organisation dedicated to the expansion of freedom and democracy around the world, while the Bulgarian democracy score for corruption remained unchanged at 4.25 for 2015 compared to the previous year, Bulgaria's rating for judicial framework and independence declined from 3.25 to 3.50 (in 2015 and 2014, respectively)⁴⁹⁰. Uncompetitive and non-transparent appointment procedures expose the Bulgarian judiciary to political meddling: several decisions of the Supreme Judicial Council (VSS) involving high-ranking officials were seen as politically motivated⁴⁹¹. Widespread corruption as well as the lack of autonomy and transparency in the judicial system deteriorated public and business confidence in the judiciary institution, making it the least trusted institution in Bulgaria⁴⁹². The Transparency International's Corruption Perception Index (CPI)⁴⁹³ shows that the perception of corruption in Bulgaria in 2014 was higher than the previous years (scoring 43 in 2014 compared to 41 in both 2012 and 2013). The accuracy of the findings of the CPI can be supported by the World Bank's Governance Indicators (WGI)⁴⁹⁴ for the same period: the control of corruption in Bulgaria in 2014 scored 49 compared to 50 and 52 in 2013 and 2012, respectively. As regards the independence of the Bulgarian judiciary, the graph below suggests that the CVM did not have a positive or remarkable impact on this

⁴⁸⁶ European Commission, [Report from the Commission to the European Parliament and the Council on progress in Bulgaria under the Co-operation and Verification Mechanism](#) of 28 January 2015, COM(2015) 36 final.

⁴⁸⁷ European Parliament, 2013, [‘The triangular relationship between fundamental rights, democracy and rule of law in the EU: Towards an EU Copenhagen Mechanism’](#), p. 9.

⁴⁸⁸ European Commission, [Statement by the European Commission on the CVM before the European Parliament's plenary session on 13 March 2013](#), p. 2.

⁴⁸⁹ [Website](#) of Freedom House, Focus on Bulgaria.

⁴⁹⁰ The ratings of Freedom House are based on a scale of 1 to 7, with 1 representing the highest level of democratic progress and 7 the lowest.

⁴⁹¹ [Website](#) of Freedom House, Focus on Bulgaria.

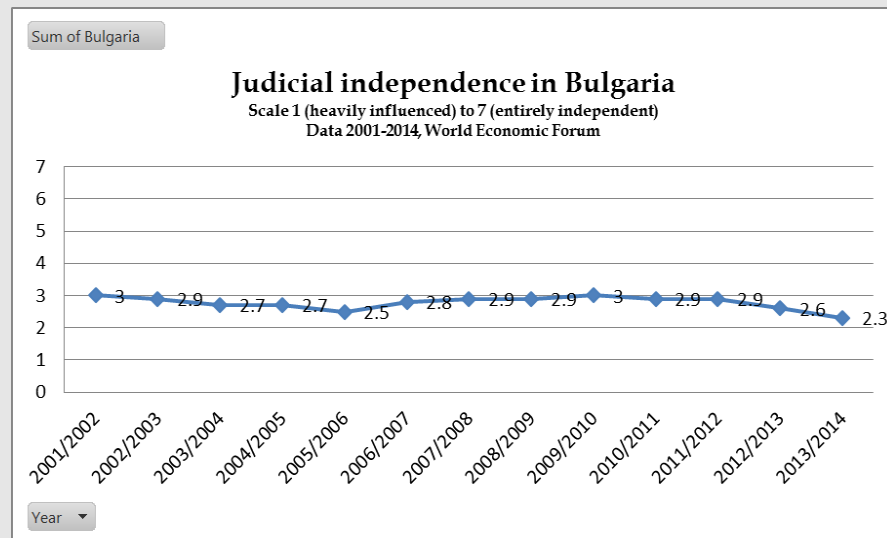
⁴⁹² Group of States against Corruption (GRECO), [Corruption prevention in respect of members of parliament, judges and prosecutors, Evaluation Report Bulgaria of 27 March 2015](#), Greco Eval IV Rep (2014) 7E.

⁴⁹³ [Transparency International's Corruption Perception Index \(CPI\)](#). It is noted that the Corruption Perceptions Index ranks countries and territories based on how corrupt their public sector is perceived to be. A country or territory's score indicates the perceived level of public sector corruption on a scale of 0 (highly corrupt) to 100 (very clean).

⁴⁹⁴ [Worldwide Governance Indicators \(WGI\)](#). It is noted that 0 corresponds to the lowest rank and 100 to the highest rank. The Worldwide Governance Indicators (WGI) aggregate and individual governance indicators for 215 economies over the period 1996–2014.

issue: from its introduction, the judicial independence in Bulgaria ranked 2,9 from 2007 to 2011 (3 between 2009 and 2010), decreasing to 2,3 between 2013 and 2014⁴⁹⁵.

Graph 1. Judicial independence in Bulgaria



According to Transparency International, 86% of Bulgarians feel that the judiciary is corrupt/extremely corrupt, while 13% of the respondents reported paying a bribe to the judiciary⁴⁹⁶. As a result of this perception, in 2013, only 7% of respondents mentioned the justice system as the institution they would most trust to resolve a corruption-related complaint⁴⁹⁷.

Corruption also represents an obstacle to doing business in Bulgaria. Indeed, the lack of autonomy and transparency in the judicial system weakened corruption investigations and property rights, creating an uncertain investment environment⁴⁹⁸. The ensuing instability and unpredictability of the regulatory framework instilled insecurity, particularly, in the business community⁴⁹⁹. According to a survey of the Bulgarian Industrial Association (BIA)⁵⁰⁰, only companies that are close to the government and the local authorities win public procurement tenders in Bulgaria. 75% of all tenders and EU funding applications in 2011 were affected by corruption⁵⁰¹. The BIA survey also showed that the Bulgarian

⁴⁹⁵ [Judicial independence \(according to the World Economic Forum\), 2001 – 2014](#). It is noted that from a scale from 1 to 7, 1 = heavily influenced; 7 = entirely independent. The question asked in the Executive Opinion Survey (2001-2014) of the World Economic Forum was: To what extent is the judiciary in your country independent from influences of members of government, citizens and firms?

⁴⁹⁶ Transparency International, [Global Corruption Barometer, Bulgaria](#).

⁴⁹⁷ European Commission, [Special Eurobarometer 397, Corruption Report](#), February – March 2013.

⁴⁹⁸ Business Anti-Corruption Portal website, [Business Corruption in Bulgaria](#).

⁴⁹⁹ Novinite.com, [‘Bulgarian Business Outraged by Govt Corruption – Poll’, 19 December 2011](#).

⁵⁰⁰ The BIA survey polled 500 managers from various sectors of the Bulgarian economy between 20 November 2011 and 7 December 2011.

⁵⁰¹ *Ibidem*.

Case-study 3: Bulgaria	Limitations of the Cooperation and Verification Mechanism (CVM)
	judiciary has the highest disapproval rate among the business respondents (69%, followed by the Parliament with 67% and the executive with 56%)⁵⁰². In 2013, the close ties between business and politics was a source of concern for 83% of respondents to the Special Eurobarometer⁵⁰³. This result was confirmed by the data released by Transparency International revealing that according to 71% and 63% of the respondents to the Global Corruption Barometer of the parliament/legislature and businesses, respectively, are corrupt or extremely corrupt⁵⁰⁴. Regarding the effect of corruption on public administration, businesses report that irregular payments are likely to occur when dealing with the border administration⁵⁰⁵. Corruption in the Bulgarian customs administration also includes exchanging of bribes between corrupt customs officials and organised crime groups and smugglers⁵⁰⁶. Corruption also strongly affects Bulgaria's land administration, and foreign investors often suffer from weak enforcement of property rights⁵⁰⁷. Delete extra space? Regarding the impacts at EU level, before the European Parliament's plenary session on 13 March 2013, the European Commission regretted that the CVM reports have also been used to justify the refusal for Bulgaria (and Romania) to enter in the Schengen zone (postponed on several occasions although the two countries already fulfilled the membership criteria)⁵⁰⁸. For the time being, both countries do not have a clear timeframe for when (if at all) they will join. The Netherlands has firmly opposed their admission and other countries such as Germany, France and Finland have voiced reservations, all citing the two countries' persistent problems with judiciary and high-level corruption⁵⁰⁹.
Conclusions	Although the CVM has contributed to strengthening Bulgaria's institutional framework when it comes to the fight against corruption and organised crime, a high percentage of citizens continue to perceive the institutions in their country to be corrupt. This has also impacted other aspects, such as preventing businesses from investing in the country and been used to justify denying the country entry into the Schengen zone. Delete extra space? Furthermore, some of the measures taken by the government to address EU benchmarks have been criticised for conflicting with fundamental rights. Therefore, despite the constitutional and legal advancements the CVM has brought to Bulgaria, the effectiveness of the mechanism in achieving its objectives remains limited.

⁵⁰² *Ibidem*.

⁵⁰³ European Commission, [Special Eurobarometer 397, Corruption Report](#), February–March 2013.

⁵⁰⁴ Transparency International, [Global Corruption Barometer, Bulgaria](#).

⁵⁰⁵ [Website](#) of the World Economic Forum, The Global Enabling Trade Report 2014.

⁵⁰⁶ European Commission, [Annex Bulgaria to the EU Anti-Corruption report](#), 3.2.2014, COM(2014) 38 final.

⁵⁰⁷ See: World Economic Forum, [The Global Competitiveness Report 2014-2015](#), 2014; [Transformation Index BTI 2014, Bulgaria Country Report](#).

⁵⁰⁸ European Commission, [Statement by the European Commission on the CVM before the European Parliament's plenary session on 13 March 2013](#),

p. 2.

⁵⁰⁹ Zhelev, V., and Bird, M., for EU Observer, '[Bulgaria, Romania tie migrant quotas to Schengen](#)', 11 September 2015.

(ii) Issue-specific mechanisms

Framework for monitoring economic policies: the European Semester for Economic Policy Coordination and other tools

The European Semester for Economic Policy Coordination ('European Semester') is an annual economic policy management tool⁵¹⁰. The European Semester has been set up to analyse national plans developed to achieve the targets of Europe 2020 – the EU's ten-year strategy for growth⁵¹¹. Assessments based on key indicators for the main policy themes allow comparison between Member States⁵¹². On the basis of data and in line with the opinion of the European Parliament, the Commission drafts country-specific recommendations that are adopted by the Council⁵¹³.

The European Semester as such is a rather new procedure and therefore it is too early to judge its efficiency and impact on national policy making. Nevertheless, the first three cycles show that the process has some limitations in terms of democratic legitimacy as well in the quality of the assessment of the countries' results and the effort to comply with the recommendation⁵¹⁴. Due to its focus on economic governance, it is not used to protect Article 2 TEU values.

A relevant question in this context is whether the European Semester framework could be applied to fields other than economic governance. The European Semester, similarly to Article 7 TEU, has a preventive and a sanctioning dimension. The former consists in the adoption of budgetary restrictions, while the latter consists in the constitution of a non-interest bearing deposit (0.2% GDP) that will be converted into a fine if the concerned Member State fails to accommodate the Commission's preventive recommendations⁵¹⁵. Similarly to Article 7 TEU, however, this sanctioning arm of the European Semester has not been used yet⁵¹⁶.

It has however been suggested that, following a decision under Article 260 TFEU, a monetary sanction could be imposed on the Member State found to be in infringement of

⁵¹⁰ European Parliament, (2013) ['The triangular relationship between fundamental rights, democracy and rule of law in the EU: Towards an EU Copenhagen Mechanism'](#), p. 18.

⁵¹¹ Website of the European Commission, ['Europe 2020 in a nutshell'](#).

⁵¹² Website of the European Commission, ['Making it happen: the European Semester'](#).

⁵¹³ European Parliament, 2013, ['The triangular relationship between fundamental rights, democracy and rule of law in the EU: Towards an EU Copenhagen Mechanism'](#), pp. 18-19; Website of the European Commission, ['Making it happen: the European Semester'](#).

⁵¹⁴ European Parliament, 2013, ['The triangular relationship between fundamental rights, democracy and rule of law in the EU: Towards an EU Copenhagen Mechanism'](#), p. 13.

⁵¹⁵ European Parliament, 2013, ['The triangular relationship between fundamental rights, democracy and rule of law in the EU: Towards an EU Copenhagen Mechanism'](#), p. p. 8, p. 19: Reverse qualified majority voting is introduced in the Six-Pack for most sanctions. It implies that a recommendation or a proposal of the Commission is considered adopted in the Council unless a qualified majority of Member States votes against it, therefore increasing the likelihood of sanctions for euro-area Member States compared to normal qualified majority voting.

⁵¹⁶ European Parliament, 2013, ['The triangular relationship between fundamental rights, democracy and rule of law in the EU: Towards an EU Copenhagen Mechanism'](#), p. 19.

Article 2 TEU values⁵¹⁷. This sanction could be imposed in the form of withholding EU funds assigned to the concerned Member State in the amount imposed as an 'infringement fine'. However, the sanction would be a measure of last resort and the amount would depend on the ability of the Member State to pay⁵¹⁸.

For example, this type of sanction has already been implemented in the Excessive Deficit Procedure (EDP) under which secondary legislation has suspended specific funds (i.e. Cohesion) due to the infringement of EU legislation. This requires the ECOFIN Council to confirm a recommendation by the Commission. This disciplinary sanction adopted under the EDP, however, depends on a failure to meet budgetary objectives instead of a breach of EU values⁵¹⁹. The effectiveness of this sanction would depend on how heavily Member States rely on EU funds. It would also mainly affect those who benefit from EU-funded projects rather than the infringing authorities. Moreover, the EU would need specific legal entitlement to adopt financial sanctions. Another limitation of these sanctions is whether they have a real dissuasive power or whether they would cause more resistance to comply. This effect has been studied in legal and political research. A possible way around these shortcomings could be to imposing these sanctions as a temporary measure until the Member State amends its conduct to meet the requirements under the common values of Article 2 TEU⁵²⁰.

Monitoring can also be ensured through the European Statistical System (ESS) and the European statistical programme established in 2009⁵²¹. This programme provides the framework for the development, production and dissemination of statistics⁵²². Under this programme, national statistical authorities receive financial support and guidance⁵²³. Data collected under this system could serve as indicators to monitor Member States' compliance in certain fields falling under Article 2 TEU values⁵²⁴. Multiannual

⁵¹⁷ Closa, C., and Kochenov, D., '[Reinforcing the Rule of Law Oversight in the European Union](#)', in Werner Schröder (ed.), *Strengthening the Rule of Law in Europe: From a Common Concept to Mechanisms of Implementation*, Hart Publishing, Oxford, 2015 (forthcoming), pp. 11-12, 17-18.

⁵¹⁸ See also the [Letter of the Foreign Ministers of Denmark, Finland, Germany and the Netherlands to the President of the European Commission](#) (6 March 2013). The letter was also sent to the Presidency of the Council.

⁵¹⁹ Scheppele, K.L., 'Enforcing the Basic Principles of EU Law through Systemic Infringement Actions', in Closa, C., and Kochenov, D., *Reinforcing the Rule of Law Oversight in the European Union* (Cambridge University Press, 2016); Scheppele, K.L., 2013, '[What can the European Commission do when Member States violate basic principles of the European Union? The case for systemic infringement actions](#)', pp. 10-12.

⁵²⁰ Closa, C., and Kochenov, D., '[Reinforcing the Rule of Law Oversight in the European Union](#)', in Werner Schröder (ed.), *Strengthening the Rule of Law in Europe: From a Common Concept to Mechanisms of Implementation*, Hart Publishing, Oxford, 2015 (forthcoming), pp. 11-12, 17-18; Scheppele, K.L., 'Enforcing the Basic Principles of EU Law through Systemic Infringement Actions', in Closa, C., and Kochenov, D., *Reinforcing the Rule of Law Oversight in the European Union* (Cambridge University Press, 2016); Scheppele, K.L., 2013, '[What can the European Commission do when Member States violate basic principles of the European Union? The case for systemic infringement actions](#)', pp. 10-12.

⁵²¹ European Parliament and Council, [Regulation \(EC\) No 223/2009 of the European Parliament and of the Council of 11 March 2009 on European statistics](#).

⁵²² *Ibidem*, Article 13(1).

⁵²³ *Ibidem*, Article 15.

⁵²⁴ Butler, I., for Liberties.eu, '[How the European Parliament can protect the EU's fundamental](#)

programmes are established to determine the priorities the collection of data should be targeting⁵²⁵. These priorities are aligned with the priority areas indicated by the Commission⁵²⁶.

European Commission's Justice Scoreboard

The EU Justice Scoreboard is part of the European Semester. The EU Justice Scoreboard was launched in 2013 to provide a systematic overview of the functioning of national justice systems so as to inform the country-specific recommendations. This is done specifically by monitoring and assessing the functioning of Member States' justice systems, specifically in civil, commercial and administrative cases⁵²⁷. In this way, the Scoreboard aims to assist both the EU and Member States in achieving more effective justice systems for citizens and businesses. This will help to reinforce growth strategies in the countries concerned and for the EU as a whole⁵²⁸.

The Scoreboard is an informative and comparative tool which provides "objective, reliable and comparable data on the functioning of the justice systems of all Member States"⁵²⁹ in order to determine potential shortcomings, possible improvements and best practices⁵³⁰. The Scoreboard relies on indicators such as independence, affordability and ease of access of the justice system, length of proceedings, clearance rate and number of pending cases to present key findings and trends over time⁵³¹. It is prepared by the Commission, using data from international organisations, including the Council of Europe Commission for the Evaluation of the Efficiency of Justice (CEPEJ), Eurostat, the World Bank, World Economic Forum and the World Justice Project⁵³².

From the perspective of improving compliance with or guaranteeing Article 2 TEU values, the Scoreboard presents several limitations. As with other 'soft-law' tools, the

[values: An interparliamentary rights dialogue](#), 15 January 2016.

⁵²⁵ Website of the European Statistical System, '[About ESS. Statistical Programmes](#)'; European Commission Press Release Database, '[European Statistical Programme 2013-17: Quality, timely and efficient statistics to support European policies](#)', 21 December 2011.

⁵²⁶ ESTAT, [Annual Work Programme for 2016 – Annex 3A: Overall priorities](#); ESTAT, [Annual Work Programme 2016 – Annex 3C: List of legal acts related to Priority Areas and ESP detailed objectives](#); European Commission, [Report from the Commission to the European Parliament and the Council on the implementation of the European Statistical Programme 2013-2014](#), COM(2015)309final (24 June 2015).

⁵²⁷ European Parliament, (2013) '[The triangular relationship between fundamental rights, democracy and rule of law in the EU: Towards an EU Copenhagen Mechanism](#)', p. 10; Moxham, L. and Stefanelli, J., 2013, [Safeguarding the rule of law, democracy and fundamental rights: a monitoring model for the European Union](#), Bingham Centre for the Rule of Law, p. 16.

⁵²⁸ Website of the European Commission Press Release Database, '[EU Justice Scoreboard: European Commission broadens the scope of its analysis of Member States' justice systems](#)', 27 March 2013.

⁵²⁹ Moxham, L. and Stefanelli, J., 2013, [Safeguarding the rule of law, democracy and fundamental rights: a monitoring model for the European Union](#), Bingham Centre for the Rule of Law, p. 3.

⁵³⁰ European Commission, [The 2014 EU Justice Scoreboard](#), COM(2014) 155 final, p. 5.

⁵³¹ European Commission, Communication to the European Parliament, the Council, the European Central Bank, the European Economic and Social Committee and the Committee of the Regions '[The EU Justice Scoreboard – A tool to promote effective justice and growth](#)', COM(2013) 160 final, Brussels, 27 March 2013, p. 3; European Parliament, (2013) '[The triangular relationship between fundamental rights, democracy and rule of law in the EU: Towards an EU Copenhagen Mechanism](#)', p. 10.

⁵³² *Ibidem*.

Scoreboard is not legally binding. It also deals with aspects of the judicial system that impact business and investment. It does not however fully assess compliance with the rule of law in light of Article 2 TEU, nor is it relevant in evaluating democracy and protecting human rights⁵³³. The sources it uses are based on quantitative data, but it does not include a qualitative examination of key factors such as independence of the judiciary⁵³⁴. Moreover, the Scoreboard focuses on civil law matters, whereas penal, administrative and constitutional justice would arguably deserve particular scrutiny from an Article 2 TEU perspective⁵³⁵.

The European Parliament has urged the Commission to establish a Justice Scoreboard in criminal matters and to gradually expand the scope “so it becomes a separate and encompassing justice scoreboard which assesses, through the use of objective indicators, all areas of justice, including criminal justice and all justice-related horizontal issues, such as the independence, efficiency and integrity of the judiciary, the career of judges and the respect of procedural rights”⁵³⁶. It offers little information on the crucial question of how the judiciary is positioned in an overall system of separation and balance of powers. The situation in Hungary, for instance, was not reflected in the last Scoreboard results, because, by its design, it does not encompass many, if not most, of the issues which may reveal rule of law problems⁵³⁷. This criticism is also expressed in the European Parliament resolution of 3 July 2013⁵³⁸.

Despite these limitations of the Scoreboard, the European Parliament “supports the aim to exchange best practices with a view to ensure an efficient and independent justice system (and) notes the importance of judicial benchmarking for cross-border mutual trust, for effective cooperation between justice institutions and for the creation of a common judicial area and a European judicial culture”⁵³⁹. The European Parliament has praised the efforts of the Commission to “provide measurable data”⁵⁴⁰ and has urged the

⁵³³ Democracy Reporting International, ‘[Proposals for new tools to protect EU values: an overview](#)’, Briefing Paper 43, November 2013, p. 2. See also Butler, L., 2013, ‘[How to monitor the Rule of Law, Democracy and Fundamental Rights in the EU](#)’, Open Society European Policy Institute - Open Society Foundations; Nielsen, N., for EU Observer, ‘[Hungary in surprise ranking on EU justice scoreboard](#)’, 27 March 2013.

⁵³⁴ *Ibidem*.

⁵³⁵ *Ibidem*.

⁵³⁶ European Parliament resolution of 12 March 2014 on evaluation of justice in relation to criminal justice and the rule of law (2014/2006(INI)), [P7_TA-PROV\(2014\)0231](#), paragraphs 1-3.

⁵³⁷ Democracy Reporting International, ‘[Proposals for new tools to protect EU values: an overview](#)’, Briefing Paper 43, November 2013, p. 2.

⁵³⁸ European Parliament, Resolution of 3 July 2013 on the situation of fundamental rights: standards and practices in Hungary (pursuant to the European Parliament resolution of 16 February 2012) (2012/2130(INI), [P7_TA\(2013\)0315](#), point 37: “Welcomes the Commission's proposal for a permanent scoreboard on justice in all 27 EU Member States as put forward by Vice-President Reding, which shows that safeguarding the independence of the judiciary is a general concern of the EU; underlines the fact that in some Member States serious concerns might be raised on these issues; calls for an enlargement of the justice scoreboard also to cover criminal justice, fundamental rights, the rule of law and democracy, as already requested”;

⁵³⁹ European Parliament, Resolution of 4 February 2014 on the EU Justice Scoreboard – civil and administrative justice in the Member States (2013/2117(INI)), [P7_TA-PROV\(2014\)0064](#), paragraphs 2 and 3.

⁵⁴⁰ European Parliament, Resolution of 4 February 2014 on the EU Justice Scoreboard – civil and

Commission to “take this exercise forward” while trying to “avoid unnecessary duplication of the work of other bodies” and basing “any comparison of national justice systems on objective criteria and on evidence which is objectively compiled, compared and analysed”, as well as taking into account “structural peculiarities and differing social traditions in the Member States”⁵⁴¹. For this purpose, the European Parliament “[u]nderlines the role of the CEPEJ in gathering and presenting the relevant data at both national and regional levels” calling for more cooperation between the EU Institutions and the CEPEJ⁵⁴², the PACE and the Venice Commission⁵⁴³, as well as with the European Judicial Network in civil and commercial matters and the use of the e-Justice Portal⁵⁴⁴.

European Commission’s Anti-Corruption Report

In order to improve the implementation of Member States’ anti-corruption policies, the European Commission has set up an EU reporting mechanism (“EU Anti-corruption Report”). This mechanism, established by the Commission in 2011⁵⁴⁵, is based on the EU’s general right to intervene in the field of anti-corruption policies subject to the limits specified in Articles 67 and 83 TFEU⁵⁴⁶. These provisions refer to the competences of the Union in the area of freedom, security and justice, including judicial and police coordination and cooperation and the mutual recognition of judgments in criminal matters, as well as the approximation of criminal laws and the adoption of directives to establish minimum rules concerning the definition of criminal offences and sanctions⁵⁴⁷.

Corruption affects all Member States and seriously harms the economy and society as a whole. It may undermine democracy, damage justice and the rule of law, and undermine the trust of citizens in democratic institutions and processes⁵⁴⁸. Furthermore, corruption affects the legitimacy of national institutions and ultimately can have a negative impact on mutual trust between Member States⁵⁴⁹. Corruption can therefore also be seen as a

administrative justice in the Member States (2013/2117(INI)), [P7_TA-PROV\(2014\)0064](#), paragraph 7.

⁵⁴¹ *Ibidem*, paragraphs 1, 4, and 8. European Parliament resolution of 12 March 2014 on evaluation of justice in relation to criminal justice and the rule of law (2014/2006(INI)), [P7_TA-PROV\(2014\)0231](#), paragraphs 6 and 7.

⁵⁴² European Parliament resolution of 4 February 2014 on the EU Justice Scoreboard – civil and administrative justice in the Member States (2013/2117(INI)), [P7_TA-PROV\(2014\)0064](#), paragraph 19.

⁵⁴³ European Parliament resolution of 12 March 2014 on evaluation of justice in relation to criminal justice and the rule of law (2014/2006(INI)), [P7_TA-PROV\(2014\)0231](#), paragraphs 8 and 9.

⁵⁴⁴ European Parliament resolution of 4 February 2014 on the EU Justice Scoreboard – civil and administrative justice in the Member States (2013/2117(INI)), [P7_TA-PROV\(2014\)0064](#), paragraph 20.

⁵⁴⁵ European Commission, [Decision of 6 June 2011 establishing an EU Anti-corruption reporting mechanism for periodic assessment \(“EU Anti-corruption Report”\)](#), C(2011) 3673 final.

⁵⁴⁶ Article 67 of the TFEU stipulates the Union's obligation to ensure a high level of security, including through prevention and combating of crime and approximation of criminal laws. Article 83 of the TFEU lists corruption as one of the particularly serious crimes with a cross-border dimension.

⁵⁴⁷ Articles 67 and 83 TFEU.

⁵⁴⁸ European Commission, [Report from the Commission to the Council and the European Parliament, EU Anti-Corruption Report, 3 February 2014](#), COM(2014) 38 final.

⁵⁴⁹ *Ibidem*.

threat to values of democracy, the rule of law and fundamental rights set out in Article 2 TEU⁵⁵⁰.

The EU Anti-corruption Report thus seeks to promote high anti-corruption standards across the EU. By highlighting problems and good practices, this mechanism allows periodic assessments of Member States' efforts in this area with a view to foster political will, help to step up anti-corruption efforts and reinforce mutual trust. It is aimed at identifying EU trends, gathering comparable data, stimulating peer learning and putting forward recommendations for further compliance with EU and international commitments⁵⁵¹.

The EU Anti-corruption Report is prepared with the support of a group of experts in collaboration with existing oversight mechanisms. These include the Council of Europe Group of States against Corruption (GRECO), the OECD's Working Group on Bribery and the Mechanism for the Review of Implementation of the UN Convention against Corruption (UNCAC), averting possible duplication⁵⁵².

The Commission released the first Anti-corruption Report in February 2014⁵⁵³. It is focused on a number of cross-cutting issues of particular relevance to the EU level, as well as selected issues specific to each Member State highlighted in country analyses. The report also provides cross-cutting and country specific recommendations. While the recommendations are not legally binding, their follow-up is to be monitored in subsequent reports⁵⁵⁴.

This first EU Anti-corruption Report revealed that much more needs to be done by all Member States. It confirmed that across the EU there are systematic corruption risks and governance failings⁵⁵⁵. It remains to be seen how effective this mechanism will be in practice to trigger concrete reforms in the Member States. Some NGOs have noted that, despite EU efforts in the fight against corruption, this remains a concern in some Member States⁵⁵⁶. For instance, the 2014 Special Eurobarometer on Corruption⁵⁵⁷ showed that out of 27,786 respondents, 76% thought that corruption is widespread in their country. The countries where there is a higher perception on corruption being endemic are Greece

⁵⁵⁰ European Commission, [Decision of 6 June 2011 establishing an EU Anti-corruption reporting mechanism for periodic assessment \("EU Anti-corruption Report"\)](#), C(2011) 3673 final; Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee, ['Fighting corruption in the EU'](#), COM(2011) 308 final, 6 June 2011; [Commission Decision of 28 September 2011 setting up the Group of Experts on Corruption](#), OJ C 286, 30 September 2011.

⁵⁵¹ European Commission, [Decision of 6 June 2011 establishing an EU Anti-corruption reporting mechanism for periodic assessment \("EU Anti-corruption Report"\)](#), C(2011) 3673 final.

⁵⁵² Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee, ['Fighting corruption in the EU'](#), COM(2011) 308 final, 6 June 2011, pp. 3-4.

⁵⁵³ European Commission, [Report from the Commission to the Council and the European Parliament, EU Anti-Corruption Report](#), 3 February 2014, COM(2014) 38 final.

⁵⁵⁴ European Parliament, 2013, ['The triangular relationship between fundamental rights, democracy and rule of law in the EU: Towards an EU Copenhagen Mechanism'](#), p. 60.

⁵⁵⁵ See, for instance, the [website](#) of Transparency International – EU Office.

⁵⁵⁶ *Ibidem*.

⁵⁵⁷ European Commission, [Special Eurobarometer 397, Corruption](#) (February 2014).

(99%), Italy (97%), Lithuania, Spain and the Czech Republic (95%), Croatia (94%), Romania (93%), Slovenia (91%) and Portugal and Slovakia (90%)⁵⁵⁸. Finally, the limited scope of the report may be criticised to the extent that it does not cover EU institutions.

2.2 Overview of mechanisms in EU foreign policy (External dimension)

The EU is under a legal obligation to promote the values on which it is based in its external policies (Article 3(1) TEU and Article 3(5) TEU)⁵⁵⁹. On 25 June 2012, the EU adopted its first 'Strategic Framework on Human Rights and Democracy'⁵⁶⁰. This framework primarily aims to enhance the effectiveness and consistency of EU external action, and specifically mentions as number of priorities such as the promotion of the universality of human rights.

In 2015, the Council of the EU highlighted that the EU remains committed to implementing the entire human rights and democracy agenda as reflected in the 2012 Strategic Framework for Human Rights and Democracy. The EU will continue to promote and defend the universality and indivisibility of all human rights in partnership with countries from all regions, in close cooperation with international and regional organisations, and with civil society. The EU will ensure a comprehensive human rights' approach to preventing and addressing conflicts and crises. It will further mainstream human rights in the external aspects of EU policies in order to ensure better policy coherence, in particular in the fields of migration, trade and investment, development cooperation and counter terrorism⁵⁶¹.

Since its adoption in 2012, the Strategic Framework and Action Plan have been largely implemented and notable achievements include the adoption of new EU guidelines on human rights. However, one may regret that the accompanying 'Action Plan on Human Rights and Democracy 2012-2014'⁵⁶² barely refers to the rule of law even though Article 21 TEU sets out that the rule of law must not only be respected, but is also supposed to underpin all aspects of the external policies and actions of the EU⁵⁶³.

⁵⁵⁸ *Ibidem*, p. 6.

⁵⁵⁹ Article 3(1) TEU reads as follows: "The Union's aim is to promote peace, its values and the well-being of its peoples"; Article 3(5) TEU reads as follow: "In its relations with the wider world, the Union shall uphold and promote its values and interests and contribute to the protection of its citizens. It shall contribute to peace, security, the sustainable development of the Earth, solidarity and mutual respect among peoples, free and fair trade, eradication of poverty and the protection of human rights, in particular the rights of the child, as well as to the strict observance and the development of international law, including respect for the principles of the United Nations Charter".

⁵⁶⁰ Council of the EU, '[EU Strategic Framework and Action Plan on Human Rights and Democracy](#)' (25 June 2012).

⁵⁶¹ Council of the EU, '[Council conclusions on the Action Plan on Human Rights and Democracy 2015-2019](#)', (20 July 2015), p. 3.

⁵⁶² Council of the EU, '[EU Strategic Framework and Action Plan on Human Rights and Democracy](#)' (25 June 2012).

⁵⁶³ Pech, L., 2016, *The EU as a global rule of law promoter: the consistency and effectiveness challenges*, Asia Europe Journal, Springer, Vol. 14, Issue 1.

A new 'Action Plan on Human Rights and Democracy for the period 2015-2019'⁵⁶⁴, adopted by the Council of the EU on 20 July 2015, reaffirms the EU's commitment to promote and protect human rights and to support democracy worldwide. However, only three action items out of 32 are related to the external promotion of the rule of law via EU support for the justice sector, transitional justice and setting up of anti-corruption bodies⁵⁶⁵.

With respect to the effectiveness and consistency of EU external action as regards the rule of law, three main problems may be highlighted: (i) the lack of clarity on what exactly the EU is seeking to promote; (ii) the lack of an effective framework enabling the EU to take stock and subsequently monitor rule of law adherence in any particular country and (iii) the lack of a more integrated approach, which has led to a certain degree of disconnection between the external and internal policies and instruments dedicated to the upholding and promotion of EU values⁵⁶⁶.

2.3 International monitoring and reporting mechanisms within the framework of the Council of Europe and the UN mechanisms

All EU Member States are members of the Council of Europe and of the United Nations. As such, they are subject to the monitoring mechanisms set up by these organisations to defend and promote democracy, the rule of law and fundamental rights⁵⁶⁷. For the purposes of avoiding any duplication, any current or future EU mechanism should take into account the roles of each of the Council of Europe, EU and UN mechanisms.

Within the Council of Europe, there are five main bodies which fulfil this mission: the European Commission for Democracy through Law (the Venice Commission); the Commissioner for Human Rights; the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT); the European Commission against Racism and Intolerance (ECRI); and the Parliamentary Assembly Committee on the Honouring of Obligations and Commitments by Member States of the Council of Europe (PACE Monitoring Committee)⁵⁶⁸. The UN has three mechanisms to supervise the situation of fundamental rights in Member States: the Universal Periodic Review (UPR); the Special Procedures, which have a thematic or country-based approach; and the Human Rights Treaty Bodies System, which oversees the enforcement of the nine core human rights' treaties⁵⁶⁹. Not all EU Member States have ratified all of these treaties and their additional protocols; hence, not all of them are subject to the surveillance of these mechanisms⁵⁷⁰.

⁵⁶⁴ Council of the European Union, '[Council conclusions on the Action Plan on Human Rights and Democracy 2015-2019](#)' (20 July 2015).

⁵⁶⁵ Pech, L., 2016, *The EU as a global rule of law promoter: the consistency and effectiveness challenges*, Asia Europe Journal, Springer, Vol. 14, Issue 1.

⁵⁶⁶ *Ibidem*.

⁵⁶⁷ Moxham, L. and Stefanelli, J., 2013, *Safeguarding the rule of law, democracy and fundamental rights: a monitoring model for the European Union*, Bingham Centre for the Rule of Law, p. 10.

⁵⁶⁸ *Ibidem*, p. 6.

⁵⁶⁹ *Ibidem*, p. 7.

⁵⁷⁰ *Ibidem*, p. 10.

The above tools share the following characteristics⁵⁷¹:

- Monitoring is periodic; although it can also be triggered as a consequence of a request, information or a complaint.
- Monitoring is carried out through information gathering, including country visits, exchanges with other stakeholders (NGOs, civil society, experts) and desk research. The information gathered through these mechanisms is also used by the EU mechanisms reporting on the situation of democracy, the rule of law and fundamental rights⁵⁷².
- The assessment of the gathered information usually entails a dialogue between the concerned Member State and the body carrying out the monitoring.
- Regardless of the form of the outcome document resulting from the assessment (report, opinion, communication, issues paper), it generally contains a set of recommendations to be taken into account by the Member State concerned.
- Most of the mechanisms do not have a legally binding force, with the exception of the PACE Monitoring Committee which can sanction the Member States failing to implement the recommendations. This sanction consists of a resolution and/or recommendation of non-ratification of the credentials of the parliamentary delegation of the Member State concerned or the annulment of ratified credentials. Where persistent non-compliance is observed in a Member State, this can lead to withdrawal from the Council of Europe and the suspension of representation rights.

All EU Member States are subject to the mechanisms described above⁵⁷³. This offers sufficient data on the situation of democracy, rule of law and fundamental rights at Member State level. The EU could benefit from a synthesised summary of information, analysis and recommendations produced by existing Council of Europe mechanisms, in order to avoid overlap and duplication. This would also be particularly useful for UN level reports given their breadth of coverage⁵⁷⁴.

Nevertheless, at EU level **there are insufficient coordinated efforts** to use this information in a targeted way in order to monitor and follow-up on situations in Member States, while at the same time “avoiding duplication and fostering synergy” and “ensuring coherence” with the work of these organisations. The Council of Europe has also invited the EU to strengthen its support in ensuring better implementation of Council of Europe recommendations and findings within its Member States, and to provide specific interventions complementing the Council of Europe regular in-depth monitoring⁵⁷⁵.

⁵⁷¹ *Ibidem*, pp. 8-10.

⁵⁷² For instance, the EU Justice Scoreboard and the Annual Reports on the situation of fundamental rights. See Section 2.1.4 of this Research Paper.

⁵⁷³ Moxham, L. and Stefanelli, J., 2013, [*Safeguarding the rule of law, democracy and fundamental rights: a monitoring model for the European Union*](#), Bingham Centre for the Rule of Law, p. 10.

⁵⁷⁴ *Ibidem*, p. 10.

⁵⁷⁵ Council of Europe, [Summary report](#) on Co-operation between the Council of Europe and the European Union, CM(2015)66 final, 29 April 2015.

It would be beneficial for the EU to capitalise on the weakness of the Council of Europe and UN bodies, namely, enforcement/follow-up. The EU can employ different tools of enforcement (e.g. political influence, EU legislation and case-law) that these international bodies, for the most part, cannot use⁵⁷⁶.

There seems to be scope therefore for closer collaboration between the EU and the Council of Europe and the EU bodies to facilitate the monitoring of compliance with Article 2 TEU within the EU. Based on this data, the EU can gather the objective and impartial evidence it needs to exert political pressure on Member States⁵⁷⁷.

2.4 Interplay between relevant actors

2.4.1 Coordination among EU institutions and with international actors

The principle of sincere cooperation between the EU institutions is founded upon Article 13(2) TEU which states that “[t]he institutions shall practice mutual sincere cooperation”⁵⁷⁸. Article 295 TFEU also provides that the “[t]he European Parliament, the Council and the Commission shall consult each other and by common agreement make arrangements for their cooperation”⁵⁷⁹. Under this same provision, these arrangements may take the form of interinstitutional agreements, which may be of a binding nature⁵⁸⁰. This cooperation can also be in the form of joint declarations, as well as exchanges among the Institutions, in writing or orally⁵⁸¹.

Coordination among the EU institutions also responds to the principle of institutional balance, which the Court referred to in the 1958 *Meroni* judgment⁵⁸². According to this principle, each of the institutions has to act within the scope of its competences as provided in the Treaties, and respect the other institutions in the exercise of their respective powers⁵⁸³.

This balance of power between the EU institutions has evolved throughout the years: from the bi-polar foundation of the Union based on the Commission and the Council, to the reinforcement of the powers of the European Parliament through successive Treaty changes, to consolidate the balanced tripod structure EU institutions form today⁵⁸⁴.

The mechanisms reviewed in this section reflect the operationalisation of these principles of coordination and institutional balance not only for example in articulating Article 7

⁵⁷⁶ Moxham, L. and Stefanelli, J., 2013, [Safeguarding the rule of law, democracy and fundamental rights: a monitoring model for the European Union](#), Bingham Centre for the Rule of Law, p. 10.

⁵⁷⁷ Moxham, L. and Stefanelli, J., 2013, [Safeguarding the rule of law, democracy and fundamental rights: a monitoring model for the European Union](#), Bingham Centre for the Rule of Law, p. 10.

⁵⁷⁸ Article 13(2) TEU.

⁵⁷⁹ Article 295 TFEU.

⁵⁸⁰ *Ibidem*.

⁵⁸¹ EUR-lex, ‘Summaries of EU legislation. [The principle of cooperation between the institutions](#)’.

⁵⁸² CJEU, [Case 9/56](#), Judgment of the Court of 13 June 1958 *Meroni&Co v. High Authority of the European Coal and Steel Community*, ECLI:EU:C:1958:7.

⁵⁸³ EUR-lex, Glossary of summaries, [‘Institutional balance’](#).

⁵⁸⁴ Monar, J., 2011, [‘The European Union’s institutional balance of power after the Treaty of Lisbon’](#), in Irusta, E. (ed.) *The European Union after the Treaty of Lisbon: visions of leading policy-makers, academics and journalists*, (Publications Office of the European Union, Luxembourg, 2011), pp. 1-2.

TEU mechanisms but also in ‘soft law’ tools, such as the Commission’s Rule of Law Framework. However, in general terms, soft-law mechanisms tend to be under the control of a leading actor (institution or body), allowing cooperation with other players. Nevertheless, this option depends ultimately on the discretion of the leading actor.

A similar observation can be made as regards the relationship between the EU and other international actors. The EU has the competence to “conduct the common foreign and security policy” of the Union⁵⁸⁵ and to conclude agreements with international organisations in this field⁵⁸⁶. The Treaty of Lisbon created the figure of the High Representative of the Union for Foreign Affairs and Security Policy as the principal representative of the EU in its international relations⁵⁸⁷. This consolidated the EU as an actor in the international arena⁵⁸⁸. As mentioned in Section 2.2, the EU also acts as an international promoter and advocate of the core values of Article 2 TEU⁵⁸⁹. In these matters, the EU cooperates with other international actors with competences and the mandate to uphold democracy, the rule of law and fundamental rights.

Specifically, as outlined in Section 2.3, the UN and the Council of Europe also have monitoring and reporting mechanisms in place. Some of the EU tools examined in this study do foresee the cooperation of the EU with, for instance, the CEPEJ or the Venice Commission (i.e. EU Justice Scoreboard, Commission Rule of Law Framework). However, as described in sections 2 and 4, an enhanced and strengthened relationship with these international bodies and a more structured reliance on the information collected through international monitoring mechanisms could lead to enhanced monitoring of Member States’ compliance with Article 2 TEU values.

2.4.2 National actors

While the scope of this research is limited to EU level instruments and tools for upholding the EU values set out in Article 2 TEU, Member States are primarily responsible for ensuring respect for democracy, the rule of law and fundamental rights. Under Article 5 TEU, “the limits of Union competences are governed by the principle of conferral”. This means that where the Treaties have not conferred upon the Union certain competences, these remain with the Member States⁵⁹⁰.

It can therefore be construed that Article 2 TEU simply proclaims values that are common to all Member States. All Member States are assumed to have a system of checks and balances based on the tripartite separation of powers to ensure that democracy, rule of law and fundamental rights are protected and respected⁵⁹¹. The added value of Article 7

⁵⁸⁵ Article 25 TEU.

⁵⁸⁶ Article 37 TEU.

⁵⁸⁷ Article 27 TEU.

⁵⁸⁸ Koehler, K., 2010, *European foreign policy after Lisbon: strengthening the EU as an international actor*, *Caucasian Review of International Affairs*, 4(1), p. 57.

⁵⁸⁹ Pech, L., 2016, [*The EU as a global rule of law promoter: the consistency and effectiveness challenges*](#), *Asia Europe Journal*, Springer, Vol. 14, Issue 1.

⁵⁹⁰ Article 4(1) TEU.

⁵⁹¹ Moxham, L. and Stefanelli, J., 2013, [*Safeguarding the rule of law, democracy and fundamental rights: a monitoring model for the European Union*](#), Bingham Centre for the Rule of Law, p. 10. Müller, J.W,

TEU, a last-resort provision, is therefore to address 'clear risks of serious breaches' of Article 2 TEU values and 'serious and persistent breaches' of these values⁵⁹². Individual breaches of fundamental rights or miscarriage of justice cases should normally be dealt with by the national judicial systems, and in the context of the control mechanisms established under the ECHR to which all EU Member States are parties⁵⁹³ (see also Sections 2.1.1 and 2.4.3).

Besides the judiciary and ombudsmen, different national actors play a role in safeguarding respect for democracy, the rule of law and fundamental rights in a Member State, including the police and immigration services. Individual lawyers, civil society organisations, activists, the press, and the public at large can also exert pressure on the Government to comply with the rule of law⁵⁹⁴. "A weakened rule of law is, first and foremost, a problem for the society of the Member State and thus warrants its involvement."⁵⁹⁵

However, the effectiveness of national actors in Member States depends partly on economic and human resources. This relates in particular to certain types of EU legislation, including in the area of anti-discrimination and data protection, where national bodies require resources to implement fundamental rights. For instance, in Hungary, freedom of expression of the media is reportedly undermined by court rulings, while tax laws discriminate against independent media companies. Authorities target civil society organisations through surprise financial audits, criminal investigations and public shaming⁵⁹⁶. For example, Norwegian NGOs were prosecuted in Hungary on charges of embezzlement and unauthorised financial activities⁵⁹⁷. These increasing pressures on the media and civil society may adversely affect their capacity to act against a government that undermines democracy, the rule of law and fundamental rights⁵⁹⁸. Therefore, certain national actors in a Member State, such as NGOs, would benefit from EU support in order to mobilise public opinion on the ground to prevent a government from enacting harmful reforms⁵⁹⁹. In his end of mission statement regarding his visit to Hungary, the UN Special Rapporteur on the situation of human rights defenders recommended "civil society to establish stronger links to European and international

2013, [Safeguarding democracy inside the EU. Brussels and the future of liberal order](#), Transatlantic Academy No. 3, pp. 9-14.

⁵⁹² European Commission, Communication '[A new EU Framework to strengthen the Rule of Law](#)' of 19 March 2014, COM(2014) 158 final/2.

⁵⁹³ *Ibidem*, p. 6.

⁵⁹⁴ See for more information the Meijers Committee, [Letter to Commissioner Reding](#): Note on the Commission Communication "A new EU Framework to strengthen the Rule of Law", Ref. CM1406, 15 June 2014.

⁵⁹⁵ Butler, I., '[EU Still Failing to Protect Fundamental Rights](#)', Open Society European Policy Institute - Open Society Foundations, 12 March 2014.

⁵⁹⁶ Website of Human Rights Watch, [Hungary](#).

⁵⁹⁷ Nielsen, N., for EU Observer, '[Hungary raids Norway-backed NGOs](#)', 10 September 2014; Gulyas, V., for Emerging Europe, '[EU to ignore Norway's call for measures against Hungary](#)', 5 September 2014.

⁵⁹⁸ European Commission, European Neighbourhood Policy and Enlargement Negotiations, '[Civil Society](#)' (06 June 2013).

⁵⁹⁹ Butler, I., '[EU Still Failing to Protect Fundamental Rights](#)', Open Society European Policy Institute - Open Society Foundations, 12 March 2014.

networks in order to compensate the shortage of independent funding”. Furthermore, the Special Rapporteur urged to establish measures to “prevent governmental agencies to interrupt or misuse EU funding to favour organisations that are closely affiliated to the Government” and called on the EU to monitor the use of its financial resources by these agencies, proposing the EU to directly fund the activities of civil society organisations⁶⁰⁰.

2.4.3 The role of the individual

While the concept of EU citizenship was not formally recognised until the Treaty of Maastricht⁶⁰¹, the idea of the EU being a broader project than just an economic union has been present since the creation of the Union. This ‘broader project’ entails a more extensive and ambitious political enterprise in which the citizens would share a common status and identity⁶⁰². In 1950, the Schuman Declaration already announced the “setting up of common foundations for economic development as a first step in the federation of Europe”⁶⁰³. The 1951 Treaty of Paris proclaimed the establishment of “the foundation of a broad and independent community among peoples long divided by bloody conflicts” and the setting up of “institutions capable of giving direction to their future common destiny”⁶⁰⁴. To bring this broader project beyond its economic settings the role of the individual was key. President Barroso in his 2012 State of the Union Address stated: “I believe in a Europe where people are proud of their nations but also proud to be European and proud of our European values”⁶⁰⁵.

The Treaty of Maastricht explicitly included a clause providing for the establishment of EU citizenship⁶⁰⁶. Article 17 of the Treaty of Amsterdam added that EU citizenship “shall complement and not replace national citizenship”⁶⁰⁷. Despite this, EU citizenship had an impact on the relationship between the State and its nationals which led to the definition of what is known as “reverse discrimination”⁶⁰⁸. This is when citizens who do not move from their country of nationality or residence do not enjoy the rights derived from EU

⁶⁰⁰ UN Special Rapporteur on the situation of human rights defenders, [End of mission statement](#) – Visit to Hungary 8-16 February 2016.

⁶⁰¹ Article 8 of the Treaty established “Citizenship of the Union is hereby established. Every person holding the nationality of a Member State shall be a citizen of the Union”.

⁶⁰² Maas, W., 2014, *The origins, evolution and political objectives of EU citizenship*, 15 German Law Journal, p. 799.

⁶⁰³ Website of the European Union, About the EU, ‘[The Schuman Declaration – 9 May 1950](#)’.

⁶⁰⁴ [Treaty establishing the European Coal and Steel Community \(ECSC\)](#), 18 April 1951, U.N.T.S. 140, Preamble.

⁶⁰⁵ Durão Barroso, J.M, ‘[State of the Union 2012 Address](#)’, 12 September 2012. SPEECH/12/596, Part 4 Treaty change. In 1948, Winston Churchill In 1948, Winston Churchill already asserted that “We hope to reach again a Europe... [in which] men will be proud to say ‘I am European’. We hope to see a Europe where men of every country will think as much of being a European as of belonging to their native land... [And] whenever they go in this wide domain ...they will truly feel ‘Here I am at home’”. Churchill, W., [Speech delivered to the Congress of Europe](#) (10 May 1948).

⁶⁰⁶ Article 8 of the Treaty of Maastricht.

⁶⁰⁷ [Treaty of Amsterdam](#) amending the Treaty on European Union, the Treaties establishing the European Communities, 2 October 1997.

⁶⁰⁸ Maas, W., 2014, *The origins, evolution and political objectives of EU citizenship*, 15 German Law Journal, p. 802; De Waele, H., 2010, *EU citizenship: revisiting its meaning, place and potential*, 12 European Journal of Migration and Law, pp. 327, 328.

citizenship and, hence, are treated worse than those citizens who do make use of their freedom of movement under the Treaties. The reasoning for this lies in the implementation of EU law for the latter group of citizens, whilst the former are under a “purely internal situation” falling out of the scope of Union law and as a result, of the rights granted under this⁶⁰⁹.

While discrimination on the ground of nationality is prohibited since the adoption of the Treaty of Rome, the CJEU has been reluctant to implement this provision to the cases of reverse discrimination, as a gesture of non-interference with the Member States’ sovereignty⁶¹⁰. This was explained for example in the *Knoors* case where the Court ruled that “it is not possible to disregard the legitimate interest which a Member State may have in preventing certain of its nationals, by means of facilities created under the Treaty, from attempting wrongly to evade the application of their national legislation”⁶¹¹. The CJEU has therefore continued to interpret and implement the rights linked to EU citizenship exclusively to cases where Union law is applicable⁶¹².

The scope of the Treaty has been progressively extended, starting with the *Martinez Sala* judgment⁶¹³, where the Court established “that a citizen of the European Union (...) lawfully resident in the territory of the host Member State, can rely on Article 6 of the Treaty [which prohibited discrimination based on nationality] in all situations which fall within the scope *ratione materiae* of Community law”⁶¹⁴. The case-law reflects an increasing trend in implementing equal treatment granted under the Treaty for a broader scope of situations, including, for instance, students’ economic allowances⁶¹⁵, healthcare insurances⁶¹⁶, or even to cases concerning third country nationals⁶¹⁷. As declared in *Grzelczyk*, Union citizenship “is destined to be the fundamental status of nationals of the Member States, enabling those who find themselves in the same situation to enjoy the

⁶⁰⁹ Maas, W., 2014, *The origins, evolution and political objectives of EU citizenship*, 15 German Law Journal, p. 802; De Waele, H., 2010, *EU citizenship: revisiting its meaning, place and potential*, 12 European Journal of Migration and Law, pp. 327, 328.

⁶¹⁰ Maas, W., 2014, *The origins, evolution and political objectives of EU citizenship*, 15 German Law Journal, pp. 805-807; De Waele, H., 2010, *EU citizenship: revisiting its meaning, place and potential*, 12 European Journal of Migration and Law, pp. 323, 324.

⁶¹¹ CJEU, [Case C-115/78](#), Judgment of the Court of 7 February 1979 *J. Knoors v. Staatssecretaris van Economische Zaken*, ECLI:EU:C:1979:31, paragraph 25.

⁶¹² Maas, W., 2014, *The origins, evolution and political objectives of EU citizenship*, 15 German Law Journal, p. 802; De Waele, H., 2010, *EU citizenship: revisiting its meaning, place and potential*, 12 European Journal of Migration and Law, pp. 327, 328.

⁶¹³ CJEU, [Case C-85/96](#), Judgment of the Court of 12 May 1998 *María Martínez Sala v. Freistaat Bayern*, ECLI:EU:C:1998:217.

⁶¹⁴ *Ibidem*, paragraph 63.

⁶¹⁵ CJEU, [Case C-184/99](#), Judgment of the Court of 20 September 2001 *Rudy Grzelczyk v. Centre public d’aide sociale d’Ottignies-Louvain-la-Neuve*, ECLI:EU:C:2001:458; De Waele, H., 2010, *EU citizenship: revisiting its meaning, place and potential*, 12 European Journal of Migration and Law, pp. 324-325.

⁶¹⁶ CJEU, [Case C-413/99](#), Judgment of the Court of 17 September 2002 *Baumbast and R v. Secretary of State for the Home Department*, ECLI:EU:C:2002:493; De Waele, H., 2010, *EU citizenship: revisiting its meaning, place and potential*, 12 European Journal of Migration and Law, p. 325.

⁶¹⁷ CJEU, [Case C-200/02](#), Judgment of the Court (sitting as full Court) of 19 October 2004 *Kungian Catherine Zhu and Man Lavette Chen v. Secretaty of State for the Home Department*, ECLI:EU:C:2004:639; De Waele, H., 2010, *EU citizenship: revisiting its meaning, place and potential*, 12 European Journal of Migration and Law, p. 325.

same treatment in law irrespective of their nationality, subject to such exceptions as are expressly provided for”⁶¹⁸.

This overarching trend in case-law was consolidated in Article 9 TEU, which establishes that the Union has to observe the principle of the equality of its citizens in all its activities⁶¹⁹. However, instead of declaring EU citizenship as complementary to national citizenship (as it was established prior to the Lisbon Treaty), it defines EU citizenship as ‘additional to national citizenship’ and that it ‘shall not replace it’⁶²⁰. This is reinforced in Article 20 TFEU. The difference between ‘complement’ and ‘addition’ can entail that EU citizenship constitutes a separate status from national citizenship and therefore conveys on its holders a new and independent set of rights which supplement their rights under their national constitutions and legislation⁶²¹.

If considered as such, the rights granted under the Treaties cover all situations falling under the *ratione materiae* of Union law, encompassing those without a transboundary element. The reviewed case-law illustrates a pattern to include within the scope of Union law those situations previously considered to be “purely internal” and which led to situations of reverse discrimination⁶²². The trend led to the *Ruiz Zambrano* judgment⁶²³ where the Court followed the *Rottman* approach and confirmed that “Article 20 TFEU precludes national measures which have the effect of depriving citizens of the Union of the genuine enjoyment of the substance of the rights conferred by virtue of their status as citizens of the Union”⁶²⁴. With this judgment, the Court appeared to require that, to consider that a Member State had breached EU citizenship rights, the breach be of a certain seriousness⁶²⁵. For instance, in the *McCarthy* case⁶²⁶, the Court considered that Ms

⁶¹⁸ CJEU, [Case C-184/99](#), Judgment of the Court of 20 September 2001 *Rudy Grzelczyk v. Centre public d’aide sociale d’Ottignies-Louvain-la-Neuve*, ECLI:EU:C:2001:458, paragraph 31.

⁶¹⁹ Article 9 TEU: “In all its activities, the Union shall observe the principle of the equality of its citizens, who shall receive equal attention from its institutions, bodies, offices and agencies. Every national of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to and not replace national citizenship”.

⁶²⁰ Article 9 TEU and Article 20 TFEU.

⁶²¹ Maas, W., 2014, *The origins, evolution and political objectives of EU citizenship*, 15 German Law Journal, p. 808-812; Van den Vrink, M.J., 2012, *EU citizenship and EU Fundamental Rights: taking EU citizenship rights seriously?*, Legal Issues of Economic Integration 39, no. 2, p.; De Waele, H., 2010, *EU citizenship: revisiting its meaning, place and potential*, 12 European Journal of Migration and Law, pp. 323, 328.

⁶²² Maas, W., 2014, *The origins, evolution and political objectives of EU citizenship*, 15 German Law Journal; Van den Vrink, M.J., 2012, *EU citizenship and EU Fundamental Rights: taking EU citizenship rights seriously?*, Legal Issues of Economic Integration 39, no. 2, 273-290; De Waele, H., 2010, *EU citizenship: revisiting its meaning, place and potential*, 12 European Journal of Migration and Law, pp. 328.

⁶²³ CJEU, [Case C-34/09](#), Judgment of the Court (Grand Chamber) of 8 March 2011 *Gerardo Ruiz Zambrano v. Office national d’emploi (ONEm)*, ECLI:EU:C:2011:124.

⁶²⁴ CJEU, [Case C-34/09](#), Judgment of the Court (Grand Chamber) of 8 March 2011 *Gerardo Ruiz Zambrano v. Office national d’emploi (ONEm)*, ECLI:EU:C:2011:124, paragraph 32. In this case, the Court considered that rejecting Mr Zambrano’s request for a residence permit would entail his children having to leave the territory of the Union and, thus, this would constitute a deprivation of the ‘genuine’ enjoyment of EU rights.

⁶²⁵ Van den Vrink, M.J., 2012, *EU citizenship and EU Fundamental Rights: taking EU citizenship rights seriously?*, Legal Issues of Economic Integration 39, no. 2, p. 279.

⁶²⁶ CJEU, [Case C-434/09](#), Judgment of the Court (Third Chamber) of 5 May 2011 *Shirley McCarthy v.*

McCarthy's rights were not sufficiently breached and, thus, that this threshold was not met. However, this case should be considered as reaffirming the doctrine of "substance of rights" set in *Zambrano* and the requirement for this substance to be sufficiently infringed⁶²⁷.

Nevertheless, the balance between Member States' citizenship and EU citizenship is not one free of ambiguity and controversy⁶²⁸. For instance, if Member States are to treat all natural persons legally residing in their territory equally, they might, for instance, be more inclined to make the entrance conditions for third country nationals more stringent or laws on naturalisation and acquisition of nationality⁶²⁹. Even requirements for citizens of other EU Member States are already being enforced, such as the condition of having sufficient economic resources and not becoming a burden to their country of residence⁶³⁰.

Furthermore, it could be considered that the "substance of the rights" doctrine established by *Zambrano* could leave out of its scope certain rights granted by the EU Charter of Fundamental Rights, such as the right to respect family life (Article 7)⁶³¹. However, this line of interpretation can be refuted by the fact that the Charter encompasses the rights of Article 20 TFEU⁶³². Nevertheless, there is a fine - and sometimes blurry - line between the rights granted by EU citizenship and those under the Charter. If they were to be the same, a citizen of the Union could claim an infringement of the Charter by a Member State in purely internal situations⁶³³.

This would be contrary to Article 51(1) of the EU Charter, which provides its implementation only in cases where Union law is applicable⁶³⁴. There is a narrow link between EU fundamental rights and EU citizenship rights as "[i]t would be paradoxical (to say the least) if a citizen of the Union could rely on fundamental rights under EU law when exercising an economic right to free movement as a worker, or when national law comes within the scope of the Treaty (for example, the provisions on equal pay) or when

Secretary of State for the Home Department, ECLI:EU:C:2011:277.

⁶²⁷ Maas, W., 2014, *The origins, evolution and political objectives of EU citizenship*, 15 German Law Journal, p. 816; Van den Vrink, M.J., 2012, *EU citizenship and EU Fundamental Rights: taking EU citizenship rights seriously?*, Legal Issues of Economic Integration 39, no. 2, p. 278.

⁶²⁸ Maas, W., 2014, *The origins, evolution and political objectives of EU citizenship*, 15 German Law Journal; Van den Vrink, M.J., 2012, *EU citizenship and EU Fundamental Rights: taking EU citizenship rights seriously?*, Legal Issues of Economic Integration 39, no. 2, 273-290; De Waele, H., 2010, *EU citizenship: revisiting its meaning, place and potential*, 12 European Journal of Migration and Law, pp. 328-329.

⁶²⁹ Maas, W., 2014, *The origins, evolution and political objectives of EU citizenship*, 15 German Law Journal, pp. 814-815; De Waele, H., 2010, *EU citizenship: revisiting its meaning, place and potential*, 12 European Journal of Migration and Law, pp. 328-330.

⁶³⁰ De Waele, H., 2010, *EU citizenship: revisiting its meaning, place and potential*, 12 European Journal of Migration and Law, p. 330.

⁶³¹ [View of Advocate General Mengozzi](#) in CJEU (Grand Chamber), [Case C-256/11 Murat Dereçi and Others v. Bundesministerium für Inneres](#), delivered on 29 September 2011, ECLI:EU:C:2011:626.

⁶³² Van den Vrink, M.J., 2012, *EU citizenship and EU Fundamental Rights: taking EU citizenship rights seriously?*, Legal Issues of Economic Integration 39, no. 2, p. 280.

⁶³³ *Ibidem*.

⁶³⁴ Article 51(1) CFR.

invoking EU secondary legislation (such as the services directive), but could not do so when merely 'residing' in that Member State"⁶³⁵.

While the Court has maintained a cautious position in proclaiming the relationship between EU fundamental rights and EU citizenship rights, attempts to clarify this relationship have been made in some cases. For example, in the *Josep Peñarroja Fa* case⁶³⁶ the Court ruled that the national legislation at stake should "comply with the requirements of EU law concerning the effective protection of the fundamental rights conferred on EU citizens"⁶³⁷. However, there have also been other cases in which the achievements of previous case-law have not been built upon. The *Dereçi*⁶³⁸ judgment suggested a backtracking in the progressive jurisprudence of the Court, and a regression in limiting the substance of rights' doctrine to cases of expulsion from the EU⁶³⁹. In the *Yoshikazu Iida* case the Court declared that "where there is no connection with the provisions on citizenship of European Union law, a third-country national cannot claim a right of residence derived from a Union citizen" and that, as established in Article 51 of the EU Charter, the CJEU can only ascertain whether the rights granted therein have been infringed exclusively in situations where Member States are implementing Union law⁶⁴⁰.

It can be argued, however, that the case-law of the CJEU establishes, in general terms, a forward-looking pattern applying EU fundamental rights in situations that fall under the *ratione materiae* of Union law. This is an area which has experienced a steady expansion with an increasingly comprehensive interpretation of EU citizens' rights⁶⁴¹. However, as indicated by Advocate General Sharpston in the *Zambrano* case "[t]he desire to promote appropriate protection of fundamental rights must not lead to usurpation of competence (...)"⁶⁴² fundamental rights protection under EU law would be complementary to that provided by national law"⁶⁴³. This would not, however, prevent the CJEU from

⁶³⁵ [Opinion of Advocate General Sharpston](#) in CJEU (Grand Chamber), [Case C-34/09](#), Judgment of the Court of 8 March 2011 *Gerardo Ruiz Zambrano v. Office national d'emploi* (ONEm), delivered on 30 September 2010, ECLI:EU:C:2010:560, paragraph 84.

⁶³⁶ CJEU, [Joined Cases C-372/09 and C-373/09](#), Judgment of the Court (Fourth Chamber) of 17 March 2011, *Josep Peñarroja Fa*, ECLI:EU:C:2011:156.

⁶³⁷ *Ibidem*, paragraph 62.

⁶³⁸ CJEU, [Case C-256/11](#) Judgment of the Court (Grand Chamber) of 15 November 2011 *Murat Dereçi and Others v. Bundesministerium für Inneres*, ECLI:EU:C:2011:734.

⁶³⁹ Van den Vrink, M.J., 2012, *EU citizenship and EU Fundamental Rights: taking EU citizenship rights seriously?*, Legal Issues of Economic Integration 39, no. 2, p. 282.

⁶⁴⁰ CJEU, [Case C-40/11](#), Judgment of the Court (Third Chamber) of 8 November 2012 *Yoshikazu Iida v. Stadt Ulm*, ECLI:EU:C:2012:691, paragraphs 79 - 82.

⁶⁴¹ Maas, W., 2014, *The origins, evolution and political objectives of EU citizenship*, 15 German Law Journal, p. 813; Van den Vrink, M.J., 2012, *EU citizenship and EU Fundamental Rights: taking EU citizenship rights seriously?*, Legal Issues of Economic Integration 39, no. 2, p. 283.

⁶⁴² [Opinion of Advocate General Sharpston](#) in CJEU (Grand Chamber), [Case C-34/09](#), Judgment of the Court of 8 March 2011 *Gerardo Ruiz Zambrano v. Office national d'emploi* (ONEm), delivered on 30 September 2010, ECLI:EU:C:2010:560, paragraph 162.

⁶⁴³ [Opinion of Advocate General Sharpston](#) in CJEU (Grand Chamber), [Case C-34/09](#), Judgment of the Court of 8 March 2011 *Gerardo Ruiz Zambrano v. Office national d'emploi* (ONEm), delivered on 30 September 2010, ECLI:EU:C:2010:560, paragraph 168.

intervening in those cases where national safeguards to uphold fundamental rights have failed and where fundamental rights under the EU Charter could be invoked⁶⁴⁴.

In relation to upholding Article 2 TEU values, citizens cannot initiate legal proceedings on the sole basis of this provision either before national courts or the CJEU. According to the principle of direct effect of EU law, established by the CJEU in the judgment of *Van Gend en Loos* of 5 February 1963⁶⁴⁵, primary legislation can have such effect only if the obligations are precise, clear and unconditional and that they do not call for additional measures, either national or European. The CJEU later rejected the principle of direct effect where Member States have a margin of discretion, however minimal, regarding the implementation of the provision in question⁶⁴⁶.

The CJEU has also granted 'direct effect' for secondary legislation through the mechanism of "normative combination" of a general principle or a fundamental right with a provision of derived legislation⁶⁴⁷. For example, in the *Chatzi* case⁶⁴⁸, the Court interpreted the principle of equal treatment as declared in Article 20 of the Charter to conclude that Mr. Chatzi could benefit from the parental leave regime foreseen in the Framework Agreement on Parental Leave⁶⁴⁹. In similar cases, the implementation of fundamental rights results from their interpretation in conjunction with other legislation rather than from their direct effect⁶⁵⁰. By interpreting directives as a consolidation of general principles, the desired direct effect is accomplished, such as in the *Mangold*⁶⁵¹ and *Kücükdeveci*⁶⁵² cases. In these cases, the lack of horizontal direct effect of Directive 2000/78/EC on Equal Treatment in Employment and Occupation was rectified by interpreting the Directive jointly with the "principle of non-discrimination". Similarly, in order to implement the principle of non-discrimination, to exercise its jurisdiction, the CJEU requires the matter to fall within the scope of EU law (Article 51(1) of the Charter)

⁶⁴⁴ [Opinion of Mr Advocate General Poiares Maduro](#) delivered on 12 September 2007, CJEU, Case C-380/05 *Centro Europa 7 Srl v Ministero delle Comunicazioni e Autorità per le garanzie nelle comunicazioni and Direzione generale per le concessioni e le autorizzazioni del Ministero delle Comunicazioni*, ECLI:EU:C:2007:505, paragraph 20. See also: Maas, W., 2014, *The origins, evolution and political objectives of EU citizenship*, 15 German Law Journal, pp. 809-810; Van den Vrink, M.J., 2012, *EU citizenship and EU Fundamental Rights: taking EU citizenship rights seriously?*, Legal Issues of Economic Integration 39, no. 2, p. 287.

⁶⁴⁵ ECJ, [Case 26/62](#), Judgment of the Court of 5 February 1963, *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration*, ECLI:EU:C:1963:1.

⁶⁴⁶ ECJ, [Joined cases C-100/89 and C-101/89](#), Judgment of 12 December 1990 *Kaefer & Procacci v. French State*.

⁶⁴⁷ Robin-Olivier, S., 2014, *The evolution of direct effect in the EU: stocktaking, problems, projections*, International Journal of Constitutional Law, Volume 12, Issue 1, p. 170.

⁶⁴⁸ CJEU, [Case 149-10](#), Judgment of the Court (First Chamber) of 16 September 2010 *Zoi Chatzi v. Ipourgos Ikononikon*, ECLI:EU:C:2010:534.

⁶⁴⁹ Framework agreement on parental leave concluded on 14 December 1995, which is set out in the annex to [Council Directive 96/34/EC](#) of 3 June 1996 on the framework agreement on parental leave concluded by UNICE, CEEP and the ETUC, 1996 O.J. (L 145) at 4.

⁶⁵⁰ Robin-Olivier, S., 2014, *The evolution of direct effect in the EU: stocktaking, problems, projections*, International Journal of Constitutional Law, Volume 12, Issue 1, p. 171.

⁶⁵¹ CJEU, [Case C-144/04](#), Judgment of the Court (Grand Chamber) of 22 November 2005 *Werner Mangold v. Rüdiger Helm*, ECLI:EU:C:2005:709.

⁶⁵² CJEU, [Case C-555/07](#), Judgment of the Court (Grand Chamber) of 19 January 2010 *Seda Küçükdeveci v. Swedex GmbH & Co. KG*, ECLI:EU:C:2010:21.

and, in this case, this was achieved through the Directive⁶⁵³. Therefore, under this interpretation, “general principles of law can have the same effect as the rights that individuals can claim in national courts against other individuals”⁶⁵⁴.

Article 2 TEU also sets out the common values of the Union which, for their comprehensive and constitutive power, can be considered as founding principles since they “have been agreed upon in the procedure of Article 48 TEU and have legal consequences (...) they are legal norms”⁶⁵⁵. In its decision in the *Kadi* case⁶⁵⁶, the CJEU recognised this effect of Article 2 TEU values proclaiming that “Th[e EC Treaty] provisions [on the direct effect and priority of international law, in particular the obligations Member States have accepted for the purpose of maintaining international peace and security] cannot, however, be understood to authorise any derogation from the principles of liberty, democracy and respect for human rights and fundamental freedoms enshrined in Article 6(1) TEU as a foundation of the Union”⁶⁵⁷.

While the case-law of the CJEU has made clear that no private applicant could force EU institutions to trigger the application of Article 7 TEU⁶⁵⁸, the Treaty of Lisbon has granted EU citizens the possibility to invite the European Commission to “submit any appropriate proposal on matters where citizens consider that a legal act of the Union is required for the purpose of implementing the Treaties”: a European Citizens’ Initiative (ECI)⁶⁵⁹. This mechanism is designed to strengthen participatory democracy in the European Union⁶⁶⁰. This opportunity has been used by EU citizens in November 2015, when the Commission registered ECI on EU fundamental values in Hungary⁶⁶¹. The ECI

⁶⁵³ Robin-Olivier, S., 2014, *The evolution of direct effect in the EU: stocktaking, problems, projections*, International Journal of Constitutional Law, Volume 12, Issue 1, pp. 171-172.

⁶⁵⁴ *Ibidem*, pp. 172.

⁶⁵⁵ Van Bogdandy, A., 2010, *Founding Principles of EU law: a theoretical and doctrinal sketch*, 2 European Law Journal, p. 106. See also Chronowski, N., 2013, [Enhancing the scope of the Charter of Fundamental Rights – problems of the limitations and advantages of directly applicable Charter rights with regard to recent case law developments of the European Court of Justice and national courts](#), Discussion Paper upon the call of the European Commission for contributions to the *Assises de la Justice*.

⁶⁵⁶ CJEU, [Joined cases C-402/05 P and C-415/05](#), Judgment of the Court (Grand Chamber) of 3 September 2008 *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities*, ECLI:EU:C:2008:461.

⁶⁵⁷ CJEU, [Joined cases C-402/05 P and C-415/05](#), Judgment of the Court (Grand Chamber) of 3 September 2008 *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities*, ECLI:EU:C:2008:461, paragraph 303.

⁶⁵⁸ See ECJ, [Case T-337/03](#), Order of the Court of First Instance (Fifth Chamber) of 2 April 2004 *Bertelli Gálvez v Commission* ECR II-1041, ECLI:EU:T:2004:106, paragraph 15, where the ECJ held that the EU Treaties – the entry into force of the Lisbon Treaty does not invalidate this conclusion – did not give it jurisdiction to determine whether the EU institutions have acted lawfully to ensure the respect by the Member States of the principles laid down under what is now Article 2 TEU or to adjudicate on the lawfulness of acts adopted on the basis of what is now Article 7 TEU, save in relation to questions concerning the procedural stipulations contained in that article, which the Court may address only at the request of the member state concerned.

⁶⁵⁹ Article 11(4) TEU.

⁶⁶⁰ Website of the European Parliament, [‘At your service. Fact Sheets on the European Union. European Citizens’ Initiative’](#).

⁶⁶¹ European Commission, [‘Commission registers European Citizens’ Initiative on EU fundamental values in Hungary’](#), 30 November 2015.

calls on the EU to trigger the mechanism under Article 7 TEU to determine whether Viktor Orbán's government policies respect Article 2 TEU values⁶⁶².

2.5 Cross-cutting issues limiting the effectiveness of current EU mechanisms

The previous review of the existing EU mechanisms reveals that the EU has struggled to identify the most effective method to monitor and enforce compliance with Article 2 TEU values at both national and EU levels. This has resulted in the following cross-cutting issues:

- The existing EU mechanisms for the protection of democracy, the rule of law and fundamental rights all have certain limitations and therefore are **not adequate** to ensure full compliance with Article 2 TEU values. Moreover, in practice, the existing mechanisms are **rarely used to their full extent**. Key EU institutions appear reluctant to use Article 7 TEU. The Commission, for instance, has refused to activate its Rule of Law Framework until very recently despite calls by the Parliament to do so with respect to Hungary. This general reluctance to act may reflect a **political disagreement** on how best address instances of non-adherence to Article 2 TEU values. There is also a clear **disconnection** between the EU's internal and external policies as previously noted.
- The EU monitoring mechanisms, in particular, have different scopes and objectives and this has led to a **rather patchy set of arrangements**. There appears to be **overlaps** and a **lack of coherence** between pre-accession requirements and post-accession monitoring. Furthermore, there seems to be **insufficient coordination** with the Council of Europe and the UN, and other international organisations such as the OSCE, to ensure a more efficient and comprehensive monitoring, assessment and evaluation of Member States at EU level.
- This lack of coherence and coordination relate to a more general **competence** issue and the **principle of subsidiarity** in determining who is (or should be) responsible for safeguarding and monitoring the democratic rule of law respecting fundamental rights in the EU⁶⁶³. There must be a sufficient legal basis for the EU to monitor and sanction non-compliance with EU fundamental values in a Member State. Articles 2 and 7 TEU are not limited to areas covered by EU law. Democracy, the rule of law and fundamental rights are core values of the EU, and the European Commission is the 'guardian of the Treaties'. As such, the Commission is arguably under a legal duty to safeguard these values within the EU (see Section 2.1.3 and Annex 2)⁶⁶⁴. However, Article 4 TEU sets out that,

⁶⁶² European Commission, '[European Citizens Initiative. Wake up Europe! Taking action to safeguard the European democratic project](#)'; Website of the ECI.

⁶⁶³ European Parliament, 2013, '[The triangular relationship between fundamental rights, democracy and rule of law in the EU: Towards an EU Copenhagen Mechanism](#)', pp. 1, 37.

⁶⁶⁴ Kochenov, D. and Pech, L., 2015, '[Monitoring and Enforcement of the Rule of Law in the EU: Rhetoric and Reality](#)', European Constitutional Law Review, vol. 11, issue 3, pp. 525, 530, 534. European Commission, Communication '[A new EU Framework to strengthen the Rule of Law](#)' of 19 March

where the Treaty does not provide the exclusive competence of the Union, competences remain with the Member States⁶⁶⁵. There is therefore a lack of clarity with regard to the legal basis for EU action when it comes to monitoring and/or enforcing Article 2 TEU values. This affects both the implementation of any existing EU mechanism and the feasibility of creating new ones⁶⁶⁶.

- Shortcomings were also identified in the process of assessing the **compatibility of EU draft legislation with the Charter of Fundamental Rights**. While all EU institutions have guidelines on scrutinising fundamental rights in the whole policy cycle (see Section 2.1.4 above), including consultation with fundamental rights' experts, there is room for improvement with respect to their practical implementation.

2.6 Conclusions: current 'State of Play'

Article 7 TEU, which formally establishes the possibility of taking measures in two situations – the existence of a “clear risk of a serious breach of Article 2 TEU values” and the existence of a “serious and persistent breach” of these values – has never been applied. Two main reasons may be offered to explain the non-activation of this provision: the thresholds for activating it, as shown above, are virtually impossible to meet, and the existence of a political convention whereby it would be politically counterproductive to do so.⁶⁶⁷ One may also note that the Council is actually under no legal obligation to do so even in a situation where it concludes that a Member State is in breach of Article 2 TEU values. This aspect clearly shows the predominant political nature of Article 7 TEU. The case law of the Court of Justice has further made clear that no private applicant could force the EU to trigger the application of Article 7 TEU.⁶⁶⁸

The Commission's Rule of Law Framework also leaves considerable room for political discretion. For instance, one may find it difficult to understand why it has been activated in relation to Poland but not with respect to Hungary. In its Resolution of 10 June 2015, the Parliament actually urged the Commission to “activate the first stage of the EU framework to strengthen the rule of law, and therefore to initiate immediately an in-

2014, COM(2014) 158 final/2,

⁶⁶⁵ Article 4 TEU.

⁶⁶⁶ See Moxham, L. and Stefanelli, J., 2013, [Safeguarding the rule of law, democracy and fundamental rights: a monitoring model for the European Union](#), Bingham Centre for the Rule of Law, p. 23.

⁶⁶⁷ It must however be noted that Vice-President Timmermans recently indicated that any reintroduction of the death penalty by any Member State, an idea mooted by the Hungarian Prime Minister Orbán, would ‘lead to the application of Article 7 TEU’. See Commission statement on the situation in Hungary, Strasbourg, 19 May 2015, Press release IP/15/5007.

⁶⁶⁸ See ECJ, [Case T-337/03](#), Order of the Court of First Instance (Fifth Chamber) of 2 April 2004 *Bertelli Gálvez v Commission* ECR II-1041, ECLI:EU:T:2004:106, paragraph 15, where the Court of Justice held that the EU Treaties – the entry into force of Lisbon does not invalidate this conclusion – did not give it jurisdiction to determine whether the EU institutions have acted lawfully to ensure the respect by the Member States of the principles laid down under what is now Article 2 TEU or to adjudicate on the lawfulness of acts adopted on the basis of what is now Article 7 TEU, save in relation to questions concerning the procedural stipulations contained in that article, which the Court may address only at the request of the Member State concerned.

depth monitoring process concerning the situation of democracy, the rule of law and fundamental rights in Hungary, assessing a potential systemic serious breach of the values on which the Union is founded”⁶⁶⁹.

The Commission has made clear that it will not hesitate to use the Framework if this is required by the situation in a particular Member State⁶⁷⁰, and has justified its non-activation with respect to Hungary on the ground that the Commission sees no systemic threat to democracy, the rule of law and fundamental rights in Hungary. Ms Jourová, the Commissioner for Justice, Consumers and Gender Equality, however listed several recent contentious issues that the Commission monitored in Hungary, including the treatment of asylum seekers, segregated education and discrimination of the Roma, the treatment of non-governmental organisations managing Norwegian funds, questionable judgments by the judiciary, State aid to media and for the construction of a nuclear plant, as well as corruption affecting public procurement⁶⁷¹. The Commissioner nevertheless concluded “these concerns are being addressed by a range of infringement actions, and as the Hungarian judiciary also has its role to play, the Commission found that conditions to start a rule of law framework procedure are not fulfilled”⁶⁷². The European Parliament in its 16 December 2015 Resolution expressed regret that the current approach taken by the Commission with regard to Hungary has been focused mainly on marginal, technical aspects of the legislation while ignoring the trends, patterns and combined effect of the measures on the rule of law and fundamental rights. It also stated that infringement proceedings, in particular, have failed in most cases to lead to real changes and to address the situation more broadly⁶⁷³.

The Commission is however entitled to its view that the situation in Poland is structurally different from the situation in Hungary. Non-political factors may have played a role. MEP Tavares suggested that the problem “resided in the Council, and that Orbán leveraged a lot of power inside the EPP”⁶⁷⁴. Tavares stated that this situation gives Poland an argument to stress that there is a certain unfairness, because the Hungarian government had made many more controversial decisions over many years, compared to the Polish government over the last couple of months⁶⁷⁵. These may well have been part of the non-legal considerations which may have guided the Commission when it decided to activate its new Framework for the first time. Strictly speaking, however, the Commission via Commissioner Jourová has offered a legalistic explanation to justify the difference of treatment: While ‘concerns about the situation in Hungary are being

⁶⁶⁹ European Parliament, Resolution of 10 June 2015 on the situation in Hungary, (2015/2700(RSP)), [P8_TA-PROV\(2015\)0227](#), paragraph 11..

⁶⁷⁰ Speech of First Vice-President Frans Timmermans to the European Parliament, ‘Commission Statement: EU framework for democracy, rule of law and fundamental rights’, [SPEECH/15/4402](#), Strasbourg, 12 February 2015.

⁶⁷¹ European Parliament, Press release, Plenary Session, ‘[Hungary: no systemic threat to democracy, says Commission, but concerns remain](#)’, 2 December 2015.

⁶⁷² *Ibidem*.

⁶⁷³ European Parliament, Resolution of 16 December 2015 on the situation in Hungary (2015/2935(RSP)), [P8_TA-PROV\(2015\)0461](#).

⁶⁷⁴ Gotev, G., for Euractiv.com, ‘[Tavares: Discussing rule of law in Poland separately from Hungary will lead ‘nowhere’](#)’, 13 January 2016.

⁶⁷⁵ *Ibidem*.

addressed by a range of infringement procedures and pre-infringement procedures, and that also the Hungarian justice system has a role to play', the situation of Poland would allegedly be different to the extent that the main issue is 'the fact that binding rulings of the Constitutional Tribunal are currently not respected', which 'is a serious matter in any rule of law-dominated state'⁶⁷⁶.

⁶⁷⁶ European Commission Press Release Database, Readout by First Vice- President Timmermans of the College Meeting of 13 January 2016, [SPEECH/16/71](#).

3 Current shortcomings and their impact

Key findings

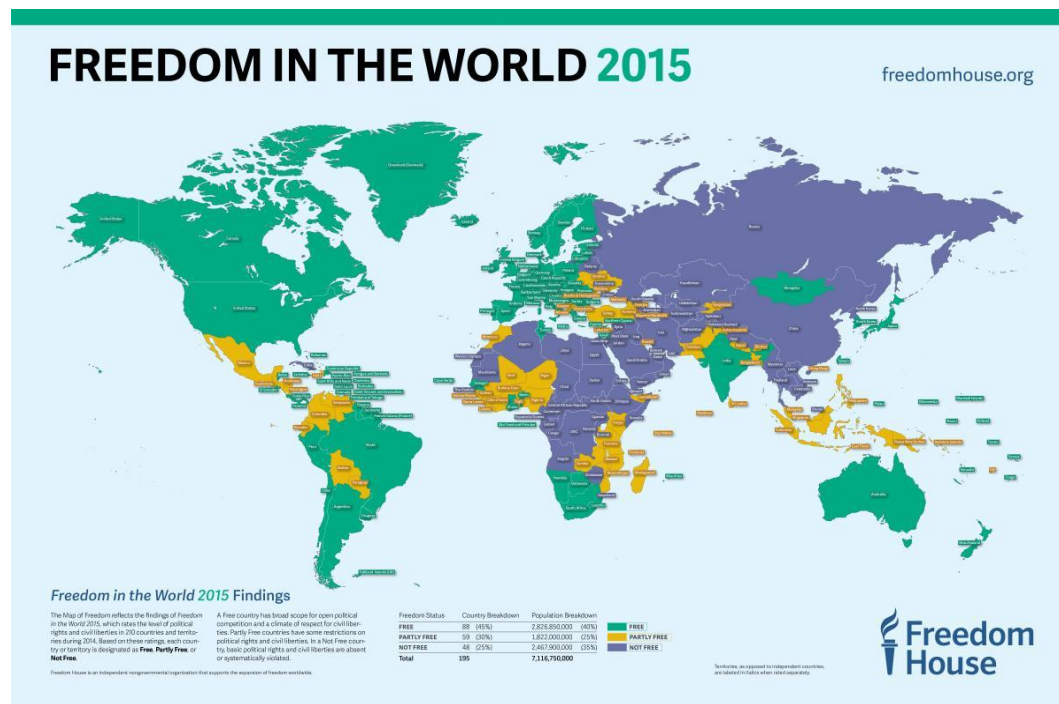
- A number of gaps and shortcomings with respect to the EU legal and policy framework have been identified and these gaps and shortcomings may have a negative impact on mutual trust among Member States and between Member States and the EU. It could also impact mutual trust between the individual and the EU as well as towards their own Member State. This could also affect the legitimacy of EU actions.
- Lack of effective enforcement of democracy, the rule of law and fundamental rights may have an adverse effect on the socio-economic development of Member States.
- There is also a correlation between Article 2 TEU values and the financial market which becomes particularly apparent in times of financial crises. For instance, the ECB, the IMF and the EU Commission jointly urged Greece to consider rectifying not only its economic shortcomings, but also its rule of law deficit.
- The impact on fundamental rights also reflects the challenges Member States face to uphold Article 2 TEU values and the limitations of the EU mechanisms to promote and protect these values. Data shows that the three most common violated rights are the right to a fair trial, the right to timely proceedings and the right to an effective remedy.

As shown in the figure below, all EU Member States may be said to broadly ensure respect for political rights and civil liberties. Compliance with Article 2 TEU values, however, cannot be taken for granted as a series of CVM-reports on Bulgaria and Romania, the Roma crises in France in 2010-13, and the ongoing controversies in Hungary and Poland have demonstrated⁶⁷⁷. The current EU framework does not seem to provide an adequate remedy to this problem. The tools that the EU has at its disposal either suffer from different limitations or are not applied effectively. This Section examines the main reasons why Article 2 TEU related problems in one Member State may present a problem to all other Member States, and highlights how this situation may affect EU citizens, businesses, Member State administrations and the EU as whole. Many of these reasons have been noted by experts participating in a roundtable on legal mechanisms and reforms of EU law organised by the NGO Democracy Reporting International in Berlin on 30 January 2014⁶⁷⁸.

⁶⁷⁷ Closa, C., and Kochenov, D., '[Reinforcing the Rule of Law Oversight in the European Union](#)', in Werner Schröder (ed.), *Strengthening the Rule of Law in Europe: From a Common Concept to Mechanisms of Implementation*, Hart Publishing, Oxford, 2015 (forthcoming).

⁶⁷⁸ See Democracy Reporting International, '[From commitment to action: Fundamental values in EU Member States](#)', Report on an expert roundtable on legal mechanisms and reforms of EU law, Berlin, 30 January, 2014. Experts, included, inter alia, representatives from EU institutions (in particular, the Commission, CJEU, EUFRA), the Council of Europe, representatives from Member States (e.g. Finland, Germany, The Netherlands, Poland) and academia.

Figure 3 Freedom in the World⁶⁷⁹



Developing mutual trust between Member States

The premise that all Member States share the same values implies and justifies the existence of mutual trust between the Member States. This means that those values will be recognised and that the law of the EU implementing these values will be respected⁶⁸⁰. Refusals to recognise other Member States' court decisions, European Arrest Warrants, newly-issued citizenship documents or the quality of phytosanitary measures – are generally prohibited by EU law, unless justified in accordance with primary or secondary EU law⁶⁸¹. Protecting and strengthening the compliance with Article 2 TEU values would clearly help in enhancing a mutual trust between the Member States.

⁶⁷⁹ Freedom in the World 2015 evaluates the state of freedom in 195 countries and 15 territories during 2014. Each country and territory is assigned two numerical ratings—from 1 to 7—for political rights and civil liberties, with 1 representing the most free and 7 the least free. The two ratings are based on scores assigned to 25 more detailed indicators. The average of a country or territory's political rights and civil liberties ratings determines whether it is Free, Partly Free, or Not Free. The methodology, which is derived from the Universal Declaration of Human Rights, is applied to all countries and territories, irrespective of geographic location, ethnic or religious composition, or level of economic development. Freedom in the World assesses the real-world rights and freedoms enjoyed by individuals, rather than governments or government performance per se. Political rights and civil liberties can be affected by both state and non-state actors, including insurgents and other armed groups. For complete information on the methodology, visit <https://freedomhouse.org/report/freedom-world/freedomworld-2015/methodology>.

⁶⁸⁰ Closa, C., and Kochenov, D., 'Reinforcing the Rule of Law Oversight in the European Union', in Werner Schröder (ed.), *Strengthening the Rule of Law in Europe: From a Common Concept to Mechanisms of Implementation*, Hart Publishing, Oxford, 2015 (forthcoming).

⁶⁸¹ Closa, C., and Kochenov, D., 'Reinforcing the Rule of Law Oversight in the European Union', in Werner Schröder (ed.), *Strengthening the Rule of Law in Europe: From a Common Concept to*

Mutual trust is essential to the working of the EU and the market itself. It is important to ensure that EU citizens can benefit from an area of freedom, security and justice. EU citizens are entitled to expect that everywhere in the EU their rights, freedoms and safety are guaranteed if they avail themselves of their freedoms. However, EU citizens' trust in governments and parliaments is low. A majority of EU citizens do not agree that the law is applied and enforced effectively and equally for all⁶⁸². In relation to confidence in national justice, there are significant differences between the Member States⁶⁸³. A lack of trust in the legal systems of other Member States undermines cooperative mechanisms within the EU which are based on the principle of mutual recognition, such as the European Arrest Warrant⁶⁸⁴. For instance, the Dutch International Legal Court decided in December 2015 not to execute Hungarian EAWs⁶⁸⁵ based on the ruling of the ECtHR of 10 March 2015 in the *Varga* case⁶⁸⁶. In this case it was considered that the prison conditions existing in Hungary were in breach of Article 3 ECHR⁶⁸⁷. The above mentioned *all-affected principle* assumes that the EU is already a coherent legal-political entity based on mutual trust and respect and works both at citizen level and at Member State level⁶⁸⁸. For further insight on this issue, see below the case-study on the European Arrest Warrant.

Case study 4: The impacts of the lack of trust in the legal systems in other Member States

The EU is based on the principle of mutual trust among Member States⁶⁸⁹. For there to be an EU area of justice, the principle of mutual trust, through the principle of mutual recognition, is key⁶⁹⁰.

Mechanisms of Implementation, Hart Publishing, Oxford, 2015 (forthcoming).

⁶⁸² Hirsch-Ballin, E., et al., 2014, [The Rule of Law: Safeguard for European Citizens and Foundation for European Cooperation](#), Advisory Council on International Affairs (*Adviesraad Internationale Vraagstukken*, AIV), Report No. 87, p. 7.

⁶⁸³ Hirsch-Ballin, E., et al., 2014, [The Rule of Law: Safeguard for European Citizens and Foundation for European Cooperation](#), Advisory Council on International Affairs (*Adviesraad Internationale Vraagstukken*, AIV), Report No. 87, p. 7.

⁶⁸⁴ The Hague Institute for Global Justice, '[Monitoring and Evaluation of the Rule of Law and Justice in the EU: Status Quo and the Way Ahead?](#)' (June 2012).

⁶⁸⁵ De Rechtspraak, '[International Law Chamber decides not to execute Hungarian extradition orders temporarily](#)' (*Internationale Rechtshulpkamer: voorlopig geen beslissingen over overleveringsverzoeken Hongarije*), 31 December 2015.

⁶⁸⁶ ECtHR, 'Hungary must take measures to improve the problem of widespread overcrowding in prisons', ECHR 077(2915), 10 March 2015.

⁶⁸⁷ *Ibidem*.

⁶⁸⁸ Closa, C., and Kochenov, D. (ed.), 2015, '[Reinforcing the Rule of Law Oversight in the European Union](#)', in Werner Schröder (ed.), *Strengthening the Rule of Law in Europe: From a Common Concept to Mechanisms of Implementation*, Hart Publishing, Oxford, 2015 (forthcoming).

⁶⁸⁹ European Commission, '[Communication from the Commission to the Council and the European Parliament on the mutual recognition of judicial decisions in criminal matters and the strengthening of mutual trust between Member States \[SEC\(2005\)641\] /COM/2005/0195 final](#)', 19 May 2005; European Commission, Communication '[A new EU Framework to strengthen the Rule of Law](#)' of 19 March 2014, COM(2014) 158 final/2, p. 2: 'Mutual trust among EU Member States and their respective legal systems is the foundation of the Union'.

⁶⁹⁰ European Commission, '[Communication from the Commission to the Council and the European Parliament on the mutual recognition of judicial decisions in criminal matters and the strengthening of mutual trust between Member States \[SEC\(2005\)641\] /COM/2005/0195 final](#)', 19 May 2005.

Case study 4: The impacts of the lack of trust in the legal systems in other Member States

One of the instruments implementing this principle is the European Arrest Warrant (EAW) established in 2004 by a Framework Decision (FD)⁶⁹¹. Through this mechanism, arrest warrants issued by a requesting Member State are directly executable in the territory of another State, without the intervention of the governments concerned or any intermediate procedure assessing the substance of the matter⁶⁹².

The EAW has made it possible to bring suspects into custody much faster (extradition times have fallen from around a year to 48 days) and easier⁶⁹³. This is possible on the basis of the presumption that all Member States respect the same values – those set in Article 2 TEU – and, thus, that the guarantees and safeguards of their respective judicial systems are equivalent⁶⁹⁴.

The EAW has contributed to the citizens' trust in their judiciary and legal systems⁶⁹⁵. However, data reveals that "[b]etween 2004 and 2009 almost **three quarters (43,059) of incoming EAW were not executed**". Although the reasons for this vary, it has a numeric reflection of EUR 215 million for Member States⁶⁹⁶. This problem shows that there is a lack of coherence and mutual trust among Member States (different pre-trial detention conditions, different legal remedies, different situations for which an EAW is issued, etc.) which could hinder the functioning of the EU, specifically in the criminal justice area.

The table below shows the main problems that have been identified in the framework and implementation of EAWs and the consequences resulting from this.

Specific problems	Consequences
The FD does not prescribe the infringement or risk of infringement of fundamental rights as an explicit ground to refuse the execution of an EAW ⁶⁹⁷	– Inconsistent practices in different Member States – Obstacles for defendants to prove such infringement (or risk thereof): risk to the right of defence
Requests for additional information from the executing authorities (Article 15(2) FD)	– Lack of request for minimum information by some Member States has led to some extreme cases concerning, for instance, mistaken identification of the

⁶⁹¹ Council of the European Union, Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, [2002/584/JHA](#), amended by Council Framework Decision [2009/299/JHA](#) of 26 February 2009. Broadbridge, S., 2009, *The European arrest warrant in practice*, Standard Note SN/HA/4979, Library House of Commons.

⁶⁹² European Parliamentary Research Service, 2013, '[Revising the European Arrest Warrant](#)', pp. 8, 23. Fichera, M., 2009, [The implementation of the European Arrest Warrant in the European Union: law, policy and practice](#), PhD thesis – University of Edinburgh, School of Law, pp. 80-95.

⁶⁹³ European Parliamentary Research Service, 2013, '[Revising the European Arrest Warrant](#)', pp. 8, 23. Fichera, M., 2009, [The implementation of the European Arrest Warrant in the European Union: law, policy and practice](#), PhD thesis – University of Edinburgh, School of Law, pp. 80-95.

⁶⁹⁴ European Parliamentary Research Service, 2013, '[Revising the European Arrest Warrant](#)', p. 8. Fichera, M., 2009, [The implementation of the European Arrest Warrant in the European Union: law, policy and practice](#), PhD thesis – University of Edinburgh, School of Law, pp. 80-95.

⁶⁹⁵ European Parliamentary Research Service, 2013, '[Revising the European Arrest Warrant](#)', pp. 8, 24. Fichera, M., 2009, [The implementation of the European Arrest Warrant in the European Union: law, policy and practice](#), PhD thesis – University of Edinburgh, School of Law, pp. 80-95.

⁶⁹⁶ European Parliamentary Research Service, 2013, '[Revising the European Arrest Warrant](#)', p. 7.

⁶⁹⁷ European Parliamentary Research Service, 2013, '[Revising the European Arrest Warrant](#)', pp. 15 -16. Fichera, M., 2009, [The implementation of the European Arrest Warrant in the European Union: law, policy and practice](#), PhD thesis – University of Edinburgh, School of Law, p. 65.

Case study 4: The impacts of the lack of trust in the legal systems in other Member States

	person concerned by the EAW (e.g. <i>Praczijsk</i> case, where the wrong person was arrested by Belgian authorities at the request of Italian authorities). – Abuses of these requests resulting in administrative burdens and financial costs that have had a negative impact on mutual trust among Member States and EU citizens⁶⁹⁸.
Lack of clear provision on the right to legal remedies ⁶⁹⁹ and rules on compensation (including MS liability for damage caused to individuals) ⁷⁰⁰	– Inconsistent practices among Member States on the possibility of challenging the EAW decision: some Member States, such as Belgium, provide for the possibility of challenging a decision of an EAW whilst others, for example Spain, do not⁷⁰¹. – Inconsistencies in available legal remedies – Inconsistencies in cases (e.g. Óscar Sánchez, a Spanish citizen sentenced to 14 years imprisonment for collaborating with a criminal organisation, did not receive any compensation for a case of mistaken identity; meanwhile, José Vicente Pereira, received EUR 85,000 for having spent 248 days in prison for the same issue of mistaken identity)⁷⁰².
Functioning of the Schengen Information System (SIS): lack of an effective and periodic system for the revision of SIS alerts ⁷⁰³	– Outdated alerts might impact fundamental rights, such as freedom of movement: for example, when an EAW is no longer applicable (the person is no longer wanted for surrender) but the alert is not removed from the SIS. In this case, when information relating to the person concerned by the EAW enters the system, this person may be either brought into custody or even denied entrance in a country.
EAW issued for prosecution purposes (e.g. Latvia, Portugal and Spain) ⁷⁰⁴	– Higher risks that a person will be arrested surrendered and, finally, released.

⁶⁹⁸ European Parliamentary Research Service, 2013, '[Revising the European Arrest Warrant](#)', p. 13.

Broadbridge, S., 2009, *The European arrest warrant in practice*, Standard Note SN/HA/4979, Library House of Commons. Fichera, M., 2009, [The implementation of the European Arrest Warrant in the European Union: law, policy and practice](#), PhD thesis – University of Edinburgh, School of Law, p. 95.

⁶⁹⁹ European Parliamentary Research Service, 2013, '[Revising the European Arrest Warrant](#)', p. 17. Fichera, M., 2009, [The implementation of the European Arrest Warrant in the European Union: law, policy and practice](#), PhD thesis – University of Edinburgh, School of Law, pp. 94-95.

⁷⁰⁰ European Parliamentary Research Service, 2013, '[Revising the European Arrest Warrant](#)', p. 20. Fichera, M., 2009, [The implementation of the European Arrest Warrant in the European Union: law, policy and practice](#), PhD thesis – University of Edinburgh, School of Law, pp. 94-95.

⁷⁰¹ European Parliamentary Research Service, 2013, '[Revising the European Arrest Warrant](#)', p. 17.

⁷⁰² *Ibidem*, p. 21.

⁷⁰³ *Ibidem*, p. 17. Fichera, M., 2009, [The implementation of the European Arrest Warrant in the European Union: law, policy and practice](#), PhD thesis – University of Edinburgh, School of Law, pp. 90-91.

⁷⁰⁴ European Parliamentary Research Service, 2013, '[Revising the European Arrest Warrant](#)', p. 18. Fichera, M., 2009, [The implementation of the European Arrest Warrant in the European Union: law, policy](#)

Case study 4: The impacts of the lack of trust in the legal systems in other Member States

	– Higher risks that a person will spend a lot of time in pre-trial detention. – Different pre-trial detention conditions (time varies from 43 to 365 detention among MS)⁷⁰⁵. – Risk to fundamental right to freedom of individuals and non-discrimination, and presumption of innocence.
EAW issued for minor offences (for example: the theft of two tyres, the stealing of piglets) ⁷⁰⁶	– Discrimination for EU citizens: presumption of innocence. – Unnecessary burden on Member State resources. – Risk that Member States introduce <i>motu proprio</i> a test of proportionality (<i>de facto</i> in Germany and Estonia).
Differences in detention conditions ⁷⁰⁷	– Risk to fundamental rights of the individual (freedom, non-discrimination, presumption of innocence)
Lack of an effective EU defence system in transnational cases: lawyers lack of knowledge and training on EU cooperation mechanisms ⁷⁰⁸	– Risk to fundamental rights of the individual (right of defence)

Socio-economic costs of abuse and misuse of EAW due to lack of mutual trust

While it is recognised that the EAW has created a more efficient, simpler, quicker, cheaper, more reliable and less political system of extradition in Europe (compared to its predecessor 1957 European Convention on Extradition)⁷⁰⁹, the analysis above has illustrated different shortcomings that contribute to increasing distrust between Member States. The impacts thereof can be expressed as follows⁷¹⁰:

For individuals

[and practice](#), PhD thesis – University of Edinburgh, School of Law, p. 65.

⁷⁰⁵ European Parliamentary Research Service, 2013, '[Revising the European Arrest Warrant](#)', p.19. Fichera, M., 2009, [The implementation of the European Arrest Warrant in the European Union: law, policy and practice](#), PhD thesis – University of Edinburgh, School of Law, pp. 173-174.

⁷⁰⁶ European Parliamentary Research Service, 2013, '[Revising the European Arrest Warrant](#)', pp. 19-20. Broadbridge, S., 2009, *The European arrest warrant in practice*, Standard Note SN/HA/4979, Library House of Commons; Fichera, M., 2009, [The implementation of the European Arrest Warrant in the European Union: law, policy and practice](#), PhD thesis – University of Edinburgh, School of Law, pp. 98 – 126.

⁷⁰⁷ European Parliamentary Research Service, 2013, '[Revising the European Arrest Warrant](#)', p. 20.

⁷⁰⁸ European Parliamentary Research Service, 2013, '[Revising the European Arrest Warrant](#)', pp. 21-22. Fichera, M., 2009, [The implementation of the European Arrest Warrant in the European Union: law, policy and practice](#), PhD thesis – University of Edinburgh, School of Law, p. 194.

⁷⁰⁹ UK House of Lords EU committee analysis, '[EU police and criminal justice measures: The UK's 2014 opt-out decision](#)', 13th Report of Session 2012–13 p. 57.

⁷¹⁰ European Parliamentary Research Service, 2013, '[Revising the European Arrest Warrant](#)', pp. 26-30.

Case study 4: The impacts of the lack of trust in the legal systems in other Member States

- Lost working days, with the employment and income lost affecting the person and his/her family
- Costs of legal advice
- Emotional costs with possible subsequent costs to health and social services
- Costs of miscarriages of justice leading to pain, suffering and reduced quality of life

For Member States

- Court costs
- Police costs
- Increased translation/interpretation and travel costs (including cost of flights for surrender and accompanying police officers)
- Operating detention facilities: increased costs relating to prison guards and administrators; warehousing detainees (food, clothing, beds, healthcare, etc.)

EU level

- Decrease in mutual trust among Member States
- Decrease in legitimacy of EU tools (EAW)
- Misuse and abuse of EAW contributes to the anti-EU sentiment

Concluding remarks

The examined issues in the implementation of the EAW show that the lack of mutual trust among Member States, which may lead to the abuse and misuse of the EAW, results in a risk of a breach of fundamental rights such as the right to freedom, non-discrimination, presumption of innocence and right of defence. Although the EAW was envisioned as a system to reinforce victims' rights and their trust in the administration of justice, the abuse and misuse of EAWs might impact the rights of the suspect to a fair trial and to detention conditions that respect their fundamental rights. In fact, the differences existing in these issues among Member States has led, in some cases, to the non-execution of EAWs, which reflects the lack of trust in the system of the requesting Member State being able to ensure the same rights and conditions as those existing in the executing State.

Socio-economic impact

The effective implementation of such values as the rule of law is vital to achieving progress within the economic, social and environmental dimension related to sustainable development. Those principles are the vehicle for ensuring the respect of democracy and human rights throughout the EU⁷¹¹.

Insufficient provision of democracy, the rule of law and fundamental rights in the EU may negatively impact specific groups of stakeholders, society at large as well as the economies of the affected Member States and the EU as a whole. Specific negative impacts depend on the type of issues related to democracy, the rule of law and fundamental rights. Some of these negative consequences have been described in the case

⁷¹¹ European Commission, Communication '[A new EU Framework to strengthen the Rule of Law](#)' of 19 March 2014, COM(2014) 158 final/2.

studies. Box 1 below provides a summary of the impact of each the problems previously examined.

Box 1 Summary of impact from the selected case-studies

Cooperation and Verification Mechanism vs corruption

The evidence described in the case study on Bulgaria shows that the CVM mechanism used in Bulgaria in the period 2007-2012 proved not to be effective in fighting corruption. Indeed, several indicators point at deterioration of various indexes relating to corruption in recent years despite the use of this mechanism.

Corruption has many detrimental consequences for the society and economy, including:

- Unpredictability of the regulatory framework creating an uncertain environment for the business sector and resulting in lost business opportunities and lost revenues/profits;
- Inefficiencies (resulting in GDP loss) due to sub-optimal allocation of resources;
- Costs to the individuals related to paying bribes;
- Unequal distribution of income;
- In the case of Bulgaria, the CVM reports highlighting high corruption have contributed to the refusal of Bulgaria to enter the Schengen zone, which has an additional impact in terms of limiting free movement of the Bulgarian citizens and limited opportunities for them to travel, settle and work. This situation also leads to additional costs of controls at the borders and inefficiencies within the Single Market.

EU infringement procedure & independence of the judiciary

In this case, available evidence shows that following the infringement case launched by the European Commission and the judgment of the CJEU on lack of compatibility of the retirement rules for the Hungarian judges with the relevant EU *acquis* prohibiting age discrimination, the situation remained unsatisfactory. Most of the judges decided to stay in retirement. Some other measures taken by the Hungarian government, including premature termination of the mandate of the head of the Supreme Court and decreased competence of the Constitutional Court, were not addressed.

The negative impact of this situation include the following:

- Loss of income for the retired judges;
- Increased costs on public administration related to payment of compensation for remuneration loss of the judges;
- Loss of experience as a result of the removal of senior judges, which can be expected to have a negative impact on the effectiveness and efficiency of the Hungarian judiciary;
- Other measures undertaken by the Hungarian government, which undermined the independence of the judiciary, may result in an increased risk of corruption (see the possible negative impact of corruption listed above for the CVM case-study).

European Arrest Warrant

The evidence gathered for this case study shows that while the EAW has contributed to the strengthening of the judiciary and legal system of the EU through the principle of mutual recognition and trust, the mechanism is not fully effective. Between 2004 and 2009, almost three quarters of incoming EAWs (with the total number reaching 54,689) were not executed. Varying definitions and conditions surrounding the implementation of this mechanism, abuse and misuse of the EAW have resulted in a number of negative impacts, including:

- Loss of time and income for individuals due to excessive detention periods in some

Member States and cases of mistaken identity;

- Costs of legal advice, emotional costs and reduced quality of life for the individuals who are submitted to varying conditions in the detention facilities;
- Unnecessary burden for the administration, police and detention facilities of the Member States in cases where the suspects were arrested and then released because of not fulfilling certain conditions (such as provision of translated documentation within a prescribed time limit); unnecessary burden may also be due to the disproportionate use of the EAW for trivial offences;
- Fundamental rights impact resulting from differences in interpretation of the rules on non-discrimination, presumption of innocence, freedom and right of defence.

A report on the European Added Value estimated the costs of various inefficiencies leading to the low rate of implementation of the EAW in the years 2004-2009 at over EUR 215 million (which would imply an annual cost of about EUR 36 million across the EU).

Data Retention Directive

The annulment of the DRD was put in place to ensure better protection of fundamental rights. However, at the same time it has led to the situation where the aspect of data retention is not harmonised across the EU. The following impacts of this situation can be listed:

- Unnecessary burden for the administration of some of the Member States where the proceedings based on the non-transposition of the DRD were launched;
- Emotional stress of the individuals and uncertainty of the businesses not knowing the rules because of the changing legislation (e.g. due to adopting and later invalidating the national legislation transposing the DRD);
- While the Directive was assessed not to be in compliance with the Charter of Fundamental Rights, lack of harmonisation across the EU may have an impact on fundamental rights, providing different standards for citizens and businesses in different Member States.

In addition to the specific negative consequences listed in the summary above, more general and indirect effects of the lack of provision or lack of effective enforcement of democracy, the rule of law and fundamental rights may be mentioned. The rule of law is considered to be an important factor for **economic development**. It encourages investment (both domestic and foreign) and supports entrepreneurship. The impacts of the rule of law on sound functioning of the businesses include the following⁷¹²:

- ensuring due process and predictability;
- protecting entrepreneurship and small business development by establishing clear and objective rules for opening, operating and closing a business;
- providing stability, certainty and clear legal boundaries for property rights;
- forcing greater accountability of public officials;
- maintaining the balance of power between the executive, legislative, judicial, and regulatory branches of government;
- providing a check on the power of the state over individual citizens.

⁷¹² Stolper et al., 2007, '[Rule of Law, Economic Growth and Prosperity](#)', Report of the Rule of Law Working Group Sponsored by the Americas Society and Council of the Americas.

According to the 2014 EU Justice Scoreboard, high-quality institutions, including effective national justice systems are determining factors of economic performance. In times of economic crisis they play a key role in restoring confidence and fostering the return to growth. Predictable, timely and enforceable justice decisions are important structural components of an attractive business environment. They contribute to trust and stability throughout the entire business cycle by maintaining the confidence for starting a business, enforcing contracts, attracting investment, settling private debt or protecting property and other rights⁷¹³.

The relevance of efficient national justice systems on economic performance has been repeatedly recognized by international institutions such as the OECD⁷¹⁴ and World Economic Forum⁷¹⁵. Efficiency of justice systems has been found to be a crucial transmission channel linking judicial reforms to economic variables such as business dynamics and foreign direct investment⁷¹⁶.

Economic history shows that in general, democracies tend to outperform authoritarian regimes in the long term regarding economic prosperity. According to some sources, broadly representative governments have a greater interest in the economic development than the relatively narrow elites or authoritarian rulers⁷¹⁷. Moreover, democracy may lead to **higher economic growth** because it lowers economic uncertainty and provides better response to adverse shocks⁷¹⁸. Expressing the impact of the rule of law and democracy on economic growth or income in quantitative terms is difficult, if not impossible, for two main reasons: 1) a wide number and scope of studies related to this topic, with a very broad range of results relating to various (direct and indirect) economic indicators and 2) the fact that democracy and the rule of law are not always clearly defined: in many cases they cannot be expressed as a 0-1 variable which could be clearly related to other (economic) variables. Some of the studies mentioned above provide quantitative examples which illustrate the hypothesis that democracy and economic growth or social well-being are indeed positively related. For example Przeworski (2004) observes that democracies are rare in poor countries and frequent in the affluent ones. In his study, he observed that out of 1,335 annual observations of countries with per capita income under \$1,000, only 142 years were spent under democratic governments. On the other hand, among 880 annual observations of countries with incomes above \$8,000, only 147 years were spent under dictatorships.

⁷¹³ European Commission, Communication from the Commission to the European Parliament, the Council, the European Central Bank, the European Economic and Social Committee and the Committee of the Regions, [The EU Justice Scoreboard 2014](#), COM (2014) 155 final.

⁷¹⁴ OECD, 2013, '[What makes civil justice effective?](#)', OECD Economics Department Policy Notes, No. 18.

⁷¹⁵ World Economic Forum, 2014, '[The Global Competitiveness Report; 2013-2014](#)'.

⁷¹⁶ European Commission, 2014, '[The Economic Impact of Civil Justice Reforms](#)', Economic Papers 530. See also Wennerström, E. & Valter, Å., 2015, '[The Gulf Countries and the Untapped Revenues of Rule of Law](#)', *Europarättslig Tidskrift*, Vol. 4, pp. 816-818.

⁷¹⁷ See e.g. Olson, M., 1993, '[Dictatorship, democracy, and development](#)', *American Political Science Review*; and Olson, M., 2000, 'Power and Prosperity: Outgrowing Communist and Capitalist Dictatorships', Basic Books, New York.

⁷¹⁸ Rodrick, D., 2000, '[Institutions for high-quality growth: What they are and how to acquire them](#)', CEPR Discussion Paper No. 2370.

Academic literature provides evidence that a high level of inequality in incomes or assets, which is observed in non-democratic and highly corrupted regimes, has an adverse impact on economic growth rates⁷¹⁹. The links between equity and growth are highlighted in the 2006 World Development Report⁷²⁰. One of the conclusions of the report is that some inequalities – not necessarily those related to income – are detrimental to economic growth. These are primarily inequalities in power, assets and access to markets and services.

Despite these arguments, there is still an on-going debate regarding impacts of democracy and the rule of law on economic growth. While some sources do not find a significant empirical relationship between the two⁷²¹ others provide evidence of it. Baum and Lake (2003)⁷²² point out at positive indirect effects of democracy on economic growth through an improved public health system (in poor countries) and education (in non-poor countries). Fidrmuc (2003)⁷²³, based on research targeted at the post-communist countries in transition, argues that democracy reinforces progress in economic liberalisation which, in turn, improves economic growth. Tavares and Wacziarg (2001)⁷²⁴ argue that democracy boosts economic growth because of its favorable effect on the accumulation of human capital and because of reduction of income inequality.

The relationship between human rights and economic growth was explored by numerous researchers, including the Nobel Prize winning economist Amartya Sen⁷²⁵. Sen stressed the significance of fundamental human freedoms and human rights for economic development, which according to him should be defined more broadly than in terms of income or GDP per capita. Market outcomes and government actions should be judged in terms of valuable human ends such as individual entitlements, capabilities, freedoms and rights rather than strictly in terms of economic outcomes and efficiency. Based on empirical research Sen concluded that civil and political rights can reduce the risk of major social and economic disasters by empowering individuals to complain and ensuring that these views are disseminated, keeping government informed and triggering an adequate policy response⁷²⁶.

Impact on international markets

⁷¹⁹ See e.g.: Aghion, P., Caroli, E. and Garcia-Penalosa, C., 1999, [Inequality and Economic Growth: The Perspective of the New Growth Theories](#), Journal of Economic Literature 37.

⁷²⁰ The World Bank, 2006, '[World Development Report. Equity and Development](#)'.

⁷²¹ See e.g. Przeworski, A., 2004, '[Democracy and Economic Development](#)'. The paper concludes that contrary to long-standing arguments, political regimes do not affect the rate of investment and the growth of total income. However, since population tends to grow faster under dictatorships, per capita incomes increase more rapidly under democracies.

⁷²² Baum, M. and Lake, D., 2003, [The Political Economy of Growth: Democracy and Human Capital](#), American Journal of Political Science, Vol. 47.

⁷²³ Fidrmuc, J., 2003, [Economic reform, democracy and growth during post-communist transition](#), European Journal of Political Economy, Vol. 19.

⁷²⁴ Tavares, J., Wacziarg, R., 2001, *How democracy affects growth*, European Economic Review 45.

⁷²⁵ Odi Briefing Paper, 2001, '[Economic Theory, Freedom and Human Rights: The Work of Amartya Sen](#)'.

⁷²⁶ Sen, A.K., 1999, *Human Rights and Economic Achievements*, The East Asian Challenge for Human Rights.

The financial market – regardless of action taken by the EU – may sanction the same behaviour that gives rise to the questions of non-compliance with Article 2 TEU, especially through credit rating agencies, whose ratings influence not only the cost of countries' international debt, but also the standing of countries' currencies. In January 2015, following the legislative changes to the constitutional court and public broadcasting under the new government, S&P cut Poland's foreign currency rating to BBB+ with a negative outlook from A-. The cut immediately sent the zloty currency to a 4-year low versus the euro⁷²⁷. A similar approach was used with respect to Hungary as a response to Viktor Orbán's drive to consolidate power at the cost of delaying an International Monetary Fund bailout. In December 2011, Hungary's sovereign-credit ratings were cut one step to BB+ from BBB⁷²⁸:

The correlation of the rule of law with the market is visible most sharply during the times of financial crises. The situation in Greece is illustrative of the potential benefits of reducing rule of law-deficits. While the EU has not sanctioned Greece for its rule of law-shortcomings specifically, the ECB, the IMF and the EU Commission jointly urged Greece to address its rule of law deficit⁷²⁹.

Financial actors also tend to reward rule of law compliance. The Netherlands, for instance, makes compliance with rule-of-law a strategic priority in order not to lose competitive edge and scores among the highest of countries participating in the Rule of Law Index 2015⁷³⁰. As regards civil procedure, the Netherlands is ranked first place, and has just adopted measures to cut the duration of civil and administrative cases further⁷³¹. Its programme for quality and innovation sets out an investment of close to €200 million for the period of 2013–2020 and estimates benefits in return for society through the reduction of duration of procedures at €225 million per year⁷³². In its EU Justice Scoreboard, the EU Commission underlines the interdependency between justice systems and the market, and the key role effective justice systems play in restoring confidence throughout the entire business cycle: 'Where judicial systems guarantee a good enforcement of rights and contracts, creditors are more likely to lend, firms are dissuaded from opportunistic behaviour, transaction costs are reduced and investments can go more easily to innovative sectors which often rely on intangible assets (e.g. intellectual property rights). More effective courts promote the entry of entrepreneurs into the market and foster competition'⁷³³.

A recent study shows that a clear connection exists also between decision-making in foreign direct investment (FDI) and the rule of law. Strong rule of law was identified as

⁷²⁷ Reuters, '[UPDATE 3-S&P shocks Poland with credit rating downgrade](#)', 15 January 2015.

⁷²⁸ Simon, Z., for Bloomberg, '[Hungary suffers second downgrade to junk as IMF talks stall](#)', 22 December 2011,

⁷²⁹ See Wennerström, E. & Valter; Å, 2015, *The Rule of Law in Times of Financial Crises: How EU Rule of Law Correlates with the Market*, Scandinavian Studies in Law, Vol. 60, p. 395 et seq.

⁷³⁰ Website of the World Justice Project, '[Rule of Law around the World](#)'.

⁷³¹ Kamerstukken II 2014/15, 34 059, nrs. 1–3 en Kamerstukken II 2014/15, 34 138, nrs. 1–3.

⁷³² De Rechtspraak, 'Notes to the of the Programme on Quality and Innovation' ([Toelichting op the businesscase van het programma kwaliteit en innovatie](#)), 24 March 2015.

⁷³³ European Commission, The EU Justice Scoreboard 2014, Communication COM (2014) 155 final.

the third most important factor in selecting the location of FDI, after the ease of doing business and the existence of a stable political environment⁷³⁴.

Impact on fundamental rights

It is crucial that EU citizens have confidence in the EU and its Member States. They should be confident that any EU Member State to which they travel or live in complies with the values on which the EU is based. Compliance with values of Article 2 TEU, in particular the safeguard and protection of democracy, the rule of law and fundamental rights, is fundamental for the legitimacy of the EU and authority of EU law⁷³⁵. EU citizens are fundamental rights holders, not merely stakeholders⁷³⁶.

Table 9 below shows a break-down per Member State of violations of human rights set out in the ECHR. While the ECHR is not a formal source of EU law, as discussed in Section 2.1.1 above the ECHR is already a source of inspiration for the CJEU and the CJEU generally takes into account the case-law of the ECtHR.

Furthermore, in the options discussed in Section 4, a closer collaboration with and reliance on data collected by the UN and the Council of Europe has been advised. Data collected on violations on human rights per State as shown in Table 9 could help illustrate the potential impact on human rights in situations where a Member State is breaching fundamental rights and, thus, Article 2 TEU or where the mechanisms set to uphold these rights have failed or are failing. In 2015, Romania, Hungary and Greece were the three EU countries with the most judgments issued against them by the ECtHR. In contrast, no judgments finding Denmark and Ireland in breach of the ECHR were issued. Data shows that the three most common violated rights are the right to a fair trial, the right to timely proceedings and the right to an effective remedy. There is also evidence of systematic violations of these rights. For instance, the ECtHR recently decided that overcrowding of penitentiaries constitutes a structural problem in Hungary⁷³⁷. Prisoners are often kept in a limited personal space, aggravated by a lack of privacy when using the lavatory, inadequate sleeping arrangements, insect infestation, poor ventilation and restrictions on showers or time spent away from their cells. This causes distress and may seriously affect a person's health. While the court ruled that Hungary should stop this practice⁷³⁸, the Council of Europe system has no legal means of enforcing this judgment. The EU would have such means (e.g. infringement proceedings

⁷³⁴ Hogan Lovells, Bingham Centre for the Rule of Law and British Institute of International and Comparative Law, 2015, '[Risk and Return. Foreign Direct Investment and the Rule of Law](#)'.

⁷³⁵ Kochenov, D., and Pech, L., 2015, '[Monitoring and enforcement of the rule of law in the EU: rhetoric and reality](#)', *European Constitutional Law Review*, Vol. 11, 511-540. .

⁷³⁶ FRA, 2013, '[The EU as a community of values: safeguarding fundamental rights in times of crisis](#)'.

⁷³⁷ ECtHR adopted a pilot-judgment, which is a procedure initiated by the ECtHR when complaints reveal in a country the existence of a structural or systemic problem or other similar dysfunction which has given rise or may give rise to similar applications, and the condemning judgments brought in the individual cases do not seem to press the country to address the problem. See ECHR, Factsheet – Detention conditions and treatment of prisoners, January 2016.

⁷³⁸ ECtHR, 'Hungary must take measures to improve the problem of widespread overcrowding in prisons', ECHR 077(2915), 10 March 2015.

with a possible recourse to the CJEU which could then impose financial penalties in case of non-compliance) but its competence is rather limited. In 2014, the Commission referred to the Charter of Fundamental Rights, which reflects inter alia provisions of the ECHR, in 11 infringement cases⁷³⁹. Furthermore, the Preamble of the EU Charter “reaffirms [...] the rights as they result, in particular, from [...] the European Convention for the Protection of Human Rights and Fundamental Freedoms”⁷⁴⁰. However, the Charter binds Member States only when they are implementing EU law⁷⁴¹.

⁷³⁹ European Commission, [Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions — 2014 report on the application of the EU Charter of Fundamental Rights, COM\(2015\) 191 final, 8 May 2015](#).

⁷⁴⁰ Preamble of the CFR.

⁷⁴¹ Article 6 TEU: “The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties. The provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties.

The rights, freedoms and principles in the Charter shall be interpreted in accordance with the general provisions in Title VII of the Charter governing its interpretation and application and with due regard to the explanations referred to in the Charter, that set out the sources of those provisions”.

Table 9 Violations of human rights as set in the ECHR by Member State⁷⁴²

2015	Total number of judgments	Judgments finding at least one violation	Judgments finding NO violation	Friendly settlements/Striking-out judgments	Other judgments ⁷⁴³	Right to life-deprivation of life	Lack of effective investigation	Prohibition of torture	Inhuman or degrading treatment	Lack of an effective investigation	Violation of Article 3 if applicant removed to a State where applicant at risk	Prohibition of slavery/forced labour	Right to liberty and security	Right to a fair trial ⁷⁴⁴	Length of the proceedings	Non-enforcement	No punishment without law	Right to respect for private and family life ⁷⁴⁵	Freedom of thought, conscience and religion	Freedom of expression	Freedom of assembly and association	Right to marry	Right to an effective remedy	Prohibition of discrimination	Protection of property	Right to education	Right to free elections	Right not to be tried or punished twice	Other Articles of the Convention
AT	8	5	2		1								1	1	2		1						1						
BE	13	11	1	1							1	1	3	5									2						
BG	32	28	2		2		2	1	10	5			3	5		3		3	2	1			9		6		2		
HR	25	17	8				1		2	3			4	5				6						2					
CY	6	5			1								8	1									1	1					
CZ	4		2	2																									
DK	0																												
EE	5	3	2											2	1			1					1		1				
FI	7	5	2												1					1								3	
FR	27	17	10						2		3		2	6		1		1		3			1						
DE	11	6	5										1	3				1		2			1						

⁷⁴² Data extracted from ECtHR, '[Violations by Article and respondent State. 2015](#)'.

⁷⁴³ Other judgments: just satisfaction, revision, preliminary objections and lack of jurisdiction.

⁷⁴⁴ Figures in this column may include cases where the Court considered that removing the applicant to a State where he/she was at risk of ill-treatment would qualify as a violation of Article 3 ECHR.

⁷⁴⁵ Figures in this column may include cases where the Court considered that removing the applicant to a State where he/she was at risk of ill-treatment would qualify as a violation of Article 3 ECHR.

Other Articles of the Convention																														
Right not to be tried or punished twice																														
Right to free elections																														
Right to education																														
Protection of property																														
Prohibition of discrimination																														
Right to an effective remedy																														
Right to marry																														
Freedom of assembly and association																														
Freedom of expression																														
Freedom of thought, conscience and religion ⁷³																														
Right to respect for private and family life ⁷⁵																														
No punishment without law																														
Non-enforcement																														
Length of the proceedings																														
Right to a fair trial ⁷⁴																														
Right to liberty and security																														
Prohibition of slavery/forced labour																														
Violation of Article 3 if applicant removed to a State where applicant at risk																														
Lack of an effective investigation																														
Inhuman or degrading treatment																														
Prohibition of torture																														
Lack of effective investigation																														
Right to life-deprivation of life																														
Other judgments ⁷³																														
Friendly settlements/Striking-out judgments																														
Judgments finding NO violation																														
Judgments finding at least one violation																														
Total number of judgments																														
2015																														
EL	47	43	4																											
HU	44	42	2			1	1																							
IE	0																													
IT	24	21	3					1	1	1																				1
LV	7	6			7				1																					
LT	14	9	2	1	2				1																					
LU	1	1																												
MT	5	3	2																											
NL	1			1																										
PL	29	20	9						2	1																				
PT	20	16	3		1	1	1																							
RO	84	72	5	1	6	1	6		27	13																				
SK	14	13			1																									
SI	14	13	1						2	3																				
ES	4	2	2							1																				
SE	6		4	2																										
UK	13	4	9																											
Total	465	362	80	7	22	3	12	2	69	27	4	2	48	61	84	12	3	35	2	14	2		66	8	42	1	5	5	1	

Concluding remarks

The literature relied upon by this Report shows that **democracy, the rule of law and fundamental rights foster economic development by providing more stability and equity for businesses and citizens**. Adequate provision and enforcement of Article 2 TEU values can be expected to lead to a more efficient allocation of resources and higher economic growth. Furthermore, according to a broad definition of economic development which looks beyond strict economic indicators such as income and GDP, market outcomes and government actions should also be judged taking into consideration the level of protection of human freedoms and rights. Therefore, this situation calls for a comprehensive reassessment of the instruments available to the EU to guarantee compliance with its values within the EU itself. They also call for understanding the reasons which may explain why the EU has had very limited success in addressing this serious challenge which, if left unanswered, may undermine the **EU's external and internal credibility and legitimacy, as well as EU citizens' trust in the effectiveness of EU institutions**.

4 Potential added value of a new EU mechanism on democracy, rule of law and fundamental rights

Key findings

- Horizontal and vertical options to overcome the identified shortcomings and gaps in the current framework are offered. Horizontal options address all Member States equally while vertical options address a specific situation in a particular Member State. If the monitoring to be carried out under horizontal options leads to the identification of a potential threat or existing breach of Article 2 TEU values by a Member State, vertical options may then be triggered to address these situations.
- Options requiring Treaty change have not been assessed in the context of this Research Paper as Treaty change would entail an extremely time-consuming process and the unanimity requirement most likely prevent the adoption of any ambitious reform.
- Options selected in this Study build on existing mechanisms reviewed in Section 2.
- There is no single option which would allow addressing all of the gaps and shortcomings highlighted in Sections 2 and 3. A combination of horizontal and vertical options would be more effective to address systemic threats to Article 2 TEU values and ensure Member States' compliance with them, especially if sanctions of a financial nature may be ultimately imposed in case of persistent non-compliance.
- Sanctions could take the form of withholding EU funds from the concerned Member State until it complies with the requirements of Article 2 TEU.
- All options foresee increased cooperation among key actors and stakeholders. However, an Inter-institutional Agreement (IIA) establishing a new monitoring cycle including a scoreboard is the only option which would require involvement from the Commission, Council and Parliament, with expert assistance provided by the EU Fundamental Rights Agency.

In the light of the gaps and shortcomings identified in Section 2, this section will analyse and assess the potential options that could be explored in order to overcome these limitations. The following assessment of the selected options from a social, economic and political point of view will aim to determine whether a new EU mechanism to uphold democracy, the rule of law and fundamental rights is required and if so, what its added value could be.

4.1 Methodology for selecting and assessing the legislative and non-legislative options to address the identified gaps and shortcomings

A long list of 20 options was first developed based on desk research and consultation with the European Parliament and the Senior Experts (see Annex 3). Following a broad analysis guided by selection criteria (see below), six options were selected taking into account desk research and stakeholder feedback.

The first exclusion criterion was to assess whether the identified options entailed Treaty change. Options requiring Treaty change were set aside as this Research Paper was commissioned to primarily examine measures which can be carried out in the short/mid-term and do not need to undergo the demanding and time-consuming Treaty revision procedure⁷⁴⁶. The main options, which would entail Treaty change and could offer a more long-term solution, are briefly outlined below (see Annex 3 for further details):

- **Revising Article 51(1) of the EU Charter of Fundamental Rights**⁷⁴⁷: According to this proposal defended by the former EU Justice Commissioner, the provision of the EU Charter of Fundamental Rights, which provides that its provisions only bind national authorities when they are implementing EU law, should be repealed so as to make all EU fundamental rights ‘directly applicable in the Member States, including the right to effective judicial review’⁷⁴⁸. There is a politico-legal dimension to this option. Abolishing Article 51(1) of the Charter may be considered again if EU accession to the ECHR finally fails⁷⁴⁹.
- **Reverse Solange doctrine**: Another interesting proposal suggested allowing national courts to open cases in a situation where human rights would be systemically violated in their own Member State. The CJEU could then be invited to consider the legality of national actions in light of Article 2 TEU, including in situations that fall outside the scope of EU Law, which the Court of Justice is not currently entitled to do⁷⁵⁰. Opening this option to individuals may be burdensome for the CJEU⁷⁵¹ and Member States would likely oppose any amendment which would make all provisions of the Charter directly applicable at national level in any situation. This would be seen as extending the reach of EU law beyond the competences allocated to the Union, which could in turn be perceived as a threat to the sovereignty and constitutional identity of Member States⁷⁵².

⁷⁴⁶ The procedure to amend the Treaties is established in Article 48 TEU.

⁷⁴⁷ European Commission, Reding, V., [Presentation of the Fundamental Rights report and the progress report on gender equality](#) (14 April 2014); European Parliament, 2013, ‘[The triangular relationship between fundamental rights, democracy and rule of law in the EU: Towards an EU Copenhagen Mechanism](#)’, p. 48; Von Bogdandy, A., Antpöhler, C., and Ioannidis, M., 2016, [Enforcing EU values: Reverse ‘Solange’ and a systemic deficiency committee](#), SSRN; Kochenov, D. and Pech, L., 2015, [Monitoring and Enforcement of the Rule of Law in the EU: Rhetoric and Reality](#), European Constitutional Law Review, vol. 11, issue 3, p. 526; Chronowski, N., 2013, [Enhancing the scope of the Charter of Fundamental Rights – problems of the limitations and advantages of directly applicable Charter rights with regard to recent case law developments of the European Court of Justice and national courts](#), Discussion Paper upon the call of the European Commission for contributions to the *Assises de la Justice*.

⁷⁴⁸ Reding, V., ‘[The EU and the Rule of Law – What next?](#)’, Speech at the Centre for European Policy Studies on 4 September 2013, SPEECH/13/677.

⁷⁴⁹ Wennerström, E., 2013, [EU Accession to the European Convention on Human Rights – the Creation of a European Legal Space for Human Rights or the Last Stand for the Normative Supremacy of the Strasbourg System?](#), *Europarättslig Tidskrift*, Vol. 2, pp. 385 et seq.

⁷⁵⁰ Von Bogdandy et al, 2012, *Reverse Solange – Protecting the Essence of Fundamental Rights against EU Member States*, 49 Common Market Law Review, p. 489.

⁷⁵¹ Information collected through consultation with stakeholders (CJEU, 14 December 2015).

⁷⁵² Chronowski, N., 2013, [Enhancing the scope of the Charter of Fundamental Rights – problems of the limitations and advantages of directly applicable Charter rights with regard to recent case law developments of the European Court of Justice and national courts](#), Discussion Paper upon the call of the European

- **Compulsory exit proposal:** the Treaties currently only foresee the voluntary exit of Member States. Under this option, the Treaties would be amended so as to introduce the compulsory exit of Member States found to be in systemic and persistent breach of EU values⁷⁵³.
- **Revision of Article 7 TEU:** Article 7 could be rewritten to foresee a more balanced inter-play between the Council and the European Parliament throughout the whole monitoring process and with respect to the adoption of any final decision on the existence of a clear risk of serious breach or a serious and persistent breach and the imposition of sanctions. This would address concerns that the final decision should not rely entirely on the political discretion of the institutions representing the Member States. Article 7 TEU should also be further reviewed so as to include the possibility for the Commission and the European Parliament, as well as EU Member States, to challenge the Council's decision before the CJEU. If the CJEU were to identify a breach, resorting to Article 260 TFEU could be organised,⁷⁵⁴ in coordination with the European Ombudsman and the European Court of Auditors⁷⁵⁵.
- **Creation of a new EU institution:** It has been suggested that a 'Copenhagen Commission' or 'Copenhagen Mechanism' be established to monitor Member States' compliance with Article 2 TEU values⁷⁵⁶. The Copenhagen Commission would work closely with other non-EU monitoring bodies, such as the Venice Commission and the UN, as well as networks of national stakeholders. To carry out this evaluation, this mechanism would include a scoreboard, which would

Commission for contributions to the *Assises de la Justice*, paragraph (IV).

⁷⁵³ Kochenov, D., and Pech, L., 2015, [Monitoring and enforcement of the rule of law in the EU: Rhetoric and reality](#), European Constitutional Law Review, Vol. 11, Issue 03, p. 526. Closa, C., and Kochenov, D. (ed.), 2015, 'Reinforcing the Rule of Law Oversight in the European Union', in Werner Schröder (ed.), *Strengthening the Rule of Law in Europe: From a Common Concept to Mechanisms of Implementation*, Hart Publishing, Oxford, 2015 (forthcoming), p. 18.

⁷⁵⁴ Article 260 TFEU: "If the Court finds that the Member State concerned has not complied with its judgment it may impose a lump sum or penalty payment on it".

⁷⁵⁵ European Parliament, 2013, [The triangular relationship between fundamental rights, democracy and the rule of law in the EU – Towards an EU Copenhagen Mechanism](#), p. 53.

⁷⁵⁶ European Parliament, Resolution of 3 July 2013 on the situation of fundamental rights: standards and practices in Hungary (pursuant to the European Parliament resolution of 16 February 2012) (2012/2130(INI)), [P7_TA\(2013\)0315](#), paragraph 79 appeals to the establishment of a new mechanism to ensure compliance by Member States with Article 2 TEU, and the continuity of the Copenhagen criteria. "This mechanism could assume the form of a 'Copenhagen Commission', or high-level group, a 'group of wise men', or an Article 70 TFEU evaluation, and build up on the reforming and strengthening of the mandate of the European Union Agency for Fundamental Rights, and on the framework of a strengthened Commission-Council-European Parliament-Member States dialogue on measures to be taken"; European Parliament, Resolution of 10 June 2015 on the situation in Hungary (2015/2700(RSP)), [P8_TA-PROV\(2015\)0227](#), paragraph 12; Müller, J.W., 2013, [Safeguarding democracy inside the EU. Brussels and the future of liberal order](#), Transatlantic Academy, 2013-2013 Paper Series, No. 3 and [Protecting Democracy and the Rule of Law inside the EU or why Europe needs a Copenhagen Commission](#), Transatlantic Academy; European Parliament, 2013, [The triangular relationship between fundamental rights, democracy and the rule of law in the EU – Towards an EU Copenhagen Mechanism](#); Kochenov, D., and Pech, L., 2015, [Monitoring and enforcement of the rule of law in the EU: Rhetoric and reality](#), European Constitutional Law Review, Vol. 11, Issue 03, p. 526; Budó, G., 2014, [EU Commission values at stake: is Article 7 TEU an effective protection mechanism?](#), CIDOB Centre for International Affairs, Issue 1.

seek, on the basis of indicators, to identify a threat to Article 2 TEU values. Together with the preventive arm of this mechanism, the Copenhagen Commission would also be able to operationalise a sanctioning arm designed to launch expedited infringement proceedings against the Member State concerned⁷⁵⁷.

Options that only cover one of the core values of Article 2 TEU, e.g. fundamental rights, were also excluded for their insufficiently broad scope. For example, the promising proposal to build a comprehensive EU internal human rights strategy, as proposed by Amnesty International⁷⁵⁸ (see Annex 3), was excluded as it does not sufficiently consider all of the EU values. This strategy would consist of setting standards to ensure that fundamental rights are protected and taken into account in the drafting, adoption and implementation of EU legislation, strengthening the dialogue between the EU Institutions and civil society and fundamental rights' experts. It would also put in place measures to prevent and react to fundamental rights' violations by Member States⁷⁵⁹. The Democratic Governance Pact (hereinafter, DGP) of the ALDE Group⁷⁶⁰ was also excluded based on these criteria (see Annex 3). The DGP calls for the following five main steps:

Box 2 The DGP's Five steps (ALDE Group)

- (1) Using the EU Charter of Fundamental Rights as an enforcement tool to protect citizen's rights. It would be used in conjunction with Article 2 TEU and in infringement actions against fundamental rights in cases beyond specific breaches of EU law;
- (2) Ensuring accession of the EU to the ECHR;
- (3) Strengthening fundamental rights' proofing in the EU legislative process by systematically requiring the opinion of the EU FRA and the European Data Protection Supervisor;
- (4) Establishing an EU Scoreboard for democracy, rule of law and fundamental rights to ensure

⁷⁵⁷ Müller, J.W, 2013, [Safeguarding democracy inside the EU. Brussels and the future of liberal order](#), Transatlantic Academy, 2013-2013 Paper Series, No. 3 and [Protecting Democracy and the Rule of Law inside the EU or why Europe needs a Copenhagen Commission](#), Transatlantic Academy; European Parliament, 2013, '[The triangular relationship between fundamental rights, democracy and the rule of law in the EU – Towards an EU Copenhagen Mechanism](#)'; Kochenov, D., and Pech, L., 2015, [Monitoring and enforcement of the rule of law in the EU: Rhetoric and reality](#), European Constitutional Law Review, Vol. 11, Issue 03, p. 526; Budó, G., 2014, [EU Commission values at stake: is Article 7 TEU an effective protection mechanism?](#), CIDOB Centre for International Affairs, Issue 1.

⁷⁵⁸ Amnesty International, '[Outline for an EU internal human rights strategy. Extract from AI's contribution on the future of EU justice and home affairs](#)' (January 2014); [Amnesty International's Presentation at the European Parliament LIBE Committee Public Hearing on "The Situation of Fundamental Rights in the European Union: how to strengthen fundamental rights, democracy and the rule of law in the EU"](#) (5 November 2013).

⁷⁵⁹ *Ibidem*.

⁷⁶⁰ ALDE, [The EU Democratic Governance Pact – Upholding the rule of law and fundamental rights](#).

an impartial and systematic assessment for all Member States;

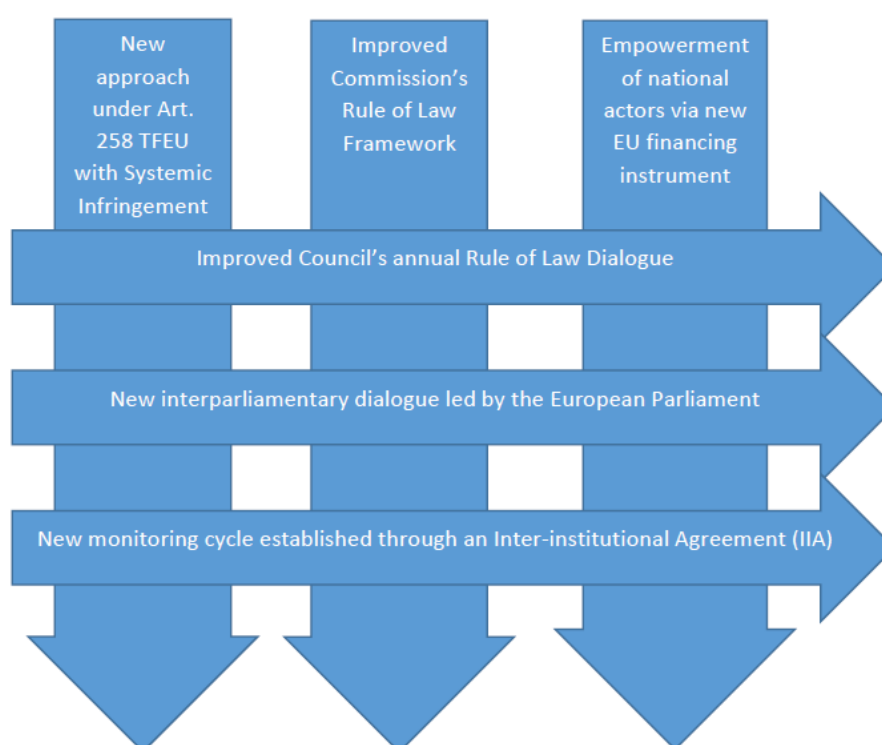
(5) Launching a European Semester for democratic governance, rule of law and fundamental rights to enhance the dialogue between the EU and Member States and ensure the monitoring and early detection of possible Article 2 TEU breaches⁷⁶¹.

The remaining shortlisted options were analysed in consultation with the European Parliament, the Centre for European Policy Studies and the Senior Experts. The shortlisted options were classified in the following way:

- (a) first, distinguishing between horizontal and vertical options, and
- (b) within these categories, between options which would require legislative and/or non-legislative change.

Figure 4 below shows an overview of these options:

Figure 4 Overview of selected options



4.1.1 Horizontal options

⁷⁶¹ ALDE, [The EU Democratic Governance Pact – Upholding the rule of law and fundamental rights](#).

Horizontal options are those which aim to monitor and improve compliance with the values laid down in Article 2 TEU in all of EU Member States on the basis of a regular, cyclical process, such as the Council's annual Rule of Law dialogue. These options will be explored by first examining an already established mechanism, which could be further improved without having recourse to legislative measures, before examining a new mechanism which would similarly organise a dialogue between parliamentarians rather than national governments and which also does not entail legislative change. Finally, the most ambitious horizontal option requiring, in part, legislative change is analysed.

(i) Non-legislative improvements

Improving the Council's Rule of Law Dialogue

As examined in Section 2, the Council's Rule of Law Dialogue presents certain flaws that ought to be addressed in order to improve its effectiveness and application in practice. The following suggestions to improve this dialogue have recently been made⁷⁶²:

- The Council should **focus on fewer specific themes** in order to allow for a more structured approach⁷⁶³. The first dialogue held in November 2015 covered a variety of topics, from terrorism to migration, from the single market to the relationships between Russia and Ukraine⁷⁶⁴. This variety prevented Member States from delving into details⁷⁶⁵. Furthermore, by narrowing the selection of topics, Member States would be briefed and could better prepare for the dialogue, thereby ensuring an effective exchange of good practices and recommendations⁷⁶⁶.
- The **recommendations** of the **Council of Europe** and the **UN** should be taken into account as a starting point for the discussions. Country fiches prepared on the basis of information gathered by these organisations could be drafted as a starting point for the Council's dialogue. This dialogue should aim to complement the monitoring carried out by these organisations, so as to avoid unnecessary duplications. The Council of the EU is not best placed for scrutinising Member States; independent experts should carry this task out. However, an added value of the Council's involvement is the political pressure that could be exerted by it on relevant countries, taking into account the conclusions and recommendations reached through this dialogue⁷⁶⁷.
- More **time** should be granted for discussions as provided in the UN Universal Periodic Review. Under this mechanism, the time for review is three hours and a half per State and the concerned State is granted an additional 70 minutes to present its observations. Similarly, in the Committee of Ministers of the Council of Europe, the sessions to review the implementation of ECtHR judgments by

⁷⁶² Kochenov, D., and Pech, L., 2015, *Monitoring and enforcement of the rule of law in the EU: Rhetoric and reality*, European Constitutional Law Review, Vol. 11, Issue 03; Butler, I., for Liberties.eu, '[The rule of law dialogue: five ideas for future EU presidencies](#)', December 2015.

⁷⁶³ Butler, I., for Liberties.eu, '[The rule of law dialogue: five ideas for future EU presidencies](#)', December 2015; Butler, I., for E-Sharp, '[Wary EU governments hold first rights talks](#)', December 2015.

⁷⁶⁴ *Ibidem*; Website of the Council of the European Union, General Affairs Council of 17-18 November 2015, Main Results; Council of the European Union, [Annotated draft agenda](#), Doc. 13570/15 (9 November 2015).

⁷⁶⁵ Butler, I., for Liberties.eu, '[The rule of law dialogue: five ideas for future EU presidencies](#)', December 2015, pp. 2-4; Butler, I., for E-Sharp, '[Wary EU governments hold first rights talks](#)', December 2015.

⁷⁶⁶ Butler, I., for Liberties.eu, '[The rule of law dialogue: five ideas for future EU presidencies](#)', December 2015, p. 6.

⁷⁶⁷ Butler, I., for Liberties.eu, '[The rule of law dialogue: five ideas for future EU presidencies](#)', December 2015, pp. 4, 9; Butler, I., for E-Sharp, '[Wary EU governments hold first rights talks](#)', December 2015.

States last ten full days⁷⁶⁸. In the November 2015 dialogue, discussions lasted barely four hours and covered other issues in the same session (such as the European Semester 2016 and the Annual programming Commission's work programme for 2016), rather than focusing exclusively on the rule of law⁷⁶⁹. To overcome these concerns relating to time, a separate session for the dialogue should be set instead of including it as an agenda item in the General Affairs Council. Another option would be to organise smaller working groups of Member States (i.e. seven Member States per group). These groups would work in parallel and their conclusions would be shared with the rest of Member States in a general debate, where additional exchanges among Member States would take place. The process could consist of a two-year dialogue where seven Member States would be reviewed every six months. This dialogue could last longer (i.e. sessions of several days) and be held more frequently, for instance, every six months under each presidency of the Council⁷⁷⁰. In this regard, the Dutch presidency will hold a preparatory seminar prior to the next rule of law dialogue. This seminar should be open to national experts on the rule of law – members of the justice system, human rights' institutions, media and civil society – to enhance the effectiveness of the dialogue. Questionnaires could also be circulated in this seminar among Member States to identify the topics that should be the subject matter of the dialogue. The questionnaires could include the request to provide examples of good practices⁷⁷¹.

- The Council's dialogue should aim to be a **true exchange** between Member States rather than a monologue or presentation by governments defending their achievements in the rule of law field whilst reflecting on their shortcomings. To this end, after a presentation on the general situation at national level, governments could use the information gathered through a country fiche and the questionnaire (see above) to identify the main challenges. The other Member States could be given the opportunity to comment on these, sharing observations, recommendations and examples of good practices⁷⁷².
- Member States should be prepared to **comment on their peers, accept recommendations** and **report back** to the Council on progress achieved⁷⁷³. During the first dialogue, governments seemed reticent to make observations

⁷⁶⁸ Butler, I., for Liberties.eu, '[The rule of law dialogue: five ideas for future EU presidencies](#)', December 2015; Butler, I., for E-Sharp, '[Wary EU governments hold first rights talks](#)', December 2015.

⁷⁶⁹ Council of the European Union, [Indicative programme – General Affairs Council meeting of 17 and 18 November 2015](#), 17 November 14.00 Beginning of the Council Meeting: Adoption of A-items (...) 'Ensuring respect for the rule of law'.

⁷⁷⁰ Butler, I., for Liberties.eu, '[The rule of law dialogue: five ideas for future EU presidencies](#)', December 2015, pp. 4-5.

⁷⁷¹ *Ibidem*; p. 5.

⁷⁷² Butler, I., for Liberties.eu, '[The rule of law dialogue: five ideas for future EU presidencies](#)', December 2015, p. 10; Butler, I., for E-Sharp, '[Wary EU governments hold first rights talks](#)', December 2015.

⁷⁷³ *Ibidem*, December 2015.

regarding the rule of law situation in other Member States⁷⁷⁴. The presidency of the Council could pre-establish a fixed number of recommendations per Member State and request the concerned Member State to comply with a number of these by a certain deadline. In addition, Member States could be required to draft a final 'country note' to reflect the results of the dialogue. This note could include requests for funding to implement the necessary measures to adopt the recommendations, as well as technical assistance from specialised actors, such as FRA, the Council of Europe or the UN⁷⁷⁵.

- The Council should clarify **who** will be collecting evidence and **how** evidence will be collected and analysed⁷⁷⁶, as well as how the inclusive approach that the dialogue is set to follow will be carried out and achieved.
- The Council could finally set up a fund to support actions taken by Member States to uphold the rule of law, such as creating positions for specialised staff from national human rights' institutions or providing training for judges and prosecutors. Funds could also be provided to a third independent party to finance the media on, for example, investigative journalism actions, or to support civil society organisations⁷⁷⁷.

New interparliamentary dialogue fostered by the European Parliament

Protocol 1 of the TFEU and the Rules of Procedure mandate the European Parliament to ensure cooperation among national Parliaments, as well as between national Parliaments and the European Parliament, promoting the exchange of information and best practices and submitting proposals to the EU Institutions on Union affairs⁷⁷⁸. On this basis, the European Parliament could launch an interparliamentary rights' dialogue to uphold Article 2 TEU values⁷⁷⁹.

This new dialogue would consist of a bi-annual cycle of dialogues between the LIBE Committee and the counterpart national parliamentary committees (14 Member States per year). This would be a two-way process with the LIBE Committee issuing recommendations for each individual Member State but also with national parliaments making recommendations to the LIBE Committee. These recommendations would be included in the agenda for discussion and follow-up⁷⁸⁰. The outcomes of these debates would have to be notified and recorded in a country note, which could be shared with

⁷⁷⁴ *Ibidem*.

⁷⁷⁵ Butler, I., for Liberties.eu, '[The rule of law dialogue: five ideas for future EU presidencies](#)', December 2015, p. 11.

⁷⁷⁶ Kochenov, D., and Pech, L., in EU Law Analysis, '[From bad to worse? On the Commission and the Council's rule of law initiatives](#)', 19 January 2015.

⁷⁷⁷ Butler, I., for Liberties.eu, '[The rule of law dialogue: five ideas for future EU presidencies](#)', December 2015, p. 10-11.

⁷⁷⁸ Articles 9 and 10 Protocol 1 TFEU and Rule 85 and Title VI of the [Rules of Procedure](#) of the European Parliament (June 2014).

⁷⁷⁹ Butler, I., for Liberties.eu, 2016, '[How the European Parliament can protect the EU's fundamental values: An interparliamentary rights dialogue](#)'.

⁷⁸⁰ *Ibidem*, pp. 1 and 13.

the Council and Commission to enhance inter-institutional cooperation⁷⁸¹. Furthermore, national parliamentary committees would also have to inform on the measures to be adopted to ensure that national bodies receiving EU funding report on the use of these funds and on the technical support received from the EU FRA, the Council of Europe and/or the UN⁷⁸².

The results of this interparliamentary dialogue could also involve reports from national parliaments in the areas in which the adoption, implementation or interpretation of EU legislation might conflict with the values laid down in Article 2 TEU. Where several national parliaments are pinpointing the same issue, these reports could be used as the basis for initiative reports by the LIBE Committee⁷⁸³.

The starting point for this dialogue would be findings and recommendations made by existing monitoring mechanisms, including the Council of Europe and the UN, gathered in the form of a 'country fiche' and complemented by information provided by civil society⁷⁸⁴. This interparliamentary dialogue should not, however, depend on the development and population of indicators due to the need for resources, time, political will and cooperation to establish these. It should rely on data already gathered and analysed by institutions such as CEPEJ and EU FRA⁷⁸⁵.

This task could be facilitated by the creation of a database, a European Fundamental Rights Information System (EFRIS), as suggested by the EUFRA. This could take the form of an electronic system providing information gathered by different actors on the situation of fundamental rights on a country-by-country or right specific basis⁷⁸⁶. The data gathered through the dialogue could also be uploaded in this database⁷⁸⁷. Under its current mandate, FRA does not have the competence to collect data outside the scope of EU matters. However, its founding regulation does not appear to prevent FRA from compiling existing, publicly available data⁷⁸⁸. Alternatively, in matters outside the scope of the FRA mandate, the European Parliament could rely on the Commission's European

⁷⁸¹ *Ibidem*, pp. 14-15.

⁷⁸² *Ibidem*, pp. 14-15.

⁷⁸³ *Ibidem* p. 16.

⁷⁸⁴ *Ibidem*', pp. 1 and 13.

⁷⁸⁵ *Ibidem*, pp. 12, 14, 15.

⁷⁸⁶ Hearing of the LIBE Committee of 10 December 2015, Presentation by Gabriel Toggenburg.

⁷⁸⁷ Butler, I., for Liberties.eu, 2016, '[How the European Parliament can protect the EU's fundamental values: An interparliamentary rights dialogue](#)', p. 17.

⁷⁸⁸ Hearing of the LIBE Committee of 10 December 2015, Presentation by Gabriel Toggenburg. Information collected through consultation with stakeholders (FRA, January 2016); Kjaerum, M., FRA Director, [Address to the European Affairs Committee hearing at the Danish Parliament](#), Copenhagen, 12 March 2015; Kjaerum, M., FRA Director, delivers [farewell speech to the European Parliamentary Committee on Civil Liberties, Justice and Home Affairs \(LIBE\)](#), Brussels, 5 March 2015; Toggenburg, G., 2013, [Fundamental Rights and the European Union: how does and how should the EU Agency for Fundamental Rights relate to the EU Charter of Fundamental Rights?](#), EUI Department of Law Research, Paper No. 13; Toggenburg, G., 2008, *The role of the new EU Fundamental Rights Agency: Debating the "sex of angels" or improving Europe's human rights performance?*, European Law Review, Issue 3; Bychawska-Siniarska, D., and Warso, Z., for Europe of Human Rights '[Doubts about the future scope of the EU Agency for Fundamental Rights](#)', 7 October 2011; Butler, I., for Liberties.eu, 2016, '[How the European Parliament can protect the EU's fundamental values: An interparliamentary rights dialogue](#)', p. 14.

Statistical Programme or other existing instruments for the development and population of indicators⁷⁸⁹. The European Parliament could also request its Research Service to carry out this task in cooperation with national authorities⁷⁹⁰.

While this interparliamentary dialogue would not involve sanctions, its dissuasiveness and effectiveness would rely on (a) political pressure, and (b) the possibility of offering Member States (or directly the competent bodies in charge of democracy, rule of law and fundamental rights) technical and financial support to design and implement the necessary reforms⁷⁹¹. The European Parliament could also include in the country notes resulting from the interparliamentary dialogue, a recommendation for the Commission to launch the Rule of Law Framework in a situation where there is evidence of a risk of a systemic threat to the values laid down in Article 2 TEU⁷⁹².

(ii) New Monitoring Cycle to be established via an Inter-institutional Agreement (IIA)

One of the cross-cutting issues identified in Section 2.5 above was the lack of coordination among the different existing tools to uphold democracy, the rule of law and fundamental rights, as well as among the EU institutions and actors involved. Each of the main EU institutions has sought to establish its own mechanism to safeguard Article 2 TEU values at Member State level⁷⁹³. As described in Section 2.4.1, the principle of “sincere cooperation” among EU Institutions and between these and Member States is founded upon Articles 4 and 13 TEU, respectively⁷⁹⁴. A lack of effective cooperation is not merely incompatible with this principle; it could also result in the malfunctioning of the European Union⁷⁹⁵.

To overcome this, the Institutions could join forces and make a *common* effort to uphold these *common* values. To this end, the Commission, Parliament and Council could adopt an interinstitutional agreement (IIA), following the example of the IIA on Better Regulation (see Section 2.1.3, point (ii)), which builds on the ‘interinstitutional acquis’⁷⁹⁶. The IIA legal basis could be found in Article 295 TEU which provides that “[t]he European Parliament, the Council and the Commission shall consult each other and by

⁷⁸⁹ Butler, I., for Liberties.eu, 2016, ‘[How the European Parliament can protect the EU’s fundamental values: An interparliamentary rights dialogue](#)’, pp. 17-18.

⁷⁹⁰ *Ibidem*, p. 18.

⁷⁹¹ *Ibidem*, pp. 12, 16.

⁷⁹² *Ibidem*, p. 15.

⁷⁹³ *Ibidem*, pp. 2-4; Kochenov, D., and Pech, L., in EU Law Analysis, ‘[From bad to worse? On the Commission and the Council’s rule of law initiatives](#)’, 19 January 2015.

⁷⁹⁴ EUR-lex, Summaries of EU legislation, ‘[The principle of cooperation between institutions](#)’.

⁷⁹⁵ EUR-lex, Summaries of EU legislation, ‘[The principle of cooperation between institutions](#)’.

⁷⁹⁶ [Interinstitutional Agreement of 20 December 1994 on accelerated working method for official codification of legislative texts](#) (OJ C 102, 4.4.1996); [Interinstitutional Agreement of 22 December 1998 on common guidelines for the quality of drafting Community legislation](#) (OJ C 73, 17.3.1999); [Interinstitutional Agreement of 28 November 2001 on a more structured use of the recasting technique for legal acts](#) (OJ C 77, 28.3.2002); [Joint Declaration of 13 June 2007 on practical arrangements for the co-decision procedure](#) (OJ C 145, 30.6.2007); [Joint Political Declaration of 27 October 2011 of the European Parliament, the Council and the Commission on explanatory documents](#) (OJ C 369, 17.12.2011); [Framework Agreement of 20 October 2010 on relations between the European Parliament and the European Commission](#) (OJ L 304, 20.11.2010).

common agreement make arrangements for their cooperation. To that end, they may, in compliance with the Treaties, conclude interinstitutional agreements which may be of a binding nature⁷⁹⁷. Through a more coordinated assessment and actions of all three Institutions, a more effective enforcement of Article 2 TEU within the EU could be achieved.

While differing from the 'Copenhagen Commission' envisioned by Müller⁷⁹⁸, the IIA could serve a similar monitoring objective. It could institute a new horizontal cyclical monitoring process led by the European Parliament but closely associated with the Commission and Council. Member States' compliance with Article 2 TEU values would be evaluated on a regular basis relying on common and objective indicators⁷⁹⁹. As part of this IIA, the Institutions would also commit to carrying out a comprehensive and in-depth fundamental rights' proofing prior to launching initiatives or actions⁸⁰⁰. For this purpose, the institutions reached on December 2015 an IIA on Better Regulation that includes guidelines for all actors involved in the preparation, adoption and implementation of EU legal acts⁸⁰¹. It would also be particularly relevant to involve EU FRA in this monitoring, including the possibility of issuing, on their own initiative, opinions on legislative proposals. However, this would require expanding the Agency's mandate and amending its founding regulation⁸⁰².

⁷⁹⁷ Article 295 TEU and Rule 140 of the European Parliament Rules of Procedure.

⁷⁹⁸ Müller, J.W., 2013, [Safeguarding democracy inside the EU. Brussels and the future of liberal order](#), Transatlantic Academy, 2013-2013 Paper Series, No. 3 and [Protecting Democracy and the Rule of Law inside the EU or why Europe needs a Copenhagen Commission](#), Transatlantic Academy.

⁷⁹⁹ European Parliament, Resolution of 10 June 2015 on the situation in Hungary, (2015/2700(RSP)), [P8_TA-PROV\(2015\)0227](#), paragraph 12; European Parliament resolution of 2 July 2013 on the situation of fundamental rights: standards and practices in Hungary (pursuant to the European Parliament resolution of 16 February 2012) (2012/2130(INI)), [P7_TA\(2013\)0315](#), paragraph 79; European Parliament, Report on the situation of fundamental rights: standards and practices in Hungary (pursuant to the European Parliament resolution of 16 February 2012) (2012/2130(INI)), [PE 508.211v04-00](#); Reding, V., 'The EU and the Rule of Law - What next?', Speech at the Centre for European Policy Studies on 4 September 2013, SPEECH/13/677; [Letter of the Foreign Ministers of Denmark, Finland, Germany and the Netherlands to the President of the European Commission](#) (6 March 2013);

⁸⁰⁰ The Commission has launched ideas on fraud proofing in the past, see Commission staff working document - accompanying document to the Communication from the Commission to the Council, the European Parliament and the European Court of Auditors - Prevention of fraud by building on operational results: a dynamic approach to fraud-proofing ([COM\(2007\) 806 final](#)) /* [SEC/2007/1676 final](#).

⁸⁰¹ European Commission, [Provisional text of the proposed interinstitutional agreement on better regulation](#), 16 December 2015. For more information see Section 2.1.3 (ii) of this Research Paper.

⁸⁰² [Letter of EU FRA to Vice-President Reding of 4 June 2013](#); European Parliament resolution of 2 July 2013 on the situation of fundamental rights: standards and practices in Hungary (pursuant to the European Parliament resolution of 16 February 2012) (2012/2130(INI)), [P7_TA\(2013\)0315](#), paragraphs 79 and 80; Report on the situation of fundamental rights: standards and practices in Hungary (pursuant to the European Parliament resolution of 16 February 2012) (2012/2130(INI)), [PE 508.211v04-00](#), paragraphs 78 and 79; Council of the European Union, Council Conclusions on the evaluation of the European Union Agency for Fundamental Rights, [Doc. 16622/13](#), 21 November 2013, Annex, Part (b). More examples can be found in the website of FRA, 'About the FRA. How we do it. How our work is used'. Butler, I., for Liberties.eu, 2016, 'How the European Parliament can protect the EU's fundamental values: An interparliamentary rights dialogue';

This new horizontal monitoring cycle could include a scoreboard to be used to determine which (if any) vertical options analysed below in Section 4.1.2 could be activated. Building on the experience of similar instruments (i.e. EU Justice Scoreboard, Anti-Corruption Reports), the European Commission (DG Justice) could set in place this scoreboard to explain when triggering benchmarks have been met, as a result of monitoring⁸⁰³. The choice of the relevant vertical option would be determined on a basis of seriousness of eventual breach of Art 2 TEU identified via the scoreboard. These vertical options could establish the sanctions to be applied within a “new mechanism on democracy, rule of law and fundamental rights”⁸⁰⁴.

4.1.2 Vertical options

Whereas horizontal options are aimed to subject all Member States to a regular monitoring process and offer them the opportunity to feed into this process via dialogue mechanisms, the vertical options highlighted below aim to improve how the EU can monitor and eventually sanction individual Member States on a case-by-case basis, hence their description as ‘vertical options’. By contrast to the horizontal options previously examined, they are not supposed to have a cyclical character and would be instead “crisis oriented”⁸⁰⁵. They are presented below on the basis of the ease by which they could be implemented.

(i) Systemic infringement actions under Article 258 TFEU

This proposal by Professor Scheppele⁸⁰⁶ is analysed according to the following logic: (1) description of the option, (2) legal basis, (3) concerns and (4) advantages. This option, which can arguably be immediately implemented without the need for any legislative measure to be adopted, would require the Commission to complement its current approach under Article 258 TFEU with a new one whereby it would bundle ‘a group of individual infringement actions together under the banner of Article 2 TEU’⁸⁰⁷. If a single infringement action unveils the breach by a Member State of one of the fundamental values protected by the Treaty, then a group of related infringement actions could make

⁸⁰³ European Parliament, 2013, [‘The triangular relationship between fundamental rights, democracy and the rule of law in the EU – Towards an EU Copenhagen Mechanism’](#), p. 51. The specifics of this Scoreboard are developed in a research paper by CEPS.

⁸⁰⁴ Butler, I., for Liberties.eu, 2016, [‘How the European Parliament can protect the EU’s fundamental values: An interparliamentary rights dialogue’](#).

⁸⁰⁵ Information collected through consultation with stakeholders (European Commission, 15 January 2016): the Commission’s rule of law framework is a crisis-based tool.

⁸⁰⁶ Scheppele, K.L., ‘Enforcing the Basic Principles of EU Law through Systemic Infringement Actions’, in Closa, C., and Kochenov, D., *Reinforcing the Rule of Law Oversight in the European Union* (Cambridge University Press, 2016); Scheppele, K.L., 2013, [‘What can the European Commission do when Member States violate basic principles of the European Union? The case for systemic infringement actions’](#), pp. 1-2.

⁸⁰⁷ *Ibidem*, pp. 1-2.

the case for the existence of a structured “systemic threat” because “the whole is more than the sum of the parts”⁸⁰⁸.

This measure would require the CJEU to accept reviewing several infringement actions related to a same Member State, instead of reviewing separately⁸⁰⁹. The Commission would thereby be given the opportunity to demonstrate the existence of a systemic pattern of infringements in a Member State instead of focusing its efforts on individual infringements of Union law which may however be connected to the extent that they may reflect a systematic plan to breach EU law⁸¹⁰. This would also give the CJEU the opportunity to understand “the bigger picture” and review specific but connected breaches of EU law at once. The Court would nonetheless remain competent to determine whether a systemic threat exists, and could also dismiss part of the infringement actions brought under the bundle, concluding that an individual action be pursued instead⁸¹¹.

The December 2015 infringement action on asylum procedures and the associated judicial issues initiated against Hungary is arguably the first example of a “systemic infringement action”⁸¹² but it is too early to say if this action means that the Commission is reviewing its approach in this area. This action however suggests that the Commission can implement such a reform through a different interpretation of the use of Article 258 without any legislative change being required.

Some caution may however be in order⁸¹³. It may be argued for instance that were the Commission to bring systematic infringement actions on the basis of Article 2 TEU, it would then rely on an open-ended provision, which may lead critics to suggest that the Commission is guided by political rather than legal concerns⁸¹⁴. Instead of bringing together these actions under Article 2 TEU, the Commission could therefore seek to rely instead on the “principle of fidelity” under Article 4(3) TEU. By showing a pattern of

⁸⁰⁸ *Ibidem*. Information collected through consultation with stakeholders (CJEU, 14 December 2015 and European Commission, 15 January 2016).

⁸⁰⁹ Scheppele, K.L., ‘Enforcing the Basic Principles of EU Law through Systemic Infringement Actions’, in Closa, C., and Kochenov, D., *Reinforcing the Rule of Law Oversight in the European Union* (Cambridge University Press, 2016); Scheppele, K.L., 2013, [‘What can the European Commission do when Member States violate basic principles of the European Union? The case for systemic infringement actions’](#), p. 3.

⁸¹⁰ Scheppele, K.L., ‘Enforcing the Basic Principles of EU Law through Systemic Infringement Actions’, in Closa, C., and Kochenov, D., *Reinforcing the Rule of Law Oversight in the European Union* (Cambridge University Press, 2016); Scheppele, K.L., 2013, [‘What can the European Commission do when Member States violate basic principles of the European Union? The case for systemic infringement actions’](#), p- 4.

⁸¹¹ Scheppele, K.L., ‘Enforcing the Basic Principles of EU Law through Systemic Infringement Actions’, in Closa, C., and Kochenov, D., *Reinforcing the Rule of Law Oversight in the European Union* (Cambridge University Press, 2016); Scheppele, K.L., 2013, [‘What can the European Commission do when Member States violate basic principles of the European Union? The case for systemic infringement actions’](#), p. 6.

⁸¹² European Commission Press Release Database, [‘Commission opens infringement procedure against Hungary concerning its asylum law’](#), 10 December 2015.

⁸¹³ Kochenov describes bundling infringement actions under Article 2 TEU as a ‘thought experiment’. See Kochenov, D., 2015, [Biting intergovernmentalism: the case for the reinvention of Article 259 TFEU to make it a viable rule of law enforcement tool](#), Jean Monnet Working Paper Series 11/15.

⁸¹⁴ Wennerström, E., 2014, [The EU Commission Defines the Rule of Law and a Mechanism for applying it inside the EU](#), *Europarättslig tidskrift*, No. 3, p. 615.

infringements in a specific Member State, the Commission could argue that the Member State concerned is “jeopardising the attainment of the Union’s objectives”⁸¹⁵. This argument has already been used in cases such as in the *Greek Mazie* case⁸¹⁶.

Another way to approach the idea of bundling infringement actions is to dislocate the individual infringements from Article 2 TEU. The ‘size’ of the bundle would provide an indication to the CJEU on whether a systemic failure is taking place. For instance, the sudden legislative changes such as the ones adopted in Poland recently could arguably qualify as several and different infringements of EU law, and the Commission could consider this bundle of infringements as constituting a systemic threat and then, either trigger its Rule of Law Framework, which it did, and/or initiate proceedings under Article 258 TFEU.

There are several concerns with regard to this option. First, the Commission may not be willing to take this approach. The Commission may have opted until now to launch individual infringement actions to avoid concerns by Member States that the EU might be interfering with their sovereignty. However, in cases where a Member State is consistently failing to fulfil its commitments as a member of the Union, the Commission could ultimately decide to make use of the bundling of infringement actions⁸¹⁷.

Another related concern is the question of resources available to the Commission and the CJEU for dealing with systemic infringement actions. According to stakeholders consulted for this study, these cases would be resource and time intensive for an already overburdened Commission and Court⁸¹⁸.

However, systemic infringement actions under Article 2 TEU could also enable the CJEU to build a strong body of case-law on this provision, which could serve as guidance for Member States and EU bodies for interpreting and implementing the fundamental values of the Union⁸¹⁹. Moreover, if the CJEU were to rule that a systemic threat exists, successful infringement actions could contribute to better compliance. In these cases, the Member State concerned would be required to address the situation as a whole, instead of adopting individual measures to remedy particular breaches. For instance, by amending and reforming the legislative changes adopted in infringement of fundamental

⁸¹⁵ Article 4(3) TEU and Scheppele, K.L., 2013, [‘What can the European Commission do when Member States violate basic principles of the European Union? The case for systemic infringement actions’](#), p. 5.

⁸¹⁶ CJEU, [Case C-68/88](#), Judgment of the Court of 21 September 1989, Commission of the European Communities v Hellenic Republic, ECLI:EU:C:1989:339.

⁸¹⁷ Scheppele, K.L., ‘Enforcing the Basic Principles of EU Law through Systemic Infringement Actions’, in Closa, C., and Kochenov, D., *Reinforcing the Rule of Law Oversight in the European Union* (Cambridge University Press, 2016); Scheppele, K.L., 2013, [‘What can the European Commission do when Member States violate basic principles of the European Union? The case for systemic infringement actions’](#), p- 4.

⁸¹⁸ Information collected through consultation with stakeholders (CJEU, 14 December 2015 and European Commission, 15 January 2016).

⁸¹⁹ Scheppele, K.L., ‘Enforcing the Basic Principles of EU Law through Systemic Infringement Actions’, in Closa, C., and Kochenov, D., *Reinforcing the Rule of Law Oversight in the European Union* (Cambridge University Press, 2016); Scheppele, K.L., 2013, [‘What can the European Commission do when Member States violate basic principles of the European Union? The case for systemic infringement actions’](#), p. 6.

values⁸²⁰. Compliance could also be secured by introducing the possibility of the CJEU adopting financial fines as sanctions against those Member States found to be in systemic breach of EU values⁸²¹. As mentioned in Section 2.1.4(ii) above, these fines could take the form of freezing EU funds. Establishing such financial sanctions might, however, require legislative change⁸²².

(ii) Improving the Commission's Rule of Law Framework via non-legislative changes

With respect to the 2014 Commission's Rule of Law Framework, a number of changes can be suggested to improve its practical application. These changes do not require the adoption of legislative measures and may be adopted directly by the Commission to remedy the gaps identified in Section 2.1.3 and Annex 1 of this Research Paper. A number of recommendations can be made to achieve this objective⁸²³:

- **Clarify the concept of 'systemic threat'** and its relationship with the closely linked but not identical notions of serious threats, systemic breaches and systemic deficiencies. Systemic threats are situations involving either the combined effect of minor breaches of EU Article 2 TEU values by a Member State or major legal changes aimed at changing the composition, functions and powers of national rule safeguards and that increase the risk of a systemic threat to EU values. Systemic breaches are situations where either the 'trends, patterns and combined effect'⁸²⁴ of national measures may be said to amount to a violation of Article 2 TEU or national rule of law safeguards have been dismantled. Systemic deficiencies are by contrast situations where a national system suffers from long-

⁸²⁰ Scheppele, K.L., 'Enforcing the Basic Principles of EU Law through Systemic Infringement Actions', in Closa, C., and Kochenov, D., *Reinforcing the Rule of Law Oversight in the European Union* (Cambridge University Press, 2016); Scheppele, K.L., 2013, '[What can the European Commission do when Member States violate basic principles of the European Union? The case for systemic infringement actions](#)', pp. 6-9.

⁸²¹ Scheppele, K.L., 'Enforcing the Basic Principles of EU Law through Systemic Infringement Actions', in Closa, C., and Kochenov, D., *Reinforcing the Rule of Law Oversight in the European Union* (Cambridge University Press, 2016); Scheppele, K.L., 2013, '[What can the European Commission do when Member States violate basic principles of the European Union? The case for systemic infringement actions](#)', pp. 9-12. Closa, C., and Kochenov, D. (ed.), 2015, 'Reinforcing the Rule of Law Oversight in the European Union', in Werner Schröder (ed.), *Strengthening the Rule of Law in Europe: From a Common Concept to Mechanisms of Implementation*, Hart Publishing, Oxford, 2015 (forthcoming), pp. 11-12, 17-18.

⁸²² Closa, C., and Kochenov, D., '[Reinforcing the Rule of Law Oversight in the European Union](#)', in Werner Schröder (ed.), *Strengthening the Rule of Law in Europe: From a Common Concept to Mechanisms of Implementation*, Hart Publishing, Oxford, 2015 (forthcoming), pp. 11-12, 17-18. See also the [Letter of the Foreign Ministers of Denmark, Finland, Germany and the Netherlands to the President of the European Commission](#) (6 March 2013). The letter was also sent to the Presidency of the Council. Scheppele, K.L., 2013, '[What can the European Commission do when Member States violate basic principles of the European Union? The case for systemic infringement actions](#)', pp. 10-12. For more information, see Section 2.1.4(ii) of this Research Paper.

⁸²³ Kochenov, D. and Pech, L., 2015, '[Upholding the Rule of Law in the EU: On the Commission's 'Pre-Article 7 Procedure' as a timid step in the right direction](#)', European University Institute Working Papers, Department of Law, p. 10.

⁸²⁴ European Parliament, Resolution of 16 December 2015 on the situation in Hungary (2015/2935(RSP)), [P8_TA-PROV\(2015\)0461](#), paragraph 7.

standing structural problems such as endemic corruption, weak institutional capacities. These either seriously threaten or already undermine EU values, without however forming part of a government-sponsored attempt to breach Article 2 TEU⁸²⁵.

- **Adopt** pre-defined triggering **benchmarks** based on objective and common indicators;
- Agree to systematically investigate any Member State referred to it under this mechanism by the European Parliament, the FRA or any national government or parliament or the Venice Commission;
- **Justify any decision not to initiate a ‘rule of law dialogue’** when any of the bodies previously mentioned has referred a Member State to its attention;
- **Publish any ‘rule of opinion’** it may adopt when there is a perceived situation of systemic threat to the rule of law;
- **Publish any response** received from the **Member State** under investigation.
- Commit itself to **triggering Article 7 TEU** in the situation where its rule of law recommendations are not effectively implemented within the time limit set. This timeframe should never exceed a period of twelve months.

While some recommendations have been made to amend the Framework to allow the automatic triggering of Article 7 TEU in situations where a Member State has failed to comply with the Commission’s rule of recommendations at the end of the third and final phase of the Framework⁸²⁶, it may be argued that this would go against the nature of the Framework itself⁸²⁷. As explained in Section 2.1.3, the Framework was designed to fill a gap between political persuasion and the more serious consequences of the infringement procedure and Article 7 TEU. The Rule of Law Framework precedes and complements Article 7 TEU but aims to “[...] resolve **future threats to the rule of law** in Member States **before** the conditions for activating the mechanisms foreseen in Article 7 TEU are met”⁸²⁸. Article 7 TEU should therefore remain as a mechanism of last resort. If Article 7 TEU needs to be activated, it would mean that ‘things have gone terribly wrong’⁸²⁹. The case of

⁸²⁵ Von Bogdandy, A., and Ionnadis, M., 2014, *Systemic Deficiency in the Rule of Law: What is it, What has been done, What can be done*, 51 Common Market Law Review p. 95: “The concept of systemic deficiency in the rule of law ... ‘applies when the operations of those institutions undermine the social function of law, create serious externalities, question the Union as a community of law, jeopardize the essence of EU citizenship or the guarantees of Articles 41 and 47 EUCFR’”.

⁸²⁶ Kochenov, D. & Pech, L., 2015, [Upholding the Rule of Law in the EU: On the Commission’s ‘Pre-Article 7 Procedure’ as a timid step in the right direction](#), European University Institute Working Papers, Department of Law; Besselink, L.F.M., 2016, [‘The bite, the bark and the howl: Article 7 TEU and the rule of law initiatives’](#), in Jakab, A., and Kochenov, D. (eds.), *The Enforcement of EU Law and Values: Ensuring Member States’ Compliance*, (Oxford University Press, Forthcoming. Amsterdam Centre for European Law and Governance Research Paper No. 2016-01).

⁸²⁷ Information collected through consultation with stakeholders (European Commission, 15 January 2016).

⁸²⁸ European Commission, Communication [‘A new EU Framework to strengthen the Rule of Law’](#) of 19 March 2014, COM(2014) 158 final/2, pp. 6,7.

⁸²⁹ Information collected through consultation with stakeholders (European Commission, 15 January 2016).

Poland arguably shows, however, that the Framework is being used to address ongoing and actual threats and not simply 'future threats', in which case one may argue that Article 7 TEU should have instead been triggered by the Commission against Poland.

The Rule of Law Framework could also be complemented with a Systemic Deficiency Committee to ensure its effective implementation⁸³⁰. The Committee would monitor Member State compliance with Article 2 TEU values. If the Committee identifies a threat to Article 2 TEU values by a Member State, this could lead to activating the Framework. The setting up of such an independent Committee could appease concerns related to the current Framework⁸³¹. This Committee may be regarded as overlapping with the suggestion of a 'Copenhagen Commission', although it would not have the same sanctioning powers⁸³². Establishing this Committee would, however, most likely require Treaty change. .

To further clarify the relationship between the pre-Article 7 procedure and Article 7 TEU, the Commission could also seek to revise its 2003 Communication on Article 7⁸³³ and better explain how the pre-Article 7 procedure complements the two options laid down in Article 7 TEU. This would entail neither Treaty nor legislative change, but would help clarify a number of recurrent issues such as whether the pre-Article 7 procedure can be used to investigate national breaches of EU values in areas outside the scope of EU law similarly to the situation with Article 7 TEU, or whether recourse to pre-Article 7 TEU has now become a compulsory preliminary step before the Commission may decide to trigger either Article 7(1) or Article 7(2) TEU.

(iii) Empowering national actors via new EU programmes

Section 2.4 above examined the important role that national actors play in upholding EU core values. Empowering national actors is therefore of vital importance.

National actors such as national courts, individual lawyers, civil society organisations, activists, the press, and the public, can be empowered through EU-funded capacity-building programmes. For example, EU funding could be provided to finance training courses for judges or prosecutors or to create specialised positions within the national human rights' institutes, as proposed in the improvement of the Council's rule of law dialogue. Financing could also be provided to support civil society and the media⁸³⁴. The EU, especially the Commission, should look for ways to assist national actors, both politically and practically. The precise form of such assistance is likely to be determined on a case-by-case basis and in consultation with the organisations or individuals concerned. However, the underlying idea is that the EU should support national efforts

⁸³⁰ Von Bogdandy, A., Antpöhler, C., and Ioannidis, M., 2016, *Enforcing EU values: Reverse 'Solange' and a systemic deficiency committee*, SSRN, pp. 14-19.

⁸³¹ *Ibidem*, pp. 14-19.

⁸³² *Ibidem*, p. 19.

⁸³³ European Commission, Communication from the Commission to the Council and the European Parliament on Article 7 of the Treaty on European Union - Respect for and promotion of the values on which the Union is based, [/* COM/2003/0606 final */](#).

⁸³⁴ Butler, I., for Liberties.eu, *'The rule of law dialogue: five ideas for future EU presidencies'*, December 2015, p. 10-11.

that promote and protect the rule of law through the dissemination of information and good practice and funding. This could involve establishing networks of national constitutional law practitioners, training and cooperation with relevant actors, including the Venice Commission, FRA. Member States would therefore have the primary responsibility for enforcing Article 2 TEU values⁸³⁵.

To make EU funding available, however, a new financing instrument of a legislative nature would most likely be required. A similar mechanism to the Instrument for Pre-Accession⁸³⁶, supporting the promotion of the rule of law in Candidate Countries could be established for Member States. These could be modelled according to the Grotius Programme⁸³⁷ from the old third pillar; the European Instrument for Democracy and Human Rights (EIDHR), from the second pillar⁸³⁸; or the European Endowment for Democracy (EED) initiative⁸³⁹. The EED is primarily a grant-awarding institution to directly and objectively support actors promoting and protecting democracy and fundamental rights. These actors include pro-democratic movements and actors in favour of a pluralistic multiparty system on democratic grounds; social movements and actors; civil society organisations; young leaders; independent media and journalists (including bloggers, social media activists, etc.), non-governmental institutions, including foundations and educational institutions functioning also in exile⁸⁴⁰. The EED has financed 247 initiatives to date⁸⁴¹.

4.2 Assessment of the selected options

This section provides a preliminary assessment of the options proposed to address the systemic breaches of the democracy, the rule of law and fundamental rights. The assessment relates to the economic, social and political dimensions. The social and political benefits that can be subscribed to all the analysed options relate to the efforts to uphold Article 2 TEU values and to address the gap in trust between Member States, the citizens and the EU institutions. Economic benefits relate most of all to the improvement in the functioning of the business sector and (international) markets. Deficiencies in the provision of these values can affect specific groups of stakeholders, society at large, as

⁸³⁵ Clingendael European Studies programme, '[Building Mutual Trust in a European Rule of Law, A Bottom-up approach](#)', Policy Seminar 7-8 April 2011.

⁸³⁶ Website of the European Commission, '[Neighbourhood-Enlargement. Instrument for Pre-accession assistance \(IPA\)](#)'.

⁸³⁷ [Joint action 96/636/JHA](#) of 28 October 1996, adopted by the Council on the basis of Article K.3 of the Treaty on European Union, on a programme of incentives and exchanges for legal practitioners, OJ L 287 of 08.11.1996.

⁸³⁸ [Regulation \(EU\) No 235/2014 of the European Parliament and of the Council of 11 March 2014 establishing a financing instrument for democracy and human rights worldwide](#), OJ L 77/85 of 15.03.2014; Website of the European Commission, 'International Cooperation and Development. [European Instrument for Democracy and Human Rights](#)'; [Website](#) of the European Instrument for Democracy and Human Rights.

⁸³⁹ Council of the European Union, [Declaration on the establishment of a European Endowment for Democracy, Doc. 18764/11](#) (20 December 2011). [Website](#) of EED.

⁸⁴⁰ Council of the European Union, [Declaration on the establishment of a European Endowment for Democracy, Doc. 18764/11](#) (20 December 2011).

⁸⁴¹ Website of EED, '[We support](#)'.

well as the economies of the Member States and the EU as a whole. Some of the negative consequences related to the specific issues have been described in the case studies (See Sections 2 and 3 of the Research Paper). More general and indirect negative effects, including limited access to democracy and fundamental rights, lack of trust between Member States, the citizens and the EU institutions and negative impacts on the functioning of the business sector and international markets have been described in Section 3.

The combined use of horizontal and vertical options could help address the issue of lack of coherence and coordination in the existing EU legal and policy framework to uphold Article 2 TEU values (see Section 2.5). Such a combination of options could also help avoid the unnecessary overlap among the mechanisms analysed in Section 2. Finally, a clearer definition of competences, benchmarks and indicators used in each of the options could bring greater clarity to the current patchwork of EU instruments and actors involved in upholding Article 2 TEU values.

The quantitative estimates presented in this Section relate only to immediate economic costs of the selected options since there are no instruments available to precisely and scientifically quantify the costs of non-adherence or, by contrast, the benefits of adherence to democracy, the rule of law and fundamental rights. These estimates are accompanied with a qualitative assessment of the social and political impacts of each of the selected options.

The assessment is structured according to the specific measures proposed in the previous sections, focusing first on the horizontal options and then on the vertical options, with a comparative assessment of the options carried out separately for each of these two groups. Table 10 below provides an overview of this assessment.

Table 10 Summary of assessment of options

Option	Economic impact	Social impact	Political impact
Horizontal options			
Improving the Council's Rule of Law Dialogue	EUR 2.9 million annually	Involvement of peer governments may be seen as a positive factor Possibility of exchange of best practices	Political climate in Member States where a systemic threat occurs may not be conducive to a productive dialogue
New Inter-parliamentary dialogue fostered by the European Parliament	EUR 3 million annually	Lack of involvement of governments may be a drawback	Relying on parliamentary actions may be difficult in times of parliamentary change
New inter-institutional	EUR 620,000	A comprehensive measure but main actions (impact	Involvement of the three principal EU institutions

Option	Economic impact	Social impact	Political impact
agreement	annually	assessment, monitoring, stakeholder consultation) happening in the 'background' of the process	can be an advantage but need to give one institution responsibility for steering the whole process
Vertical options			
Bundle of infringement actions	No costs specifically related to this measure, some economies of scale could arise	Risk of watering down the impact due to long-lasting court proceedings Stigmatisation of the EU may arise	Risk of 'purchasing' non-compliance
Improving the Commission's Rule of Law Framework	Not quantified	Limited possibility for the society to follow the process due to the confidential nature of the process	Reluctance of some national governments to let the Commission look into rule of law matters beyond the area governed by EU law
Empowering national actors	EUR 330,000 annually per Member State covered with a capacity building programme	Positive impact on national stakeholders involved in strengthening the rule of law	Not openly stigmatising; need to decide who receives funding and how

4.2.1 Horizontal options

Three horizontal options have been identified and listed from the least to the most restrictive option. The assessment relates to each of these options.

Improving the Council's Rule of Law Dialogue

This option implies a systematic dialogue between the Member States and the Council.

- *Economic dimension*

The suggestions on how to improve the dialogue formulated in Section 4.1.1 allow making an indicative estimate of at least some elements of costs related to this measure:

- The discussions should last longer than it is the case within the current framework. In the November 2015, discussions lasted four hours and focused not only on issues related to the rule of law. Assuming that the discussions including the representatives of all Member States would last two days and would be

organised once a year, one could estimate the costs of organising such sessions. Assuming that on average 5-people delegation from each Member State would come implying the cost of a EUR 1000 per person⁸⁴², this rough estimate would come to an aggregate cost of EUR 140,000.

- In addition, in order to be able to comment on the developments in other Member States, circulate and comment on any reports received and report back to the Council, each Member State should make some human resources available for tasks related to this measure. Assuming that each Member State would mobilise 1 senior expert and 1 assistant (full time), the costs could be estimated at approximately EUR 100,000⁸⁴³ annually per Member State – i.e. EUR 2.8 million across the EU.

With these assumptions, the total monetary costs of this option can be assessed to amount to approximately **EUR 2.9 million**. Additional costs could arise due to the necessity of collection of data and evidence needed for monitoring as well as due to expert consultations and reports which might be needed for better assessment of at least some of the problems.

- *Social dimension*

As discussed in Section 4.1.1, under this option Member States could be requested to prepare ‘country fiches’ based on the recommendations of the UN and the Council of Europe. In preparing these country fiches, Member States could involve civil society, the media and run surveys on the implementation of these recommendations and the efficiency of the measures adopted. This enhanced stakeholder consultation could strengthen trust between society and their public administration. The ‘country notes’ that would result from the dialogue, including the recommendations by other Member States and counter-measures proposed by the concerned Member State, should be made public and subject to consultation with concerned stakeholders. The ‘country note’ would also include requests for funding. The public should also be consulted on what measures should be financed and in which way. The process of public consultation and public access to information and administrative procedures is a common constitutional right in the European tradition⁸⁴⁴. This more transparent approach would help strengthen the right of access to information and maintain trust in the society that any deficits in the rule of law will not be left unaddressed.

- *Political dimension*

⁸⁴² Assuming EUR 500 per person per day, covering travel and per diem expenses.

⁸⁴³ Assuming roughly the cost of employment of a senior expert at EUR 60,000 per year and the costs of the assistant at EUR 40,000 per year.

⁸⁴⁴ Hins, W., and Voorhoof, D., 2007, *Access to State-held information as a fundamental right under the European Convention on Human Rights*, European Constitutional Law Review, Vol. 3, pp. 114-117. Website of the European Commission, [‘Justice. Consultation on EU citizenship: share your opinion on our common values, rights and democratic participation’](#). The Commission carried out this consultation between 14 September to 7 December 2015 among all EU citizens, organisations and other stakeholders. The aim of the consultation was to enquire on the obstacles that they face in their daily lives.

An improved Council dialogue would include a preparation seminar where Member States would choose the topic to be discussed at the dialogue (see Section 4.1.1). The starting point for the dialogue would be a 'country fiche' prepared in advance. This approach would enable Member States to better prepare for the discussions, enhancing dialogue from the outset of the procedure. In addition, by granting more time for the debates, the dialogue would be a true exchange of observations and best practices. These systematic dialogue sessions with involvement of representatives of all the Member States' governments, formulating and receiving concrete recommendations and the necessity to comment on them would likely increase trust between Member States and the EU's institutions.

Trust would also be reinforced by a system of follow-up which would monitor the implementation of the established recommendations. If the Council were to set a limit to the number of recommendations that can be made to the concerned Member State, this could translate in more willingness to implement the recommendations. One of the obstacles identified in this Research Paper is the lack of personal and economic resources at national level to enforce EU legislation upholding Article 2 TEU values. This could be overcome by granting specific funding for Member States to implement the recommendations.

However, as noted by some stakeholders, the political climate in Member States where a systemic threat has materialised or is materialising (i.e. in situations where the concerned Member State's government consciously acts against the rule of law), may be not conducive to a productive dialogue⁸⁴⁵.

New inter-parliamentary dialogue fostered by the European Parliament

This option introduces a bi-annual cycle of dialogues between the LIBE Committee and the counterpart national parliamentary committees. This dialogue would be facilitated through the creation of a database on European fundamental rights (EFRIS).

- *Economic dimension*

The costs of this measure can be roughly estimated by referring to the principal elements of the measure as mentioned in section 4.1.1:

- Bi-annual dialogue: With similar assumptions as for the previous options (assuming that a 5-person delegation would need to travel for each round of dialogue), the costs of these dialogue rounds can be assessed at EUR 70,000 annually (i.e. half of the relevant cost of the previous option with the assumption of bi-annual rather than annual sessions).
- In addition, in order to be able to gather information and data and prepare reports from national parliaments, each Member State should make some human resources available for tasks related to this measure. Assuming that each Member

⁸⁴⁵ Kochenov, D. and Pech, L., 2015, [Monitoring and Enforcement of the Rule of Law in the EU: Rhetoric and Reality](#), European Constitutional Law Review, vol. 11, issue 3.

State would mobilise 1 senior expert and 1 assistant (full time), the costs could be estimated at approximately EUR 100,000 annually per Member State – i.e. EUR 2.8 million across the EU⁸⁴⁶.

- Creation of a database such as European Fundamental Rights Information System (EFRIS) could imply mobilising additional 2 full-time employees with an approximate cost of EUR 100,000.

With these assumptions, the total monetary costs of this option can be assessed at a similar level as the previous option and amount to approximately **EUR 3 million**. Additional costs could arise due to expert consultations and reports which might be needed for better assessment of at least some of the problems.

- *Social dimension*

The new inter-parliamentary dialogue would allow the representatives of the “peoples of Europe” to exchange views and best practices on upholding the common values that bind them together under Article 2 TEU. As with the Council’s dialogue, this procedure could involve a consultation with key stakeholders – such as national courts, the media and civil society – and the general public. The new inter-parliamentary dialogue would also be based on a legitimate political mandate and reinforce the trust of society on national parliaments by society to address their needs⁸⁴⁷.

- *Political dimension*

Political impacts would in principle be the same as for the previous option. A dialogue between peer parliaments and the European Parliament and exchange of best practices would most likely increase trust between these institutions and Member States in general. However, the main difference as compared to the previous measure is that it would only involve national parliaments and not governments. The political significance of this option would arguably be lower as parliaments hold the representative power of the people, as well as the capacity to adopt laws to address the best interests of society. Periods of parliamentary transition might create some delays; however, the dialogue would also be held in sessions taking into account these periods to avoid any interruption of the proceedings. Similarly to the previous option, the effectiveness of this instrument would be undermined in situations where the problems with the rule of law are related to the existing parliamentary setup.

An Inter-institutional Agreement

The objective of this option is to bring some order to the current patchwork of instruments and initiatives by requiring the main EU institutions (the Parliament, the Commission and the Council) to agree an over-encompassing framework to more effectively guarantee compliance with Article 2 TEU values and avoid duplication of work as well as inconsistent actions. The agreement among these institutions could take a similar form to the initiative on Better Regulation.

⁸⁴⁶ The same assumptions as for the previous measure have been used.

⁸⁴⁷ Aristotle, *Politics* (Aeterna Press, 2015); Rousseau, J-J, *The Social Contract or Principles of Political Right* (Wordsworth Classics of World Literature, 1998); Gallagher, M., Laver, M., and Mair, P., *Representative Government in Modern Europe* (5th revised edition, McGraw-Hill, London, 2011).

- *Economic dimension*

While concluding an agreement between the institutions would not entail significant costs, some processes envisaged under this measure would be expected to be costly. These are:

- A mechanism to monitor Member States' compliance with Article 2 TEU values on a regular basis. This cyclical monitoring process would be led by the European Parliament to which the Commission and the Council would contribute. Such a mechanism would require engagement of a few employees from these institutions. Assuming four people were involved full time (two from the Parliament and one from each the Commission and the Council), the annual costs could be estimated at EUR 200,000⁸⁴⁸.
- Comprehensive fundamental rights proofing prior to launching initiatives or actions could be incorporated in impact assessments of the planned initiatives. Including such in-depth analysis of fundamental rights' aspects in impact assessment would be likely to increase the costs of impact assessment studies. Statistics of the Regulatory Scrutiny Board, which deals with the Commission's impact assessments, indicate that in 2015, the number of completed impact assessments evaluated by the Board amounted to 30⁸⁴⁹. Assuming the average cost of conducting an impact assessment at the level of EUR 100,000 and assuming that additional comprehensive fundamental rights proofing would increase the costs by 10%, an indicative estimate of costs of this measure can be estimated at EUR 300,000. A similar increase in costs of impact assessments could be assumed for the reports requested by the European Parliament. In 2007, the parliamentary budget for impact assessments amounted to 700,000⁸⁵⁰. Assuming that this budget remained more or less stable in recent years, it can be estimated that the additional requirements on fundamental rights proofing would entail an additional cost of approximately EUR 70,000. The additional costs at EU level could therefore amount to roughly EUR 370,000. In order to be more effective, this option should be complemented with some action at national level (such as empowering national actors, see Section 4.1.2).
- A scoreboard managed by the Commission: it can be envisaged that for preparing the scoreboard and issuing the relevant reports, an additional one full-time employee would be needed, working in cooperation with the persons involved in the monitoring process. The resulting cost can be estimated to amount to approximately EUR 50,000 a year.

Based on the above assumptions, total costs of this option could be estimated to amount to approximately **EUR 620,000**. Adding capacity building at national level in accordance with the assumptions presented for the option 'empowering national actors' would increase the costs to approximately 5.2 million.

⁸⁴⁸ Assuming the annual gross salary of EUR 50,000.

⁸⁴⁹ Impact Assessment Board/Regulatory Board, [2015 Activity Statistics](#), 2015.

⁸⁵⁰ Meuwese, A. C. M., 2008, [Impact Assessment in EU Lawmaking](#), p. 120.

- *Social dimension*

As discussed in Section 4.1.1, the IIA would ensure a more comprehensive and coordinated action of the EU institutions. While most activities (impact assessments, monitoring, stakeholder consultation) would occur 'in the background' of the political agenda, these would be essential for the functioning of this option. Public involvement in the direct monitoring of Member State's compliance with Article 2 TEU values and their capacity to bring cases before the institutions to launch the appropriate procedures when threats to these values are identified could enhance public access and participation in EU proceedings. This problem is interrelated to the lack of trust of citizens in the EU and their lack of identification with the European process⁸⁵¹.

- *Political dimension*

Involvement of all the three principal institutions of the EU (the Parliament, the Council and the Commission) would show that the EU institutions take seriously the principle of sincere cooperation and their duty to establish 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'⁸⁵². On the other hand, one may seek to avoid a situation where no one institution is 'in charge' and it may therefore be suggested to make the Commission, as guardian of the Treaties, primarily responsible for 'steering' any new horizontal mechanism or cycle which may be established.

4.2.2 Vertical options

Vertical options would be used in crisis situations in parallel with the horizontal options. Therefore, the costs entailed by these options would come on the top of the costs of the horizontal options.

Bundle of infringement actions

This option would imply assembling several infringement actions under the banner of Article 2 TEU. The Member State concerned would be required to address the situation as a whole instead of adopting individual measures to remedy specific breaches of EU law.

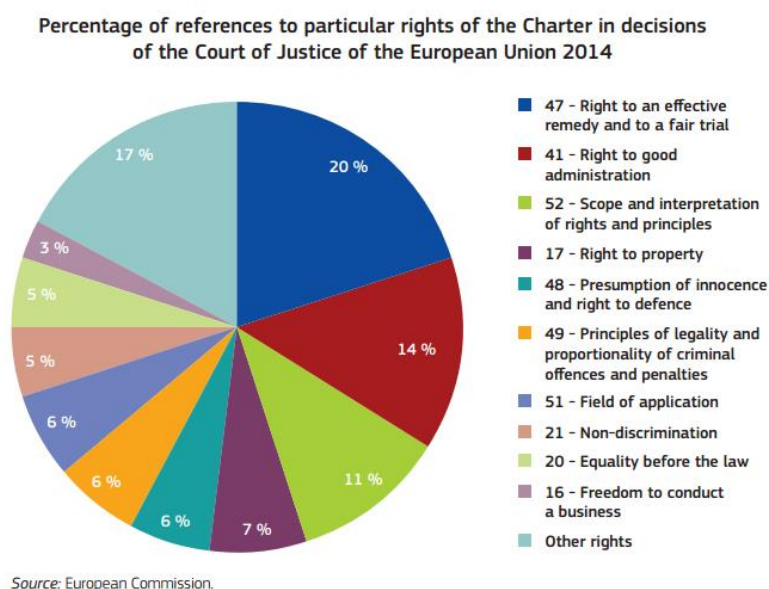
- *Economic dimension*

⁸⁵¹ European Parliament, 2014, '[Strengthening European Democracy: citizen's participation. Which challenges we face at the European Elections of 2014?](#)'; European Commission, '[Political participation and EU citizenship: perceptions and behaviour of young people](#)'; European Commission, 2012, '[The citizen's effect](#)'. Website of the European Commission, '[Horizon 2020. Spreading excellence and widening participation](#)'; Stockemer, D., 2011, 'Citizen's support for the European Union and participation in European Parliament elections', European Union Politics, Vol. 13, Issue 1, 26-46.

⁸⁵² Article 13(1) TEU.

There are no specific, additional costs related to this measure on the administrative side – bundling infringement actions could actually diminish the administrative costs for the CJEU because of the economies of scale (i.e. handling several cases together instead of handling them separately might bring some savings on administrative costs for the court). The direct costs of this measure for the concerned Member States would probably take the form of financial fines. These cannot be estimated in quantitative terms because the type and scale of eventual infringements, which could be addressed by this measure, cannot be assessed. Figure 5 below presents the percentage breakdown of the application of the EU Charter on Fundamental Rights, which can give some indication on the type of infringements that could be covered in the bundles of infringement actions under this measure⁸⁵³.

Figure 5 Breakdown of the references to particular rights in the CFR in CJEU in 2014



Furthermore, Box 3 provides a few examples from past cases of infringements on fundamental rights which can give an indication of the scale of such costs.

Box 3 Examples of infringement cases with financial penalties imposed on Member States

Commission v. Greece: Failure to adopt Directive 2004/80/EC on compensation to crime victims. The European Commission ordered Greece to pay to the Commission, into the account 'European

⁸⁵³ European Commission, [2014 Report on the Application of the EU Charter of Fundamental Rights](#).

Community own resources', a proposed penalty payment in the sum of EUR **72,532.80 for each day of delay** in taking the measures necessary to comply with the judgment in Case C-26/07, from delivery of the judgment until the day on which the judgment in Case C-26/07 has been complied with⁸⁵⁴.

Commission v. Belgium: Failure to fulfil the obligations under Article 260(1) TFEU concerning compliance with the urban waste water treatment directive. The Commission ordered the Kingdom of Belgium to pay to the European Commission, into the 'European Union own resources' account, a **lump sum of EUR 10 million** and declared that, if the failure to fulfill obligations were to continue until the day of delivery of the present judgment, the Kingdom of Belgium would be ordered to pay to the European Commission a penalty payment of EUR 859,404 for each six-month period of delay in taking the measures necessary to comply with the judgment in *Commission v Belgium*⁸⁵⁵.

- *Social dimension*

Bringing a bundle of infringement actions by the CJEU against a Member State would give a clear signal to the Member State concerned regarding the need to strengthen democracy, the rule of law and fundamental rights⁸⁵⁶. However, the process of handling legal cases at the CJEU and imposing and executing penalties may last several years, which can 'water down' the effects of this measure as far as public perception is concerned. The average time between a case being lodged with the Court under Article 258 TFEU and judgment is often over two years⁸⁵⁷. The average time between an adverse judgment against a Member State in an infringement procedure under Article 258 TFEU and the subsequent judgment about penalties under Article 260 TFEU is nine years⁸⁵⁸. This could have a negative impact on the effective judicial protection of individuals and, ultimately, in their trust in the functioning of the CJEU system⁸⁵⁹. While proceedings are carried out in Luxembourg, individuals directly impacted by the infringement actions have to endure them in their daily lives⁸⁶⁰. This therefore increases the perception of disconnect with CJEU proceedings and the ability of these to address the situation threatening their fundamental rights.

- *Political dimension*

⁸⁵⁴ CJEU, [Case C-407/09](#), Judgement of the Court (First Chamber) of 31 March 2011 *European Commission v. Hellenic Republic*, ECLI:EU:C:2011:196.

⁸⁵⁵ CJEU, [Case 533/11](#), Judgment of the Court (First Chamber) of 17 October 2013 *European Commission v. Kingdom of Belgium*, ECLI:EU:C:2013:659.

⁸⁵⁶ See Section 4.1.2 of this Research Paper.

⁸⁵⁷ Website of the European Commission, [Legal Enforcement](#).

⁸⁵⁸ Scheppele, K.L., 'Enforcing the Basic Principles of EU Law through Systemic Infringement Actions', in Closa, C., and Kochenov, D., *Reinforcing the Rule of Law Oversight in the European Union* (Cambridge University Press, 2016).

⁸⁵⁹ Lenaerts, K., 2013, '[Effective judicial protection in the EU](#)', *Assises de la Justice*; CEPEJ, 2013, '[The functioning of judicial systems and the situation of the economy in the European Union Member States](#)'; Council of Europe, 2007, '[The length of civil and criminal proceedings in the case-law of the European Court of Human Rights](#)'.

⁸⁶⁰ A similar argument has been made regarding the International Criminal Court proceedings in The Hague. See, for example, Nicholson, T., for Justice in Conflict, '[Could the International Criminal Court be a development agency?](#)', 24 June 2013; REDRESS; 'The participation of victims in the International Criminal Court Proceedings. A review of the practice and consideration of options for the future' (October 2012).

This measure would on the one hand provide a strong legal mechanism with a possibility of applying concrete financial penalties. Since this option relies on the Treaties, rather than on soft-law instruments, it could bridge the enforcement gap underlying non-binding mechanisms. However, options should be combined. Bundling infringement actions could positively complement the debates and dialogues of horizontal options reassuring Member States and citizens that, should the monitoring mechanisms uncover a threat or breach of Article 2 TEU values, these infringement actions will be launched to put an end to the situation and prevent the Member State from persisting in its noncompliant conduct.

However, the tangible effects might be questionable. Professor Scheppele states: “In truth, the EU lacks an effective mechanism to prevent Member States from using penalty payments to ‘purchase’ continued noncompliance or indeed from simply ignoring both Court judgements”⁸⁶¹. If Member States are currently able to use this approach as a reaction to CJEU judgments, the same situation could be envisaged with regard to bundled infringement procedures.

Furthermore, stigmatisation of a particular Member State through a court judgment could also potentially backfire, creating the situation where the EU would be seen as an external enemy of the nation⁸⁶². This could trigger or strengthen anti-EU tendencies and movements in that Member State resulting, in the worst-case scenario, in leading to the departure of such a Member State from the EU⁸⁶³.

Improving the Commission’s Rule of Law Framework

This mechanism, which aims at filling the gap between political persuasion and possible sanctions under Article 7 TEU, is designed as a dialogue between the concerned Member State and the Commission and involves three steps: assessment, recommendations and monitoring.

- *Economic dimension*

The impact of this option can be assessed in a similar way as the impacts of the first two horizontal options (the dialogues of the Parliament and the Council), with similar types of costs such as costs related to visits of the concerned Member State’s officials in Brussels to participate in debates and additional employment to ensure appropriate administrative support and monitoring. The scale of the costs on an annual basis is difficult to ascertain since this would depend on the number of crisis situations observed as well as on the type of the situation being addressed.

- *Social dimension*

⁸⁶¹ *Ibidem*.

⁸⁶² Recent developments in the UK, Poland and Hungary depict the EU as enemy of the State. See for example, Walker, J., for Birminghammail, ‘[EU referendum: European Union has caused poverty and unemployment, says Labour MP](#)’, 5 March 2016; Müller, P., for Spiegel, ‘[European Council Head Tusk: I am Public Enemy No.1 in Poland](#)’, 17 January 2016; LSE, ‘[The representation gap: why ignoring Euroscepticism has opened the door for extremist parties](#)’.

⁸⁶³ Watt, N., for The Guardian, ‘[Vote Leave says it will be official Brexit campaign in referendum](#)’, 3 March 2015.

An improved Commission's Rule of Law Framework, with more transparency, clearly defined concepts and benchmarks to trigger it and the transparency of the interim decisions that are taken ('rule of law opinion'), including in the communications with the concerned Member State, would increase the visibility of this mechanism and the trust of Member States and citizens regarding its functioning.

These benefits could be enhanced if, as proposed by Von Bogdandy et al, a Systemic Deficiency Committee were set up to ensure the impartiality and objectivity of the monitoring process. The intervention of relevant actors and stakeholders, such as EU FRA, the Venice Commission and civil society in triggering this option would also be key to increase its trustworthiness. Public access to administrative proceedings, including those of the EU, and their right to information is not only a constitutional right, but also a safeguard for them to trust in the institutions that represent them and are supposed to protect their best interests. The trust of Member States and citizens in the Framework would also be strengthened by the objective and impartial indicators used in the scoreboard to monitor Member States' compliance.

- *Political dimension*

The prominent role of the Commission is well grounded in the Commission's role as a Guardian of the Treaties⁸⁶⁴. However, an improved Rule of Law Framework, based on well-defined benchmarks, relying on objective indicators monitored by an independent Systemic Deficiency Committee and involving other actors and stakeholders from the outset of the proceedings could prevent reluctance from national governments to empower the Commission to look into rule of law matters beyond the area governed by EU law⁸⁶⁵. The new improved Rule of Law Framework would ensure a more objective dialogue and also help activate all the necessary actions to prevent a situation from escalating into a breach of Article 2 TEU values.

Empowering national actors

This option would imply launching EU-funded capacity-building programmes targeted at national courts, civil society organisations and other institutions in order to better protect democracy, the rule of law and fundamental rights in Member States.

- *Economic dimension*

A pre-accession instrument IPA, currently targeted at seven countries, had a budget of EUR 11.5 million for the period 2007-2013, and a similar budget is available for the current financial perspective (2014-2020)⁸⁶⁶. The main areas of support cover five objectives, including the support for the rule of law. Assuming that the rule of law-

⁸⁶⁴ European Commission, Communication '[A new EU Framework to strengthen the Rule of Law](#)' of 19 March 2014, COM(2014) 158 final/2.

⁸⁶⁵ Kochenov, D., Pech, L. (2015) [Upholding the Rule of Law in the EU: On the Commission's 'Pre-Article 7 Procedure' as a timid step in the right direction](#), European University Institute Working Papers, Department of Law, p. 13.

⁸⁶⁶ Website of the European Commission, '[Neighbourhood-Enlargement. Instrument for Pre-accession assistance \(IPA\)](#)'.

related projects would receive about 20% of the funds, one could estimate that about EUR 2.3 million could be spent per participating country over the seven years of the programme's duration, or approximately EUR 330,000 annually. The total annual cost would depend on the number of programmes active within the EU (reflecting the number of Member States at which such instruments are targeted).

- *Social dimension*

This measure would be targeted at national institutions and organisations, which would have a positive impact on these stakeholders in terms of increasing their knowledge and access to information as well as funding. By opening a direct line of action with the concerned stakeholders, the sense of disconnect with EU proceedings and lack of identification with these and the EU as a whole could be bridged. Furthermore, the trust of stakeholders in EU proceedings could increase as they would be receiving directly the aid and would be the target of the programmes. This could help lay rest to concerns on funding being used for other purposes by government authorities managing the funding. Stakeholders active in the area of civic society rights would receive support that would be of special importance in situations where Member State governments would intentionally or unintentionally undermine their capacities⁸⁶⁷.

- *Political dimension*

Unlike other options in which the "naming and shaming" element might be stronger, this option would not openly stigmatise any Member State for 'improper behaviour'. However, deciding who should receive funding, and on the basis of which process, might present some challenges. To avoid questions on the impartiality of the process, a thorough investigation of the Member State situation supported by the information collected through horizontal options should be carried out. For instance, the 'country notes' of the improved Council's dialogue, the results of the interparliamentary dialogue or the data collected through the scoreboard of the new monitoring cycle established by the IIA could underline the civil society, media or judicial organisations in need of aid. This data collection would be supported by the consultation carried out with relevant stakeholders in each of these processes.

4.3 European Added Value

The EU Added Value (EAV) can be defined as 'the value resulting from an EU intervention which is additional to the value that would have been otherwise created by Member States action alone'⁸⁶⁸. That is, the EAV represents the benefits achieved by a given policy measure, over and above the benefits that would have been achieved by using policy measures aimed at the same objective(s) at a different (e.g. national) level.

⁸⁶⁷ Rankin, J., for the Guardian, '[Refugee crisis: EU allocates EUR 700m in extra aid to cope with influx](#)', 2 March 2016; European Parliament, 2014, '[EU financing for NGOs in the area of home affairs, security and migration](#)'.

⁸⁶⁸ European Commission, Staff Working Paper '[The added value of the EU budget accompanying the document Commission Communication: A budget for Europe 2020](#)', SEC(2011) 867 final, 29 June 2011.

Democracy, the rule of law and fundamental values are core values of the EU that are enshrined in the TEU. As pointed out in Section 2, Member States commit to conform to these values upon EU accession. The way the EU complies with Article 2 TEU values and the way EU institutions exercise their powers are set in a number of EU guidelines⁸⁶⁹. Member States are also obliged to “assist each other in carrying out tasks which result from the Treaties”⁸⁷⁰. It is therefore evident that democracy, the rule of law and fundamental rights within the EU are not a vague set of empty slogans. They constitute a strong commitment with a set of operational guidelines and a general framework for cooperation and support. With this in mind, it seems logical that the best mechanism to address possible flaws and deficiencies in the application of these values that are defined and set out at EU level should also be applied at EU level.

Despite this statement, the following subsections investigate the options of a mechanism safeguarding democracy, the rule of law and fundamental values at the national and international (other than EU) levels. These two subsections are followed with a section concerning the subsidiarity rule, which is related to the EAV concept. The section concludes with a short summary and conclusions on the EAV of the EU mechanism to address the gaps in upholding Article 2 TEU values.

4.3.1 National level

Section 2.4 presents multiple ways in which the national actors are involved in upholding democracy, the rule of law and fundamental rights. These include the triple division of powers, judiciary and police system and a variety of civic society organisations with the involvement of the media. However, the effectiveness of national actors in Member States depends on the quality and capabilities of these institutions. These may be undermined by governmental policies. Gradual and persistent weakening of various national institutions, civic society and media by governments⁸⁷¹ makes the national mechanisms less reliable and less strong in upholding the values in question. Therefore, additional mechanisms at a higher level, with concrete sanctions, may be needed to protect these values effectively for all EU citizens.

4.3.2 International level

As analysed in Section 2.3, at the international level, there are two main institutions involved in safeguarding democracy, the rule of law and fundamental rights, namely the Council of Europe and the United Nations. All EU Member States are members of both organisations. The primary drawback of the mechanisms which can be used within these frameworks is that they have no legally binding force except for the PACE Monitoring Committee of the Council of Europe, which can sanction the countries failing to

⁸⁶⁹ See, for instance, Council of the European Union, ‘[Guidelines on methodological steps to be taken to check fundamental rights compatibility in the Council’s preparatory bodies](#)’, 10140/11, 18 May 2011; and European Commission, Commission Staff Working Paper ‘[Operational Guidance on taking account of Fundamental Rights in Commission Impact Assessments](#)’ (SEC(2011)0567), 6 May 2011. These examples were mentioned in the Editorial comments, ‘Safeguarding EU values in the Member States – Is something finally happening?’ [2015] 52 *Common Market Law Review*, p. 619.

⁸⁷⁰ Article 4(3) TEU.

⁸⁷¹ As was the case for example in Hungary and Poland, where the governments took actions targeted at weakening the independence of the judiciary system and the media.

implement the recommendations with the suspension of representation rights or, in the most drastic cases, a withdrawal from the Council of Europe. Regarding the UN, not all EU Member States have ratified all of the treaties relating to democracy, the rule of law and fundamental rights and their additional protocols; hence, not all of them are subject to the surveillance of the same UN mechanisms⁸⁷².

4.3.3 Subsidiarity

Subsidiarity is a concept related to the EAV. Non-compliance with the principle of subsidiarity would undermine the EAV of any measure or policy adopted by the EU. As defined in Article 5 TEU, subsidiarity means that in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.

There are no indications that any of the proposed EU mechanisms would be in conflict with the subsidiarity objective. While the horizontal measures focus mostly on monitoring and dialogue, the vertical measures would be launched only in crisis situations assessed as a 'systemic breach' of the values. Therefore, while day-to-day implementation of democracy, the rule of law and fundamental rights would be the primary responsibility of the Member States, the Union would intervene only in circumstances where national actions would not bring satisfactory effects in terms of adherence to EU values as laid down in the TEU. Indeed, individual breaches of EU values should be primarily dealt with by national actors and mechanisms, while relevant EU mechanisms should be triggered in situations where systemic breaches may be established.

Concluding remarks

The previous sections presented a set of arguments pointing at the European Added Value of addressing any systemic problem in a particular Member State at the EU level rather than at other (national or other international) levels. First of all, it has been argued that because EU values are set out in the Treaty, upholding them has become a joint responsibility of Member States upon their accession. Furthermore, both EU institutions and peer Member States have expressed their support for ensuring the implementation of these values and monitoring compliance with them. Therefore actions at EU level seem to be best suited to address problems concerning the values promoted by the EU. Secondly, other political levels do not seem to be sufficiently effective: while other international mechanisms available mostly lack the legislative force or offer mild sanctions, the national structures turn out to be too weak and too prone to national governments' influence to be able to address a situation where a 'systemic breach' has arisen. Furthermore, the EU mechanisms proposed in this study are fully consistent with the subsidiarity principle, leaving day-to-day responsibility for upholding the values in

⁸⁷² Moxham, L. and Stefanelli, J., 2013, [*Safeguarding the rule of law, democracy and fundamental rights: a monitoring model for the European Union*](#), Bingham Centre for the Rule of Law, p. 10.

question to Member States and offering a possibility of launching concrete instruments only in crisis situations.

5 Overall conclusions

This Research Paper has examined the existing EU mechanisms that aim to guarantee compliance with the values laid down in Article 2 TEU. This Paper contributes to the European Added Value Assessment accompanying the European Parliament's own legislative initiative on the possibility and added value of establishing a new EU mechanism on democracy, rule of law and fundamental rights following the European Parliament's Resolution of 10 June 2015 on the situation in Hungary⁸⁷³, where it urged the Commission to establish an EU mechanism to uphold Article 2 TEU values.

Although the precise meaning and scope of these fundamental values remains relatively undefined and vague, every single Member State, by deciding to join the EU, has committed itself to promoting and upholding these values. However, in recent years, serious concerns have been raised with individual Member State's adherence to values such as the rule of law. This has led to an in-depth review of the EU mechanisms in place to monitor and uphold its core values. The appraisal of the EU 'toolbox' to uphold democracy, the rule of law and fundamental rights has become a particular area of focus since the Commission introduced in 2014 a new instrument: the Rule of Law Framework.

This Report also covers additional existing mechanisms. With respect to the instruments which have their basis in EU primary law, the present Report examines Article 7 TEU, the infringement procedure (Articles 258, 259 and 260 TFEU) and the peer reviews under Article 70 TFEU. It is submitted that, despite their coercive power, some primary law mechanisms have not been used (Article 7 TEU) or rarely used (Article 259 TFEU). This can be explained by the high benchmarks set by Article 7 TEU, which are very difficult to meet. With respect to Article 7 TEU, its non-application may be explained inter alia by a general consideration that it constitutes a "last resort" measure, which demanding procedural thresholds make it virtually impossible to use in any event. As regards Article 259 TFEU, its underuse can be explained by the reluctance of Member States to criticise other Member States.

The EU may also rely on a number of soft law mechanisms to help promote and uphold Article 2 TEU values. These range from mechanisms equally applicable to all Member States, such as the Commission's Rule of Law Framework and the Council's Rule of Law dialogue to those with a more targeted scope, such as the Annual Reports on Human Rights of all three EU Institutions or the Cooperation and Verification Mechanism applicable to Bulgaria and Romania. A common denominator to these mechanisms is their lack of strict enforcement options as they may only result in recommendations to Member States.

Different actors with varying roles are involved in the functioning of these mechanisms. The Research Paper analyses the role of the EU as an external promoter of Article 2 TEU values, as well as its relationships with other international actors, including the Council of Europe and the UN, and with the Member States as well as individuals.

⁸⁷³ European Parliament, [Resolution of 10 June 2015 on the situation in Hungary](#), (2015/2700(RSP)), P8_TA-PROV(2015)0227, paragraph 12.

The Research Paper uncovers a number of cross cutting issues that could challenge the effectiveness and efficiency of these tools. In particular, the uncoordinated creation and/or use of these instruments and the variable actors involved create a confusing landscape that could threaten the trust that Member States and EU citizens ought to have in an institutional framework which is supposed to ensure the consistency, effectiveness and continuity of EU policies and actions. This brings into question the legitimacy of the EU itself.

A number of options have been assessed to address certain gaps and shortcomings of the different mechanisms identified in this Research Paper. These options include measures aimed at individual Member States (vertical options) and measures aimed at the EU as a whole, respecting the equality of Member States before the Treaties (horizontal options). The options are based on the premise that, if monitoring carried out through horizontal options uncovers a potential threat to Article 2 TEU values, vertical options could be activated to address the situation and, if need be, lead to the imposition of appropriate sanctions.

The combination of vertical and horizontal options, thus, addresses requests by different actors to establish an EU mechanism on democracy, rule of law and fundamental rights. The combination of these options may ensure a more comprehensive and coordinated effort in upholding these core values. At the same time, horizontal options could have the binding power to activate the sanctioning mechanisms of the EU (including the vertical options in this proposal), thus, fulfilling the expectations of the institutions and stakeholders demanding the establishment of the new EU mechanism on democracy, rule of law and fundamental rights.

In particular, an Inter-institutional agreement (IIA) among EU institutions, which would involve relevant stakeholders such as the EU FRA, national actors and the individual in a new monitoring cycle and includes a scoreboard to scrutinise Member States' compliance, could be a step forward in overcoming the identified gaps and shortcomings. This IIA could contribute to achieving an effectively functioning mechanism which truly defends Article 2 TEU values and reinforces the trust in the EU institutions and their legitimacy.

Annex 1: Overview of relevant provisions and mechanisms to uphold democracy, the rule of law and fundamental rights in the EU

Source	Tool	Scope	Actors involved and role	Limitations
EU primary law	Article 2 TEU	Sets out the values on which the EU is founded and which are common to all Member States.	EU and Member States: uphold Article 2 TEU values	Lack of clarity: Vague content and it may therefore be difficult to determine when Article 2 TEU is breached.
	Article 7 TEU	Establishes a preventive and reactive mechanism to protect EU values.	- Member States: proposal (1/3) - European Commission: proposal - European Parliament: consent - Council of the European Union: adopts a decision on: (a) the existence of a clear risk of a serious breach (Article 7(1) TEU): 4/5 (b) the existence of a serious and persistent breach (Article 7(2) TEU): unanimity (c) the suspension of certain rights of the Treaties (Article 7(3) TEU): qualified majority.	- Lack of enforceability: conditions for applying these mechanisms are almost impossible to fulfil (e.g. unanimity of the European Council required to determine the existence of a serious and persistent breach by a Member State); - Lack of clarity: vague definition of what constitutes “clear risk of a serious breach” and “a serious and persistent breach”; - Lack of political will to use this mechanism.
	Articles 258 - 260 TFEU	Under the infringement procedure, the Commission (258 TFEU) and Member States (259 TFEU) can bring Member States that have failed to fulfil an	Commission: delivers a reasoned opinion and, if the Member State concerned does not comply with it within the	Limited scope: to individual violations of EU law, not a systemic violation of EU values.

Source	Tool	Scope	Actors involved and role	Limitations
		obligation under the Treaties before the CJEU. If the CJEU finds this to be the case, the State concerned shall be required to take the necessary measures to comply with the judgment of the Court (260TFEU).	indicated timeframe, brings the matter before the CJEU - Member States: (1) bring the matter before the Commission and CJEU (2) the Member State concerned can submit observations - CJEU: require Member States to fulfil their obligations under the Treaty and, if they do not comply, impose fines.	
	Article 70 TFEU	Under peer reviews, the Commission and Member States collaborate to conduct 'peer reviews' or evaluations of Member State implementation of the EU policies in the area of freedom, security and justice.	- European Commission: proposal - Council: conducts evaluation with Member States - European Parliament and national parliaments: are informed of the results	- Limited scope: to the evaluation of implementation of EU policies with regard to the area of freedom, security and justice, although this area is, in fact, quite broad; - Lack of enforceability: non-binding recommendations; - Lack of clarity in defining how the Commission should carry out its role.
Soft-law	Commission Rule of Law Framework	A mechanism to uphold the core values of democracy, rule of law and fundamental rights as set in Article 2 TEU within the EU. The Framework aims to address emerging threats to the rule of law	- The Commission: launches this mechanism - The European Parliament and the Council have to be informed at every stage and on the results - FRA, the Council of Europe, the	- Lack of comprehensiveness: only covers the rule of law; - Lack of clarity in the benchmarks and definitions to trigger the Framework, which could affect the objectivity and effectiveness of the Framework;

Source	Tool	Scope	Actors involved and role	Limitations
		before they escalate.	Organisation for Security and Co-operation in Europe (OSCE) and other stakeholders: the Commission may rely on the information gathered by them to carry out the 'rule of law' assessment	• Lack of balance of powers and accountability: only the Commission has the discretion to decide when this mechanism should be activated; • Lack of transparency due to the confidential nature of the discussions with the Member State concerned; • Lack of dissuasive power: no sanctions are foreseen in the Framework; • While it has just been activated in relation to Poland's constitutional crisis, it has yet to prove its effectiveness in dealing with systemic threats to the rule of law.
	Council Annual Dialogue on Rule of Law	A dialogue among all Member States within the Council to promote and safeguard the rule of law in the framework of the Treaties. The dialogue is based on 'the principles of objectivity, non-discrimination and equal treatment of all Member States 'and to be conducted on a non-partisan and evidence-based approach'.	• European Council • Member States	• Lack of effectiveness: the design of this tool as a dialogue could negatively impact its effectiveness and ability to deliver concrete results; • Lack of clarity on how this will be implemented in practice and who will be responsible for collecting the evidence; • Lack of a well-defined structure to guide the dialogue and select the topics; • Lack of sufficient time to carry out the dialogue; • Lack of will from Member States to

Source	Tool	Scope	Actors involved and role	Limitations
				make observations on their peers and accept recommendations.
	Strategy for the effective implementation of the Charter of Fundamental Rights by the European Union	- To guarantee that at every step - from the EU legislative process to the application of EU law at national level - the rights and principles of the Charter are taken into account; - To improve EU citizens' understanding of fundamental rights' protection within the EU, providing them with concrete information on possible remedies and the role of the Commission in this field; - To monitor - through presenting Annual Reports - the progress achieved regarding the Charter's application.	The Commission	- Limited scope: to fundamental rights; - Lack of enforceability: Non-binding tool;
	Better Regulation Guidelines and Toolbox	A "check list" for the Commission's staff and support units carrying out impact assessments. Focus on what fundamental rights might be affected by a specific proposal and how they should be taken into account in each of the methodological steps.	The Commission, in particular, staff dealing with impact assessments	Lack of effectiveness: The implementation in practice of the Better Regulation is still to prove its effectiveness.
	Guidelines on methodological steps to be taken to check	Context and methodological guidance for the Council preparatory bodies in the process of checking compliance with fundamental rights in connection with	The Council and its preparatory bodies	Lack of effectiveness: The implementation in practice of the Better Regulation is still to prove its effectiveness.

Source	Tool	Scope	Actors involved and role	Limitations
	fundamental rights compatibility at the Council's Preparatory Bodies'	the proposals under discussion at the relevant Council preparatory bodies.		
	European Parliament Impact Assessment Handbook	Guidance for committees in using the EP impact assessment services.	The European Parliament	Lack of effectiveness: The implementation in practice of the Better Regulation is still to prove its effectiveness.
	European Commission Annual Report on the Application of the Charter of Fundamental Rights	The annual report monitors progress in the areas where the EU has powers to act, showing how the Charter has been taken into account in actual cases, notably when new EU legislation is proposed.	The European Commission	• Lack of comprehensiveness: The report does not provide a detailed assessment of the fundamental rights' situation in each Member State. • Lack of enforceability: This reporting mechanism does not foresee a follow-up procedure on the recommendations.
	European Council conclusions on fundamental rights and the rule of law	A dialogue among all Member States within the Council to promote and safeguard the rule of law in the framework of the Treaties.	The Council and Member States	• Lack of enforceability: Non-binding tool; • Lack of coordination and overlaps with other fundamental rights monitoring tools; • Lack of comprehensiveness: it is limited to the analysis of fundamental rights-related issues when Member States are applying EU law.

Source	Tool	Scope	Actors involved and role	Limitations
	European Parliament's Annual Report on the Situation of Fundamental Rights in the EU and other reports	Resolution on the fundamental rights' situation in the EU by theme. It offers a political forum with visibility and is important to exert political pressure on Member States in areas of concern.	The European Parliament	Lack of enforceability: The recommendations provided in this report are not legally binding. No systematic monitoring is foreseen on whether or how the recommendations have been followed-up by Member States.
	FRA reports, including the Annual Report on Fundamental Rights	Expertise relating to fundamental rights provided to the relevant institutions, bodies, offices and agencies of the EU and its MS when implementing EU law	FRA	Competence limitation and lack of enforceability: limited agency's mandate - FRA has only a supporting role in the EU legislative process
	CVM	Special mechanism to evaluate the progress made by Romania and Bulgaria in complying with EU fundamental values	• Member States (Romania, Bulgaria) • The Commission: is in charge of assessing progress achieved and necessary measures to be taken • The European Parliament and the Council: hold debates on the Commission's reports and progress achieved	• Lack of comprehensiveness: country-specific tool (only used with Bulgaria and Romania); • Lack of relevance: It addresses pre-accession-related and transitional situations, therefore not suitable for addressing a threat to Article 2 TEU values in all EU Member States; • Lack of effectiveness: problems to be addressed through CVM persist (e.g. corruption - see case-study on Bulgaria); • Lack of dissuasive power/enforceability: no sanctions.
	European Semester	Annual economic policy management tool set up to analyse national plans	The Commission	• Lack of democratic legitimacy; • Lack of objectivity: quality of the

Source	Tool	Scope	Actors involved and role	Limitations
		developed to achieve the targets of Europe 2020		assessment of the countries' results; - Limited scope: due to its focus on economic governance, its impact on the protection of Article 2 TEU values is rather limited too; - Lack of enforceability: the sanctioning arm of this mechanism has never been used.
	Justice Scoreboard	An informative and comparative tool which provides objective, reliable and comparable data on the functioning of justice systems in all Member States.	- The Commission - The Council of Europe Commission for the Evaluation of the Efficiency of Justice (CEPEJ), Eurostat, the World Bank, World Economic Forum and the World Justice Project: data used from these sources, among others.	- Lack of relevance: It does not fully assess compliance with the rule of law, nor does it evaluate democracy and protection of fundamental rights; - Limited scope: (i) It is based only on quantitative data, and does not include a qualitative examination. (ii) It does not focus on penal, administrative and constitutional justice. (iii) It offers little information on how the judiciary is positioned in an overall system of separation and balance of powers. - Lack of enforceability (non-binding).
	Anti-corruption report	The report highlights problems and good practices related to corruption. It focuses on cross-cutting issues of particular relevance to the EU level, as well as selected issues specific to each	- The Commission - Group of experts in collaboration with existing oversight mechanisms - the Council of Europe Group of	- Limited scope: this report does not cover corruption within the EU institutions; - Lack of enforceability (non-binding);

Source	Tool	Scope	Actors involved and role	Limitations
		Member State. It provides non-binding recommendations.	States against Corruption (GRECO), the OECD's Working Group on Bribery and the Mechanism for the Review of Implementation of UN Convention against Corruption (UNCAC); provide data	Lack of effectiveness: corruption continues to be considered as one of the issues of major concern in the EU.

Annex 2: Assessment of the Rule of Law Framework

Table 11 Criteria for the assessment of the Commission's Rule of Law Framework

No	Assessment criteria	Objectives of the Commission's Rule of Law Framework ⁸⁷⁴	Questions informing the criteria
1.	<i>Relevance</i> : is the extent to which the objectives and design of the Framework are consistent with (a) the established mechanisms to secure EU values and rights; and (b) the needs and priorities of the beneficiaries (Member States, citizens).	The Framework complements existing instruments , notably the Article 7 TEU procedure and the Commission's infringement proceedings.	- How does the Framework fit into the context of other mechanisms established to secure EU values and rights? - What is the added value of the Framework?
2.	<i>Comprehensiveness</i> is the extent to which the Framework covers, or has the potential to cover, in its entirety the subject matter for which it was envisioned (i.e. to react to systemic threats to the rule of law).	It is focused on the rule of law . The rule of law is the foundation of all values upon which the Union is based. By guaranteeing the respect of the rule of law, the protection of other fundamental values will be upheld.	- Is the new Framework comprehensive enough to address any potential risks of breaching the EU fundamental values by EU Member States? - Is there a balance between the mandate and competences of the Commission, as guardian of the Treaties, and the foreseen involvement of the other key stakeholders?
3.	<i>Effectiveness</i> is the extent to which the Framework attains	The Communication sets out a new Framework to ensure an effective and coherent protection of the	To what degree is the Framework executable? What are the risks?

⁸⁷⁴ Objectives have been selected based on the European Commission, Communication '[A new EU Framework to strengthen the Rule of Law](#)' of 19 March 2014, COM(2014) 158 final/2 and this press release: '[European Commission presents a framework to safeguard the rule of law in the European Union](#)', 11 March 2014.

No	Assessment criteria	Objectives of the Commission's Rule of Law Framework ⁸⁷⁴	Questions informing the criteria
	its objectives.	rule of law in all Member States. It is a framework to address and resolve a situation where there is a systemic threat to the rule of law.	Is the new Framework sufficiently comprehensive to address potential breaches of EU fundamental values by EU Member States?
4.	<i>Objectivity</i> is the extent to which the Framework is based on evidence and facts.	The Framework will apply in the same way in all Member States and will operate on the basis of the same benchmarks as to what is considered a systemic threat to the rule of law.	- Does the Framework suggest predictable triggers or indications of the typical circumstances under which the Commission will be inclined to react? - Does the Framework indicate how the Commission intends to give account of its deliberations, in more or less detail, over time?
5.	<i>Impartiality</i> is the extent to which the Framework is not biased and remains alien to external pressures (i.e. political pressure from Member States, from other Institutions)	The Framework will apply in the same way in all Member States .	Is the Framework based on appropriate criteria to ensure that the Commission takes an unbiased decision?
6.	<i>Efficiency</i> is the extent to which the Framework uses the least costly resources possible to achieve its objectives.	The purpose of the Framework is to enable the Commission to find a solution with the Member State concerned in order to prevent the emergence of a systemic threat to the rule of law that could develop into a "clear risk of a serious breach" within	- What resources does the Commission intend to devote to activating and maintaining the Framework? - What will be the internal decision-making procedures of the Commission for applying the Framework?

No	Assessment criteria	Objectives of the Commission's Rule of Law Framework ⁸⁷⁴	Questions informing the criteria
		the meaning of Article 7 TEU (i.e. the Commission has established an 'early warning tool' ⁸⁷⁵).	
7.	<i>Clarity</i> is the extent to which the Framework is based in coherent and intelligible criteria and the foreseeability of its procedural stages.	By setting up a new Framework to strengthen the Rule of Law the Commission seeks to provide clarity and enhance predictability as to the actions it may be called upon to take in the future, whilst ensuring that all Member States are treated equally.	- Does the new Framework contain clear, appropriate criteria and predictable procedural steps? - Would pre-defined triggering benchmarks be welcome?
8.	<i>Accountability</i> is the extent to which the European Commission has acted in compliance with agreed rules and standards and reports fairly and accurately on its performance.	The European Commission plays a central role in this new rule of law framework as the independent Guardian of the Union's values.	What existing accountability procedures could be used to ensure success of the Framework?
9.	<i>Transparency</i> is the extent to which the mechanism and the decisions taken therein, as well as the results, are accessible to external actors (i.e. other Institutions, Member States, the general public).	The launching of the Commission assessment and the sending of its opinion will be made public , but the content of the exchanges with the Member State concerned will, as a rule, be kept confidential, in order to facilitate quickly reaching a solution.	- In which procedural steps of the Framework could more or less transparency be desired or deemed constructive? - To what extent could more information regarding requests (if any) to trigger the Framework received by the Commission be published?

⁸⁷⁵ European Commission Press release database, '[European Commission presents a framework to safeguard the rule of law in the European Union](#)', 11 March 2014.

Relevance of the Rule of Law Framework

- *How does the Framework fit into the context of other mechanisms established to secure EU values and rights?*

The main objective of the Rule of Law Framework is to “[...] resolve future threats to the rule of law in Member States before the conditions for activating the mechanisms foreseen in Article 7 TEU would be met.” It is therefore meant to fill a gap between political persuasion and targeted infringement proceedings on the one hand, and Article 7 TEU, or the suspension of a Member State’s rights, on the other hand.⁸⁷⁶ In particular, the new Framework allows the Commission to react when there are specific indications of a ‘systemic threat to the rule of law’ and, if necessary, to provide specific recommendations to the Member State concerned⁸⁷⁷. Based solely on this description, the Framework established by the Commission appears to be relevant to address the current gap in the EU system.

Nevertheless, according to some critics the Commission’s objective to create a mechanism, which stands in between the political persuasion and the option of resorting to Article 258 TFEU and/or Article 7 TEU, could not be achieved. This is because the mechanism is not sufficiently dissuasive and does not indicate what would happen if the Member State concerned does not accomplish the Commission’s recommendation⁸⁷⁸. Without an effective legal sanction, this Framework has been criticised as being “nothing more than the sophisticated, institutionalised instrument of political persuasion for the sake of the rule of law”⁸⁷⁹.

Furthermore, the Council Legal Service issued an opinion in May 2014⁸⁸⁰ defending that the combined interpretation of Articles 2 and 5 TEU results in that “a violation of the values of the Union, including the rule of law, may be invoked against a Member State only when it acts in a subject matter for which the Union has competence based on specific competence-setting Treaty provisions”⁸⁸¹. Taking this into account, Article 7 TEU is the only legal basis “for a Union competence to supervise the application of the rule of law, as a value of the Union, in a context that is not related to a specific material competence or that exceeds its scope”⁸⁸². Out of that provision, the Council Legal Service concluded that “there is no legal basis in the Treaties empowering the institutions to create a new supervision mechanism of the respect of the rule of law by the Member States, additional to what is laid down in Article 7 TEU”⁸⁸³.

⁸⁷⁶ European Commission, Communication ‘[A new EU Framework to strengthen the Rule of Law](#)’ of 19 March 2014, COM(2014) 158 final/2, p. 3; European Commission Press Release Database, ‘[European Commission presents a framework to safeguard the rule of law in the European Union](#)’, 11 March 2014. Information collected through consultation with stakeholder (European Commission, 15 January 2016). See also Parliamentary Assembly, Council of Europe, ‘[European Union and Council of Europe human rights agendas: synergies not duplication](#)!’, Doc 13321 of 2 October 2013.

⁸⁷⁷ Timmermans, F., ‘[The European Union and the Rule of Law](#)’, Keynote speech at Conference on the Rule of Law, Tilburg University, 1 September 2015.

⁸⁷⁸ Fekete, B., ‘[New European Commission Framework to strengthen and protect the rule of law in Member States](#)’, Hungarian Academy of Sciences.

⁸⁷⁹ *Ibidem*.

⁸⁸⁰ Council of the European Union, Opinion of the Legal Service [10296/14](#), 27 May 2014.

⁸⁸¹ *Ibidem*, paragraph 16.

⁸⁸² *Ibidem*, paragraph 17.

⁸⁸³ *Ibidem*, paragraph 24.

The Framework has just been activated with regard to Poland's constitutional crisis⁸⁸⁴. The Commission has yet to intervene in the Hungarian crisis despite the repeated calls by the European Parliament⁸⁸⁵, civil society and even EU citizens through the European Citizens Initiative, although this has yet to collect sufficient signatures to be processed⁸⁸⁶. On the Parliament's request to undertake an in-depth monitoring process on the situation of democracy, the rule of law and fundamental rights in Hungary, at the plenary debate on 2 December 2015 the Commission replied that the conditions to activate the Rule of Law Framework regarding Hungary are, at this stage, not met⁸⁸⁷. In the European Parliament Plenary of 2 December 2015, Commissioner Jourova explained that "the Rule of Law Framework will be activated where there are clear indications of a systemic threat to the rule of law in a Member State, in particular in situations which cannot be effectively addressed by the infringement procedure and if the 'rule of law safeguards' which exist at national level no longer seem capable of effectively addressing these threats. These national 'rule of law safeguards' refer to all judicial and constitutional mechanisms and safeguards which aim to ensure the protection of democracy and fundamental rights in a Member State". Taking this into consideration, the Commissioner concluded that "concerns about the situation in Hungary are being addressed by a range of infringement procedures and pre-infringement procedures, and that also the Hungarian justice system has a role to play" and that, therefore, "the conditions to activate the Rule of Law Framework regarding Hungary are at this stage not met". However, the Commissioner added that the situation in Hungary will continue to be closely scrutinised⁸⁸⁸.

Furthermore, First Vice-President Frans Timmermans has also explained that the Commission has to "remain an impartial, objective and independent arbiter" and that it can only act "against actual measures, not polemics or speeches"⁸⁸⁹.

- *What is the added value of the Framework?*

The Framework to strengthen the rule of law within the EU has been described as a 'pre-Article 7' mechanism⁸⁹⁰. It allows for a dialogue between the Commission and the

⁸⁸⁴ European Commission, News, '[Rule of law in Poland: Commission starts dialogue](#)', 13 January 2016.

⁸⁸⁵ European Parliament, resolutions of 10 March 2011 on the media law in Hungary, [P7_TA\(2011\)0094](#); of 5 July 2011 on the Revised Hungarian Constitution [P7_TA\(2011\)0315](#); of 16 February 2012 on the recent political developments in Hungary(1) instructing the Committee on Civil Liberties, Justice and Home Affairs, in cooperation with the European Commission, the Council of Europe and the Venice Commission, to follow up the issue of whether and how the recommendations set out in that resolution have been implemented, and to present its findings in a report,- having regard to its resolutions; resolution of 3 July 2013 on the situation of fundamental rights: standards and practices in Hungary (pursuant to the European Parliament resolution of 16 February 2012) (2012/2130(INI), [P7_TA\(2013\)0315](#); European Parliament resolution of 10 June 2015 on the situation in Hungary (2015/2700(RSP)) [P8_TA-PROV\(2015\)0227](#); of 16 December 2015 on the situation in Hungary (2015/2935(RSP)) [P8_TA-PROV\(2015\)0461](#).

⁸⁸⁶ European Commission, Press Release Database, '[Commission registers European Citizens' Initiative on EU fundamental values in Hungary](#)', 30 November 2015.

⁸⁸⁷ European Parliament, '[Situation in Hungary: follow-up to the European Parliament Resolution of 10 June 2015](#)', P8_TA-PROV(2015)0461, point H.

⁸⁸⁸ Jourova, V., Intervention in the Plenary Session of 2 December 2015, point 17. '[Situation in Hungary: follow-up to the European Parliament Resolution of 10 June 2015](#)'. Information collected through consultation with stakeholders (European Commission, 15 January 2016).

⁸⁸⁹ Timmermans, F., '[The European Union and the Rule of Law](#)', Keynote speech at Conference on the Rule of Law, Tilburg University, 1 September 2015.

Member State concerned on issues where a 'systematic threat to the rule of law' has been identified without having to immediately launch an Article 7 TEU procedure. Article 7 TEU gives the Council the power to sanction any Member State for 'serious and persistent breach' of the EU values laid down in Article 2 TEU and to adopt preventive sanctions where there is 'a clear risk of a serious breach' of EU values. It therefore offers the possibility to discuss and address concerns in an easier and more straightforward manner before more serious legal measures are triggered⁸⁹¹.

The Commission is the key actor in this process on the premise⁸⁹² that it has the required competence, as a guardian of the treaties, to ensure the implementation of Article 2 TEU⁸⁹³. Based on this Framework, the Commission can now decide on its own discretion whether a concern, raised with regard to a certain Member State by the European Parliament, other Member States, civil society or EU citizens, is a systematic threat to the rule of law. In addition, for the first time a Commissioner has been explicitly tasked to coordinate the Commission's work in the area of rule of law (currently, Mr. Timmermans, the First Vice-President of the Commission)⁸⁹⁴.

The Commission's proposal, however, is characterised as rather cautious. The Commission did not seek to gain any new powers but to establish a new, additional tool to address threats to the rule of law which are of a systemic nature⁸⁹⁵. In that sense, the new framework recognises what has already been the Commission's approach in recent years⁸⁹⁶. It also follows the method of political persuasion which has been regularly applied in other instances with positive results⁸⁹⁷.

Some scholars argue that it is difficult to see what the Communication adds as the Framework has an equally high threshold to Article 7 TEU and it also allowed the Commission to issue "reasoned opinion". If there had ever been the political will to activate Article 7 TEU mechanism, this would also have been preceded by informal

⁸⁹⁰ European Commission, Communication '[A new EU Framework to strengthen the Rule of Law](#)' of 19 March 2014, COM(2014) 158 final/2, p. 6; and Kochenov, D. and Pech, L., 2015, [Upholding the Rule of Law in the EU: On the Commission's 'Pre-Article 7 Procedure' as a timid step in the right direction](#), European University Institute Working Papers, Department of Law, pp. 1-2.

⁸⁹¹ *Ibidem*.

⁸⁹² The Legal Service of the Council has argued that the Commission had no powers to establish the new Rule of Law Framework. See Council of the European Union, '[Ensuring respect for the rule of law in the European Union](#)', Doc. 15206/14, 14 November 2014.

⁸⁹³ European Commission, Communication '[A new EU Framework to strengthen the Rule of Law](#)' of 19 March 2014, COM(2014) 158 final/2, p. 6; and Kochenov, D. and Pech, L., 2015, [Upholding the Rule of Law in the EU: On the Commission's 'Pre-Article 7 Procedure' as a timid step in the right direction](#), European University Institute Working Papers, Department of Law, pp. 1-2.

⁸⁹⁴ Website of the European Commission, The Commissioners, First Vice-president (2014-2019) [Frans Timmermans](#).

⁸⁹⁵ Kochenov D. and Pech, L., 2015, [Upholding the Rule of Law in the EU: On the Commission's 'Pre-Article 7 Procedure' as a timid step in the right direction](#), European University Institute Working Papers, Department of Law, pp. 1-2.

⁸⁹⁶ Müller, J-W., in *Verfassungsblog*, '[The Commission gets the point – but not necessarily the instruments](#)', 17 March 2014.

⁸⁹⁷ Fekete, B., '[New European Commission Framework to strengthen and protect the rule of law in Member States](#)', Hungarian Academy of Sciences.

dialogue, just as the Commission already does before taking a Member State to the CJEU for breaching EU law⁸⁹⁸.

Comprehensiveness of the Rule of Law Framework

- *Is the new Framework comprehensive enough to address any potential risks of breaching the EU fundamental values by EU Member States?*

The Framework established by the Commission is focused on one of the values set out in Article 2 TEU, i.e. the rule of law. The Communication sets forth a definition of the rule of law, drawing on the case-law of the ECHR and the CJEU, which can be regarded as highly positive since it offers a clearer understanding of this key concept which contributes to the more effective application of this Framework. Furthermore, it is emphasised that the rule of law is “the backbone of any modern constitutional democracy”, which is “intrinsically linked to respect for democracy and for fundamental rights: there can be no democracy and respect for fundamental rights without respect for the rule of law and vice versa.”⁸⁹⁹

The above implies that if violations of fundamental rights and democratic values cannot be resolved at national level this may amount to a systemic threat to the rule of law and thus the Commission’s Framework could apply⁹⁰⁰. This may be seen as another positive aspect of the Communication, since threats to the independence of the judiciary in the EU is a problem in certain Member States⁹⁰¹. For example, the 2014 EU Justice Scoreboard shows that Romania, Bulgaria and Slovakia are the Member States where citizens have the worst perception on the independence of their judiciary systems⁹⁰². The data regarding the concerns on the independence of the judiciary in Romania and Bulgaria is also found in the 2016 reports of the Cooperation and Verification Mechanism⁹⁰³. However, some Member States have already questioned the links the Commission has made with regard to fundamental rights and democracy as a matter of competence and political impartiality⁹⁰⁴. First, the EU Charter of Fundamental Rights applies to Member States only when they implement EU law⁹⁰⁵. Second, the Commission might not be sufficiently impartial given the possibility of the next Commission President being one of the nominated candidates of the European political parties⁹⁰⁶. For instance, the UK

⁸⁹⁸ Butler I., [‘EU Still Failing to Protect Fundamental Rights’](#), Open Society European Policy Institute - Open Society Foundations, 12 March 2014.

⁸⁹⁹ European Commission, Communication [‘A new EU Framework to strengthen the Rule of Law’](#) of 19 March 2014, COM(2014) 158 final/2, pp. 3-4.

⁹⁰⁰ Democracy Reporting International, [‘In need of new tools: protecting democracy in EU Member States’](#), Briefing Paper 39, July 2013.

⁹⁰¹ Butler, I., 2013, [‘How to monitor the Rule of Law, Democracy and Fundamental Rights in the EU’](#), Open Society European Policy Institute - Open Society Foundations.

⁹⁰² European Commission, [The 2014 EU Justice Scoreboard](#), Figure 29, p. 26.

⁹⁰³ European Commission, [Report from the Commission to the European Parliament and the Council on progress in Bulgaria under the Co-operation and Verification mechanism \[SWD\(2016\) 15 final\]](#), COM(2016) 40 final, 27 January 2016, pp. 3-5; European Commission, [Report from the Commission to the European Parliament and the Council on progress in Romania under the Co-operation and Verification mechanism \[SWD\(2016\) 16 final\]](#), COM(2016) 41 final, 27 January 2016, pp. 1, 3-5, 12.

⁹⁰⁴ UK Parliament, [Documents](#) considered by the European Scrutiny Committee on 7 May 2014.

⁹⁰⁵ Article 51 CFR.

⁹⁰⁶ UK Parliament, [Documents](#) considered by the European Scrutiny Committee on 7 May 2014.

Parliament debated the Rule of Law Framework showing concerns on the basis of the Commission's competence to propose this mechanism, arguing that it is merely "political and not legally-binding"⁹⁰⁷.

This may explain to some extent why Article 2 TEU has been narrowed down to the rule of law. The rule of law can be regarded as a more technical issue with less scope for political controversy than the notions of democracy and human rights⁹⁰⁸. In practice, however, concerns have been raised about Member State compliance with fundamental rights as well as the principles of democracy. For instance, the OSCE report⁹⁰⁹ on the 2014 general elections in Hungary stated that the main governing party enjoyed an undue advantage because of restrictive campaign regulations. Biased media coverage and campaign activities blurred the separation between the political party and the State. The legal framework for these elections was amended substantially in recent years, negatively affecting the electoral process, including the removal of important checks and balances. These are just a few examples showing that flawed elections in a Member State fall under the scope of threats to democracy rather than the rule of law.

It is therefore not entirely clear to what extent the new Framework is comprehensive enough to address potential risks of breaching any of the EU fundamental values under Article 2 TEU. It is argued, however, that a lasting solution for the protection of Article 2 TEU may require a more comprehensive approach⁹¹⁰. An EU mechanism that is only aimed at the rule of law in Member States would only be a piecemeal solution considering that Article 2 TEU calls for upholding other equally central values, including human rights and democracy⁹¹¹. Nonetheless, as First Vice-President Timmermans has explained, "by guaranteeing the rule of law and the right to effective judicial protection, we at the same time ensure that fundamental rights will be effectively protected and electoral laws correctly applied"⁹¹².

- *Is there a balance between the mandate and competences of the Commission, as guardian of the Treaties, and the foreseen involvement of the other key stakeholders?*

Regarding interaction among different EU institutions, the Communication states that "the European Parliament and the Council will be kept regularly and closely informed of progress made in each of the stages".⁹¹³ With regard to the involvement of other stakeholders,⁹¹⁴ the Communication recognises the need to draw on the expertise of the EU Agency for Fundamental Rights or the Council of Europe. The Commission will, "as a rule and in appropriate cases", seek the advice of the Council of Europe and/or its Venice

⁹⁰⁷ *Ibidem*; point 1.22 (iv).

⁹⁰⁸ Democracy Reporting International, '[In need of new tools: protecting democracy in EU Member States](#)', Briefing Paper 39, July 2013.

⁹⁰⁹ OSCE/ODIHR Limited Election Observation Mission, '[Hungary, Parliamentary Elections, 6 April 2014: Final Report](#)', 11 July 2014.

⁹¹⁰ See also Democracy Reporting International, '[In need of new tools: protecting democracy in EU Member States](#)', Briefing Paper 39, July 2013.

⁹¹¹ Democracy Reporting International, '[Proposals for new tools to protect EU values: an overview](#)', Briefing Paper 43, November 2013.

⁹¹² Timmermans, F., '[The European Union and the Rule of Law](#)', Keynote speech at Conference on the Rule of Law, Tilburg University, 1 September 2015.

⁹¹³ European Commission, Communication '[A new EU Framework to strengthen the Rule of Law](#)' of 19 March 2014, COM(2014) 158 final/2, p. 8

⁹¹⁴ European Commission, Communication '[A new EU Framework to strengthen the Rule of Law](#)' of 19 March 2014, COM(2014) 158 final/2, p. 9.

Commission, and will coordinate its analysis with them in all cases “where the matter is also under their consideration and analysis”. For instance, regarding the Polish constitutional reform, which has triggered the Commission to start a dialogue under the Rule of Law Framework, the Commission has held meetings and debates both with the European Parliament and the Council⁹¹⁵, and has informed on their intention of relying on the Venice Commission to carry out an impartial, evidence-based assessment of the situation⁹¹⁶.

This consultation with other actors and stakeholders might not only improve the fact-finding, assessment and evaluation of the situation in a Member State, but also enhance the legitimacy of the Commission’s involvement in strengthening the rule of law in Member States⁹¹⁷. To a certain extent, however, a broad consultation process might decrease the efficiency of this Framework, which is, *inter alia*, aimed to provide a swift reaction to concerns identified in a Member State. Therefore, a better balance might be required between the comprehensiveness and efficiency of the Framework so as to improve the fact-finding, assessment and evaluation while ensuring that the process is carried out efficiently.

The Effectiveness of the Rule of Law Framework

- *To what degree can the Framework attain its objectives? What are the risks?*

The Communication has set out the new Framework to ensure an effective and coherent protection of the rule of law in all Member States. It is a Framework to address and resolve a situation where there is a systemic threat to the rule of law.

The effectiveness of the Framework is arguably the main issue to address⁹¹⁸. First, it is questionable whether this Framework completes the current EU legal and policy framework in a way that ensures full compliance with the common fundamental values and rights set out in Article 2 TEU (see Section 2). Second, there are also doubts whether this Framework is appropriate for achieving its immediate objectives, i.e. ‘effective and coherent protection of the *rule of law* in all Member States’. While the practical application of this Framework cannot yet be analysed⁹¹⁹, it contains certain features that can potentially hinder its effective application. These include, for example, the reliance on a dialogue between the Commission and Member States without having any binding and punitive means at the Commission’s disposal to actually enforce the compliance with Article 2 TEU.

First, this new Framework relies on the idea that a dialogue between the Commission and a Member State taking measures against the rule of law, sometimes even consciously, will have positive results⁹²⁰. Stakeholders, however, have pointed out that, almost by

⁹¹⁵ European Parliament, [Plenary Session on the situation in Poland](#), 18 to 21 January 2016.

⁹¹⁶ Website of the European Commission, [Introductory remarks by First Vice President Timmermans at the European Parliament's plenary session on the situation in Poland](#), 19 January 2016.

⁹¹⁷ Butler, I., 2013, ‘[How to monitor the Rule of Law, Democracy and Fundamental Rights in the EU](#)’, Open Society European Policy Institute - Open Society Foundations.

⁹¹⁸ Butler, I., 2013, ‘[How to monitor the Rule of Law, Democracy and Fundamental Rights in the EU](#)’, Open Society European Policy Institute - Open Society Foundations.

⁹¹⁹ This Framework was activated for the first time on 13 January 2015 with regard to Poland.

⁹²⁰ Kochenov, D. and Pech, L., 2015, [Monitoring and Enforcement of the Rule of Law in the EU: Rhetoric](#)

definition, a political climate in which one or more systemic threats to the rule of law have emerged may not be conducive to the productive dialogue the Commission strives for⁹²¹. In fact, the Commission's involvement might prove counterproductive in some cases. Politicians responsible for the breakdown of the rule of law might benefit politically from publicly defying the EU. Thus, the currently envisioned procedure might have little positive effect on the situation in the Member State and might even delay any meaningful action⁹²². It is argued therefore that while this Framework may deter some governments, for national politicians pursuing an 'illiberal democracy' agenda⁹²³ and determined to go head to head with the Commission, Article 7 TEU would still be the only option⁹²⁴.

Other issues that may hinder the application of the new Framework are the relatively open-ended nature of the concept of rule of law and other values such as democracy and lack of pre-defined benchmarks, despite recent efforts to define these terms (both these issues are analysed further under the criteria for clarity, comprehensiveness and objectivity). It is not clear how the notions of systemic threat or systemic breach should be understood and how the fact finding and assessment will be carried out. Many calls have been made for the establishment of an independent and regular monitoring of Member States in this area. These could involve other international organisations such as the Venice Commission, which has a high degree of credibility for independent assessments of constitutional matters and the OSCE/ODIHR with regard to election observation⁹²⁵. However, the Commission has the sole authority to determine whether a particular Member State ought to be assessed, which may jeopardise the effectiveness and credibility of this mechanism.

- *Is the new Framework sufficiently comprehensive to address potential breaches of EU fundamental values by EU Member States?*

Under the Framework, where a Member State has not taken appropriate steps to address the identified issue after receiving the Commission's rule of law opinion, this will result in a non-binding "recommendation of rule of law". The new Framework does not entail any automatic triggering of sanctioning procedures, particularly Article 7 TEU, and relies on the good will and cooperation of Member States. In light of the fact that Article 7 TEU

[and Reality](#), European Constitutional Law Review, vol. 11, issue 3, pp. 532-533; Kochenov, D. and Pech, L., 2015, [Upholding the Rule of Law in the EU: On the Commission's 'Pre-Article 7 Procedure' as a timid step in the right direction](#), European University Institute Working Papers, Department of Law, pp. 12-13.

⁹²¹ Meijers Committee, [Letter to Commissioner Reding: Note on the Commission Communication "A new EU Framework to strengthen the Rule of Law"](#), Ref. CM1406, 15 June 2014.

⁹²² *Ibidem*.

⁹²³ Zalan, E., for EU Observer, '[How to build an illiberal democracy in the EU](#)', 8 January 2016. In this piece, the author presents seven steps that conduct to 'illiberal democracies': "(1) winning an election by promising nothing concrete, but old glory, (2) dismantle constitutional checks and weaken other institutions set up to keep an eye on you, (3) take control of the state media and squeeze private media hard, (4) take control of finances, reign in oligarchs, investors and banks, (5) discredit the opposition and Western critics, (6) create an enemy or enemies, and (7) rewrite election rules". The term 'illiberal democracy' was coined by Fareed Zakaria, who first introduced this term in the article '[The Rise of Illiberal Democracy](#)', Foreign Affairs, Nov/Dec 1997.

⁹²⁴ Müller, J.W., in Verfassungsblog, '[The Commission gets the point – but not necessarily the instruments](#)', 17 March 2014.

⁹²⁵ Democracy Reporting International, '[In need of new tools: protecting democracy in EU Member States](#)', Briefing Paper 39, July 2013.

has not been used, it has been suggested as the Framework constitutes an intermediate, i.e. pre-Article 7 TEU, mechanism. Another option would be to provide for intermediate penalties⁹²⁶. Furthermore, any enforcement measure against a Member State should be subject to due process, including an effective remedy to the CJEU⁹²⁷. This would ensure that this Framework itself is founded on the principles of rule of law.

Objectivity of the Rule of Law Framework

- *Does the Framework suggest predictable triggers or indications of the typical circumstances under which the Commission will be inclined to react?*

When the former President of the Commission, Mr. Barroso, proposed the idea of a new rule of law framework, he suggested that it should be 'triggered by pre-defined benchmarks'⁹²⁸. The Commission's Communication reaffirmed this stating that the Framework is to apply in the same way in all Member States and to operate on the basis of the same benchmarks as what is considered 'a systemic threat to the rule of law'.⁹²⁹

Under Article 49 TEU, the Commission assesses how candidate countries' comply with values of Article 2 TEU⁹³⁰. Through the enlargement *acquis* the Commission could therefore provide relevant benchmarks, which would provide a sound basis for developing a mechanism for monitoring all or some of the values set out in Article 2 TEU.

However, these pre-defined benchmarks promised by the former President of the Commission have yet to be established⁹³¹. The lack of pre-established benchmarks that determine the triggering of the new Framework might affect the impartiality of the process. Although the Venice Commission is developing a set of legal and factual benchmarks, the aim of these is not to be used as a 'box-ticking' exercise, but to serve as guidance to monitor the situation of democracy, rule of law and fundamental rights at national level⁹³². These benchmarks are based on the 'Checklist for evaluating the state of the rule of law in single states' that the Venice Commission prepared as part of the 2011

⁹²⁶ Müller, J.W., in Verfassungsblog, '[The Commission gets the point – but not necessarily the instruments](#)', 17 March 2014.

⁹²⁷ Democracy Reporting International, '[Proposals for new tools to protect EU values: an overview](#)', Briefing Paper 43, November 2013. For a proposal to address the problem through judicial remedies, see: von Bogdandy, A., et al., 2012, *Reverse Solange – Protecting the Essence of Fundamental Rights Against EU Member States*, 49 Common Market Law Review, pp. 489–519.

⁹²⁸ Durão Barroso, J.M, '[State of the Union 2013 Address](#)', 11 September 2013. SPEECH/13/684.

⁹²⁹ European Commission, Communication '[A new EU Framework to strengthen the Rule of Law](#)' of 19 March 2014, COM(2014) 158 final/2, p. 6.

⁹³⁰ See i.e. the European Commission, '[Agenda 2000 – Commission Opinion on Slovakia's application for membership of the European Union](#)', Doc/97/20, Part C, p. 130. See also Council of the European Union, '[Draft Minutes of the 2099th Council Meeting \(Justice and Home Affairs\)](#)', Doc 8230/98, 29 July 1998, Annex.

⁹³¹ Kochenov, D. and Pech, L., 2015, '[Monitoring and Enforcement of the Rule of Law in the EU: Rhetoric and Reality](#)', European Constitutional Law Review, vol. 11, issue 3, pp. 532–533; Kochenov, D. and Pech, L., 2015, '[Upholding the Rule of Law in the EU: On the Commission's 'Pre-Article 7 Procedure' as a timid step in the right direction](#)', European University Institute Working Papers, Department of Law, p. 12.

⁹³² Intervention of Ms. Simona Granata-Menghini, Secretary of the Venice Commission, at the Hearing of the LIBE Committee, 10 December 2015. Information collected through consultation with stakeholder (Venice Commission, 19 January 2016).

Report on the Rule of Law⁹³³. The Venice Commission has expressed its intention of sharing these benchmarks with the European Commission⁹³⁴ and this has declared that it will remain open to the information provided by other actors and stakeholders, including the Venice Commission⁹³⁵. However, the European Commission has not made any other statements on the establishment of such benchmarks since it seems that the basis to trigger and implement the Framework is clearly established in the Communication⁹³⁶.

Moreover, the absence of a requirement or Commission commitment to declare *ex post* how it has used its powers under the Framework hinders predictability. If the Commission does not provide an indication concerning which situations it will act upon, the next best option would be to subsequently declare which situations it considered and its position regarding these situations.

For the assessment of the situation in a Member State, the Commission may draw on any sources it chooses. The Framework provides that the Commission may seek the advice of the Council of Europe and/or its Venice Commission 'in appropriate cases'⁹³⁷, but it fails to establish what these cases may be. It is left up to the Commission when to seek advice. On the one hand, this allows the Commission to come up with a comprehensive judgment – as opposed to working through checklists as in accession processes⁹³⁸. On the other hand, it is not clear how it would be ensured that the Framework is applied consistently in all Member States as neither the factors triggering the Framework nor the sources for assessing the situation in a Member State are sufficiently defined, although the Commission tends to differ, as it considers the Communication establishing the Framework to be thorough in this regard⁹³⁹.

- *Does the Framework indicate how the Commission intends to give account of its deliberations, in more or less detail, over time?*

The EU Framework does not provide for active monitoring of Member States and there are no common indicators developed for such monitoring. This seriously undermines the preventive function of the framework⁹⁴⁰. However, the extent to which indicators can be used is still being debated. In its 2003 Communication, the Commission stated that Article 7 TEU implied the need for a 'regular monitoring' mechanism to 'detect fundamental rights anomalies or situations where there might be breaches or the risk of

⁹³³ Venice Commission, [Report on the Rule of Law](#), CDL-AD(2011)003rev, 25-26 March 2011, Annex.

⁹³⁴ Intervention of Ms. Simona Granata-Menghini, Secretary of the Venice Commission, at the Hearing of the LIBE Committee, 10 December 2015. Information collected through consultation with stakeholder (Venice Commission, 19 January 2016).

⁹³⁵ European Commission, Communication '[A new EU Framework to strengthen the Rule of Law](#)' of 19 March 2014, COM(2014) 158 final/2. Information collected through consultation with stakeholders (European Commission, 15 January 2016).

⁹³⁶ Information collected through consultation with stakeholders (European Commission, 15 January 2016).

⁹³⁷ European Commission, Communication '[A new EU Framework to strengthen the Rule of Law](#)' of 19 March 2014, COM(2014) 158 final/2, pp. 7, 9.

⁹³⁸ Müller, J-W., in Verfassungsblog, '[The Commission gets the point – but not necessarily the instruments](#)', 17 March 2014.

⁹³⁹ Information collected through consultation with stakeholders (European Commission, 15 January 2016).

⁹⁴⁰ Butler, I., 2013, '[How to monitor the Rule of Law, Democracy and Fundamental Rights in the EU](#)', Open Society European Policy Institute - Open Society Foundations.

breaches of' the EU's Article 2 TEU values⁹⁴¹. The Commission has already begun some monitoring of access to justice in EU Member States through its Justice Scoreboard⁹⁴². Yet, it is limited to the role that courts play in economic development by providing efficient and timely justice in commercial and civil disputes and thus does not shed light on how effectively courts uphold the rule of law in terms of keeping national authorities' powers in check⁹⁴³.

Impartiality of the Rule of Law Framework

- *Are there safeguards in the Framework to ensure that the Commission takes an unbiased decision?*

Concerns have been raised that the Commission may not be entirely impartial, given the role of Member States in appointing commissioners and the relative influence in particular of larger Member States⁹⁴⁴. It is argued that the Commission has become more 'politicised' with the adoption of the Treaty of Lisbon. If the Commission starts resembling a government based on a partisan majority in the European Parliament, it will less likely be perceived as an impartial guardian of the Treaties⁹⁴⁵. However, precisely, as guardian of the Treaties, Member States have entrusted in the Commission the endeavour of safeguarding the general interest of the Union and the application of Union law⁹⁴⁶. In doing so, the Commission shall not "seek or take instructions from any Government or other institution, body, office or entity"⁹⁴⁷. The impartiality of the Commission is also required under the Staff Regulations⁹⁴⁸ and the Code of Conduct⁹⁴⁹. Breaching this obligation might lead to disciplinary and financial sanctions⁹⁵⁰. Furthermore, the Commission is subject to the scrutiny of the Investigation and Disciplinary Office (IDOC) and the European Anti-Fraud Office (OLAF)⁹⁵¹.

Efficiency of the Rule of Law Framework

⁹⁴¹ European Commission, [Communication from the Commission to the Council and the European Parliament on Article 7 of the Treaty on European Union - Respect for and promotion of the values on which the Union is based](#), COM/2003/0606 final, 15 October 2003, p. 7.

⁹⁴² European Commission Press Release Database, '[EU Justice Scoreboard: European Commission broadens the scope of its analysis of Member States' justice systems](#)', 27 March 2013.

⁹⁴³ Butler, I., 2013, '[How to monitor the Rule of Law, Democracy and Fundamental Rights in the EU](#)', Open Society European Policy Institute - Open Society Foundations, p. 2.

⁹⁴⁴ Democracy Reporting International, '[Proposals for new tools to protect EU values: an overview](#)', Briefing Paper 43, November 2013.

⁹⁴⁵ *Ibidem*.

⁹⁴⁶ Article 17(1) TEU.

⁹⁴⁷ Article 17(3) second paragraph TEU.

⁹⁴⁸ [Regulation No 31 \(EEC\), 11 \(EAEC\)](#), laying down the Staff Regulations of Officials and the Conditions of Employment of Other Servants of the European Economic Community and the European Atomic Energy Community, OJ P 045 14.6.1962, p. 1385.

⁹⁴⁹ European Commission, [Code of Conduct for Commissioners](#), C(2011) 2904 final, 20 April 2011.

⁹⁵⁰ [Regulation No 31 \(EEC\), 11 \(EAEC\)](#), laying down the Staff Regulations of Officials and the Conditions of Employment of Other Servants of the European Economic Community and the European Atomic Energy Community, OJ P 045, 14 June 1962, Articles 22 and 51, Annex IX Disciplinary proceedings.

⁹⁵¹ *Ibidem*; European Commission, [Decision implementing provisions on the conduct of administrative inquiries and disciplinary procedures](#), C(2004) 1588, 30 June 2004, Articles 1 and 2.

- *What resources does the Commission intend to devote to activating and maintaining the Framework?*
- *What will be the internal decision-making procedures of the Commission for applying the Framework?*

The purpose of the Framework is to enable the Commission to find a solution with the Member State concerned to prevent the emerging of a systemic threat to the rule of law that could develop into a 'clear risk of a serious breach' within the meaning of Article 7 TEU (i.e. the Commission has aimed to establish an 'early warning tool'⁹⁵²).

While it is not possible to assess the actual efficiency of this Framework, several observations can be made. First, the new Framework is designed as a procedure that would be easier to trigger and that offers a timely response to specific concerns at stake. Compared to Article 7 TEU and the traditional infringement procedure, the new Framework aims to allow EU action at an early stage, and offers the possibility of entering into a political dialogue with the relevant Member State as soon as possible in a more structured framework than before. The unclear threshold to activate the Framework can, however, undermine the efficiency of the process. There might also need to be a better balance achieved between ensuring a swift response and allowing more systematic involvement of other relevant actors in this process⁹⁵³.

The efficiency of the application of the framework will depend primarily on the political will of the Commission to act and the resources allocated for this purpose.

Clarity of the Rule of Law Framework

- *Does the new Framework contain clear, appropriate criteria and predictable procedural steps?*

Clarity and predictability of the new Framework is essential for the Member States to understand their obligations and consequences related to the failure in fulfilling these. By setting up this Framework the Commission seeks to 'provide clarity and enhance predictability' for the actions it may be called upon to take in the future⁹⁵⁴.

The Commission has defined four principles on which this Framework is based⁹⁵⁵: 1) a dialogue with the Member State concerned; 2) an objective and thorough assessment of the situation at stake; 3) ensuring the principle of equal treatment; 4) requesting that the Member State concerned takes swift and concrete actions to address the systemic threat and avoid the use of Article 7 TEU. These principles have already been analysed under previous criteria. Regarding procedural steps, the Framework foresees four main steps⁹⁵⁶: 1) an assessment of whether there are "clear indications of a systemic threat to the rule of law"; 2) sending a 'rule of law opinion' to the Member State concerned; 3) in case the Member State has not taken appropriate action, issuing a 'rule of law recommendation';

⁹⁵² European Commission Press release database, '[European Commission presents a framework to safeguard the rule of law in the European Union](#)', 11 March 2014.

⁹⁵³ Meijers Committee, [Letter to Commissioner Reding: Note on the Commission Communication "A new EU Framework to strengthen the Rule of Law"](#), Ref. CM1406, 15 June 2014.

⁹⁵⁴ European Commission, Communication '[A new EU Framework to strengthen the Rule of Law](#)' of 19 March 2014, COM(2014) 158 final/2, p. 6.

⁹⁵⁵ *Ibidem*, p. 7.

⁹⁵⁶ *Ibidem*, p. 7-8.

and 4) carrying out follow-up to the recommendation, taking into account the possibility of activating one of the mechanisms set out in Article 7 TEU”⁹⁵⁷.

The key concept for activating this Framework is thus ‘systemic threats’ to the rule of law⁹⁵⁸. The Communication refers to “situations where the authorities of a Member State are taking measures or are tolerating situations which are likely to systematically and adversely affect the integrity, stability or the proper functioning of the institutions and the safeguard mechanisms established at national level to secure the rule of law”⁹⁵⁹. Some general examples are provided of what might satisfy the threshold for action: ‘the political, institutional and/or legal order of a Member State as such, its constitutional structure, separation of powers, the independence or impartiality of the judiciary or its system of judicial review including constitutional justice where it exists, must be threatened – for example, as a result of the adoption of new measures or of widespread administrative practices of public authorities and lack of domestic redress.’⁹⁶⁰

Other than this, a definition of ‘systemic threat’ is not provided, nor is a differentiation with ‘systematic violation’ made⁹⁶¹. To activate the preventive mechanism under Article 7 TEU⁹⁶² the threshold is the existence of a “clear risk of a serious breach” of Article 2 TEU and for Article 7 TEU sanctioning mechanism⁹⁶³ is the existence of a “serious and persistent breach”. The Commission has not explained or established criteria to distinguish these from the “systemic threat to the rule of law” necessary to launch the new Framework⁹⁶⁴.

As pointed out by some stakeholders, even a small number of isolated but very serious events could expose a systemic threat which might warrant action on the part of the EU and the framework aims to address systemic ‘threats’, rather than actual systemic ‘violations’ or a complete breakdown of the rule of law⁹⁶⁵. For example, countries that would be caught by a new mechanism, as flagged by the vice-president of the Commission Viviane Reding, included Hungary and Romania⁹⁶⁶, which witnessed government interference with the judiciary. It is argued, however, that these examples are more an actual serious breach of the fundamental values, rather than a mere ‘systemic

⁹⁵⁷ *Ibidem*, p. 8.

⁹⁵⁸ *Ibidem*, p. 6.

⁹⁵⁹ *Ibidem*, p. 6.

⁹⁶⁰ *Ibidem*, p. 7.

⁹⁶¹ Kochenov, D. and Pech, L., 2015, [Monitoring and Enforcement of the Rule of Law in the EU: Rhetoric and Reality](#), European Constitutional Law Review, vol. 11, issue 3, p. 532-533; Kochenov, D. and Pech, L., 2015, [Upholding the Rule of Law in the EU: On the Commission's 'Pre-Article 7 Procedure' as a timid step in the right direction](#), European University Institute Working Papers, Department of Law, p. 12.

⁹⁶² Article 7(1) TEU.

⁹⁶³ Article 7(2) TEU.

⁹⁶⁴ Kochenov, D. and Pech, L., 2015, [Monitoring and Enforcement of the Rule of Law in the EU: Rhetoric and Reality](#), European Constitutional Law Review, vol. 11, issue 3, p. 532-533; Kochenov, D. and Pech, L., 2015, [Upholding the Rule of Law in the EU: On the Commission's 'Pre-Article 7 Procedure' as a timid step in the right direction](#), European University Institute Working Papers, Department of Law, p. 12.

⁹⁶⁵ Meijers Committee, [Letter to Commissioner Reding: Note on the Commission Communication "A new EU Framework to strengthen the Rule of Law"](#), Ref. CM1406, 15 June 2014.

⁹⁶⁶ Reding, V., [The EU and the Rule of Law - What next?](#), Speech at the Centre for European Policy Studies on 4 September 2013, SPEECH/13/677.

threat'; if the Framework is not initiated until a large number of violations have occurred, it might be too late to act upon a 'threat'⁹⁶⁷.

The terms for applying the Framework are therefore not entirely clear and it might be difficult for the procedure to safeguard Article 2 TEU values in practice. Stakeholders have suggested that if the new mechanism is to be meaningful, the concept of 'systemic threat' regarding both isolated violations and systemic violations needs to be clarified⁹⁶⁸.

Accountability of the Rule of Law Framework

- *What existing accountability procedures could be used to ensure the success of the Framework?*

The Commission has a central role to play in the new Rule of Law Framework as 'the independent Guardian of the Union's values'⁹⁶⁹. While this is questioned by other actors⁹⁷⁰, the allocation of authority and responsibility is clear⁹⁷¹. This Framework specifically puts the Commission in the centre of the process as the responsible institution for activating the Rule of Law Framework, performing the assessment, initiating dialogue and providing recommendations. The Commission may use external expertise, but is not obliged to do so.

The Commission is arguably well placed for this task as it already has vast experience in assessing compliance with Article 2 TEU by the candidate countries in their pre-accession phase (Article 49 TEU) and 'exporting' these values to third countries (Article 21 TEU). This may also contribute to the coherence between and after accession, as well as between its internal policy framework and its external dimension. From the point of view of citizens, it might be clearer if one single institution is in charge; reducing complexities in the process may secure greater citizen engagement in European affairs. Furthermore, a crisis in a Member State and possible future EU responses, as a rather sensitive matter, would require a mechanism that is 'simple and provides clear accountability'⁹⁷².

While the Commission justifies its mandate to design and implement the Rule of Law Framework in its role as guardian of the treaties, other actors, might consider that the proposal of the Commission pertains to areas so far reserved to Member States and, thus, carrying the responsibility in areas so far reserved for Member States might not be politically attractive in relation to the Council⁹⁷³ and some Member States⁹⁷⁴. The Council

⁹⁶⁷ For instance, Meijers Committee, [Letter to Commissioner Reding: Note on the Commission Communication "A new EU Framework to strengthen the Rule of Law"](#), Ref. CM1406, 15 June 2014. According to Meijers Committee incidents which might amount to systemic threats would be the illegitimate dismissal of one or more judges or the illegal arrest of journalists.

⁹⁶⁸ Meijers Committee, [Letter to Commissioner Reding: Note on the Commission Communication "A new EU Framework to strengthen the Rule of Law"](#), Ref. CM1406, 15 June 2014. Kochenov, D. and Pech, L., 2015, [Monitoring and Enforcement of the Rule of Law in the EU: Rhetoric and Reality](#), *European Constitutional Law Review*, vol. 11, issue 3, p. 532-533.

⁹⁶⁹ European Commission, Communication '[A new EU Framework to strengthen the Rule of Law](#)' of 19 March 2014, COM(2014) 158 final/2.

⁹⁷⁰ Council of the European Union, Opinion of the Legal Service [10296/14](#), 27 May 2014. See also Council of the European Union, '[Ensuring respect for the rule of law in the European Union](#)', Doc. 15206/14, 14 November 2014.

⁹⁷¹ European Commission, Communication '[A new EU Framework to strengthen the Rule of Law](#)' of 19 March 2014, COM(2014) 158 final/2.

⁹⁷² Democracy Reporting International, '[Proposals for new tools to protect EU values: an overview](#)', Briefing Paper 43, November 2013.

⁹⁷³ Council of the European Union, Opinion of the Legal Service [10296/14](#), 27 May 2014 as referred

was originally the main actor regarding the application Article 7 TEU and together with the Commission, was also instrumental in designing the CVMs for Bulgaria and Romania⁹⁷⁵. Yet, in a Union of 28 countries, it has become more difficult to use Article 7 TEU⁹⁷⁶. Therefore, many stakeholders, including Foreign Ministers of Denmark, Finland, Germany and the Netherlands, have called for the Commission to come up with an initiative for a new and more effective mechanism to safeguard fundamental values in Member States⁹⁷⁷. Many have also stressed that the European Parliament should continue to work as a political forum with more visibility and connection to citizens. For instance, Orbán's debate with the EP is perceived a positive moment of public accountability at European level⁹⁷⁸.

While many commentators agree that the Commission should play the central role in this process, some argue that the triggering of the Rule of Law Framework should be possible by other key stakeholders. It is proposed that, for instance, the Council, the European Parliament and the parliaments of Member States, as well as national human rights' bodies, the FRA and the Council of Europe Commissioner for Human Rights should be able to formally request the Commission to initiate a dialogue procedure⁹⁷⁹.

The EU's task is to create strong levels of vertical accountability in cases where domestic mechanisms fail to work⁹⁸⁰ and the Commission as the 'guardian of the Treaties' seems to be best placed to take the leading role.

Transparency of the Rule of Law Framework

- *In which procedural steps of the Framework could more or less transparency be desired or deemed constructive?*

to in Council of the European Union, '[Ensuring respect for the rule of law in the European Union](#)', Doc. 15206/14, 14 November 2014.

⁹⁷⁴ For instance, the position of the UK Government is that: "The Treaties confer clear roles on the Council and the European Council in relation to the rule of law; the Government does not want to see these undermined by the proposed framework. It is the Council and the European Council that make determinations under the procedures in Article 7 TEU. Moreover before determining that there is a "clear risk of a serious breach" by a Member State of the values in Article 2 TEU, the Council may already address recommendations to the Member State concerned. The Commission in contrast is one of three actors that can initiate the procedures under Article 7 TEU. So while the Commission has a legitimate role in assessing whether a referral needs to be made under Article 7 TEU and formulating a process that guides this work, this should not supersede the Council's role." See the UK Parliament, [Documents](#) considered by the European Scrutiny Committee on 7 May 2014.

⁹⁷⁵ Wennerström, E., and Valter, Å, 2015, [The Rule of Law in Times of Financial Crises – How EU Rule of Law Correlates with the Market](#), Scandinavian Studies in Law, Vol. 60, p. 618.

⁹⁷⁶ *Ibidem*.

⁹⁷⁷ *Ibidem*. See also the [Letter of the Foreign Ministers of Denmark, Finland, Germany and the Netherlands to the President of the European Commission](#) (6 March 2013). The letter was also sent to the Presidency of the Council.

⁹⁷⁸ Democracy Reporting International, '[From commitment to action: Fundamental values in EU Member States](#)', Report on an expert roundtable on legal mechanisms and reforms of EU law, Berlin, 30 January, 2014, p. 3.

⁹⁷⁹ Meijers Committee, [Letter to Commissioner Reding: Note on the Commission Communication "A new EU Framework to strengthen the Rule of Law"](#), Ref. CM1406, 15 June 2014.

⁹⁸⁰ Democracy Reporting International, '[In need of new tools: protecting democracy in EU Member States](#)', Briefing Paper 39, July 2013.

The Communication states that the launching of the Commission assessment and the sending of its opinion will be made public, but the content of the exchanges with the Member State concerned will, as a rule, be kept confidential, in order to facilitate reaching a solution quickly⁹⁸¹. The Commission has foreseen this to avoid a “naming and shaming” which could jeopardise achieving a positive outcome in an already sensitive political situation⁹⁸². However, the Framework has just been activated with regard to Poland and it seems that keeping the secrecy of the exchanges with the concerned Member State is proving somehow challenging: one of the two letters Commissioner Timmermans sent to Warsaw was leaked to the press⁹⁸³ and the press coverage on the issue has been voluminous⁹⁸⁴.

From the point of effectiveness, this partial confidentiality may prevent a meaningful and effective enforcement of EU values⁹⁸⁵. The procedure would have a “far more persuasive power – and ensure a more accurate picture of the situation – if all the Member-States, the European Parliament, human rights bodies including the EU Agency for Fundamental Rights and civil society organisations were involved in this dialogue”⁹⁸⁶. One may ask under which circumstances the Commission should publish any rule of law opinion adopted, instead of just communicating it with the Member State concerned, and conversely when the Commission should publish Member State responses to its opinions.

Furthermore, Article 11 TEU provides that EU institutions shall, by appropriate means, give citizens and representative associations the opportunity to make known and publicly exchange their views in all areas of EU action. The institutions should maintain an open, transparent and regular dialogue with representative associations and civil society. As the CJEU has confirmed ‘a lack of information and debate is capable of giving

⁹⁸¹ European Commission, Communication ‘[A new EU Framework to strengthen the Rule of Law](#)’ of 19 March 2014, COM(2014) 158 final/2, p. 6.

⁹⁸² *Ibidem*, p. 8; Kochenov, D. and Pech, L., 2015, *Monitoring and Enforcement of the Rule of Law in the EU: Rhetoric and Reality*, European Constitutional Law Review, vol. 11, issue 3, p. 533; Kochenov, D. and Pech, L., 2015, *Upholding the Rule of Law in the EU: On the Commission’s ‘Pre-Article 7 Procedure’ as a timid step in the right direction*, European University Institute Working Papers, Department of Law, p.12.

⁹⁸³ Brunsden, J., for Financial Times, ‘[Leaked: Timmermans letter to Warsaw](#)’, 13 January 2016.

⁹⁸⁴ Just to cite some News Articles: European Commission, Fact Sheet ‘[College Orientation Debate on recent developments in Poland and the Rule of Law Framework: Questions & Answers](#)’, 13 January 2016; De La Baume, M., for Politico, ‘[EU launches ‘rule of law’ probe of Poland](#)’, 13 January 2016; EurActiv, ‘[EU takes unprecedented step against Poland over rule of law](#)’, 4 January 2016; LaLibre, ‘The European Commission will debate the situation of the rule of law in Poland’ ([La Commission européenne va débattre de la situation de l’État de droit en Pologne](#)), 3 January 2016; Valero, C., for El Mundo, ‘Poland faces the European Commission for opening a file against it’ ([Polonia se enfrenta a la Comisión Europea por abrirle un expediente](#)), 13 January 2016; Berendt, J., for The New York Times, ‘[New Polish Government Faces EU Investigation](#)’, 13 January 2016; Lisicki, P. for The Guardian, ‘[Brussels has overstepped the mark by interfering in Poland’s affairs](#)’, 18 January 2016.

⁹⁸⁵ European Commission, Communication ‘[A new EU Framework to strengthen the Rule of Law](#)’ of 19 March 2014, COM(2014) 158 final/2, p. 8; Kochenov, D. and Pech, L., 2015, *Monitoring and Enforcement of the Rule of Law in the EU: Rhetoric and Reality*, European Constitutional Law Review, vol. 11, issue 3, p. 533; Kochenov, D. and Pech, L., 2015, *Upholding the Rule of Law in the EU: On the Commission’s ‘Pre-Article 7 Procedure’ as a timid step in the right direction*, European University Institute Working Papers, Department of Law, p.12.

⁹⁸⁶ Butler, I., ‘[EU Still Failing to Protect Fundamental Rights](#)’, Open Society European Policy Institute - Open Society Foundations, 12 March 2014.

rise to doubts in the minds of citizens, not only as regards the lawfulness of an isolated act, but also as regards the legitimacy of the decision-making process as a whole'⁹⁸⁷.

The Commission has been invited to trigger this Framework against Hungary; however, for the time being, it decided not to⁹⁸⁸. To put the Commission under pressure to open an Article 7 TEU procedure against Hungary, EU citizens submitted a European Citizens' Initiative. It was registered by the Commission on 30 November 2015⁹⁸⁹. According to Article 11 TEU, not fewer than one million citizens who are nationals of a significant number of Member States may take the initiative of inviting the European Commission, within the framework of its powers, to submit any appropriate proposal on matters where citizens consider that a legal act of the Union is required for the purpose of implementing the Treaties⁹⁹⁰.

Concluding remarks

The analysis above revealed a number of shortcomings in the current EU framework to effectively deal with Article 2 TEU violations in Member States. It is criticised as being overly focused on the rule of law issues to ensure full compliance with the other Article 2 TEU values of democracy and fundamental rights. It is also not entirely clear what situations and evidence will trigger this Framework, nor does the Framework provide for binding measures to enforce compliance with Article 2 TEU. This lack of clarity in the criteria, benchmarks and procedural aspects might have a direct link with the political concerns that surround the Framework, which could be interpreted as a matter of lack of trust. As demonstrated with regard to accountability, there does not seem to be a common understanding on whether the Commission has the authority to establish and use this Framework. This does not contribute to the principle of mutual trust in which the Union is founded.

⁹⁸⁷ CJEU, [Case C-36/05 P](#) Judgment of the Court (Grand Chamber) of 1 July 2008 *Kingdom of Sweden and Maurizio Turco v Council of the European Union*, ECLI:EU:C:2008:374, paragraph 59.

⁹⁸⁸ European Parliament, Resolution of 10 June 2015 on the situation in Hungary, (2015/2700(RSP)), [P8_TA-PROV\(2015\)0227](#), paragraph 12. Jourova, V., Intervention in the Plenary Session of 2 December 2015, point 17. '[Situation in Hungary: follow-up to the European Parliament Resolution of 10 June 2015](#)'. Information collected through consultation with stakeholders (European Commission, 15 January 2016).

⁹⁸⁹ European Commission, Press release, '[Commission registers European Citizens' Initiative on EU fundamental values in Hungary](#)', 30 November 2015.

⁹⁹⁰ Article 11 TEU. The procedures and conditions required for such a citizens' initiative are determined in accordance with the first paragraph of Article 24 TFEU.

Annex 3: Table of options

EP Working theme	Option	Brief overview	Legal feasibility	Political feasibility	Economic feasibility	Selected
Methods and existing mechanisms	Using Article 2 TEU in conjunction with Articles 4(3), 3(1) and 13(1)	Articles 3(1) and 13(1) TEU oblige the EU and its institutions to promote EU values and Article 4(3) sets a duty of loyalty which prohibits 'sins of commission and omission'. Under these provisions MS and EU (including institutions) are obliged to uphold Article 2 TEU values and, thus, if these are infringed, measures can be adopted	It does not require Treaty Change	The problem seems to be that this interpretation needs to be operationalised through concrete measures.	Since this option does not require Treaty change it seems that it would be economically feasible since it would only consist of implementing in conjunction provisions that already exist. However, the specifics of how these would be implemented (who) are not determined and, thus, specifying the economic consequences proves challenging.	No , this is more a legal basis than a policy option
Methods and existing mechanisms	Using Article 2 TEU in combination with Article 19 TEU	Article 19 TEU provides that national courts have an active role in the effective application of EU law. It could be interpreted that undermining their role could constitute an infringement of EU law.	It does not require Treaty Change	It can be argued that there is no direct link between changes to the national judiciary and the implementation of EU law at MS level.	This option does not require Treaty change. However, the political implications (drawing the aforementioned direct link) could entail undesirable economic consequences.	No , this is more a legal basis than a policy option
Methods and existing mechanisms	Using Article 260 TFEU after Article 258	If the ECJ finds an MS to be in violation, then the Commission could bring another action before the	The power of the EU to adopt financial sanctions is limited and	Sanctions are almost never an effective way to bring about	Adopting financial sanctions could entail economic drawback for population benefitting from	Yes

EP Working theme	Option	Brief overview	Legal feasibility	Political feasibility	Economic feasibility	Selected
	TFEU	Court requesting it to order levying a fine or lump-sum from the MS (it could consist of withholding the amount due directly from moneys assigned to the MS from EU budget)	needs a specific legal basis: changes in the framework of Article 260 TFEU might be necessary	compliance. In the most extreme cases, MS which are consciously adopting measures in breach of Article 2 TEU values, might prefer to pay than to comply.	EU funding.	
Methods and existing mechanisms: using Article 2 TEU as legal basis for infringement proceedings	Bundle of infringement actions	It would consist of an extension of infringement procedure. The EC would bring a 'bundle' of infringement actions against an MS under Article 2 TEU which would aim to show the 'systemic' nature of the threat to the rule of law. This could also be used to the accumulation of Article 259 TFEU actions (see Kochenov)	This option would be legally feasible because it would not require Treaty Change and it would just consist of an extension of the already existing infringement procedure under Article 258 TFEU.	To be assessed on the basis of input by SE, EP and workshop	On the basis of an interview held with the CJEU, this would be possible so far as the Commission has the necessary resources to bring such actions to the Court.	Yes
Methods and existing mechanisms: using Article 2 TEU as legal basis for infringement	Create an infringement procedure on the basis of Article 2 TEU	Self-descriptive	It would require Treaty Change: slow and burdensome processes, not appropriate to deal with imminent rule of law crisis but	All measures involving Treaty Change can present political resistance from MS, overall if it means that their actions might be	It could be resource-intensive to bring cases under this legal basis due to the need to gather evidence.	No

EP Working theme	Option	Brief overview	Legal feasibility	Political feasibility	Economic feasibility	Selected
proceedings			can offer a more long-term solution and increase legitimacy of EU action (Closa&Kochenov)	more susceptible to scrutiny and, if applicable, sanction		
Methods and existing mechanisms	Improve the Rule of Law Framework	- Clarify the concept of 'systemic threat' and its relationship with the closely linked but not identical notions of serious threats, systemic violations and systemic deficiencies; - Adopt pre-defined triggering benchmarks; - Agree to systematically investigate any Member State referred under this mechanism by the European Parliament, the FRA or any national government or parliament or the Venice Commission; - Justify any decision not to initiate a 'rule of law dialogue' when any of the bodies previously	This option would be legally feasible because it would not require Treaty Change and it would just consist of an extension of the already existing Framework.	There could be concerns on making public the 'rule of law opinion' and the communications with the MS since the aim of the framework is to enhance the dialogue and reach a solution as soon as possible to avoid an escalation of the rule of law crisis.	It is too early to carry out an economic assessment of the Rule of Law Framework. Furthermore, it has to be taken into account that the Framework is a 'crisis mechanism'. This means that the economic cost will depend on the circumstances of the situation being addressed.	Yes

EP Working theme	Option	Brief overview	Legal feasibility	Political feasibility	Economic feasibility	Selected
		mentioned have referred a Member State to its attention; • Publish any 'rule of opinion' it may adopt when it is of the view that there is indeed a situation of systemic threat to the rule of law; • Publish any response received from the Member State under investigation				
Methods and existing mechanisms	Improve Council's Rule of Law dialogue	• Establish specific themes • Recommendations by UN and Council of Europe to be used as starting point • Information to be provided on how and whom will be responsible to provide evidence	No Treaty change is required.	It would require political will from the Council and the MS	No high economic involvements are foreseen since it would entail improving an already existing tool. However, if the Council were to outsource the evidence-gathering exercise this might entail an investment of resources, as well as in the analysis of the evidence	Yes
Methods and existing mechanisms	Revision of Communication 2003	It should be done in light of the Rule of Law Framework to enable that 7(1) and 7(2) do not have to be applied sequentially.	This would require a revision of 2003 Communication.	To be assessed on the basis of input by SE, EP and workshop	Since this option would only entail the revision of Article 7 TEU it is not foreseen that it will have a negative economic impact. On the contrary, if Article 7(1) and 7(2) can be used	Yes

EP Working theme	Option	Brief overview	Legal feasibility	Political feasibility	Economic feasibility	Selected
					separately this could entail saving in resources.	
Methods and existing mechanisms	Changing the thresholds in Article 7 TEU	Self-descriptive	It would require Treaty Change: slow and burdensome processes, not appropriate to deal with imminent rule of law crisis but can offer a more long-term solution and increase legitimacy of EU action	It could raise political concerns. Article 7 TEU is envisioned as a last resort option and if this were to change, MS might present some reservations.	Lowering the thresholds could entail more cases based on Article 7 TEU and, thus, need for more resources to be invested in these cases.	No
Methods and existing mechanisms	Extending jurisdiction CJEU	- Enabling national courts to bring to the CJEU actions on the legality of MS actions under Article 2 TEU - Eliminating Article 51(1) of the Charter - Individuals to be able to bring actions to the CJEU (reverse Solange doctrine)	This option would entail that Article 51(1) of the Charter would have to be repealed. Furthermore, a legal change would also be necessary to enable individuals to bring actions to the CJEU.	Extending the jurisdiction of the CJEU could raise political concerns in MS. MS might claim that national actions belong to the sovereignty of the State and, thus, CJEU cannot intervene.	Further to an interview with CJEU, it is considered that extending the role of the CJEU by allowing individuals to bring actions before the Court could overburden it.	No
Methods and	Improve	It has been suggested that the	This option would	Issues of	The economic cost of reinforcing	No

EP Working theme	Option	Brief overview	Legal feasibility	Political feasibility	Economic feasibility	Selected
existing mechanisms	cooperation with Council of Europe	EU could rely more on the monitoring than the VC and the data gathered by CEPEJ to identify possible threats to the rule of law	be legally feasible because it would only entail using, improving and extending the already existing cooperation between Council of Europe and EU	competence could be raised in this regard.	and improving this relationship would not be of great consequence.	
Methods and existing mechanisms	ALDE DGP	- The Charter of Fundamental Rights becomes a legal tool for enforcement/the protection of citizens' rights. It must be applied in conjunction with Article 2 TEU, and used for the infringement procedure against fundamental rights' violations. It should serve to tackle fundamental rights' violations beyond specific breaches of EU laws; - Accession of the EU to the European Convention on Human Rights; - Any legislative proposal	According to ALDE, these instruments do not need a change of the Treaties. It could be observed as a mid/long-term solution. If the measures were to be adopted progressively the DGP could provide a comprehensive, permanent, long-term solution. It is a 'catch-all' option since it covers many of the options herein studied.	It would be politically feasible although MS could present certain reservations to the changes suggested.	Creating new tools could be resource-intensive.	No

EP Working theme	Option	Brief overview	Legal feasibility	Political feasibility	Economic feasibility	Selected
		should be accompanied by an opinion from the European Agency for Fundamental Rights, and the European Data Protection Supervisor when appropriate and their opinions must be made public; • Define the EU Scoreboard for Democracy, Rule of Law and Fundamental Rights (DLR) to carry out an impartial and systematic assessment for all Member States; • Establish a European semester for Democratic Governance, Rule of Law and Fundamental Rights (DLR) during which any potential breach of rule of law and fundamental rights can be reported and addressed as part of a dialogue between EU institutions and the				

EP Working theme	Option	Brief overview	Legal feasibility	Political feasibility	Economic feasibility	Selected
		Member State concerned.				
Methods and existing mechanisms	Amend the Treaties	To give the EU power to expel an MS which is not systematically complying with Article 2 TEU	It would require Treaty Change: slow and burdensome processes, not appropriate to deal with imminent rule of law crisis but can offer a more long-term solution and increase legitimacy of EU action (Closa&Kochenov)	This option could find resistance from MS since it would require a Treaty Change and it could entail an expulsion from the EU	The procedure to amend the Treaties is complex and the economic consequences of expelling an MS from the Union could be of concern.	No
Democracy, rule of law and fundamental rights in impact assessments or screening procedures	Improve existing guidelines and ensure involvement of experts such as FRA	If consulting with experts were to be an obligation in the legislative process, this could ensure that legal acts of the Union would comply with Article 2 TEU values.	This option would be legally feasible because it would not require Treaty Change and it would just consist of involving experts in the legislative process.	There could be concerns of independence if the EU were to use only certain experts. *To be further developed on the basis of input by SE, EP and workshop.	This option could present certain economic concerns since the services provided by the experts would have to be covered.	No
Democracy, rule of law	Building a comprehensive	1. Develop a strong and comprehensive EU human	This option would not require Treaty	This option would be politically	The resources needed should be assessed.	No

EP Working theme	Option	Brief overview	Legal feasibility	Political feasibility	Economic feasibility	Selected
and fundamental rights in impact assessments or screening procedures	EU internal human rights strategy	rights' based approach: a) Putting human rights at the heart of all EU policies; b) Enhancing EU institutions' capacity to properly address human rights' issues; c) Strengthening dialogue with civil society; 2. Setting standards to strengthen the EU's legislative framework on human rights and remedying existing gaps in protection; 3. Monitoring human rights in the implementation of EU law; 4. Preventing and reacting to human rights' violations by Member States.	Change and as a 'soft law' approach would just imply operationalising and making more coherent the already existing tools on fundamental rights	feasible, although more standards and more monitoring towards MS could provoke resistance.		This option does not cover other Article 2 TEU values (democracy and rule of law)
Democracy, rule of law and fundamental rights in impact assessments or screening procedures	Monitoring Cycle	Permanent and comprehensive monitoring cycle modelled on the European Semester involving EC, Council and EP, as well as FRA	Soft law approach that would not require Treaty Change	Political will to operationalise this mechanism would be needed	The resources needed could be used from already existing tools.	Yes (included in IIA)

EP Working theme	Option	Brief overview	Legal feasibility	Political feasibility	Economic feasibility	Selected
Individual enforcement	Empowering national actors	• EU to support national efforts promoting and protecting the rule of law through the dissemination of information and good practice and financially. Member States would have the primary responsibility for enforcing Article 2 TEU values. • EU capacity-building programmes. • Vital role of national courts, individual lawyers, civil society organisations, activists, the press, and the public at large by exerting pressure on the Government to comply with the rule of law. The EU, especially the Commission, should look for ways to assist them, both politically and practically. The exact form of such assistance is likely to be determined on a case-	This option would be legally feasible because it would only entail operationalising the already existing cooperation between EU and MS.	It would rely heavily on the political will of the stakeholders.	It could be economically feasible but the financial aid that the EU could provide under this option would have to be assessed.	Yes

EP Working theme	Option	Brief overview	Legal feasibility	Political feasibility	Economic feasibility	Selected
		by-case basis and in consultation with the organisations or individuals concerned.				
Annual pan-European debate	Initiating inter-parliamentary rights dialogue	It has been suggested that the EP institute an inter-parliamentary rights dialogue between the LIBE Committee and its counterpart committees in the MS Parliaments. This dialogue would be held over a two-year period and would result in recommendations by the LIBE Committee.	This option would not require Treaty Change and as a 'soft law' approach would just imply operationalising the cooperation that already exists between the EP and national Parliaments.	This option would depend on the political will of national governments to introduce in their parliamentary discussions this new mechanism. *To be further developed on the basis of input by SE, EP and workshop.	Ab initio, this option would be economically feasible since it would be using the MS Parliaments' discussions on democracy, rule of law and fundamental rights in cooperation with the EP. It would be to operationalise the cooperation between the EP and national parliaments.	Yes (included in IIA)
	Copenhagen Commission	New EU monitoring body, which would subject Member States to a similar level of monitoring currently applied for Candidate Countries	It would require Treaty Change: slow and burdensome processes, not appropriate to deal with imminent rule of law crisis but can offer a more long-term solution and increase	Political concerns might arise from MS. Claims that the EU already has mechanisms to monitor democracy, the rule of law and fundamental rights could be made. (Closa&Kochenov,	The economic cost of establishing a new body, with the implications of staff and budget that it would require, could be of concern	No

EP Working theme	Option	Brief overview	Legal feasibility	Political feasibility	Economic feasibility	Selected
			legitimacy of EU action. It could strengthen the EU's capacity to protect liberal democracies.	p.8)		
	Outsource monitoring to Venice Commission	According to the VC stakeholder, this would not be an option since it is not within the mandate of the VC. The cooperation between the EU and Council of Europe is already operational. It would be insufficient in dealing with highly technical areas of EU law	It would require legal changes to entitle the VC, as an external actor to the EU, to have the competence to monitor compliance with Article 2 TEU values.	It would raise political concerns, as it would entail outsourcing monitoring to an external actor, alien to the EU.	It would be resource-intensive for the VC.	No

This Research Paper provides an overview of the existing EU mechanisms which aim to guarantee democracy, the rule of law and fundamental rights within the EU itself, as set in Article 2 TEU. It analyses the scope of these mechanisms, the role of EU institutions and other relevant actors, and identifies gaps and shortcomings in the current framework. The Research Paper also includes illustrative case-studies on several key challenges, including the limits of infringement actions in addressing the threats to judicial independence in Hungary; the shortcomings of the Cooperation and Verification Mechanism in Bulgaria; and the consequences of a weak fundamental rights proofing of the Data Retention Directive. The Research Paper briefly examines the monitoring mechanisms existing at international level, including the UN and the Council of Europe before considering how the EU institutions interact to protect and promote Article 2 TEU values and the role of national authorities and individuals in fulfilling this objective. An analysis of the impact of the gaps and shortcomings identified in this Research Paper is also offered, with a particular focus on the principle of mutual trust, socio-economic development and fundamental rights protection. The impact on mutual trust is discussed in an illustrative case-study on the consequences of the unequal enforcement of the European Arrest Warrant framework decision. Finally, the Research Paper proposes and assesses a set of vertical and horizontal options in order to overcome these gaps and shortcomings

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