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How to Improve the EU's Rule of Law Toolbox

Policy Paper

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INTRODUCTION

The rule of law is fundamental for the member states of the European Union (EU) to remain functioning democracies. Yet, maintaining the rule of law is also essential for the European Union itself: on the systemic level – to maintain a legal union; on the structural level – to solve problems by effectively applying EU law; and on the political level – to ensure democratic accountability.

Meanwhile, in some member states the rule of law cannot be taken for granted. Published in July 2022, the latest European Commission's Rule of Law Report[1] gives reasons for concern. In some EU member states worrisome trends can be observed, such as the weakening of the judiciary and the dismantling of democratic control mechanisms; failing to apply effective anti-corruption measures; or misusing spyware for political purposes. In particular, the decade of ongoing disputes with two "rule breakers" – Poland and Hungary – and the inability of EU institutions to counter rule of law violations have exposed the insufficiency of the existing toolbox and its sensitivity to adverse political circumstances. At the same time, triggered by Russia's war of aggression against Ukraine, the onset of the *Zeitenwende* – a new geopolitical pressure under which the EU must continue to function and protect its democratic architecture – could serve as a new impetus for the defence of European values.

Against this background, this policy paper takes a critical yet constructive look at the EU's rule of law toolbox. Firstly, it provides a harmonised definition of the rule of law and maps the existing measures to uphold the rule of law in the EU. Secondly, it examines the effectiveness (the ability to produce desired results) of individual instruments by analysing their technical and legal implementation criteria as well as political vulnerability. Thirdly, it proposes recommendations aimed at improving the existing toolbox and offers complementing policy approaches for tackling rule of law backsliding in the future, reaching beyond its institutional and legal foundations.

1 EUROPEAN DEFINITION OF THE RULE OF LAW

The European Commission emphasises the rule of law as one of the founding values of the European Union.[2] In a nutshell, it assumes that governments are bound by law and that inviolable civil liberties can be defended in independent courts.[3] Yet, good democratic governance requires adopting a more unambiguous and determinate definition of the rule of law.

1 Communication from the Commission to the European Parliament, the Council, the European Social and Economic Committee and the Committee of the Regions, 2022 Rule of Law Report. The rule of law situation in the European Union, COM/2022/500, Luxembourg, 13.7.2022, https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52022DC0500

2 Communication from the Commission to the European Parliament, The European Council and the Council, Further strengthening the Rule of Law within the Union, State of play and possible next steps, Brussels, 3.4.2019, COM(2019) 163 final, https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52019DC0163

3 *Rule of law: new mechanism aims to protect EU budget and value*s, European Parliament News, 8.7.2021, https://www.europarl.europa.eu/news/en/headlines/eu-affairs/20201001STO88311/rule-of-law-new-mechanism-aims-to-protect-eu-budget-and-values

The definition of the rule of law recognised within the European legal debate closely follows the standard set by the Council of Europe's European Commission for Democracy through Law (also known as the Venice Commission). It identified a consensus of necessary elements of the rule of law that includes six formal and substantial components: (1) Legality; (2) Legal certainty; (3) Prohibition of arbitrariness; (4) Access to justice before independent and impartial courts; (5) Respect for human rights; (6) Non-discrimination and equality before the law.[4] The European Court of Justice (ECJ) picked up these components and gradually expanded the rule of law in the EU towards a more substantive understanding in its case law.

Yet, it is Regulation 2020/2092 that has delivered the first legally binding definition of the rule of law in EU legislation.[5] It lays out the formal concept, while explicitly listing the attributes of a functional rule of law. Therefore, it feeds into the tradition of the so-called "thick" or maximalist approach, reaching beyond narrow procedural terms and embracing mechanisms, institutions, and practices constituting a foundation of the democratic legal order.

The rule of law is therefore a principle well-established and well-defined in EU law.[6] The attempts of some member states, such as Poland and Hungary, to emphasise national legal traditions as superior or question the constitutional principles of the EU are unfounded.

EU Definition of the Rule of Law

"[T]he rule of law" refers to the Union value enshrined in Article 2 TEU. It includes the principles of legality implying a transparent, accountable, democratic and pluralistic law-making process; legal certainty; prohibition of arbitrariness of the executive powers; effective judicial protection, including access to justice, by independent and impartial courts, also as regards fundamental rights; separation of powers; and non-discrimination and equality before the law. The rule of law shall be understood having regard to the other Union values and principles enshrined in Article 2 TEU.

Regulation (EU, Euratom) 2020/2092 of the European Parliament and of the Council of 16 December, 2020 on a general regime of conditionality for the protection of the Union budget.

2 MAPPING THE EU'S RULE OF LAW TOOLBOX

The EU's toolbox for protecting the rule of law consists of preventive and corrective measures. Preventive measures include reporting tools and formal channels for political dialogue. They help establish the risk of rule of law breaches and serve as early warning signs, helping to determine if corrective measures should be implemented. Their goal is to exercise political pressure on non-abiding "rule breakers" and solve emerging problems through dialogue. Should preventive measures not succeed, the corrective ones follow. They aim to counteract the further deterioration of the rule of law in a given member state. They use financial and political pressures to actively discipline member states, in which violations of the rule of law persist.

PREVENTIVE APPROACH

Reporting tools and dialogue-based formats serve as the preventive arm to safeguard the rule of law. Their function is early warning and quick response: They identify problems and resolve them through political means.

The annual **Rule of Law Report**[7] is part of the broader Rule of Law Mechanism[8] launched to stimulate the inter-institutional exchange between the member states and the European Commission, the European Council, and the European Parliament. The report attempts to assess the rule of law situation in all 27 member states in practical terms. Both national authorities as well as independent institutions and stakeholders, including civil society organisations, serve as sources of information and provide both horizontal and country-specific input. The report summarises positive and negative developments in the member states, covering issues of particular importance for ensuring the rule of law, such as the judiciary, fight against corruption, media pluralism, checks and balances. From 2022, the report also formulates specific recommendations for each member state.

The European Semester provides an annual overview of the efficiency, quality, and independence of justice systems through the **EU Justice Scoreboard**.[9] This tool is one of the information sources for the annual Rule of Law Report. Its results also serve the Recovery and Resilience Facility and deliver useful input for the application of the Rule of Law Conditionality Regulation. Additionally, as part of the European Semester, its findings inform the country-specific recommendations for improving the performance of national justice systems, proposed by the European Commission and later adopted by the European Council.

In addition to reporting activities, political dialogue is an established tool to tackle rule of law breaches. In 2014, the

4 Council of Europe, Commission, Report on the Rule of Law Adopted by the Venice Commission at its 86th plenary session (Venice, 25–26 March, 2011), Strasbourg, 4.4.2011, Study No. 512 / 2009, CDL-AD(2011)003rev, p. 10, https://www.venice.coe.int/WebForms/pages/?p=02_Rule_of_law&lang=EN

5 Regulation (EU, Euratom) 2020/2092 of the European Parliament and of the Council of 16 December, 2020 on a general regime of conditionality for the protection of the Union budget, 22.12.2020, EN Official Journal of the European Union L 433 I/1, https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32020R2092&from=EN

6 Laurent Pech, *The Rule of Law as a Well-Established and Well-Defined Principle of EU Law.* Hague J Rule Law 14, pp. 107–138 (2022), https://doi.org/10.1007/s40803-022-00176-8

7 2022 *Rule of Law Report*, European Commission, https://ec.europa.eu/info/policies/justice-and-fundamental-rights/upholding-rule-law/rule-law/rule-law-mechanism/2022-rule-law-report_en#methodology

8 Rule of Law Mechanism, European Commission, https://commission.europa.eu/strategy-and-policy/policies/justice-and-fundamental-rights/upholding-rule-law/rule-law/rule-law-mechanism_en

9 EU Justice Scoreboard, European Commission, https://commission.europa.eu/strategy-and-policy/policies/justice-and-fundamental-rights/upholding-rule-law/eu-justice-scoreboard_en

Rule of Law Framework[10] was set out, allowing the Commission to conduct assessment and issue recommendations for member states exhibiting democratic backsliding. Another dialogue-based instrument was also developed during the 2020 German Presidency of the Council: the **Rule of Law Peer Review** within the General Affairs Council,[11] enhancing the annual Council **Rule of Law Dialogues**, first established in 2014.[12] The idea behind dialogue-based tools is to discuss the problems and irregularities identified in the individual member states on an equal footing, without any finger pointing. At each dialogue event, an exchange takes place between several countries and the focus lies on knowledge transfer through peer reviews rather than top-down decisions.

CORRECTIVE APPROACH

Imposing fines and suspending payments or voting rights serve as the corrective arm of the EU's rule of law defence system. Their function is to stop rule of law breaches from re-occurring and to restore the status quo.

As the "guardian of the treaties," the European Commission can launch an **infringement procedure**[13] against a member state that fails to apply or violates EU law. If it suspects breaches, the Commission sends an official communication requesting further information or explanations. If it concludes that there is indeed a breach of EU law, it sends a reasoned opinion calling for remedial action. The member state concerned still has the opportunity to react and fix irregularities. It is only if the Commission finds a persistent lack of compliance with EU rules that it can refer the member state concerned to the ECJ. In the worst-case scenario of non-compliance with court decisions, fines are imposed in the form of a lump sum and penalty payment.[14]

The opposite approach to imposing financial penalties is **withholding payments**. In the past, the access to funds from specific programmes was limited or suspended due to non-compliance with grant-making provisions related to the rule of law and democratic standards. For example, applications for funds from the twinning programme Europe for Citizens were rejected, demanding that the member states and state authorities adhere to the European Charter of Fundamental Rights.[15] However, such sanctions were rather precedential, derived from general provisions and applied on a case-by-case basis.

Regarding a more systemic approach, the long-discussed **conditionality** was finally approved at the end of 2020. The Rule of Law Conditionality Regulation follows the rule of protecting the EU budget from violations of the rule of law in a member state that could significantly affect the sound financial management of the EU budget or the financial interests of the EU. The Commission can initiate the procedure if given reasonable grounds to consider the existence of such breaches; the measures are imposed following a decision by the Council, which is taken by vote, and lifted if the situation is fully remedied within two years. The conditionality mechanism is now linked to the Multiannual Financial Framework (MFF) 2021-2027 and the EU's economic and social recovery plan Next Generation EU (NGEU).[16] Poland and Hungary have been the first member states to feel the rigour of this approach in terms of the (non-) granting of funds from the Recovery and Resilience Facility.

Once the three-stage process of the aforementioned Rule of Law Framework fails and violations of fundamental values referred to in Article 2 TEU continue, then the EU can suspend a member state's voting rights. **Article 7 TEU**[17] is nicknamed the "nuclear option" as it foresees the ultimate political sanction available to discipline member states. First, the European Commission, the European Parliament or one third of the member states must find a serious risk of a breach of EU law, calling the member state concerned to respond to the Council, as a preventive measure (Art. 7.1). If the risk persists, the European Council can determine the existence of a breach (Art. 7.2) and decide to trigger Article 7.3, which sets the sanction mechanism in motion. The main difficulty in applying it is that it requires unanimity (excluding the member state in question). So far, this instrument has not been used successfully.

3 THE EFFECTIVENESS OF THE EU'S RULE OF LAW TOOLBOX

The ongoing erosion of the rule of law in the EU gradually undermines the legal union. Despite applying a broad portfolio of countermeasures, they haven't yet produced the desired results. Their effectiveness – accuracy and ability to accomplish their purpose – needs improvement. Therefore, a review

10 Communication from the Commission to the European Parliament and the Council. A new EU Framework to strengthen the Rule of Law, COM/2014/0158 final, https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52014DC0158

11 *Germany: working to promote the rule of law in Europe*, Federal Foreign Office, 2.10.2020, https://www.auswaertiges-amt.de/en/aussenpolitik/europe/rule-of-law-europe/2341072; *Videoconference of EU Justice Ministers: Focus on rule of law and the fight against terrorism*, Germany's Presidency of the Council of the European Union, 2.12.2020, https://www.eu2020.de/eu2020-en/news/article/videoconference-justice-terrorism-rule-of-law-/2422272; *First country-specific discussion on the rule of law among EU member states*, Federal Foreign Office, 17.11.2020, https://www.auswaertiges-amt.de/en/aussenpolitik/europe/-/2417932

12 Note from the Presidency of the Council of the European Union on 4 October, 2021 to Delegations, Subject: Annual rule of law dialogue, Council of the European Union, Brussels, 4.10.2021, https://data.consilium.europa.eu/doc/document/ST-12467-2021-INIT/en/pdf#:~:text=On%2016%20December%202014%2C%20the%20Council%20adopted%20conclusions,of%20law%20in%20the%20framework%20of%20the%20Treaties1.

13 EU law and its application, European Commission, https://commission.europa.eu/law/law-making-process/applying-eu-law_en

14 Infringement procedure, European Commission, https://commission.europa.eu/law/application-eu-law/implementing-eu-law/infringement-procedure_en

15 *Poland, Hungary face EU regional funds blockage over fundamental rights charter*, Euractiv, 11.1.2021, https://www.euractiv.com/section/non-discrimination/news/poland-hungary-face-eu-regional-funds-blockage-over-fundamental-rights-charter/

16 Rule of law conditionality regulation, European Commission, https://ec.europa.eu/info/strategy/eu-budget/protection-eu-budget/rule-law-conditionality-regulation_en

17 Consolidated Version of the Treaty on European Union. Title I Common Provisions. Article 7 (ex-Article 7 TEU), 26.10.2012, Official Journal of the European Union, C 326/1, https://eur-lex.europa.eu/legal-content/ENG/TXT/HTML/?uri=CELEX:12012M007&from=EN

Mapping the EU's rule of law toolbox

Preventive approach
- Reporting: Rule of Law Report; EU Justice Scoreboard
- Dialogue-based tools among member states: Rule of Law Dialogue/Rule of Law Peer Review;
- Dialogue-based tool with the Commission: Rule of Law Framework

Corrective approach
- Infringement decisions by the European Court of Justice (ECJ)
- Blocking single cohesion funds or other financing programmes by the European Commission
- Protecting the budget: rule of law conditionality mechanism to Multiannual Financial Framework (MFF); suspending funds specifically within the Recovery and Resilience Facility
- Article 7

of the existing toolbox is needed to identify its strengths and weaknesses. Firstly, the technical and legal challenges regarding its full implementation need to be critically analysed. Secondly, the political sensitivity of applying the entirety of the EU's rule of law toolbox must be examined.

3.1 Technical and Legal Challenges

Each instrument within the rule of law toolbox has a specific purpose and scope. None of the tools has been designed along the "one-size-fits-all" principle or as the ultimate panacea for all rule of law deficiencies. Understanding their functions and limitations as well as locating them within the rule of law review process of the EU helps to match expectations with their actual abilities. Finding a middle ground between legitimacy, accuracy, and swift implementation is crucial to making a positive impact and improving their effectiveness.

PREVENTIVE APPROACH

The primary role of preventive measures, be it rule of law reporting or dialogue-based tools, is to monitor the developments across the EU, reflect long-term trends, and detect worrisome incidents. Their main advantage is the early warning ability and documenting the existence of continuous deficiencies over time. However, there has been some criticism regarding their purpose and the maximum use of their potential. For example, the Rule of Law Report offers an in-depth country-specific analysis embracing a broad thematic spectrum, yet its critics point out that it has little effect on actually enforcing the rule of law requirements in the EU. The report draws information from on the ground, cooperating with local authorities as well as non-governmental organisations, yet lacks a contextual analysis of rule of law backsliding,[18] does not track deliberate and devastating patterns, and uses euphemisms and understatements[19] in the pursuit of political neutrality. Moreover, although it offers recommendations, there is neither a procedure to implement them, nor any foreseen consequences for non-implementation.[20]

The EU Justice Scoreboard is criticised as superficial for laying too much focus on hard data and missing the qualitative indicators on how the rule of law is functioning.[21] However, in contrast to the Rule of Law Report, its outcomes in practical use provide empirical data for corrective tools, thereby establishing a legitimate link between monitoring and disciplinary measures.

Regarding dialogue-based tools, whereas their advantage is the ability to exercise political pressure from fellow member states instead of top-down messaging from Brussels, their weakness lies in the lack of any real pressure on member states to self-report on rule of law deficiencies. Another criticism refers to the fact that the reviews take place behind the closed doors of the General Affairs Council, thereby failing to provide transparency of the review process.[22] However, designed as means of persuasion rather than coercion, closed hearings provide confidentiality, facilitating a level of honesty impossible to achieve otherwise.

To sum up, the technical and legal implementation criteria for the preventive measures are relatively easy to fulfil. However, their impact on enforcing the rule of law standards in the EU is relatively low. Their design does not always ensure the execution of resulting recommendations, both at the procedural as well as regulatory level. However, these tools are focused on diagnosing problems with the rule of law in all member states and as such accomplish their reporting mission by mainstreaming the problematic, monitoring developments in the long term as well as providing evidence for rule of law breaches in all 27 member states.

CORRECTIVE APPROACH

The primary role of corrective measures is to curb the breaches of EU law by applying direct sanctions. The conciliatory nature of EU governance is its biggest advantage while seeking solutions by means of compromise and diplomacy. Yet, the lack of decisive action reflected in lengthy proceedings as well as the diffusion of responsibilities resulting from collective decision-making has prevented the effective reinforcement of

18 *The EU Commission's 3rd Rule of Law Report: Progress, But More Action Needed*, Civil Liberties Union, 14.7.2022, https://www.liberties.eu/en/stories/eu-commission-third-rule-of-law-report-progress-but-more-action-needed/44372

19 Laurent Pech, *Doing more harm than good? A critical assessment of the European Commission's first Rule of Law Report*, Heinrich-Böll-Stiftung Brussels European Union, 4.12.2020, https://eu.boell.org/en/2020/12/04/doing-more-harm-good-critical-assessment-european-commissions-first-rule-law-report

20 Kerstin McCourt, *European Commission Lacks Tenacity on the Rule of Law*, Human Rights Watch, 20.7.2022, https://www.hrw.org/news/2022/07/20/european-commission-lacks-tenacity-rule-law

21 András Jakab, Lando Kirchmair, *How to Quantify a Proportionate Financial Punishment in the New EU Rule of Law Mechanism?*, Verfassungsblog, 22.12.2020, https://verfassungsblog.de/how-to-quantify-a-proportionate-financial-punishment-in-the-new-eu-rule-of-law-mechanism/

22 Thomas Conzelmann, *Peer reviewing the rule of law? A new mechanism to safeguard EU values*, European Papers Vol. 7, 2022, No 2, pp. 671–695, https://doi.org/10.15166/2499-8249/593.

such measures, triggering criticism regarding the effectiveness of the EU's rule of law toolbox per se.

The sanctioning mechanisms available to the EU are to be applied in cases of repeated and intentional abuse of the rule of law. An infringement case can be brought before the Court of Justice of the EU (CJEU), which can be compared to a constitutional court at the national level, practicing judicial review of European law and national law, based on the doctrine of primacy of EU law.[23] Non-compliance with the CJEU's judgment may result in a financial penalty, imposed cumulatively if the violation of EU law is particularly serious and persistent. Yet, as is often the case with litigation, infringement procedures are far from delivering quick fixes. The CJEU deals with more than 800 cases annually: preliminary rulings, direct actions, and appeals, covering "an extremely wide range of matters" and, even with urgent litigation, the number of pending cases exceeds 1,100 annually.[24] Moreover, there is no guarantee a member state will comply with the ruling or acknowledge the primacy of EU law over national regulations, as demonstrated in those cases involving the Polish government.[25] Technical inefficiency and a lack of legal compliance can delay the effectiveness of infringement decisions.

Financial penalties and freezing access to EU funds seem to have the biggest disciplinary potential. Blocking single financing programmes has preceded the more systemic rule of law conditionality, applicable to the Multiannual Financial Framework (MFF). Met with great expectations, the regulation has also attracted criticism regarding its legal implementation criteria. Firstly, one of the reasons to doubt its effectiveness is the weakness of its application. The final agreement was watered down, for example by requiring a qualified majority to impose measures, settling for a longer procedure, or including the so-called "emergency break" giving the member state in question the opportunity to once again address the Council before it votes on the measures proposed by the Commission.[26] With the member states, rather than the Commission, holding the key decision-making power to withhold funds, the process is also regarded as more politicised than technocratic.[27] Secondly, a common line of criticism sees the conditionality mechanism as not sensitive enough to sanction the long-term demolition of democratic structures and institutions, focusing on single breaches instead. It also seems to be more effective when addressing irregularities in public procurement laws, ineffective prosecution or conflicts of interest, therefore acting as an anti-corruption tool.[28] Finally, the regulation serves to protect the EU budget from rule of law breaches, which some regard as a false priority and a monetisation of the rule of law.[29] On the technical side, financial sanctions raise questions about the disproportionate impact on the member states affected: Their leverage varies, depending on the beneficiary or net contributor status. Applying collective responsibility for the actions of national governments raises concerns about the impact on underdeveloped regions and further divergence among EU member states and regions instead of promoting cohesion.[30]

Last but not least, the effectiveness of Article 7 has not stood the test of time. The Commission initiated the procedure against Poland in December 2017. In September 2018, the European Parliament triggered the same for Hungary. None of these actions was conclusive. In theory, the procedure can practically exclude a member state from the decision-making process and, as such, has a potent deterring effect. However, the attempt to use it with full force failed. Its technical and legal implementation criteria make it vulnerable to temporary political dynamics and long-term conflicts of interests within the EU. The consensual culture in the European Council that avoids ostracising member states to prevent sabotaging essential future votes makes it unlikely that Article 7.2 would be triggered in the first place.[31] Furthermore, the unanimity requirement makes it unrealistic that it will ever be voted for because of the political calculation of member states that might be on a collision course with the Commission.[32] Using a veto against suspending the rights of another member state can be an insurance policy for the next potential defendant. Due to its technical and legal set-up, which make it susceptible to political vulnerability, Article 7 proved to be a dead end in defending the rule of law.

3.2 Political Vulnerability

Despite expanding its resources, the EU's rule of law toolbox has proven to be vulnerable to political pressures and political discretion.[33] With a number of measures being triggered and threatening the vital interests of the member states affected, the dispute over the rule of law in the EU has become heavily politicised. Understanding the politics of the rule of law is the key to overcoming the deficiencies of the existing toolbox.

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23 Niels Petersen, Konstantin Chatziathanasiou, *Primacy's Twilight? On the Legal Consequences of the Ruling of the Federal Constitutional Court of 5 May 2020 for the Primacy of EU Law*, Policy Department for Citizens' Rights and Constitutional Affairs Directorate-General for Internal Policies PE 692.276 – April 2021.

24 Marc-André Gaudissart, *Statistics concerning the judicial activity of the Court of Justice*, Court of Justice of the European Union, https://curia.europa.eu/jcms/jcms/Jo2_7032/en/

25 Order of the Vice-President of the Court in Case C-204/21 R, Commission v Poland, Court of Justice of the European Union, Press Release No 192/21 Luxembourg, 27.10.2021, https://curia.europa.eu/jcms/upload/docs/application/pdf/2021-10/cp210192en.pdf; *The European Commission decides to refer Poland to the Court of Justice of the European Union for violations of EU law by its Constitutional Tribunal*, European Commission, https://ec.europa.eu/commission/presscorner/detail/en/ip_23_842

26 Aleksejs Dimitrovs, Hubertus Droste, *Conditionality Mechanism: What's In It?*, Verfassungsblog, 20.12.2020, https://verfassungsblog.de/conditionality-mechanism-whats-in-it/

27 Antonia Baraggia, Matteo Bonelli, *Linking Money to Values: The New Rule of Law Conditionality Regulation and Its Constitutional Challenges*, German Law Journal, 23(2), pp. 131–156, https://doi.org/10.1017/glj.2022.17.

28 Petra Bárd, Dimitry V. Kochenov, *War as a pretext to wave the rule of law goodbye? The case for an EU constitutional awakening*, European Law Journal, Volume 27, Issue 1–3, pp. 39–49, https://onlinelibrary.wiley.com/doi/full/10.1111/eulj.12435

29 Ibidem; Roila Mavrouli, *The Dark Relationship Between the Rule of Law and Liberalism. The New ECJ Decision on the Conditionality Regulation*, European Papers, Vol. 7, 2022, No 1, European Forum, Insight of 2 June, 2022, pp. 275–286 ISSN 2499–8249, https://doi.org/10.15166/2499-8249/559.

30 Antonia Baraggia, Matteo Bonelli, op.cit.

31 Thomas Conzelmann, op.cit.

32 Petra Bárd, Dimitry V. Kochenov, op. cit.

33 András Jakab, *Three misconceptions about the EU rule of law crisis*, Verfassungsblog, 17.10.2022, https://verfassungsblog.de/misconceptions-rol/

Structural and systemic loopholes have provided fertile ground for rule of law backsliding. Attempts to reverse it face the challenge of having to synchronise diverse EU institutions in their practical understanding of the rule of law. Whereas the Commission sees the rule of law from a formal and substantive perspective, the CJEU focuses on the access to justice before independent and impartial courts. Simultaneously, the broad approach of the Rule of Law Report or the technical focus of the EU Justice Scoreboard go beyond the neat definition laid out in Regulation 2020/2092. The clash over fundamental principles has led to a political crisis resulting in the paralysis of the EU's decision-making processes, best illustrated when two member states were blocking the final agreement on the 2021-2027 EU budget because of the introduction of rule of law conditionality. The ambiguity of the term helped the "rule breakers" blur and alienate the rule of law dispute.

As the guardian of the treaties, the European Commission has faced the fiercest criticism for failing to curb anti-democratic inclinations.[34] It has been accused of misjudging the scale of the problem and delaying reaction to the repeated rule of law breaches occurring in member states.[35] A lack of political will[36] or consistency, and even the appeasement of backsliding regimes[37] were specifically attributed to the Commission leadership under President Ursula von der Leyen. Despite the more categorical and principled approach of Věra Jourová, today the Vice President of the European Commission for Values and Transparency, relativising the hostile actions of the Polish and Hungarian governments and a lack of vision on how to overcome the rule of law impasse[38] were a sign of weakness of the Commission in dealing with governments intentionally undermining the EU's legal order.[39]

Regarding the scope and severity of consequences for undermining democratic standards, the European Parliament often offered solutions bolder than those offered by the Council or the Commission. For example, it adopted a resolution bluntly labelling Hungary a "hybrid regime of electoral autocracy."[40] In the case of the conditionality mechanism, the Parliament first clashed with the European Council over the superiority of funds over principles,[41] then threatened to sue the Commission for inaction due to a delayed application of the Rule of Law Conditionality Regulation.[42] But at the same time, too often party politics play a significant role in the European Parliament, for example in accepting political actors that are non-compliant with basic values into the political mainstream or allowing corruption scandals. The problem of the power struggle within the EU is a complex one.

Toxic solidarity and apathy have too often replaced a much-needed commitment to the rule of law standards among the member states. As with the case of triggering Article 7, informal alliances, national interests, or simple precaution seem to outweigh the common good. If pragmatism leads the way, values lag behind. In 2020, only five EU member states supported the European Commission at the CJEU against yet another assault on judicial independence in Poland.[43] A few years later, in 2023, 15 member states backed the legal case brought by the Commission against the Hungarian government to protect the LGBT community in the country.[44] Time will tell whether this mobilisation heralds an awakening of the European community.

The Russian war of aggression against Ukraine has put the EU under enormous pressure. The war began at a time when the EU found itself in a deep crisis of constitutional identity, augmented by soaring inflation and energy prices. The rule of law dispute has not only revealed cracks in the European foundations but also exposed how determined the "rule breakers" were to avoid the consequences of their actions, even going so far as to sabotage EU decision-making processes. In pursuit of unlocking the Recovery Fund, the Polish government tried to use the influx of Ukrainian war refugees as a bargaining chip. In retaliation for blocking EU money over corruption concerns, Hungary vetoed EU aid for Ukraine. The blatant contrast between how Budapest and Warsaw perceive the Kremlin today might be a window of opportunity to split this tandem, however it is not a given. An unprecedented event – the military conflict in the European neighbourhood – clearly proves the worth of alliances such as the EU but it also is a bitter reminder that neglected problems will inevitably backfire.

4 DEFENDING THE RULE OF LAW IN EUROPE: POLICY RECOMMENDATIONS

The acute erosion of the rule of law in the EU has continued for approximately a decade now. It started in 2010 with the electoral victory of Fidesz in Hungary, and since 2015 has been fol-

34 *When Will the EU Commission Act? An Open Letter*, Verfassungsblog, 29.4.2020, https://verfassungsblog.de/when-will-the-eu-commission-act/

35 Petra Bárd, Dimitry V. Kochenov, op.cit.; Laurent Pech, Dimitry V. Kochenov, *The Commission's Rule of Law Blueprint for Action: A Missed Opportunity to Fully Confront Legal Hooliganism*, Verfassungsblog, 5.9.2019, https://verfassungsblog.de/the-commissions-rule-of-law-blueprint-for-action-a-missed-opportunity-to-fully-confront-legal-hooliganism/; Kochenov, Dimitry, *Elephants in the Room: The European Commission's 2019 Communication on the Rule of Law* (22.8.2019). The Hague Journal of the Rule of Law, Vol 11, 2019, pp. 423–438, University of Groningen Faculty of Law Research Paper No. 38/2019, Available at SSRN: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3440957

36 Petra Bárd, Dimitry V. Kochenov, op.cit.; Laurent Pech, 2020, op. cit.

37 Laurent Pech, Dimitry V. Kochenov, op. cit.

38 Petra Bárd, Dimitry V. Kochenov, op. cit.; Petra Bárd, *The von der Leyen Commission and the Future of the Rule of Law*, Verfassungsblog, 11.11.2019, https://verfassungsblog.de/the-von-der-leyen-commission-and-the-future-of-the-rule-of-law/

39 Laurent Pech, Dimitry V. Kochenov, op. cit.

40 *MEPs: Hungary can no longer be considered a full democracy*, Press Room, European Parliament, 15.9.2022, https://www.europarl.europa.eu/news/en/press-room/20220909IPR40137/meps-hungary-can-no-longer-be-considered-a-full-democracy

41 Roila Mavrouli, op. cit.

42 *Rule of Law: Parliament prepares to sue Commission for failure to act*, Press Room, European Parliament, 15.6.2021, https://www.europarl.europa.eu/news/en/press-room/20210604IPR05528/rule-of-law-parliament-prepares-to-sue-commission-for-failure-to-act

43 *Commission, 5 EU members clash in court with Poland over rule of law*, Politico, 1.12.2020, https://www.politico.eu/article/five-eu-countries-and-commission-clash-with-poland-over-rule-of-law-at-court-hearing/

44 *15 EU countries, including Germany and France, join legal case against Hungary's anti-LGBT law*, Euronews, 7.4.2023, https://www.euronews.com/my-europe/2023/04/07/15-countries-including-germany-and-france-join-legal-case-against-hungarys-anti-lgbt-law

lowed by the government of the Law and Justice party (PiS) in Poland. The wide range of experiences with the existing toolbox can guide the way for improving the existing measures and thinking beyond the existing framework to restore the rule of law in Europe. Current unprecedented circumstances – the *Zeitenwende* call for a pivot in European leadership – offer a window of opportunity to do so. Therefore, policy recommendations regarding the improvement of the rule of law situation in Europe refer to optimising the effectiveness of the existing rule of law toolbox at the EU level as well as building capacities for more resilient democratic order in the member states.

4.1 Increasing the Effectiveness of the Rule of Law Toolbox

Since the purpose and impact of tools applied to protect the rule of law from backsliding varies, it is crucial to increase their effectiveness and efficiency by creating a coherent strategy to coordinate their outputs. Advancing rule of law mechanisms as well as making them faster in their execution can deliver more promising results.

Policy recommendations

- Creating procedural pathways for member states to meet the recommendations listed in the Rule of Law Report.
- Changing the EU Justice Scoreboard into an empirical and coherent rule of law index, becoming an authoritative point of reference in rule of law disputes.
- Advancing the conditionality mechanism by attaching it to more EU programmes, grants, and loans financed from the EU budget as well as by making it quicker in execution by introducing fast-track procedures.
- Advancing rule of law tools by making the application by vote easier (Art. 7, Conditionality Regulation).

4.2 Monitoring the Effectiveness of EU Rule of Law Instruments

In addition to measuring the quality of the rule of law in all member states with the annual Rule of Law Report or EU Justice Scoreboard, a complementary internal monitoring of the applied rule of law instruments is needed. A regular review of applied tools can help identify their deficiencies. A systematic long-term observation can help to reveal possible synergy effects. The European Commission already has an Evaluation & Impact Assessment Unit as well as the independent Regulatory Scrutiny Board[45] to ensure evidence-based and transparent EU law-making. A policy evaluation of the rule of law toolbox can draw from the methods and activities already used by the European Commission in other policy fields.

Policy recommendations

- Developing internal evaluations specifically addressing the applied rule of law instruments, built on the existing analytical approach and within the existing institutional framework, to provide operational recommendations based on available data sources and measurable indicators.
- Establishing a clear and permanent rule of law portfolio (permanent responsibility) by one Commissioner.

4.3 Harmonising the European Understanding of the Rule of Law

In disputes with non-abiding member states, the concept of the rule of law is often relativised in a self-serving way. Ambiguous rhetoric and interpretive politics are applied when EU bodies attempt to protect the community of law.[46] Therefore, it is necessary for the EU to enforce a shared understanding of the rule of law. An unambiguous definition in the European legal space should be translated into political practice through developing a set of common standards, adapting the reporting tools accordingly as well as by applying the EU law consequently.

Policy recommendations

- Formulating a clear and unambiguous European definition of the rule of law, accepted by all EU institutions as well as member states.
- Developing a set of common rule of law standards and empirical benchmarks and adapting the preventive measures accordingly (Rule of Law Report, EU Justice Scoreboard, Rule of Law Dialogue).
- Depoliticising EU law by applying it consistently, including the inevitability of foreseen sanctions, if rule of law breaches occur.

4.4 Supporting the Social Pillars of the Rule of Law

Fixing the rule of law erosion cannot happen without tackling democratic backsliding. In addition to the legal tools and enforcement procedures, informal social control also plays a significant role in protecting the rule of law in the EU. Democratic political culture, civic mobilisation, and media attention can facilitate actions taken at the EU level from the bottom up. Therefore, it is necessary to supplement the EU's existing rule of law toolbox with measures for strengthening the social pil-

45 Regulatory Scrutiny Board, European Commission, https://commission.europa.eu/law/law-making-process/regulatory-scrutiny-board_en

46 Martijn Mos (2020) *Ambiguity and interpretive politics in the crisis of European values: evidence from Hungary,* East European Politics, 36:2, pp. 267–287, doi: 10.1080/21599165.2020.1724965

lars of rule of law resilience, such as the independent media and civil society organisations (CSOs), especially in countries with proven cases of shrinking spaces, corruption, state capture, and rule of law breaches.

Policy recommendations

- Smart capacity building of the independent media and civil society organisations (CSOs) by improving access to EU funds through direct grant-making and bypassing national intermediary institutions.
- Developing the abilities and resources of non-state actors to strengthen the rule of law directly or indirectly by increasing the volume of available operating grants, technical assistance, or loans – also for small civic organisations or local media outlets.
- Safeguarding the functioning of independent media and organised civil society through European legislation: finalising the European statute for associations and NGOs and the EU anti-SLAPP law.

CONCLUSION

A decade of destructive developments in Hungary and Poland has exposed the EU's inability to fully protect its constitutional identity. The effectiveness of individual rule of law tools as well as their combined impact could and should be improved, in both technical as well as political terms. Fixing rule of law erosion also requires tackling the more general democratic backsliding. To maintain a functioning democratic order, the rule of law must be sustained by both a robust institutional response and political accountability.[47]

To combat rule of law breaches in the EU, there must be consequences severe enough to discourage governments from undermining the democratic order. From the point of view of technical and legal implementation criteria, building more complementary synergies between single rule of law instruments can improve both their effectiveness and efficiency. To maximise the potential of the EU's rule of law toolbox, more attention is needed when it comes to monitoring its effectiveness. Constant re-evaluation will allow for a more accurate application of rule of law tools in the future, including tracing their synergies and favourable policy mixes.

Additionally, it is essential to view the rule of law as a political phenomenon, transcending its legal core and entrenching it in political discourse. In countries experiencing acute rule of law backsliding, internal resistance is as important as external pressure. Therefore, it is crucial to proactively shape favourable conditions to defend the European community of law by strengthening democratic institutions and practices, both at the EU level as well as from the bottom up in individual member states.

47 András Jakab, op. cit.

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