



## **Defending the rule of law in the European Union: legal and political approaches**

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*ABSTRACT: In the context of rule of law backsliding, EU institutions and Member States have been taking action to defend this fundamental common value against the challenges it is facing, especially in certain Member States. Their action involves both legal and political approaches aimed at covering every aspect of the defence needed to safeguard and strengthen the rule of law, ranging from dialogues at Union and state levels to sanctioning mechanisms that tackle directly the immediate threats posed by illiberal governments and governmental practices.*

*KEYWORDS: EU fundamental values – rule of law backsliding – Article 7 – conditionality regime – Rule of Law Report.*

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## 1. Introduction

The rule of law is a fundamental value of the European Union (EU), being common to its institutions and Member States and materialising in a set of principles that guarantee the fundamental rights of citizens against arbitrary exercises of power. However, the rule of law has been facing serious challenges in the context of rule of law backsliding, an illiberal political trend that threatens the essential checks and balances that the principles of the rule of law represent.

At the EU level, there have been profuse initiatives stemming from concern with the state of the rule of law in the EU, especially in certain Member States. Before any litigation, the institutions and the Member States must work together in approaching these concerns. Depending on the case, some approaches require robust legally-backed solutions, others require continuous dialogue and exchange of information and good practices. It is our goal with this article to explore some of the main legal and political approaches, by EU institutions and Member States, to the defence of the rule of law.

## 2. The relevance of the rule of law in the EU

### 2.1. *The value of the rule of law and the principle of the Union of law*

As a politically organised community, the EU is not ideologically neutral. Article 2 of the Treaty on European Union (TEU) establishes that the EU 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, adding that these values are common to its Member States. Drawing from Europe's common cultural and humanist heritage, these values are highly relevant both as criteria for accession to the EU, via Article 49 TEU, and as an imperative of the Union itself, established as an objective in Article 3 TEU. The EU's foundation on these common values contributes to the construction of the society characterised by pluralism, non-discrimination, tolerance, justice, solidarity, and equality between women and men referred to in the second part of Article 2.

The central place that these fundamental values hold within the European legal order characterises the Union as a community of values, to the extent that the EU is based on the primacy of these values, in which *“the human person, and not the economy or the single currency, becomes the centre of the civilizational heritage of the Union and its Member States.”*<sup>1</sup> In addition, the fundamental values laid out in Article 2 TEU correspond to a set of legal principles that also play a formative and structuring role in the EU legal system, insofar as they serve as a parameter for interpreting EU law and bindingly govern the activities of the institutions and bodies of the EU and the Member States. Because the EU conceives itself as a community of values, insofar as the actions of its institutions are bindingly governed by principles arising from its fundamental values, it is natural to conclude that the Union's actions are subject to the Law. That is why the value of the rule of law assumes paramount importance within the EU's legal system.

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<sup>1</sup> Fausto de Quadros, “O conteúdo e os valores da Constituição Europeia”, in *Colóquio Internacional “Uma Constituição para a Europa”* (Coimbra: Almedina, 2004), 191. Author's translation – original quote: *“a pessoa humana, e não a economia ou a moeda única, passa a estar no centro do património civilizacional da União e dos Estados membros.”*

But before we proceed, we must first briefly analyse what the rule of law is. Emerging from several ideologies of limitation of power, the rule of law is a legal principle that ensures the submission of public power to binding legal norms that limit and legitimise it. Two complementary dimensions emerge from this notion: a formal dimension and a material dimension. In a formal dimension, the rule of law guarantees the primacy of the fundamental law, the legality of the administration, the separation of powers, the independence of the courts and effective judicial protection. The material dimension of the rule of law relates to the fundamental values that frame the legal order to which that principle refers to, corresponding to the humanist values of human dignity, equality, freedom, justice, or security.

At the EU level, the same applies, albeit adapted to the supranational legal and political reality it represents. In the context of the Union's legal order, we detect the key aspects that define the rule of law. The primacy of the EU's fundamental law (i.e., the Treaties), the separation of powers sought by institutional balance, the observation of the principle of legality in every decision procedure, the independence of the Court of Justice of the European Union (CJEU) and the establishment of effective judicial protection through EU litigation, all within the framework of values such as democracy and fundamental rights, reveal the fairly obvious truth: the EU is a political community that observes and actively upholds the rule of law. That is why the EU is characterised as a Union based on the rule of law.

The idea of a Union based on the rule of law arises with judgement *Les Verts*,<sup>2</sup> paradigmatic jurisprudence where the CJEU recognised that the (then) European Economic Community (EEC) was a “community of law, inasmuch as neither its Member States nor its institutions can avoid a review of the question whether the measures adopted by them are in conformity with the basic constitutional charter, the Treaty [establishing the EEC].”<sup>3</sup> This understanding led to the creation of the principle of the Union of law, constructed as a “i) limit to the performance of European institutions and Member States in the areas covered by Union law, as well as a ii) guarantee to the rights of individuals affected by European provisions.”<sup>4</sup>

Although Member States have different national identities, legal systems and traditions, the core meaning of the rule of law is the same across the EU. In its 2020 Rule of Law Report,<sup>5</sup> the European Commission presents a very precise definition of rule of law as all public powers always acting within the constraints set out by law, in accordance with the values of democracy and fundamental rights, and under the control of independent and impartial courts. As the Commission puts it, respect for the rule of law is essential for citizens and business to trust public institutions, having a direct impact on the life of every citizen as a precondition for ensuring equal treatment before the law and for the defence of EU citizens' rights.

<sup>2</sup> Judgment CJEU *Parti écologiste ‘Les Verts’ v. European Parliament*, 23 April 1985, Case C-294/83, ECLI:EU:C:1986:166

<sup>3</sup> Judgment *Les Verts*, recital 23.

<sup>4</sup> Alessandra Silveira et al., “União de direito para além do direito da União – as garantias de independência judicial no acórdão *Associação Sindical dos Juizes Portugueses*”, *JULGAR* (2018): 4, available at <http://julgar.pt/uniao-de-direito-para-alem-do-direito-da-uniao-as-garantias-de-independencia-judicial-no-acordao-associacao-sindical-dos-juizes-portugueses/>. Author's translation – original quote: “i) limite à atuação das instituições europeias e dos Estados-Membros nos domínios abrangidos pelo direito da União, bem como uma ii) garantia aos direitos dos particulares afetados por disposições europeias.”

<sup>5</sup> European Commission, 2020 *Rule of Law Report: the rule of law situation in the European Union*, COM(2020) 580 final, 30 September 2020, available at <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52020DC0580>.

Seeing that the EU is based on the rule of law, threats to this nuclear value challenge its legal, political and economic basis: deficiencies in one Member State impact other Member States and the EU as a whole. As the European Commission states in the 2020 Rule of Law Report – which echoes a variety of other Commission communications on the matter –, the Union has a shared stake with the Member States – which are primarily responsible for ensuring respect for this value – and a role to play in resolving rule of law issues wherever they appear. That is why the rule of law remains a very relevant value and principle – especially in recent years – that must be enforced and upheld. So, before we proceed, we must analyse why the protection of the rule of law has gained central place in the European legal and political landscape.

## 2.2. Rule of law backsliding in EU Member States

In recent years, there has been a general concern with the issue of the rule of law. These concerns range from issues relating to misuses of law and abuses of political power, which can usually be resolved by States' legal orders, to problems so deep-seated that even States' own legal-political systems cannot cope. The latter form the most concerning set of problems, since they represent a general dismantlement or profound undermining of the liberal democratic state,<sup>6</sup> adding up to an overall crisis of the rule of law which materialises in a range of different phenomena, from new concepts such as constitutional capture to recurring problems such as systemic corruption. The notion conceived with the purpose to encapsulate all these phenomena, repeated across the literature on the subject, is the term “*rule of law backsliding*”, which refers to the process of gradual constitutional capture at the base of a “*systemic undermining of the key components of the rule of law*.”<sup>7</sup>

In turn, constitutional capture is defined as the systematic weakening of the checks and balances of a State's legal system, and it may even go so far as to seriously hinder changes in political power, through control of the entire political system by vitiation of democratic processes and legal guarantees.<sup>8</sup> These processes of gradual constitutional capture form a “*well-organised script*” through which rule of law backsliding encroaches and consolidates. The disenchantment of citizens with political party systems leads to the appearance of illiberal politicians, in new political parties or in the midst of traditional parties, all armed with demagogic promises of radical and immediate change. Dissatisfied citizens elect these illiberal politicians, who soon begin to dismantle the pre-existing constitutional framework, through legalistic tricks that aim to strangle any means of opposition to their consolidation. As these illiberal politicians and ideologues consolidate political power, citizens awake far too late for the damage inflicted and can no longer use the guarantees they once enjoyed to protect them against arbitrary use of power by the State.

<sup>6</sup> Carlos Closa, Dimitry Kochenov and JHH Weiler, “Reinforcing rule of law oversight in the European Union”, *EUI Working Paper RSCAS 2014/25* (2014): 4, available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2404260](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2404260).

<sup>7</sup> Laurent Pech and Kim Lane Scheppele, “Illiberalism within: rule of law backsliding in the EU”, *Cambridge Yearbook of European Legal Studies*, vol. 19 (2017): 6, available at: [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3009280](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3009280).

<sup>8</sup> Jan-Werner Müller, “Rising to the challenge of constitutional capture: Protecting the rule of law within EU member states”, *Eurozine*, 21 March 2014, available at: <https://www.eurozine.com/rising-to-the-challenge-of-constitutional-capture/>.

<sup>9</sup> Pech and Scheppele, “Illiberalism within”, 6.

Within this framework, rule of law backsliding represents “*the process through which elected public authorities deliberately implement governmental blueprints which aim to systematically weaken, annihilate or capture internal checks on power with the view of dismantling the liberal democratic state and entrenching the long-term rule of the dominant party.*”<sup>10</sup> Rule of law backsliding differs from “*mere*” structural deficiencies of the rule of law, such as endemic corruption or insufficient administrative or judicial resources, in the sense that the former is a deliberate strategy pursued by public authorities with the goals of fundamentally undermining pluralism<sup>11</sup> and to capture the entire legal-social apparatus, from the legislative and executive powers to the judicial structure, media and security forces.<sup>12</sup> The paradigmatic examples of rule of law backsliding within the EU — Hungary<sup>13</sup> and Poland — clearly demonstrate why that fundamental value is at the heart of the Union’s concerns: backsliding “*implies that a country was once better, and then regressed [...] particularly [...] where this retrogression is a deliberate strategy of a ruling party.*”<sup>14</sup>

The cases of Hungary and Poland have been particularly serious because they represented the first flagrant instances of an unprecedented backsliding of the rule of law. With the rise to power of Fidesz in Hungary and PiS in Poland, the institutions and postulates of the democratic rule of law were dismantled at an unprecedented rate. Despite adopting different paths, both Member States followed the same “*recipe*” for dismantlement that we alluded to above. In Hungary, following a constitutional majority by Fidesz in the Hungarian parliament, several laws were enacted to fulfil Viktor Orbán’s vision of an illiberal democracy, attacking checks and balances such as the courts and civil society institutions.<sup>15</sup> In the Polish case,<sup>16</sup> the PiS-led government never enjoyed such constitutional majority, having resorted to reversing the rule of law through legal subterfuge, exploiting the backdoors of the law to dismantle the checks and balances of the Polish system,<sup>17</sup> attacking courts and civil society institutions in a similar way to Hungary.

In both cases, at different speeds but in a consistent and identical manner, the parties in power embarked on a general dismantling of the systems of guarantees of their respective States, with the aim of installing an illiberal form of State. In both Member States, attacks on fundamental rights followed. Notably, the LGBT community was heavily targeted, with Poland creating the infamous LGBT-free zones and, recently, with Hungary limiting freedom of expression and equality of LGBT citizens.

<sup>10</sup> Pech and Scheppele, “Illiberalism within”, 6.

<sup>11</sup> Pech and Scheppele, “Illiberalism within”, 8.

<sup>12</sup> Arch Puddington, *Breaking down democracy: goals, strategies, and methods of modern authoritarians*, Freedom House, June 2017, 1, available at: [https://freedomhouse.org/sites/default/files/June2017\\_FH\\_Report\\_Breaking\\_Down\\_Democracy.pdf](https://freedomhouse.org/sites/default/files/June2017_FH_Report_Breaking_Down_Democracy.pdf).

<sup>13</sup> In fact, Hungary represents “*the first, and probably model, case of constitutional backsliding from a full-fledged liberal democratic system to an illiberal one with strong authoritarian elements*”, in Gábor Halmai, “Illiberal constitutionalism? the Hungarian constitution in a European perspective”, in *Verfassungskrisen in der Europäischen Union*, ed. Stefan Kadelbach (Baden: Nomos, 2018), 86.

<sup>14</sup> Pech and Scheppele, “Illiberalism within”, 8-9.

<sup>15</sup> Halmai, “Illiberal constitutionalism?”, 87-89.

<sup>16</sup> Though currently Poland has managed to halt its backsliding path, with a civic coalition-led government, we cannot help but fear an eventual backslide to pre-2023 Poland (reinforced by the PiS-backed candidate’s victory in the 2025 presidential election).

<sup>17</sup> Dimitry Kochenov and Petra Bard, “Rule of law crisis in the new Member States of the EU: the pitfalls of overemphasising enforcement”, *RECONNECT Working Paper*, no. 1 (2018): 9, available at: [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3221240](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3221240).



What began as a worrying degradation of democratic institutions in a few Member States has since evolved to a global illiberal tendency, which is why effectively defending the value of the rule of law remains as urgent as ever. The European institutions have sought the best ways to tackle that issue, either through political and soft law solutions such as the rule of law framework and the Rule of Law Reports and dialogues, hard law solutions such as deploying Article 7 TEU or enacting Regulation 2020/2092, or through judicial means such as the infringement procedure. The focus of this article is all of these main legal and political approaches to tackling rule of law backsliding. However, in a prior note, we must point out that we will not analyse the infringement procedure, as it will be the focus of a separate study.

### 3. Article 7 of the TEU

Article 7 TEU, originally introduced by the Treaty of Amsterdam, aims to provide the Union institutions with the means to ensure that Member States respect the common values enshrined in Article 2 of the TEU. The aim of this provision is to tackle breaches of the common values through a comprehensive and systemic political approach, providing the EU with two response mechanisms: a recommendation, addressed to the Member States concerned, in the event of a clear risk of a serious breach of the common values and the suspension of certain Member States' rights arising from the Treaties, in the event that the European Council has previously declared the existence of a serious and persistent breach of the same values. The same article also establishes three distinct procedures:<sup>18</sup> the procedure for declaring the existence of a clear risk of a serious breach, and the subsequent adoption of recommendations, a procedure for verifying the existence of a serious and persistent breach and a procedure for sanctioning the offending Member State, in particular by suspending some of its rights.

We must begin our analysis by looking at the key-concepts of “*clear risk of a serious breach*” and “*serious and persistent breach*”, with the aid of the European Commission's Communication on Article 7.<sup>19</sup> A risk of a serious breach is by definition potential and must be clear so to exclude merely circumstantial deviations. A serious breach occurs when the identified risk materialises. Thus, the alert mechanism enshrined in Article 7(1) serves as a preventive means of sending a warning signal to an offending Member State before the risk materialises into a breach while placing EU institutions under an obligation to maintain constant surveillance.

The Commission Communication *sub judice* divides between “*serious*” and “*persistent*” breach. The criteria to determine the seriousness of a breach must tend to its object and result, among others that may be used to assess such situations. For instance, the object of a law that constrains certain minorities' rights would be that same constraint and the result, the constraint itself, would be the breach

<sup>18</sup> Dimitry Kochenov, «Article 7 TEU: a commentary on a much talked-about “dead” provision», in *Defending Checks and Balances in EU Member States*, ed. Armin Von Bogdandy *et al.* (Berlin: Springer-Verlag, 2021), 136, available in open-access at: <https://link.springer.com/book/10.1007/978-3-662-62317-6>.

<sup>19</sup> European Commission, *Respect for and promotion of the values on which the Union is based*, COM(2003) 606 final, 15 October 2003, available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52003DC0606>.

of the value of equality or non-discrimination. The persistence of a breach serves only as criterion for deploying the sanctioning procedure laid out in Article 7(3), which can be triggered solely against a breach that has already been committed and that has lasted for some time. Persistence can be expressed in a variety of manners that altogether reveal a systematic repetition of individual breaches, ranging from concrete norms or legislative instruments to “*mere administrative or political practice of the authorities of the Member State.*”

There are three procedures enshrined in Article 7, the first related to the preventive verification mechanism and the latter related to the sanctioning mechanism. Article 7(1) establishes the procedure for determining the existence of a clear risk of serious breach. The goal of this procedure is to push the Member States “*where the breach could occur to engage in dialogue with the EU institutions in order to prevent a possible breach.*”<sup>20</sup> The determination process may be triggered by a reasoned proposal by one-third of the Member States, the European Parliament or the European Commission, and the procedure is led by the Council, which must hear the defaulting Member State and address recommendations to it, decided by a qualified majority of four-fifths of its members, to remedy the situation in question. Point 2 of Article 7(1) determines that the Council must monitor the situation and regularly verify whether the reasons that led to the finding of the manifest risk continue to be valid.<sup>21</sup>

The procedures relating to the sanctioning mechanism are divided into a pre-sanctioning procedure and the sanctioning procedure itself. The pre-sanctioning procedure, provided for by Article 7(2), relates to determining the existence of a serious and persistent breach and its aim is to verify a situation of serious and persistent breach, by a Member State, of the values listed in Article 2 TEU. The verification may be triggered upon proposal by one third of the Member States or the European Commission and is led by the European Council, which must invite the Member State concerned to submit its observations. After this submission, the European Council may determine the existence of a serious and persistent breach, acting by unanimity and after obtaining the European Parliament’s consent. The requirement of unanimity indicates, once again, that the breach in question must be systematic in nature, in the sense “*that the institutions of the Member State concerned cannot, on their own, successfully resolve the problem of failing to adhere to EU values*”,<sup>22</sup> in order to prevent abusive use of this mechanism by Member States.

Article 7(3) stipulates the determination of a breach as the essential condition to trigger the sanctioning procedure, which materialises in a set of economic and non-economic measures, attending to the specific characteristics of each case. The initiative to initiate the procedure is up to the Council, as does the decision to apply the sanctioning measures to a given Member State, by means of a qualified majority decision. Under Article 238(3)(b) TFEU, because the Member States in question do not participate in voting, the qualified majority required for the Council is at least 72 % of the members of the Council representing the participating Member States,

<sup>20</sup> Kochenov, “Article 7 TEU”, 138.

<sup>21</sup> The European Commission proposes that this monitoring must be carried out through “*practical operational measures to ensure thorough and effective monitoring of respect for and promotion of common values*” such as, for example, “[i]ntroducing regular monitoring of respect for common values and developing independent expertise” – European Commission, *Respect for and promotion of the values on which the Union is based*, paragraph 2.1.

<sup>22</sup> Kochenov, “Article 7 TEU”, 141.

comprising at least 65 % of the population of these States. In addition, Article 7(5) TEU refers to Article 354 TFEU, the second paragraph of which determines the application of those majority rules instead of the general rules.

As to the sanctions themselves, Article 7(3) of the TEU generally provides for the suspension of certain rights arising from the application of the Treaties to the Member State in question. The expression “*certain of the rights*” is an indeterminate concept so as to allow the Council some flexibility in tailoring measures to the specific cases, with a view to persuading the Member State concerned to fulfil its obligations. The sanctioning measures can be of economic or non-economic nature, but there is one that stands out as it appears in the text of the norm itself: the suspension of the defaulting Member State’s voting rights in the Council. A limited interpretation of Article 7(3) suggests that the aim of this norm is insulating the EU from the impact of a Member State that deviates from the common values,<sup>23</sup> enabling even “*a kind of moral quarantine, not an actual intervention*”,<sup>24</sup> aimed at forcing the Member State to mend its ways.

However, in an expansive interpretation, the purpose of the article under study ultimately points to the protection of European citizens against the violation of the principles contained in Article 2 TEU by a Member State, given that the majority of doctrine understands that, because the EU has an undeniable constitutional quality, those fundamental values create normative expectations for EU citizens. Therefore, “*Article 7 protects, to a certain degree depending on our understanding of how deep the EU constitutional quality goes, these citizens against a Member State’s parliamentary majority that encroaches on the values of Article 2 TEU.*”<sup>25</sup>

Inevitably, as the European Commission itself warns, the triggering of this mechanism ends up generating implications for the EU as a whole, namely in the mutual trust between its Members, on which it is based, with some calling it the “*nuclear option*” in order to highlight its nature as a last resort. Notwithstanding this suspension, the Member State in question remains bound by its obligations under the Treaties, as stipulated in the second paragraph of Article 7(3), and its continued membership of the Union is never called into question, the withdrawal of which may only be decided by the Member State itself, in accordance with Article 50 TEU. Under Article 7(4) TEU, the Council may decide to amend or revoke measures taken under paragraph 3 if the situation which led to the taking of those measures changes, acting to that end by a qualified majority in the same terms as described above.

Although in theory, Article 7 TEU seems a valuable mechanism to defend the common values of the EU, among which is the rule of law, practice points otherwise. Firstly, the inevitable economic losses resulting from sanctions affect the Internal Market as a whole, the consequence being the absence of political will to even activate any of the procedures laid out in the norm *sub judice*. Secondly, these procedures are mainly symbolic and superficial: even the sanctioning of a Member State will likely not change anything within its legal order, which can reveal a

<sup>23</sup> Tomas Dumbrovsky, “Beyond voting rights suspension: tailored sanctions as democracy catalyst under Article 7 TEU”, *EUI Working Paper RSCAS 2018/12* (2018): 6, available at: [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3157513](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3157513).

<sup>24</sup> Jan-Werner Müller, “Should the EU protect democracy and the rule of law inside Member States?”, *European Law Journal*, vol. 21, no. 2 (2015): 144.

<sup>25</sup> Dumbrovsky, “Beyond voting rights suspension”, 7.



certain pointlessness in activating it.<sup>26</sup> Thirdly, the political nature of Article 7 allows for a great deal of behind-the-scenes leverage, easily deadlocking any votes. Last but not least, due to the very scope of Article 7, the procedures can only be used against truly grave and evident sets of facts, leaving out the gradual nature of democratic backsliding.<sup>27</sup>

Article 7 TEU has unfortunately revealed its lack of practical efficacy when it was activated for the first time. In 2017, the European Commission deployed Article 7(1) against Poland, but the vote never occurred. In 2024, the Commission withdrew the application due to the new Polish government's action towards repairing the rule of law, without the procedure ever having advanced to any vote in the Council. In 2018, the European Parliament voted to deploy Article 7(1) against Hungary, a procedure that, except for a few hearings,<sup>28</sup> is still ongoing as of September 2025. As if that was not bad enough, when we reference several Member States where rule of law is gradually backsliding, the problem of strategic alliances between them in Council votes arises, which can lead to real blockages when debating the application of the procedure to any of them, especially when those procedures demand unanimity [as is the case of Article 7(2)].

To sum up, the Article 7 procedures, while promising, prove impractical as currently designed. Perhaps a Treaty change that would correct the impasses and optimise the effects of this procedure could make it more effective in protecting the fundamental values that shape the EU. However, even that seems unlikely, as it would require European States to negotiate a deeper transfer of sovereignty in an era of identitarian and sovereigntist nationalisms. That is why the European institutions have developed other mechanisms to tackle breaches of the fundamental values of the EU. One of those mechanisms was our next legal approach, the much talked about conditionality regulation.

#### 4. Regulation (EU, Euratom) 2020/2092 on a general regime of conditionality for the protection of the Union budget

In the context of the discussion of the 2021-2027 Multiannual Financial Framework, the European Commission commented on the need for “*a new mechanism to protect the EU budget from financial risks linked to generalised deficiencies as regards the rule of law*”,<sup>29</sup> the measures of which should function in a logic of proportionality and safeguard the obligations of Member States with respect to beneficiaries. This was followed by a comprehensive interinstitutional dialogue on the subject, culminating in a proposal by the European Commission for a regulation on the protection of the Union's budget in case of generalised deficiencies as regards the rule of law in Member States. Following an ordinary legislative procedure, the European Parliament and the Council then adopt, in a

<sup>26</sup> For both arguments, see Kochenov, “Article 7 TEU”, 145.

<sup>27</sup> For both arguments, see Carlos Closa and Dimitry Kochenov, “Part I. The case for EU reinforced oversight in four questions”, in *EUI Working Paper RSCAS 2014/25: Reinforcing Rule of Law Oversight in the European Union*, ed. Carlos Closa, Dimitry Kochenov and Joseph H.H. Weiler (2014): 7, available at: [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2404260](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2404260).

<sup>28</sup> Hearings were held in the European Parliament in May 2022, which may be consulted at: [https://www.europarl.europa.eu/doceo/document/TA-9-2022-0204\\_EN.html](https://www.europarl.europa.eu/doceo/document/TA-9-2022-0204_EN.html).

<sup>29</sup> European Commission, *A modern budget for a Union that protects, empowers and defends the multiannual financial framework for 2021-2027*, COM(2018) 321 final, 2 May 2018, available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:52018DC0321>.

joint position dated 16 December 2020, Regulation (EU, Euratom) 2020/2092 on a general conditionality regime for the protection of the Union budget.

The preamble of Regulation 2020/2092 essentially links protecting the Union's budget and the affirmation of the rule of law. Recital 3 of the preamble defines the rule of law as requiring that all public authorities act within the constraints set out by the law, in accordance with the values of democracy and respect for fundamental rights, and under the control of independent and impartial courts. These postulates materialise in a set of principles such as legality (which implies a transparent, accountable, democratic, and pluralistic law-making process), legal certainty, prohibition of arbitrariness of the executive powers, effective judicial protection and separation of powers, which must be respected.

Recital 5 of the Regulation reaffirms the understanding of the EU as a Union of law based on common fundamental values by recalling that any country that becomes a Member State *“joins a legal structure that is based on the fundamental premiss that each Member State shares with all the other Member States, and recognises that they share with it, a set of common values on which the Union is founded”*, a premise that *“implies and justifies the existence of mutual trust between the Member States that those values will be recognised and, therefore, that the law of the Union that implements them will be respected.”* Recital 6 adds that respect for the rule of law is essential for the protection of the other fundamental values on which the Union is founded, concluding that *“[t]here can be no democracy and respect for fundamental rights without respect for the rule of law and vice versa.”*

Recitals 7 and 8 of the Regulation assert that, whenever Member States implement the Union's budget, respect for the rule of law is an essential precondition for compliance with the principles of sound financial management, which can only be ensured by Member States if public authorities act in accordance with the law, if cases of fraud or other breaches of the law are effectively pursued by investigative and prosecution services, and if arbitrary or unlawful decisions of public authorities can be subject to effective judicial review by independent courts and by the CJEU. Recital 9 concludes that those conditions are required as a minimum guarantee against unlawful and arbitrary decisions of public authorities that could harm the financial interests of the EU.

Articles 1 and 2 of Regulation 2020/2092 lay down the subject matter of the legislation and the working definitions applicable, essentially reproducing the text of the corresponding recitals. It is Article 3 that establishes which situations may indicate breaches of the principles of the rule of law. Article 3(a) presents, from the outset, one of the most recurrent concerns throughout the Regulation, which is the concern with the independence of the judiciary. Point (b) and Point (c) of the same Article identify failure to prevent, correct or sanction arbitrary or unlawful decisions by public authorities, withholding financial and human resources affecting their proper functioning or failing to ensure the absence of conflicts of interest and limitation of the availability and effectiveness of legal remedies, including through restrictive procedural rules and lack of implementation of judgments, or limiting the effective investigation, prosecution or sanctioning of breaches of law as also indicative of breaches of the rule of law.

Article 4(1) of Regulation 2020/2092 lays down the conditions for adopting protective measures, stating that appropriate measures should be taken where it is established that breaches of the principles of the rule of law in a Member State

affect or seriously risk affecting the sound financial management of the Union budget or the protection of the financial interests of the Union in a sufficiently direct way, clarifying in paragraph 2 what situations can qualify as breaches of the rule of law, among which we find situations such as the proper functioning of the authorities implementing the Union budget, in particular in the context of public procurement or grant procedures, the proper functioning of the authorities carrying out financial control, monitoring and audit or the effective judicial review by independent courts of actions or omissions by the referred authorities.

Provided that the conditions set out in Article 4(2) are observed, the European Commission may adopt one or more of the appropriate measures provided for in Article 5, which are divided into two groups: one set of measures is applicable where the Commission implements the Union budget in direct or indirect management pursuant to points (a) and (c) of Article 62(1) of Regulation 2018/1046 (on the financial rules applicable to the general budget of the Union), and where a government entity is the recipient; the other set of measures is applicable where the Commission implements the Union budget under shared management with Member States pursuant to point (b) of Article 62(1) of Regulation 2018/1046. Among the measures that can be applied under the first situation we find, for example, the suspension of payments or of the implementation of the legal commitment, or even the termination of the legal commitment, the prohibition on entering into new legal commitments or the suspension or reduction of the economic advantage under an instrument guaranteed by the Union budget. As for the measures that can be applied under the second situation, we can mention, among others, suspension of the approval of one or more programmes, the reduction of pre-financing or even the suspension of payments.

Article 5(2) of the Regulation ensures that the *“legitimate interests of final recipients and beneficiaries are properly safeguarded when measures are adopted”*, stipulating that the imposition of appropriate measures by the Commission shall not affect the obligations of government entities or of Member States to implement the programme or fund affected by the measure, particularly the obligations they have towards final recipients or beneficiaries. Article 5(2) also establishes a regular quarterly reporting deadline, counting from the adoption of the measures, the purpose of which is to allow the European Commission to verify that decisions taken under the Regulation do not affect, directly or indirectly, payments to be made to final recipients or beneficiaries. In turn, the Commission shall provide information and guidance for the benefit of final recipients or beneficiaries on the obligations by Member States via a website or an internet portal, where it will also provide adequate tools for them to inform it about any breach of these obligations that directly affects them, pursuant to Article 5(4).

Article 5(3) establishes a principle of proportionality, prescribing that measures shall be determined considering the actual or potential impact of the breaches of the principles of the rule of law on the sound financial management of the Union budget or the financial interests of the Union. The proportionality of the measures must be assessed according to the criteria set out in recital 18 of the preamble: the seriousness of the situation; the time which has elapsed since the conduct started; the duration and recurrence of the conduct; the intention; the degree of cooperation of the Member State concerned in putting an end to the breaches of the principles of the rule of law; and the effects on the sound

financial management of the Union budget or the financial interests of the Union. Additionally, recital 17, adding a subsidiarity principle, warns of the supplementary nature of the measures provided for in this Regulation, which should only be applied in case other procedures set out in Union legislation would not allow the Union budget to be protected more effectively.

Article 6 of Regulation 2020/2092 establishes the procedure to be followed for the adoption of the protective measures. The procedure is initiated by the European Commission, which, after finding that there are reasonable grounds to consider that the conditions set out in Article 4 are fulfilled, sends a written notification to the Member State concerned setting out the factual elements and specific grounds on which it based its findings, immediately informing the European Parliament and the Council. The Commission must consider relevant information from available sources, including decisions, conclusions and recommendations of Union institutions, other relevant international organisations, and other recognised institutions, both before and after having sent the written notification. The Member State in question may make observations on the findings set out in the notification, within a time limit of at least one month and not more than three months from the date of notification, as well as observations regarding the proportionality of the proposed measures, within a time limit of one month.

Pursuant to Article 6(9), the European Commission, considering that the conditions of Article 4 are fulfilled, shall submit a proposal for an implementing decision on the appropriate measures to the Council, within one month of receiving the Member State's observations or, if none are made, within one month of the deadline set for the Member State's reply. The Council adopts the implementing decision within one month of receiving the proposal from the European Commission, with the Council being able to amend the Commission's proposal and adopt the amended text by means of an implementing decision, acting to that effect by a qualified majority voting, calculated in accordance with Article 16(4) TEU *ex vi* Article 6(11) of the Regulation. It is allowed to the Commission, whenever it deems it appropriate, the use of its prerogative to convene the Council, in accordance with Article 237 TFEU, in order to ensure a timely decision.

Article 7 of the Regulation *sub judice* establishes the procedure for lifting the adopted measures. At any time, the Member State concerned may adopt new remedial measures and submit to the Commission a written notification including evidence showing that the conditions of Article 4 are no longer fulfilled. In turn, the European Commission shall reassess the situation in the Member State concerned at the request of the Member State itself, by its own initiative or, at the latest, one year after the adoption of measures by the Council. Where the Commission considers that the conditions of Article 4 are no longer fulfilled, it shall submit to the Council a proposal for an implementing decision lifting the adopted measures. If the situation so justifies, the Commission may adapt, by a Council implementing decision, or maintain, by a reasoned decision, the adopted measures. Article 8 of the Regulation demands that, throughout the procedure, the Commission must immediately inform the European Parliament of any measures that are proposed, adopted, or lifted.

Regulation 2020/2092 was adopted in the context of the issues we discussed above regarding rule of law backsliding, seeing that the existent legal mechanisms at the time seemed ineffective or outright useless, leading European institutions to

seek effective alternatives. Among others, the solution of ensuring compliance with the postulates of the rule of law through budget management is, without a doubt, innovative. However, doubts regarding the effectiveness, and even legitimacy, of the conditionality regulation emerged. There have been raised numerous issues and concerns,<sup>30</sup> but we cannot address them all in this text, so we will focus on the questions that were eventually raised when Hungary and Poland legally contested this regulation.

In effect, Hungary and Poland each filed an action for annulment of Regulation 2020/2092 before the CJEU. Among many claims they put forward, we shall analyse the main allegations and the CJEU's findings in the consequent judgements.<sup>31</sup> Both Member States began by arguing the EU's lack of competence to adopt the regulation. Regarding the legal basis, they claimed that linking the rule of law to the sound financial management of the EU budget does not fall within the scope of Article 322(1) TFEU. Complementarily, both Member States argued that the regulation circumvented Article 7 TEU, claiming it is the only legal basis on which it may be determined that there is a risk of a serious breach by a Member State of the values contained in Article 2 TEU, a determination that is an exclusive competence of the European Council.

Both Member States also claimed that the regulation was in violation of the principle of proportionality, by not clarifying sufficiently its link with the other provisions intended to protect the Union budget, and the principle of legal certainty, by not clarifying sufficiently the concept of rule of law, arguing that the densification of that value is a political matter, thus a matter of the exclusive competence of the Member States.

The CJEU argued against those claims, rejecting the annulment of the regulation. The CJEU points out that compliance by the Member States with the common values on which the EU is founded justifies the mutual trust between those States. Basing the Union budget on Member States' mutual trust in the responsible use of the common resources included in it, the Court finds that the sound financial management of the Union budget and the financial interests of the Union may be seriously compromised by breaches of the principles of the rule of law committed in a Member State, which in turn undermines mutual trust as well. Therefore, a conditionality mechanism linking the receipt of Union financing and the respect of the principles of the rule of law is capable of falling within the power conferred by the Treaties on the EU to establish financial rules relating to the implementation of the Union budget. Thus, the EU has competence to enact Regulation 2020/2092 and the legal basis for that is correct.

<sup>30</sup> For the concerns raised about Regulation 2020/2092 see, among others: Maria José Rangel de Mesquita, "European Union values, rule of law and the multiannual financial framework 2021-2027", *ERA Forum*, vol. 19 (2018), available at: <https://link.springer.com/article/10.1007/s12027-018-0523-6>; Gábor Halmai, "The possibility and desirability of economic sanction: rule of law conditionality requirements against illiberal EU Member States", *EUI Department of Law Research Paper* No. 2018/06 (2018), available at: [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3126231](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3126231); and Antonia Baraggia and Matteo Bonelli, "Linking money to values: the new rule of law conditionality regulation and its constitutional challenges", *German Law Journal*, vol. 23 (2022).

<sup>31</sup> Judgment CJEU *Hungary v. Parliament and Council*, 16 February 2022, Case C-156/21, ECLI:EU:C:2022:97 and Judgment CJEU *Poland v. Parliament and Council*, 16 February 2022, Case C-157/21, ECLI:EU:C:2022:98.



Regarding the claim that the regulation circumvents Article 7 TEU, the CJEU finds that, seeing that the purpose of the procedure laid down in Article 7 is to allow the Council to penalise serious and persistent breaches of each of the common values on which the EU is founded and that, diversely, the regulation applies only in the event of a breach of the principles of the rule of law in a Member State which affects or seriously risks affecting the proper implementation of the Union budget, the procedure under Article 7 TEU and the procedure established by the regulation pursue different aims and each has a clearly distinct subject matter.

Regarding the claim of violation of legal certainty, the Court of Justice states that the principles set out in the regulation, as constituent elements of the concept of rule of law, have their source in common values which are also recognised and applied by the Member States in their own legal systems and to which they adhere, as a value common to their constitutional traditions, consequently demonstrating that Member States are in a position to determine with sufficient precision the essential content and the requirements flowing from each of those principles. In addition, the Court of Justice finds that the Commission must comply, subject to review by the EU judicature, with strict procedural requirements involving several consultations with the Member State concerned, and concludes that the regulation meets the requirements of the principle of legal certainty.

As to the claim of violation of proportionality, the Court of Justice noted that the regulation demands that a genuine link must be established between a breach of a principle of the rule of law and an effect or serious risk of effect on the sound financial management of the Union. Reminding also that the concept of “*serious risk*” is clarified in EU financial legislation and that the protective measures must be strictly proportionate to the impact of the breach found on the Union budget, the Court of Justice concludes that the regulation also fulfils the principle of proportionality.<sup>32</sup>

On 27 April 2022, the European Commission formally announced it would be triggering the conditionality mechanism against Hungary. After the procedural back and forth required by the regulation between Brussels and Budapest, the European Commission adopted, on 18 September, a proposal on measures for the protection of the Union budget against breaches of the principles of the rule of law in Hungary,<sup>33</sup> following which the Council, on 15 December, adopted an implementing decision on the protective measures to apply to Hungary.<sup>34</sup>

In its proposal on protective measures to adopt by the Council, the European Commission found that the issues raised during the proceedings constitute systemic breaches of the principles of the rule of law, in particular of the principles of legal certainty and prohibition of arbitrariness of the executive powers, in light of Article 3(b) of Regulation 2020/2092.<sup>35</sup> The Commission invoked several of the situations

<sup>32</sup> For a summary of what was discussed in the cited case-law, see Court of Justice, Press Release No. 28/22 (2022), available at: <https://curia.europa.eu/jcms/upload/docs/application/pdf/2022-02/cp220028en.pdf>.

<sup>33</sup> European Commission, *Proposal for a Council implementing decision on measures for the protection of the Union budget against breaches of the principles of the rule of law in Hungary*, COM(2022) 485 final (18 September 2022), available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:52022PC0485>.

<sup>34</sup> Council of the European Union, *Council implementing decision (EU) 2022/2506 on measures for the protection of the Union budget against breaches of the principles of the rule of law in Hungary* (15 December 2022), available at: [https://eur-lex.europa.eu/eli/dec\\_impl/2022/2506/oj/eng](https://eur-lex.europa.eu/eli/dec_impl/2022/2506/oj/eng).

<sup>35</sup> European Commission, *Proposal for a Council implementing decision*, recital 57.

listed in Article 4(2) of the same regulation, such as “(a) the proper functioning of authorities implementing the Union budget, [...] in particular in the context of public procurement procedures”, “(b) the proper functioning of the authorities carrying out financial control, monitoring and audit and the proper functioning of effective and transparent financial management and accountability systems” or “(e) the prevention and sanctioning of fraud, [...], corruption or other breaches of Union law relating to the implementation of the Union budget or to the protection of the financial interests of the Union [...]”.

As to the proposed measures, the European Commission suggested addressing both the programmes under direct and indirect management, pursuant to point (a) of Article 5(2) of Regulation 2020/2092, and the programmes under shared management, pursuant to point (b) of the same norm, proposing a prohibition on entering into new legal commitments with any public interest trust and any entity maintained by Hungary under any Union programme under direct and indirect management and the suspension of 65% of the commitments in three operational programmes for the period 2021-2027 financed from several EU cohesion funds, as well as the suspension of their approval in total, if the identified programmes have not been approved before the Council’s decision. These measures translated into the freezing of 7.5 billion euros in funds from the Union budget and the freezing of 5.8 billion euros from the COVID-19 Recovery Plan, the total amounting to a suspension of roughly 13.3 billion euros in EU funding to Hungary.<sup>36</sup>

The subsequent Council implementing decision establishes different values, after negotiations within the Council, determining the suspension of 55% of the commitments referred above, amounting to 6.3 billion euros, and subjecting the freezing of 5.8 billion euros in recovery funds to the condition that Hungary addressed the issues raised through the implementation of 27 milestones regarding the independence of the judiciary, the non-discrimination of minorities and the separation of powers and arbitrariness of executive powers. In December 2023, the European Commission, observing its obligations under Article 7(1) second paragraph of Regulation 2020/2092, reassessed the situation in Hungary and decided to maintain the adopted measures, repeating the process in December 2024.

We are still at a very early stage in assessing the concrete effectiveness of the conditionality mechanism, and only with time will it be possible to understand how the interaction between this mechanism and other EU provisions aimed at defending the rule of law complement each other in defending this fundamental value. However, as time is often pressing, it becomes necessary to take concrete actions that enforce the rule of law in the immediate term. Cutting off funding is definitely a start, but it certainly has its limitations, which is why all EU mechanisms aimed at protecting the rule of law must work in a complementary manner to safeguard this fundamental EU value.

## 5. The European Commission’s annual Rule of Law Reports

The need to pursue dialogic and consensual solutions means that EU institutions cannot simply adopt an adversarial stance when dealing with sensitive issues that may interfere, for example, with respect for the constitutional identity or the exercise

<sup>36</sup> Alice Tidey, “Brussels recommends freezing €7.5 billion in EU funds to Hungary over rule of law concerns”, *Euronews*, 30 November 2022, available at: <https://www.euronews.com/my-europe/2022/11/30/brussels-to-announce-decision-to-cut-75-billion-of-eu-funds-to-hungary-over-rule-of-law-co>.

of exclusive competences by Member States. However, they also cannot fail to strive to maintain the EU's fundamental values and founding principles, as is the case with the rule of law. The challenge facing EU institutions is precisely how to achieve such a balance. EU institutions have a duty, enshrined in the Treaties, to ensure the process of European integration and the maintenance of its founding principles, always respecting the autonomy of Member States and cooperating with them – European integration can only be achieved through cooperation between all parties involved in strengthening this integration, and a true EU implies that European institutions, Member States and citizens always act in a concerted and joint manner towards deepening that Union.

It follows from Article 17(1) TEU that the European Commission ensures the application of the Treaties and the measures adopted by the institutions pursuant to them, which is why the Commission is said to be the “*guardian of the Treaties*”, monitoring the application of EU law, whether primary or secondary, under the supervision of the CJEU. In this role, it “*has the responsibility of ensuring the respect of the values on which the EU is founded and of protecting the general interest of the Union*”,<sup>37</sup> playing an active role in this regard. In its Communication “*A new EU framework to strengthen the rule of law*”, the European Commission proposes “*a new framework to ensure an effective and coherent protection of the rule of law in all Member States*”, aimed at responding to and remedying any situation in which there is a systemic threat to the rule of law and aiming 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*.”<sup>38</sup>

When there are clear indications of a systemic threat to the rule of law in a given Member State, the European Commission will initiate a structured dialogue with the Member State concerned, seeking to find a dialogic solution through an objective and in-depth assessment of the situation in question, indicating rapid and concrete measures to respond to that systemic threat. If the Member State has not cooperated throughout the procedure or has even obstructed its progress, the European Commission will assess the possibility of resorting to the mechanisms provided for in Article 7 TEU. Naturally, the European Parliament and the Council are regularly informed and monitor the progress of the entire procedure.

In 2019, the European Commission presented the Communication “*Further strengthening the Rule of Law within the Union*” in which it proposed to “*take stock of the experience gained in recent years and provide avenues for reflection on possible future measures*.”<sup>39</sup> Invoking the rule of law framework, the Commission acknowledged that, while resorting to the mechanism helped identify rule of law issues in some Member States, it did not address sufficiently the identified shortcomings. Based on the need to promote rule of law standards, recognise warning signs, improve the EU's ability to respond to problems concerning the rule of law, and address long-term shortcomings through structural reforms, the Commission proposes an effective strengthening of the rule of law based on three pillars: (i) the development of knowledge and a common culture of the rule of law; (ii) the prevention of problems

<sup>37</sup> European Commission, *A new EU framework to strengthen the rule of law*, COM(2014) 158 final, 11 March 2014, available at: <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A52014DC0158>.

<sup>38</sup> European Commission, *A new EU framework to strengthen the rule of law*.

<sup>39</sup> European Commission, *Further strengthening the rule of law within the union: state of play and possible next steps*, COM(2019) 163 final, 3 April 2019, available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52019DC0163>.

through cooperation and support for strengthening the rule of law at national level, aimed at early intervention to avoid the risk of escalation; and (iii) the formulation of an effective joint response through enforcement by the Union when national mechanisms prove insufficient to address identified issues.

Briefly after defining these intentions, the European Commission presented the Communication “*Strengthening the rule of law within the Union: A blueprint for action*”, proposing a rule of law review cycle to “*deepen its monitoring of rule of law related developments in the Member States*”,<sup>40</sup> encompassing all the different components of the rule of law and involving all Member States, inviting them to engage in a mutual exchange of information and dialogue on issues related to that fundamental value. To achieve these objectives, the commission proposed the creation of an annual Rule of Law Report as part of the intended annual rule of law cycle. Essentially, with the aim of ensuring “*the necessary transparency and awareness, and to keep the rule of law on the political agenda of the EU*”,<sup>41</sup> the Commission intended to publish an annual report providing a synthesis of significant developments in the Member States and at EU level.

In the Commission’s view, this Report intends to provide “*an opportunity to report on the state of play in formal rule of law processes, as well as on the work of the EU institutions in the promotion of rule of law standards and the development of a rule of law culture*”,<sup>42</sup> highlighting best practices and identifying recurring problems. The Commission also committed to continuing discussions and adopting additional measures, if necessary, stating the “*development of a coordinated and coherent strategic approach for the Union involving all relevant actors*”<sup>43</sup> as a common objective.

These advancements culminated in the publication of the first Rule of Law Report, in September 2020. Recovering the intention of the “*Strengthening the rule of law within the Union: A blueprint for action*” Communication that the EU and its Member States should increase efforts to promote a robust political and legal culture supporting the rule of law, the Commission intended “*to set out first key elements of the situation in the Member States, on which the new cycle of the rule of law mechanism and future reports will be able to build*”,<sup>44</sup> assisted by 27 chapters per country, based on specific quantitative assessments of each Member State and which form an integral part of the Report. The analysis proposed and developed by the Report is based on four main pillars: (i) the judicial system; (ii) the fight against corruption; (iii) media pluralism; and (iv) other institutional checks and balances. A network of national contact points was established to help setting up the mechanism and its methodology, and to act as an ongoing channel of communication.

With the Report, the Commission intended to help lead the debate within European and national institutions and begin work to promote reforms compatible with the rule of law through EU funding and expertise, thus providing a “*solid basis for further inter-institutional work*”<sup>45</sup> that would be carried out in the new cycle of analysis. The European Commission closed the 2020 Rule of Law Report remarking that it established the foundations for a new and dynamic process, involving a

<sup>40</sup> European Commission, *Strengthening the rule of law within the Union: a blueprint for action*, COM(2019) 343 final, 11 July 2019, available at: <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=COM%3A2019%3A343%3AFIN>.

<sup>41</sup> European Commission, *Strengthening the rule of law within the Union*.

<sup>42</sup> European Commission, *Strengthening the rule of law within the Union*.

<sup>43</sup> European Commission, *Strengthening the rule of law within the Union*.

<sup>44</sup> European Commission, *2020 Rule of Law Report*.

<sup>45</sup> European Commission, *2020 Rule of Law Report*.

continued dialogue with EU-level and state-level actors and stakeholders, intended to make the rule of law more resilient in European democracies. *“Being better equipped”*, concludes the European Commission, *“will help all Europeans to take up the challenges of the unprecedented economic, climate and health crisis, in full respect for our common principles and values.”*<sup>46</sup>

Since the first report was published in 2020, five more have been produced. We will address the most recent report before making a global analysis of this soft law instrument and its effects. Following essentially the same methodology, the 2025 Rule of Law Report takes note of what developments have occurred and what setbacks have arisen within the four rule of law pillars, at EU and Member State level. Regarding that, the Commission reports a positive trajectory in several Member States, with national reforms having been taken forward, stimulated by the annual rule of law cycle.

However, the 2025 Rule of Law Report presents a single market dimension through which we analyse the four pillars. This additional dimension aims to underline *“how rule of law challenges can directly impact economic confidence, legal certainty, and the effective functioning of the Union’s economic framework”*, essentially reinforcing the link between budget protection and rule of law enforcement previously established by the conditionality regulation, as we have already seen. Seeking to further the synergies arising from that regulation’s potential, the Commission intends to *“build a closer link between the recommendations in the Rule of Law Report and the financial support”*,<sup>47</sup> ensuring as well that the future long-term budget has strong safeguards on the rule of law.

The rule of law annual cycle and annual reports represent a preventive and dialogical means to address issues with that fundamental value and to tackle the identified issues in a co-operative manner. Because the Report is not an enforcement tool nor a sanctioning mechanism, several criticisms have emerged, ranging from its superficial and bureaucratic implementation to its ineffective reaction to rule of law backsliding. Although there are several insufficiencies with these reports, and some merit can be given to these criticisms, we believe the rule of law mechanisms aim at a larger picture objective: to effectively create the ideal ecosystem for this fundamental value to thrive within a society and, therefore, resist to attempts to undermine or dismantle it. Although, in the short term, there is still an urgent need to tackle the dismantling of the rule of law, the focus of the Reports is to shield it in the long turn. That is why the solutions provided by an effective Article 7 TEU, the conditionality regulation, and a comprehensive infringement procedure are paramount to protect the rule of law now, while the Rule of Law Reports build the rule of law’s endurance for the future.

## 6. Other institutional and state-level approaches

As provided for in Articles 14 and 16 TEU, the European Parliament and the Council jointly perform legislative and budgetary functions within the EU. Individually, the European Parliament also performs functions of representing European citizens, exercising political oversight over other European institutions,

<sup>46</sup> European Commission, *2020 Rule of Law Report*.

<sup>47</sup> European Commission, *2025 Rule of Law Report: the rule of law situation in the European Union*, COM(2025) 900 final, 8 July 2025, available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:52025DC0900>.



and providing consultation. The Council, individually, performs policymaking and coordination functions for the Union. Seeking the balance between national interests and supranational interests, both institutions start from different points of view towards common objectives, achievable together. This is no different when it comes to promoting the fundamental value of the rule of law in the EU.

The fact that the European Parliament exercises political oversight over the European Commission means that the latter must answer before the former. And, indeed, political pressure from Parliament has its effects. Parliament resolutions formed the basis for the Commission's Rule of Law Reports initiative.<sup>48</sup> In 2020, the European Parliament began evaluating the European Commission's Rule of Law Report, offering its contributions to maximising the effectiveness of the mechanism, a procedure it adopts every year since, with the last being the 2024 Report. With regard to the Member States, the European Parliament wields significant political influence, without constituting any form of political control. Examples of this include the various reports and resolutions on specific situations regarding the rule of law in the Member States, including the resolution to activate the proceedings of Article 7(1) TEU against Hungary.<sup>49</sup>

In turn, the Council can also use its functions, even more significantly than Parliament, to put the defence of the rule of law at the centre of the EU's agenda. For example, a Council recommendation was the basis for the Commission's suggestion to promote a common knowledge and culture of the rule of law in the EU. But one of the Council's most significant contributions dates back to 2014, when it decided to engage in an annual dialogue with Member States on the rule of law. In its 16 December 2014 Conclusions, the Council, emphasising that it is the responsibility of the Union and its institutions to promote EU values and respect for the rule of law, and that it is especially the responsibility of the Council to foster a culture of respect for the rule of law within the EU, committed itself to establishing a dialogue among all Member States within the Council to promote and safeguard the rule of law, to be held annually, in the form of a General Affairs Council, and focusing on thematic issues when necessary.

In 2019, the annual rule of law dialogue was structured into its current form, which consists of a peer-to-peer review with all Member States divided into two different political discussions: (i) horizontal discussions on general trends across the EU; and (ii) country-specific discussions addressing key developments in each Member State, being covered 12 Member States per year. As with the first annual report, the first annual dialogue occurred in 2020. Since then, the Council has held six horizontal discussions and twelve country-specific discussions. The latest annual dialogue occurred on the Council meeting (General Affairs) of 16 September 2025. Following the Commission's 2025 Rule of Law Report, ministers

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<sup>48</sup> For example, see European Parliament, *Resolution with recommendations to the Commission on the establishment of an EU mechanism on democracy, the rule of law and fundamental rights*, 2015/2254(INL), 25 October 2016, available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52016IP0409> and European Parliament, *Resolution on the need for a comprehensive EU mechanism for the protection of democracy, the rule of law and fundamental rights*, 2018/2886(RSP), 14 November 2018, available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52018IP0456>.

<sup>49</sup> European Parliament, *Resolution on a proposal calling on the Council to determine, pursuant to Article 7(1) of the Treaty on European Union, the existence of a clear risk of a serious breach by Hungary of the values on which the Union is founded*, 2017/2131(INL), 12 September 2018, available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52018IP0340>.

held a horizontal discussion on general developments related to the rule of law situation in the EU, welcoming the inclusion of the Single Market dimension we have mentioned above.<sup>50</sup>

Under Article 15 TEU, the European Council is responsible for providing the necessary impetus for the development of the EU, as well as for the important role of defining the general political guidelines and priorities of the Union, and it is composed of the Heads of State or Government of the Member States. The political direction carried out by the European Council gives it, in practice, a material power of initiative (because, formally, the European Commission holds the exclusive of initiative), since, although on a different level from the Council, it plays an important role in articulating the national interests of the Member States. The rule of law is a strategic concern of the European Council: the respect of the rule of law as an important aspect of the Union budget derives from concerns expressed by this institution, and the promotion and safeguard of the respect for the rule of law is reaffirmed in the *Strategic Agenda 2024-2029* annexed to the European Council Conclusions of 27 June 2024.<sup>51</sup>

Article 19(1) TEU grants the CJEU the power to ensure respect for the law in the interpretation and application of the Treaties. This means that the Court of Justice plays a fundamental role as the institution to which “*national judges must turn in order to ensure the unity of the European legal order*”,<sup>52</sup> holding the final word on both European and, in some cases, national rules. More than that, the CJEU plays a role of primal importance in driving the European integration process itself, through interpretative methods that focus on the spirit of the Treaties, and not just on their letter. In view of this fundamental role, the CJEU contributes broadly to the protection and reinforcement of the rule of law. It was through its case law that the CJEU deduced from the spirit of the European integration process the fundamental principles that shape the EU, including the Union of law, in the terms we have discussed in the first paragraphs of this study.

But the CJEU can also contribute to the promotion of the rule of law outside the scope of its litigation. The Court of Justice presents an annual report consisting of a summary of the CJEU’s activity, under its judicial, institutional and administrative aspects, presenting the most important judgments, explaining their impact for European citizens, and offering, through images, infographics and statistics, a summary of the events that marked the year, while proposing an analysis of the case law, accompanied by links to the full texts. Since 2019, the annual reports have dedicated an entire section to developments on the rule of law and fundamental rights, with a particular emphasis on effective judicial protection.

The contributions that Member States can make to strengthening the rule of law in the EU can arise at two distinct levels: at Union level and at national level. The discussions, votes and conclusions of the European Council are held and taken

<sup>50</sup> Council of the European Union, Conclusions (General Affairs) of 16 September 2025, available at: <https://www.consilium.europa.eu/en/meetings/gac/2025/09/16/>. Council meetings and respective conclusions may be searched at: <https://www.consilium.europa.eu/en/meetings/calendar/>.

<sup>51</sup> European Council, Conclusions of 27 June 2024, available at: <https://data.consilium.europa.eu/doc/document/ST-15-2024-INIT/en/pdf>. European Council conclusions may be searched at: <https://www.consilium.europa.eu/en/european-council/conclusions/>.

<sup>52</sup> Alessandra Silveira, “Tribunal de Justiça da União Europeia (TJUE)”, in *Enciclopédia da União Europeia*, ed. Ana Paula Brandão *et al.* (Lisboa: Petrony, 2017), 462. Author’s translation – original quote: “*juízes nacionais devem acorrer com o intuito de assegurar a unidade do ordenamento jurídico europeu.*”

by the Heads of Government or State of the Member States, which means that all the contributions of the European Council discussed above are the direct result of their actions. As for the Council, the rotating presidency model means that the three Member States that will form the presidency agree among themselves on common agendas for the EU, which has been essential in keeping the rule of law among the top priorities of Union policies. For example, the structuring of the annual rule of law dialogue we have mentioned above results from a proposal of the 2020-2021 trio of presidencies. Interparliamentary cooperation is equally important in coordinating the agenda for strengthening the rule of law in the Union, particularly through bodies such as the Conference of Speakers of the Parliaments of the EU or the Conference of Parliamentary Bodies Specialising in Union Affairs, whose mission is to exchange information and discuss issues of common interest.

It is at the internal level that the contribution of the Member States is effectively felt by European citizens. States are responsible for the consistency of their legal systems and the willingness of their institutions to provide effective protection of the rule of law. Governments and administrations are responsible for observing democratic rules and ensuring that oversight mechanisms are not tampered with. Parliaments are responsible for establishing oversight mechanisms in a transparent and effective manner. Regarding the interactions between national and supranational institutions, although the application of EU law results from an obligation under the Treaties, the role of state authorities in its effective implementation within the national legal system is of fundamental importance. Essentially, Member States constitute the first line of defence and promotion of the rule of law at the level of the Union as a whole. For the EU's common values, including the value of the rule of law, emanated, first of all, from the Member States to the European legal corpus that shapes the entire process of European construction.

## 7. Conclusion

As we have seen, the fundamental value of the rule of law, which is common to the EU and its Member States, is under threat from illiberal political movements seeking to dismantle it. There is an urgent need for an effective response that can reverse the damage already seen in certain Member States, as well as a way to effectively prevent similar situations from occurring altogether. It is demanded of the EU to respond in a unified manner, with every actor from the institutions to Member States and civil society, carrying out their roles with the rigor and commitment such a fundamental common value demands.

Although enforcement mechanisms such as sanctions play a vital part in defending the value of the rule of law, their effectiveness is dubious if the environment and culture which led to their need does not change. It is by shielding the rule of law from the conjunctural institutional degradation that we can guarantee that it resists and progresses, remaining the fundamental safeguard of European citizens before the arbitrary exercise of political power.

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