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Yes, we should!

EU priorities for 2019-2024

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Restoring credibility and trust by enforcing the rule of a law

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MAIN RECOMMENDATION ► The EU has to find a convincing and efficient answer to the ongoing pressure on the rule of law in individual member states.

WHAT TO DO:

- ► Complement the political procedure stipulated in Article 7 TEU by making full use of all legal instruments available. This should include a legal re-interpretation of the Article 7 procedure and a restructuring of the European Structural and Investment Funds (ESIF) to include rule of law conditionality.
- ► Enhance the implementation and execution of European rules with a new concept of cooperative enforcement based on a network of national authorities and European agencies.

Over the past years, the gap between promise and delivery in the European Union (EU) has widened.[2] Too often, European policies have failed to deliver on essential elements defining the rule of law. While some national governments have been successful in putting political pressure on institutions, others have been incapable, or indeed unwilling, to implement agreed rules defining European goods and interests. Consequently, the EU has lost credibility among its citizens and the trust of its member states.

Therefore, in the next politico-institutional cycle, the EU has to find a convincing and efficient answer to the ongoing pressure on the rule of law in individual member states. To that end, the Union should prevent rule of law backsliding in individual EU countries by making full use of its available legal instruments and by enhancing the implementation of European law through the introduction of a new concept of cooperative enforcement ('agencyfication'). The new EU leadership should push in this direction if it wants to regain trust and credibility with regard to the defence of European values in the eyes of its citizens.

During the past few years, national governments in some member states have enacted laws that have undermined the separation of powers, the rule of law, and human rights.

The EU has been unable to prevent this kind of rule of law backsliding for several, mainly political, reasons.

The challenge of rule of law backsliding

According to Article 2 of the Treaty on the European Union (TEU), the EU "is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law, and respect for human rights." As these values are at the same time "common to the Member States", the countries of the EU form a "community of values".[3] While accepted and confirmed by all member states as a prerequisite for their accession to the EU (Article 49 TEU), the fundamental values of Article 2 TEU form the basis of their national constitutions and their membership in the Union. The assumption of the Treaties that all member states share a certain degree of homogeneity in terms of the rule of law, democracy, and fundamental rights highlights the importance of unity, solidarity, and mutual trust for the proper functioning of the EU.

However, during the past few years, national governments in some member states have enacted laws that have undermined the separation of powers, the rule of law, and human rights. The Hungarian government, for example, has gradually adopted legislation that strengthens the political control over the independent judiciary and media, threatens non-governmental organisations, and limits academic freedom. Taking cues from Hungary, in 2015, the Polish government limited the competences of the Supreme Court and used a new retirement law to try to force its president and other judges out of office before the end of their constitutionally mandated six-year tenure. As the Supreme Court is able to rule on issues such as the validity of elections and the legality of protests, these measures, aiming to assert political control over the judiciary, undermine the rule of law and core democratic principles. In 2016, Romania has begun to walk down a similar path. The social democratic government intervened to end the public prosecution's preliminary investigations into certain party politicians, as well as to regain political control over the judiciary.

These three national governments did so in spite of international criticism, domestic protests, and the European Commission's launch of infringement procedures against their legislative changes. The EU has been unable to prevent this kind of rule of law backsliding for several, mainly political, reasons. For one, the procedure stipulated in Article 7 TEU, which allows the Union to intervene in case member states breach the fundamental principles of Article 2 TEU, failed to prevent national sovereignty from prevailing over the rule of law. The Polish government, for example, proved unwilling to comply with the Commission's recommendations. Instead, it publicly stated that its actions were "in line with European standards" and, as such, they "cannot be the basis for formulating the claim that there is a systemic threat to the rule of law".[4]

Moreover, party cooperation within umbrella groups such as the European People's Party (EPP) has protected in particular the Orbán government from open condemnation. Furthermore, the Juncker Commission and the member states recognise that action against rule-breakers would threaten the EU's unity in the face of growing external challenges, especially Brexit.

Questions related to the EU's ability to resist challenges to the principle of the separation of powers, the rule of law, and human rights, and regain its credibility as a community of values, will continue to hang over the next politico-institutional cycle like the sword of Damocles.[5]

While these issues threaten the rule of law as a core value of the EU enshrined in Article 2 TEU and therefore also the Union's very foundations, it also silently wears down the integrity of the rule of law in practice, at the European level. This occurs when member states refuse to respect European rules, in general, and the rulings of the Court of Justice of the European Union (CJEU), in particular.

The challenge of the implementation and enforcement gap

By virtue of the rule of law, the EU is a "community of law" (*"Rechtsgemeinschaft"*) – a notion coined by the Commission's first president, Walter Hallstein, to emphasise that the authority of European law is a precondition and tool for integration. Law serves as a confidence-building bridge by creating reliable common rules that member states and European citizens can trust. In the words of the CJEU:

> *"In permitting Member States to profit from the advantages of the Community, the Treaty imposes on them also the obligation to respect its rules. For a state unilaterally to break, according to its own conception of national interest, the equilibrium between advantages and obligations flowing from its adherence to the Community brings into question the equality of Member States before Community law and creates discriminations at the expense of their nationals, and above all of the nationals of the state itself which places itself outside the Community rules. This failure in the duty of solidarity accepted by Member States by the fact of their adherence to the Community strikes at the fundamental basis of the Community legal order."*

The "duty of solidarity", rooted in European law (see Article 4(3) TEU: principle of loyal cooperation), is a key tool to achieve unity in an ever more culturally, socially, and politically heterogeneous Union.

While in Europe's multi-tier system of governance the European level depends on the national governments, administrations, and courts to implement and enforce the Union's law, mutual trust among the member states that each of them will deliver on the duty of solidarity is a precondition for the EU's unity and credibility among its citizens. Nevertheless, there are two challenges to this pre-requisite for the Union's proper functioning:

- First, national politicians tend to describe unpopular decisions or criticism from the EU as the foreign rule of "Brussels' bureaucrats". Despite the duty of solidarity that requires a member state to comply with European law even if it is not to its advantage, the Brexiteers' politically effective soundbite, "We can have our cake and eat it"[10], sums up the attitude in many member states. More and more EU countries tend to welcome the advantages of the single market, the euro area, or the freedom of movement for their own citizens within the Schengen area, but they do not want to bear the associated burdens and responsibilities for the 'European goods' entailed by the rules of the Treaties and expressed by the duty of solidarity.

- Second, the incapacity of some member states' governments to govern leads to an implementation and enforcement gap regarding European law that throws into question the principle of uniform

application, mutual trust among member states, as well as the credibility of the EU as a whole. It is not by chance that this challenge was addressed by the Commission's White Paper on the Future of Europe in scenario 4 called "Doing less more efficiently".[11] Occasionally, EU action is still hampered by a lack of competence at the European level but, mostly, it is obstructed by the failure to fully operationalise and implement the Union's competences.

Mismatch between promises by the EU and expectations of its citizens, on the one hand, and delivery, on the other, is linked to the gap between strong legislative action and little enforcement or implementation efforts.

This mismatch between promises by the EU and expectations of its citizens, on the one hand, and delivery, on the other, is linked to the gap between strong legislative action and little enforcement or implementation efforts, which, in principle, remain in the hands of the member states due to the EU´s system of "executive federalism".[12] The diesel car emission scandal, mentioned as an example in the White Paper, illustrates this disparity, where EU legislation promises clean air and national authorities in many cases fail to deliver. This gap stems from a lack of EU enforcement powers, insofar as the implementation and execution of EU law is still largely in the hands of member states, who must ensure compliance by private parties. This situation is clearly different in the United States, where a federal agency fulfils this task. Examples may also be found in the context of the so-called migration crisis, where the EU has been heavily criticised for its slow reaction, often due to the division of responsibilities between the EU and the member states, particularly in the context of implementation and enforcement.

To complement the political procedure of Article 7 TEU, the EU should make full use of the legal instruments available.

Key recommendations

The EU should restructure the European Structural and Investments Funds (ESIF) in a way that would include a rule of law conditionality.

IMPROVING COMPLIANCE WITH ARTICLE 2 TEU TO PREVENT RULE OF LAW BACKSLIDING

If a member state does not comply with the common values enshrined in Article 2 TEU, the Treaties provide in Article 7 TEU for a political sanctioning procedure comprising two stages. Both of them require a Council decision:

► According to Article 7(1) TEU, the preventive mechanism (stage 1) establishing the "clear risk of a serious breach" requires 'only' a 4/5 majority of the member states.

► Whereas a decision (stage 2) on finding the "existence of a serious and persistent breach" (based on which a decision

for sanctions could – but does not have to – follow), would have to be taken unanimously, in line with Article 7(2) and (3) TEU.

In 2018, after years of dialogue with the European Commission, measures to strengthen political control of the judiciary in Hungary and Poland led to the activation of the Article 7(1) procedure. As stage 1 lacks any sanctions, the intervention of the EU appeared to be ineffective.[13] Only at stage 2 (pursuant to Article 7(2) and (3) TEU) can a member state be sanctioned if a "serious and persistent", and in this sense evident, breach of the rule of law is determined by the EU. In this regard, one major obstacle in the deployment of the sanction mechanism is its rigorous unanimity requirement in the European Council. More specifically, opposition from only one member state in the European Council is sufficient to block the political evaluation of a breach as "serious" and "persistent", as well as the decision on sanctions that could lead to the suspension of that state's membership rights.[14] In the case of Poland, the Hungarian government was expected not to support the decisions implied by stage 2.[15]

To prevent rule of law backsliding in the member states in a more efficient manner than so far, and thus to help the EU regain its credibility with regard to European values without Treaty change, four different options are available:

► First, based on the principles of equity and good faith, as well as loyal cooperation (Article 4(3) TEU), the unanimity requirement in Article 7(2) and (3) TEU could be interpreted by the EU institutions involved in such a way that any country being subject of a pending Article 7(1) procedure should be excluded from voting in the European Council on the Article 7(2) determination.[16]

► Second, to complement the political procedure of Article 7 TEU, the EU should make full use of the legal instruments available. Being the guardian of the Treaties, the Commission should activate an infringement procedure by which the case would be submitted to the CJEU (Article 258 TFEU). In this context, the Commission would have to argue for an extension of the infringement from single cases breaching a specific law to systemic breaches of the rule of law. In practice, two procedures have already been launched targeting specific laws, which – according to the Commission – among other things, threaten the independence of the judiciary and, therefore, violate Article 19 (1) TEU.[17] A systemic infringement procedure would reach out further and could be launched to directly enforce Article 2 TEU, alleging a systematic and evident violation of the rule of law based on a bundle of measures strengthening political influence on the independent judiciary by the member state concerned.[18]

Critics argue against this approach suggesting that the masters of the Treaties created Article 7 TEU as the only procedure for enforcing compliance with the values of Article 2 TEU.[19] However, as there are important structural differences between the purely political procedure of Article 7 TEU and the judicial procedure of Article 258 TFEU, a parallel applicability seems justifiable.[20] Although the CJEU has not ruled on this subject matter, its jurisprudence suggests that Article 19 (1) TEU, as "a concrete expression of the value of the rule of law as stated in Article 2 TEU"[21], is a suitable standard of review for infringement procedures.[22] In this context, compliance with the rule of law could potentially be enforced through a suspension of EU funds. This could be accomplished by simply applying Article 260(2) TFEU[23] given that the Treaties do not specify that a sanction has to be paid out of the member states' treasury but can instead be deducted from its transfers by the EU.[24]

► Third, the EU should restructure the European Structural and Investments Funds (ESIF) in a way that would include a rule of

law conditionality. This Article 2 TEU value conditionality has already been built into the Commission's proposal for the next Multiannual Financial Framework (MFF) for 2021-2027. This idea won widespread political support in some member states, as well as among civil society, but also elicited strong criticism from a number of member states and the Council's legal service. According to the latter, Article 7 TEU prevents any other form of enforcement of the values of Article 2, as it constitutes a *lex specialis* in this area. Although the CJEU has not yet pronounced itself on this specific issue, it interpreted Article 19(1) TEU in another case as "a concrete expression of the value of the rule of law as stated in Article 2 TEU".

Better implementation by 'agencyfication'

To tackle the described implementation and enforcement gap, the EU is in need of a new concept of cooperative enforcement. It should be based on the principle of subsidiarity (Article 5 TEU), expressing a presumption of member states' responsibility by putting the burden of proof for action on the EU, on the one hand, and the principle of solidarity, on the other.

According to the new concept of cooperative enforcement, national authorities and the Commission would build up a network of governance with regard to an efficient implementation of European rules. This network would be based on a toolbox of cooperation, ranging from the exchange of information to specialised, personnel, or technical support by the European level (following the example of the Commission's newly established Structural Reform Support Service (SRSS)). Where national authorities lack the needed capacities, these would have to be built up with European assistance. Above all, however, safeguards should be put in place so that the Commission or a European agency could intervene if national authorities are unable or unwilling to deliver on the agreed objectives.

Similar cases of cooperative enforcement were initiated in the Schengen area, where the shortcomings in border management, asylum procedures, as well as the need to enhance efficient cooperation in the area of counterterrorism and cybersecurity, became key issues. Building on the Treaty principles of subsidiarity and solidarity, a European agency could step in when a member state proves unable or unwilling to implement European goals.

The example of the European Border and Coast Guard Agency (EBCG) offers a perfect blueprint for this kind of 'agencyfication'. Because of the shortcomings exposed during the migration crisis, the EBCG was created as a model of joint responsibility for border management, in which the member states, in keeping with the principle of subsidiarity, retain primary responsibility for their share of Europe's external border. Functioning – and therefore effective – border management is, however, in the interest of not only the member states with an external border but of all EU countries that have abolished controls on internal borders in the Schengen area. Applying the principle of solidarity means that whenever a member state is unable or unwilling to effectively protect its national external borders, thereby undermining the 'European good' (effective border management for example), the EU acquires a fall-back responsibility.

With regard to the member states' sovereignty, the application of any means of cooperative enforcement should be progressive. In a first instance, the agency should issue recommendations and provide financial, personnel, or technical support to countries in need. If national authorities are not willing to cooperate, the agency should have the competences and capabilities to intervene by complementing or taking over the responsibilities of national authorities in implementing and enforcing jointly-agreed rules defining European objectives. As this would be possible without the specific request of the member state concerned and therefore probably against its will, this intervention would have to be based on a Council decision adopted by qualified majority. If the member state concerned would not be ready to accept this intervention, it would be excluded from certain European benefits. In the example of the Schengen area, this would mean that the member state concerned would face internal border controls and its citizens would lose their right of free movement (Article 21 TFEU), which is inevitably linked to a proper functioning of the Union's external border management.

This vision is mirrored also in scenario 4 of the Commission's White Paper on the Future of Europe: As a result of "doing less more efficiently", the EU would be able to act faster and more decisively in its chosen priority areas. For these policies, stronger tools are given to the EU to directly implement and enforce collective decisions, as is already the case today in competition policy or banking supervision.

Conclusions

For the past few years, the rule of law – a core value and fundamental principle of the EU and its member states – has been under pressure in the EU. This happened not as a result of major political events but rather through a process of constant erosion. Therefore, in the next politico-institutional cycle, the EU should stop this gradual wearing down of its rule of law by reinforcing the "community of law". To this end, the EU should:

► Complement the political procedure stipulated in Article 7 TEU by making full use of all legal instruments available.

► Enhance the implementation and execution of jointly-agreed European rules with a new concept of cooperative enforcement based on a network of national authorities and European agencies.

This does not mean a blanket demand for a more centralised Europe but a call for a more operational EU, able to deliver on its citizens' legitimate expectations. In this regard, the rule of law calls for a new working method based on the European principles of subsidiarity and solidarity. If the incoming EU leadership does not pay enough attention to this process of erosion, mutual trust among member states, the credibility of the EU in the eyes of its citizens, and the unity of the EU itself will continue to diminish, thereby undermining the political legitimacy of the European project.

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2. See European Commission, "White Paper on the Future of Europe: reflections and scenarios for the EU27 by 2025", COM (2017) 2025 of 1 March 2017, p. 12 *et seq*. and p. 22; for an in-depth analysis see also Calliess, Christian (2018), "Zur Zukunft der EU", Freie Universität Berlin Nr. 110.

3. Calliess, Christian (2009), "Europe as transnational law – The transnationalization of European Values", *German Law Journal*, Vol. 10, No.10.

4. "Poland in response to EU: rule of law not under threat", *Reuters*, 20 February 2017, "The Polish Foreign Ministry said in a statement on Monday (Feb 20) that it had submitted a response to the Commission's concerns. In a separate statement on its website, however, it said the changes Poland had implemented had been in line with European standards and had created "the right conditions for a normal functioning" of the Constitutional Court. "Once again, Poland stressed that the existing political dispute around the principles of functioning of the Constitutional Court cannot be the basis for formulating the claim that there is a systemic threat to the rule of law," the ministry said."

5. See the in-depth analysis of Buras, Piotr, "Poland, Hungary, and the slipping facade of democracy", *European Council on Foreign Relations*, 11 July 2018.

6. Hallstein, Walter (1969), *Der unvollendete Bundesstaat*, Econ Düsseldorf Vienna, pp. 33-38.

7. CJEU Case 39/72 *Commission v Italy*, ECLI:EU:C:1973:13 (paragraph 24 *et seq*.).

8. See European Commission, "European governance – A White Paper", COM(2001) 428 final, 25 July 2001.

9. See Commission (2017), *op. cit.*, p. 12 and 22.

10. See Dallison, Paul, "A brief history of having cake and eating it. How an old expression became one of the key phrases of Brexit", *POLITICO*, 31 August 2017. Cake is a recurring theme of Brexit, chiefly thanks to Boris Johnson claiming that the UK could "have our cake and eat it" as it leaves the European Union. He has also given the phrase a slight twist, saying: "my policy on cake is pro having it and pro eating it."

11. See Commission (2017), "White Paper on the Future of Europe", *op. cit.*, p. 22.

12. See Chamon, Merijn (2016), *EU agencies: Legal and political limits to the transformation of the EU administration*, Oxford: Oxford University Press, here p. 48.

13. See Scheppele, Kim Lane and Pech, Laurent (2018), "Didn't the EU learn that these rule-of-law interventions don't work?", *VerfBlog*.

14. Scheppele, Kim Lane (2016), "Enforcing the basic principles of EU law through systemic infringement actions", p. 106; Franzius, Claudio (2018), "Der Kampf um die Demokratie in Polen und Ungarn", DÖV 2018 381, p. 382.

15. Gotev, Giorgi, "With Hungarian support, Poland defies EU over rule of law", *Euractiv,* 21 February 2017; cf same assessment by De la Baume, Maia, "EU punch misses mark in fight with Poland", *POLITICO,* 14 February 2017; see also commentary by Buras, Piotr (2017), "The EU's Polish dilemma", European Council on Foreign Relations: "Once the two-month period for the Polish government to follow its recommendations expires late February, Brussels will have little choice but to ask the European Council to vote on triggering Article 7 of the EU Treaty. It states that a violation of the EU's basic principles can be met with sanctions. Hungary and the U.K. – Poland's closest allies – would most probably block this decision, but for the Commission's image, it will be better to fail in the European Council than to abstain from the action altogether."

16. Pech, Laurence and Scheppele, Kim Lane (2017), "Illiberalism within: rule of law backsliding in the EU", *Cambridge Yearbook of European Legal Studies*, 19, pp. 27-33.

17. Case C-192/18 and Case C-619/18.

18. Scheppele, Kim Lane (2016), "Enforcing the basic principles of EU law through systemic infringement actions", in Closa and Kochenov (eds.), *Rule of law oversight in the European Union*, CUP. p. 112; also in favour: Franzius, Claudio (2018), "Der Kampf um Demokratie in Polen und Ungarn", DÖV 381, p. 386.

19. Scheppele, Kim Lane, Pech, Laurence and Kelemen (2018), "Never missing an opportunity to miss an opportunity: the Council Legal Service Opinion on the Commission's EU budget-related rule of law mechanism", *VerfBlog*, 11/12.

20. So argued by Schmidt, Matthias and Bogdanowicz, Piotr (2018), "The infringement procedure on the rule of law crisis: how to make effective use of Art. 258 TFEU", CMLR 55, pp.1069-1073.

21. CJEU C-64/16 para 32, CJEU C-216/18 PPO para. 49.

22. Schmidt and Bogdanowicz (2018), op. cit., p.1083.

23. Critic by Möllers, Christoph and Schneider, Linda (2018), "*Demokratiesicherung in Europa*, Tübingen,; here pp. 113.

24. See Scheppele (2016), *op. cit.*, p. 130.

25. CJEU C-64/16 para 32, CJEU C-216/18 PPO para. 49.

26. For a more in-depth analysis see Calliess, Christian (1999), *Subsidiaritäts- und Solidaritätsprinzip in der EU*, Baden-Baden, 2nd edition; and in practice Report "Active subsidiarity, a new way of working" of the Task Force on Subsidiarity, Proportionality and 'Doing less, more efficiently' from 10 July 2018 as well as the hereon based Communication "The principles of subsidiarity and proportionality: Strengthening their role in the EU´s policymaking", COM(2018) 703 final from 23 October 2018 and the Declaration of Bregenz by the Austrian Presidency of the EU, "Subsidiarity as a building principle of the EU", 16 November 2018.

27. This is a Commission department set up in 2015 on the basis of experience of the crisis, especially in Greece.

28. See also scenario 4 "Doing less more efficiently" in Commission (2017), *op. cit.*

29. See Regulation No 2016/1624 adopted in September 2016 on the basis of Articles 77(2)(b) and (d) and 79(2)(c) TFEU.

30. Commission (2017), op. cit., p. 22.