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EUROPEAN COUNCIL EXPERTS' DEBRIEF

HOW CAN AN ENLARGING EU BEST PROTECT RULE OF LAW AND DEMOCRACY?

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FOREWORD

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In 2023, TEPSA's EUCO Debriefs examined four major themes: the economy, migration, relations with China, and enlargement. Today, we address the sensitive issue of the Rule of Law. 15 experts from the TEPSA network and invited guests have provided their response to the following question: *How should the EU best use its existing mechanisms for protecting the Rule of Law (including article 7 TEU; EU budget conditionality), and how should it adapt them in preparation for enlargement to EU 30+?* Asking all experts to reply to the same question inevitably leads to overlapping comments and repetitions, but we wanted to feature all the different angles to present an in-depth assessment to our readers.

Democracy, human rights, and rule of law are enshrined in the Treaties and are part of the European Union's (EU) DNA. There was no hesitation at the time to include those provisions in the Treaties. But over the past years, we have seen backsliding in some countries, and the EU struggling to impose respect for the rule of law. The tables you will see in one of the contributions on the present situation are quite telling in this respect. This is worrisome, also with a view to the new dynamics of the enlargement process. How can the EU ensure that new countries joining it are both willing and apt to subscribe to its standards? The European Council of 14-15 December highlighted this point in its conclusions, stating that the EU "needs to be ready at the time of accession" and that "aspiring members need to step up their reform efforts, notably in the area of the rule of law." But the Polish and Hungarian cases and troublesome developments in other countries point to severe problems even with current members of the EU.

The contributions received from our experts show that the EU has given considerable attention to the issue and developed a whole toolbox of instruments to deal with it, both specific rule of law instruments as well as more general tools that can also serve for rule of law purposes. They contain interesting ideas on how to reform the system further.

- Article 7 of the Treaty on the European Union (TEU) is the main instrument. So far, it has been triggered twice, first against Poland, on a proposal by the Commission, and then against Hungary, on a proposal by the European Parliament (EP). The Council has responded by organising six hearings with each of the two concerned Member States. But it has never reached a decision on determining that there is a clear risk of breach of the values referred to in Article 2 TEU; successive Presidencies have shrunk from putting the issue to a vote, presumably because they feared not reaching the required majority, but possibly also for political reasons. Most of our experts deplore this fact and voice frustration about the ineffectiveness of the mechanism, the more so since in the case of a possible referral to the European Council (by a four fifths majority in the Council), the final decision on a breach, possibly coupled with measures, requires unanimity (minus the Member State concerned). What to do? The first suggestion made is for the Council to come to a decision on the risk of a clear breach; in other words, to fully apply the present article. The very fact of referring a country to the European Council on this matter would be an

extraordinarily strong political signal. The second suggestion is to modify the voting procedures of Article 7, which requires treaty change. Other ideas mentioned would merit more in-depth examination: setting strict timelines, adopting clearer and more actionable criteria, giving a more direct role to the European Court of Justice (ECJ). One expert suggests taking inspiration from the way the Stability and Growth Pact (SGP) was reformed a few years ago to give it more teeth.

- The Rule of Law Mechanism (RLM), of which the Rule of Law Report (RLR) is the cornerstone; one can also mention in this context the EU Justice Scoreboard. These are helpful soft instruments that stimulate inter-institutional dialogue and encourage cooperation in relation to some essential aspects of the rule of law, such as the administration of justice and corruption. However, some equally fundamental elements are not covered, such as the rights of minorities, which is a delicate issue in some candidate countries. For the RLM/RLR to remain a valid (yet not decisive) tool after enlargement, according to one of the experts, it might be a good idea to expand its scope.

- The Cooperation and Verification Mechanism (CVM) put into place for Romania and Bulgaria after their accession, and which remained in force until 7 October 2023, could serve as inspiration for the ongoing accession negotiations, according to one of our experts.

- The Common Provisions Regulation: this regulation governs eight EU funds representing one third of the EU budget, including the European Regional Development Fund, the European Social Fund, and the Cohesion Fund. It now contains a horizontal enabling condition on the Charter of Fundamental Rights of the European Union (EU Charter) as a necessary pre-requisite for the reimbursement of operations financed with European Structural and Investment funds. This horizontal enabling condition on the EU Charter constitutes a promising tool owing to its wide scope of application. In this respect, the EP has recently proposed to reinforce references to the EU Charter also in the Financial Regulation, in order to ensure respect of fundamental rights in the implementation of all EU spending programmes.

- The Ordinary Infringement Procedure of Article 258 of the Treaty on the Functioning of the European Union (TFEU) is a judicial procedure, initiated by the European Commission at the ECJ, to establish that a Member State has failed to comply with an obligation under the Treaties. This is a general instrument, but it can, of course, also serve to combat infringements of the rule of law provisions. The Commission has initiated such cases in the past and will no doubt continue to do so. As pointed out in one contribution, for Poland this has led to the imposition of daily fines of EUR 1 million for not respecting a ruling on the independence of Polish justice.

- The Preliminary Procedure of Article 267 TFEU organises a system of cooperation between national courts and tribunals and the ECJ in Luxembourg about questions related to the interpretation of EU law provisions. This is quite an effective instrument ensuring a constant judicial dialogue across the EU.

- The Budget Conditionality Regulation, launched in 2020 with the adoption of the new Multiannual Financial Framework (MFF) 2021-2027 and the COVID-19 recovery package NextGenerationEU, it is a regulation aiming more specifically at protecting the financial interests of the EU against breaches of the rule of law. It is not primarily a rule of law instrument, but we have seen that the inclusion of rule of law concerns for triggering it has been a game changer and has led to funds in Hungary being frozen because of breaches of rule of law provisions.

This overview shows that the EU has, over the years, tried out diverse ways to address the issue. The question is whether they function and are sufficient. Our experts consider that this is not the case, hence the suggestions for reform mentioned within the various chapters. They insist on the need, in this context, to go beyond formal measures to consider country-specific conditions. They argue that an institutional-based approach in the accession negotiations (see the Copenhagen criteria) may not be enough in the future, and that the EU should broaden the criteria beyond mere institutional reforms to encompass a new set of standards. The determination of the Ukrainian elite and society to stay the European democratic course goes beyond formal conditions; this is an encouraging sign. It is indeed vital to look at the practical effects on the ground rather than just ticking boxes.

I would like to conclude this summary overview with a few personal remarks. The rule of law theme is both existential and highly emotional and elicits strong reactions. It is a fact that the behaviour of the Hungarian authorities poses real problems to the EU. Some people even speak of a "rogue" Member State, which is not a term I would use. Firstly, I would point out that the problem of rule of law is a broader one than just Hungary, as the contributions show. Secondly, as documented with the latest Polish elections, there is always hope for changes within a country. Thirdly, the Commission's relentless pressure has led to improvements on the ground, even though they are insufficient. I would add one other important consideration. There are no simple solutions to this problem in view of the nature of the EU. Brussels cannot just push a button and cow a Member State into submission. Brussels precisely is not Moscow, and Orbán should stop saying it is. This statement, coming from the leader of a country that was brutally put in its place in 1956 by the Soviets, is outrageous and an insult to the Hungarian people's sufferance at the time. The EU is a union of rules and law, and even when dealing with a difficult partner like Hungary it must respect its own rules. This means, for instance, that the Conditionality Regulation requires proof that a country's rule of law problems cause financial damage to the EU budget. It also means that it is wrong to imply that voting against an EU text requiring unanimity (or even the mere threat of voting against) is *per se* against EU values. It is not; it is availing yourself of the possibilities offered by the Treaties, and Hungary is not the only country having made dubious cross-references in European history. One can criticise such a decision politically, of course, and I have no sympathy for the way the Hungarians have operated over the past years. But that is another issue. The suggestion to go to Qualified Majority Voting (QMV) on EU issues still requiring unanimity to avoid similar situations raises many other questions, and it would of course require treaty change. This will certainly not happen anyway as far as enlargement is concerned. As to the area of Common Foreign and Security Policy, I am personally doubtful except in a limited fashion. On major issues, I do not see the EU outvoting Greece or Cyprus on relations with Turkey, or Poland and the Baltic countries on relations with Russia, for instance.

But the debate must and will go on. I warmly thank all our top-level experts for having taken the time to share their thoughts with us and our readers. They provide a lot of food for thought and interesting suggestions for future improvement. Theirs is a most useful contribution to solving one of the major challenges the EU faces today.

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ABBREVIATIONS

CVM	Cooperation and Verification Mechanism
EP	European Parliament
EU	European Union
EU Charter	Charter of Fundamental Rights of the European Union
MFF	Multiannual Financial Framework
QMV	Qualified Majority Voting
RQMV	Reverse Qualified Majority Voting
RLM	Rule of Law Mechanism
RLR	Rule of Law Report
SGP	Stability and Growth Pact
TEU	Treaty on the European Union
TFEU	Treaty on the Functioning of the European Union

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From Copenhagen to Kyiv: Rule of Law under Martial Law

The European Union's (EU) mechanisms for protecting the democratic rule of law are procedural, economic, and political. Legal and political science scholars have documented how the EU underused these mechanisms in its struggle with autocratising Member States and candidate countries. Autocratising EU Member States have dispelled the deterrence function of Article 7 of the Treaty on European Union (TEU). And scholarship has also acknowledged the limited long-term effects of pre-accession conditionality for candidate states. Learning from the lessons of the past, the EU can improve and make better use of its democracy consolidation toolbox in preparation for enlargement to EU 30+.

Here are three steps the EU needs to take:

- Prevent democratic rule of law depletion with self-discipline and multilateral surveillance;
- Evaluate democracy beyond formal measures considering country-specific conditions;
- Analyse future vulnerabilities from EU-demanded economic reforms.

First, as all managers of common resource pools, the EU is challenged to avoid the tragedy of the commons. Member States with access to the goods the EU generates (which we can also call commons) act in their own interest and, in doing so, ultimately deplete the resource. Many regional organizations, such as the EU, deal with the consequences of expansion, congestion, and rivalry over the resources they generate. This is true particularly in the context of goods such as the rule of law and market competition, but it also applies for macroeconomic policy coordination, and financial market integration. Increased rivalry over the goods it produces and the pressure to widen can lower the quality or amount of specific goods the EU produces. The EU is a generator and keeper of the rule of law, but EU Member States with different understandings of how to govern this resource can deplete it of its original substance, thus changing its nature. As the EU moves towards more enlargement in the context of the Russia-Ukraine war, a major target for EU policy makers is to avoid the depletion of its attractive resources, including the possibility to manage the rule of law. To that end, the EU needs to undergo internal reforms to strengthen both self-discipline and multilateral surveillance among the Member States. Integrating new countries in its coordinated system of common resource pools in the absence of such constraining reforms creates the common conditions for a tragedy of the commons, and a collapse of the EU system.

Second, the EU must update its assessment indexes for members and candidate states, avoiding an overreliance on formal measures. The experience of enlargement to Hungary highlights the risks of overestimating a country's democratic credentials. The EU's current approach to assessing Ukraine and Moldova's democratic reforms

provides a hopeful step in a more nuanced direction. Both countries are expected to make significant democratic and rule of law improvements. Notably, the EU evaluates Ukraine's democratic rule of law even amid martial law, challenging decision-makers and technocrats to rethink how democratisation processes occur.

In the country progress report of November 8, 2023, the European Commission noted Ukraine's commitment to pursuing rule of law reforms despite the ongoing martial law. According to the report which was the base for the start of accession negotiations with Ukraine, "the Ukrainian government and Parliament showed determination to carry out the necessary reforms required by the EU accession process" (p. 3). In the words of the Commission's report, "the impact of its [legal framework] full implementation is yet to be assessed" (p. 14). But so far, the determination of the Ukrainian elite and society to stay the European democratic course outweighs formal conditions on the ground. In Moldova, the incumbency of its pro-European and pro-democratic elites is also deemed necessary for the country to maintain the path of democratic reform.

The EU's handling of Ukraine's reforms highlights the shortcomings of previous institutional-based approaches to assessing a country's democratic progress. These observations do not negate the importance of institutional changes for democracy-building and resilience, as outlined in the Copenhagen criteria. However, the Ukrainian case underscores the need to broaden the criteria beyond mere institutional reforms to encompass a new set of standards, call it the 'Kyiv Criteria'. For instance, this new set of criteria would operationalise why Hungary's COVID-19 "state of emergency" legislation heightens the risk for that country's autocratisation more than the current martial law in Ukraine.

Third, the EU needs to look at how it uses accession negotiations differently in each country to create long-term democratic support. This is where the demands for economic reform associated with access to the Single Market, the EU's financial space, business and banking environment come into play. During the Special European Council of 1 February 2024, EU leaders greenlit additional funding in support of Ukraine's preparation for EU accession. Funds will be disbursed based on Ukraine's (work in progress) Nation Plan for Reform. Conditions include attention to "building social cohesion". In practice, both the EU and Ukraine prioritise neoliberal reforms not dissimilar from the legacy of the Washington consensus. Yet Western allies interested in Ukraine and other candidate states' resistance to autocratisation should build firewalls around those effects of economic reform that create anti-democratic attitudes in the long run. Reforms demanded of candidates must generate long-term benefits for a broader spectrum of citizens compared to those observed in Central and Eastern Europe, thereby reducing space for the rise of far-right grievances and populism. Those reforms ought to foster extensive political and societal support coalitions centred on key democratic institutions linked to pro-EU reforms, both political and economic. Crucially, the EU must heed the lessons from the Western Balkans, which show that the credibility of the enlargement process is vital for sustaining pro-democratic and pro-EU sentiments among citizens and political elites.

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The three "C"s response: credibility, consistency and concrete change

The EU has faced for years now a profound crisis of the rule of law in some of its Member States. In response, EU institutions have slowly and timidly developed what is called the "rule of law toolbox", that is a set of policy instruments designed to serve different purposes. Some of them, such as the EU Justice Scoreboard, allow the Commission to monitor the state and the functioning of the national judicial systems; others, like the European Semester or the Annual Rule of Law Report, provide recommendations to strengthen the efficiency, quality, and independence of the justice systems in all EU Member States. Through these instruments, the Commission shapes the national agenda of reforms, in dialogue with the Member States; other instruments have been designed to deal with systemic threats to the rule of law, such as the Rule of Law Framework. Rather late, after lengthy debates in the European Parliament (EP), in the Council and in the Commission, the Commission (for Poland) and the EP (for Hungary) activated Article 7 TEU. The issue has been divisive, both within and among institutions. While the first measures undermining the rule of law were adopted in Hungary in the beginning of the 2010s, eight years passed before the EP triggered Article 7 TEU in 2018, and two years were necessary for the Commission to trigger the procedure against Poland in 2017 in reaction to the assault on judicial institutions by the Polish Law and Justice government in 2015.

In addition, a complex regime of spending conditionality has been put in place to protect the EU budget in cases when breaches of the rule of law principles affect or risk affecting the EU's financial interest (Regulation 2020/2092), to ensure the respect of the Charter of Fundamental Rights (EU Charter) in the implementation of the EU's Cohesion Policy (Regulation 2021/1060), and as part of the implementation of the Recovery and Resilience Facility.

Much has been written in academia and in the public sphere about the nature of these policy instruments. And even more so on their limited impact on the ground. Article 7 TEU is currently at a standstill, despite the organisation of six hearings with Hungary and six with Poland and several "state of play" updates. Often considered (wrongly) as a "nuclear option", Article 7 TEU has turned into a "talking shop" in the Council. As a result, social and political actors in Poland and Hungary are deploring that little has been achieved on the ground and that the process of de-Europeanisation or even 'autocratisation' has accelerated in some contexts.

The question is: how can we make better use of the tools?

The simple answer is that these instruments must be used to the fullest extent for the EU to be credible not only internally *vis-à-vis* its citizens, but also *vis-à-vis* candidate countries. The EP has been very vocal on this issue, urging

the Commission to be stricter in the application of the new rules, in particular the instruments that emerged with difficulty such as the Rule of Law Conditionality Regulation. The same applies to Article 7 TEU. The EP has called on the Council to "break its silence" on Article 7 TEU and move forward. The conditionality regime should not be idealised in the absence of political will.

In addition, what matters in the implementation of the conditionalities is the practical effect on the ground, not the box-ticking. Experience shows that corruption can be resistant to conditionality. Experience also shows that too many conditions can weaken the expected outcome. In other words, the multiplication of conditions on paper is not a guarantee of effective implementation either. Multiplying conditionalities in search for effectiveness can alter the process and transform it into a too bureaucratic exercise. There is a risk to assess positive changes on paper, and formal compliance - and even "creative compliance" - rather than substantive transformation. This can undermine the credibility of the exercise. It also raises key concerns and the question of the credibility of the assessment and of the conditionality regime itself.

With a view to enlargement, and, above all, to a possible reform of the EU, an in-depth reform of Article 7 TEU should be considered, based on the experience of the last years with Poland and Hungary. Several proposals have been advanced by both academics and political actors, including, for example, assigning a role to the European Court of Justice (ECJ) with regard to violations of the rule of law, the replacement of the four-fifths vote of the Council to establish that there has been a serious breach with Qualified Majority Voting (QMV), as proposed by the Franco-German group of experts, and the introduction of a clear time framework of six months for the Council in the first phase of the procedure, as proposed by the EP.

There is no shortage of policy ideas for change. It is more a question of political will and time in a context of rapidly deteriorating democracy in the world and, alarmingly, also inside the Union.

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Challenges in protecting rule of law: the Hungarian case and EU responses

The institutions of the EU have been busy trying to reform the EU's rule of law protection toolkit in the past few years. However, it seems like there is still room for improvement: rule-breaking Member States can still control the narrative, as exemplified by the vote on Ukraine's aid package in which Hungary had to be pressured and lobbied into supporting the decision. However, when it comes to the rule of law, such soft methods have proven ineffective so far, so it is time to focus on enforcement. The EU needs a clear strategy and Member States' willingness is essential to address rule of law violating behaviour.

The case of Hungary cannot be left out of the discussion about rule of law matters in the EU. The country's saga started with the Sargentini report and the initiating by the EP of the Article 7 TEU procedure against Hungary back in 2018. However, that procedure turned out to be quite slow, and has lacked any major consequence for the country thus far. Therefore, it was high time the EU introduced the budget conditionality mechanism and activated it against Hungary in 2022. This new method was the first attempt of the Commission to tie rule of law violations (such as corruption) to budget concerns, and it seemed to be working at first. By the end of 2022, the EU was withholding money from Hungary on three accounts - the budget conditionality mechanism, the Recovery and Resilience Funds and the horizontal principles of the Multiannual Financial Framework - that could not be completely separated from each other, and the aspect of the protection of the rule of law was present in all of them. As a result, Hungary has made some alterations to its national administrative system, and a comprehensive justice reform was also introduced, which enabled the unblocking of a certain amount of funds. This, however, does not mean that Hungary is on the right track to become compliant with several other aspects of the rule of law: the governing party is still abusing its majority in parliament, the electoral system is rigged, media freedom is questionable, and the country is still not a member of the European Public Prosecutors' Office, etc.

The Hungarian example shows that the EU's current efforts are insufficient and inadequate to protect the rule of law. The problem with Article 7 in Hungary's case is that only its first paragraph has been activated so far ("clear risk of a serious breach"), and it is nearly impossible to reach the sanctioning phase. The determination of the existence of a serious and persistent breach of Article 2 TEU values would require unanimity, which is highly unlikely. In order to conclude the preventive arm of Article 7 and determine the clear risk of a serious breach, a four-fifths majority is needed from the Council. This would be feasible and might elevate the level of deterrence in the whole process. Concluding at least the first stage of Article 7 could send a clear message to other Member States as well: there is a red line, and should a Member State cross it, it will have serious consequences. The second paragraph of Article 7 would still require unanimity, which is a serious problem. The EU can only step up its game against rule of law violating behaviour if it shifts to majority voting in rule of law matters, instead of unanimity.

A strict and tough approach is required from the EU and its Member States regarding the protection of the Rule of Law if we take into consideration the upcoming challenges the bloc faces: EP elections in 2024 and enlargements in the foreseeable future. Budget conditionality is a new way of addressing certain rogue Member State behaviour and rule of law concerns, but the Hungarian example proved that its deterring effect is not enough, as some Member States might rather give up some of their budget than make meaningful changes in certain crucial areas (i.e., the rights of LGBTQ+ persons in Hungary). Moreover, when it comes to regimes that have been operating without taking the rule of law seriously for more than a decade, a few alterations might not be enough to sufficiently improve the functioning of democracy at a national level. If one considers the situation of the rule of law in those countries that are awaiting accession, these issues sound even more alarming. Therefore, the EU should continue to apply the budget conditionality in cases where it is necessary, but simultaneously Article 7 should also be revived. Last but not least, majority voting should be enabled instead of unanimity in cases when the stakes are this high.

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Betting on funding conditionality to strengthen protection of the rule of law and fundamental rights: potential and challenges

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On 1 February 2024, at the end of a special European Council, the 27 EU Member States reached an agreement on the revision of the current MFF (2021-2027). The EU leaders greenlit EUR 64 billion of additional funding in order to create a new Ukraine Facility and to reinforce other funding instruments. The agreement was reached despite opposition up until the eve of the summit by Hungarian Prime Minister Orbán who had vetoed the mid-term revision in December and called for an 'off-budget' solution.

Discussions on the EU budget are always particularly sensitive, and became more frequent in the legal and political debate in the past few years. This is because the EU increasingly relies on EU funding mechanisms to deepen integration. Moreover, considering that the EU's spending power has massively increased with the adoption of the Next Generation EU programme on top of the EU budget, new mechanisms have been adopted to ensure that EU funds are spent in conformity with EU laws and values.

First, the EU has adopted a new Conditionality Regulation which allows the suspension of EU funds in case of Member States' violations to the rule of law that affect or seriously risk affecting EU financial interests in a sufficiently direct way. Second, the new Common Provisions Regulation now contains an horizontal enabling condition on the EU Charter as a necessary pre-requisite for the reimbursement of operations financed with European Structural and Investment funds. While the political debate has been centred on the former Regulation, the horizontal enabling condition on the EU Charter might constitute a more promising tool owing to its wider scope of application.

Both instruments have been used against Hungary and led to the freezing of more than EUR 28 billion funds due to Hungary's violation of fundamental rights in different areas, including judicial independence, asylum, and academic freedom. While at first sight the debate on the revision of the MFF is not directly related to the implementation of conditionality instruments for protecting the EU budget, the measures adopted against Hungary played a central role in the political discussions between the 27 Member States on the aid to Ukraine. It is in this context that the Commission has recently unblocked EUR 10 billion of frozen Cohesion Funds, on the grounds that Hungary has taken the measures it committed to implement in order for the Commission to consider that the horizontal enabling condition on the EU Charter is fulfilled in what concerns judicial independence.

The EP has strongly condemned this decision and is considering legal action against it. In particular, the EP highlights that the situation in Hungary remains alarming and that EU institutions should not give in to Orbán's blackmail. Indeed, despite the achievement of a compromise for the revisi highlights that the situation in Hungary

remains alarming and that EU institutions should not give in to Orbán's blackmail. Indeed, despite the achievement of a compromise for the revision of the MFF, the same situation may occur again in the future.

Since EU funds constitute a very important vector of social and economic growth in the Member States, a wider use of EU funding conditionality has the potential to drive important changes at national level and accompany the Member States in the accomplishment of reforms which also impact the protection of the rule of law and fundamental rights. While the steering potential of EU funding is still to be proven, EU institutions should continue to exploit the existing mechanisms to promote and foster EU values. In this respect, the EP has recently proposed to reinforce references to the EU Charter also in the Financial Regulation, in order to ensure respect of fundamental rights in the implementation of all EU spending programmes.

The effectiveness of these conditionality mechanisms can be further improved by mitigating the risks of their interference with political discussions between the Member States. In fact, the existing political tensions related to the provision of aid to Ukraine undoubtedly pushed the Commission to release EU funds to Hungary, although they should not impact the assessment of the Commission regarding the measures taken by Hungary to remedy to violations of judicial independence. Furthermore, as also highlighted by the EP, the measures of EU funding would be more effective if treated as a single package, so that no partial release is authorised when major fundamental rights violations still persist.

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Article 7 of TEU - soft protection or real restrictions?

The EU has been observed with scepticism for some time - do the existing Member States really have complete independence; which mechanisms reduce autonomy, and which improve it; will the expansion of the community threaten existing Member States? Many of these issues are reflected in the rule of law of the EU. And many Member States rely entirely on Article 7 TEU to decide how the situation will be handled.

Questions that may arise when analysing Article 7 TEU

One of the main fundamental principles of the EU is the rule of law. As the popularity of populist and extremist parties in the Member States increases, the rule of law is being undermined. Article 7 was created to preserve the inviolability of fundamental values. Its purpose is to target the Member States that do not respect these values. To put sanctions in force, it is necessary to achieve consensus among all Member States, except for the Member State suspected of violating the rule of law. The decision is made by the European Council, which is made up of heads of states. Which makes one think – is it realistically possible to adapt this Article to the current political and geopolitical situation? And what happens when the country that transgresses the rules is on 'too friendly terms' with other Member States? And should the decision on actions under Article 7 not be made from an objective and legal point of view?

Article 7 TEU - weaknesses and how to improve them

This Article faces several challenges in ensuring respect for the rule of law. The first main challenge is the long time needed to establish sanctions or measures to stop the violations of the rule of law. It takes time to build consensus, which hinders quick and effective action. In this time, the Member State that committed the violations has the opportunity to influence the decision of other Member States. Additionally, the close economic, cultural, and political ties between EU Member States influence decision-making in the European Council. Supplementing this mechanism with a separate organisation that will monitor the Member State that made the violations of the rule of law while on the ground, would allow for the opportunity to observe changes and provide an analysis of the situation in real time. To avoid creating opportunities for the Member State accused of violating the rule of law to circumvent the rules, it would be necessary to make the criteria more precise and to set automatic and mandatory measures that must be followed for a certain period of time. The more flexible the criteria and sanctions are, the more likely they are to be avoided and circumvented. Many Member States are aware of this and use it to their advantage. However, in order to ensure the objectivity of the decision of the European Council, national authorities could be involved in decision-making in a neutral, Union-capacity.

Article 7 is a very important point in the TEU. It symbolises the core values on which the Union is based. As there are different states and tests, developing this Article would be an opportunity to achieve the ideal protection mechanism against rights violations - only a few changes are needed!

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What can the Stability and Growth Pact reforms tell us about improving the Article 7 TEU procedure?

Article 7 TEU establishes a 'nuclear level sanction' – the suspension of membership rights for a Member State, such as voting rights within the Council of the European Union. While originally a corrective sanction mechanism introduced with the Amsterdam Treaty, the Haider scandal in Austria led the EU MS and institutions to make a supplementary preventive procedure (Article 7(1)) through amendments in the Nice Treaty. It is important to note that the Article 7(1) procedure is a completely standalone mechanism with no bearing on the corrective procedure enshrined in Articles 7(2) and 7(3). The corrective mechanism, however, is a much more difficult and political mechanism. First, the European Council and the Council are given a large margin of discretion, affirmed by the continuous use of the term "may" within the articles. Second, the threshold for activating the corrective procedure is very high, making it a difficult procedure to set into motion.

However, these are not problems that are specifically exclusive to Article 7. A historic example that comes to mind is the Stability and Growth Pact (SGP) before the six-pack and two-pack reforms: a set of rules, consisting of a preventive and corrective arm, aimed at ensuring the stability of the Euro and the economic performance of the Member States.

Essentially, if a certain Member State was in breach of SGP rules concerning excessive deficit or debt, the procedure followed these main steps: 1) the Council needed to reach a decision, based upon a Commission proposal, that excessive deficit exists; 2) the Council would then provide private recommendations to the Member State in breach, and in cases where no action was taken, publicise them; and 3) where no or insufficient action has been taken, the Council could request non-interest bearing deposits or impose fines.

Famously, this system failed in 2003-2004, when the Council could not reach qualified majority for giving notice to Germany and France to correct their excessive deficit. This necessitated multiple reforms to strengthen enforcement of the SGP.

What were some of the key reforms?

First, reverse Qualified Majority Voting (RQMV) was introduced, which essentially automated the decision to impose sanctions, unless the Council could reach a qualified majority to not impose them.

Second, an indirect solution was created – while not in the Treaties, the withholding of Structural and Investment Funds as a replacement to sanctions was popularised.

Third, further reporting, coordination, and other corrective measures such as the Macroeconomic Imbalance Procedure were introduced.

How is this applicable to the Article 7 procedure, and moving forward?

First, hard sanctions are necessary. While weaker forms of coordination, such as exchanging best practices, and coordinating policy are better for fields such as education, culture, pension, etc., stronger coordination forms such as sanctions were necessary in the field of economics – the EU is an economic and monetary union. This same reasoning is applicable to rule of law - there is a strong necessity for a functioning Article 7 procedure with sanctions that have a deterrent effect, because the EU is a union founded on rule of law. Of course, softer sanctions might be easier to reach consensus on, and provide more credibility to the system, but they also face the risk of inciting misbehaviour in political players, since countries could pay a price to incur rule of law changes. They must exist in parallel, creating a gradated approach leading towards the suspension of membership rights, while also being successive enough to avoid a situation where the EU essentially writes off rule of law breaches with a fine or through the withholding of Structural and Investment Funds. This is evident in the case of Hungary, where the withholding of Structural and Investment Funds proved effective against Hungary in 2012 for correcting its excessive deficit; however, the approach has failed to produce significant rule of law changes as of recent.

Second, the decision process on the implementation of sanctions must be reformed. There needs to be credibility behind Article 7; if Member States feel that their peers will never sanction their actions, then the whole system fails. While the introduction of RQMV might sound like too far of a shift away from the intergovernmental nature of the procedure, it would ensure that the process does not stagnate. RQMV could be imaginable for the Article 7(3) procedure, withdrawing membership rights after a breach has been concluded following Article 7(2). It would also seem necessary to scrap unanimity in favour for a supermajority approach within Article 7(2) – for example, applying the majority required for Article 7(1) to Article 7(2) as well, or linking the preventive and corrective arms, lessening the majority required in Article 7(2). Finally, it would be necessary to rid Article 7(2) and 7(3) TEU of the term “may” in favour of “shall”.

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The EU needs to protect its fundamental values and decision-making capability

Hungary's attempts to block the opening of new enlargement negotiations and the financial support for Ukraine point towards political risks related to the EU's recently established budget conditionality mechanism. To prevent further disruptive behaviour of a Member State facing EU funds freeze, the Union should prepare to use and reform the sanctioning arm of Article 7 TEU to protect its fundamental values and decision-making.

Even if Hungary has consistently voiced dissent with the EU mainstream opinion on Ukraine, its views have failed to resonate in the other 26 EU capitals. Consequently, the motive behind Prime Minister Viktor Orbán's blocking tactics in the European Council has been seen to result, at least partly, from an attempt to unblock all or part of the EU money suspended from Hungary.

The EU has frozen some EUR 30 billion of funds from Hungary under the newly established mechanism aimed to protect the EU's budget against breaches of the rule of law principles. The mechanism was agreed in conjunction with the current MFF in 2020, and it can be utilised by QMV. The Commission's decision to release some EUR 10 billion of the frozen EU funds to Hungary in the eve of the pivotal European Council meeting in December added to the assessments highlighting a transactional logic in play in the dispute, even though the Commission energetically disputes this reading.

The risk of blocking behaviour was manifested already when the new mechanism was agreed in 2020. Poland and Hungary took the MFF decision, including the Recovery and Resilience Facility, hostage, and required modifications to the budget conditionally mechanism. The compromise achieved in December 2020 European Council did not affect the setting up of an effective mechanism. However, it demonstrated that a Member State, facing growing political pressure and potentially notable financial consequences due to the rule of law breaches, can retaliate by preventing vital EU decisions requiring unanimity and seek concessions regarding utilisation of budget conditionality.

Hungary's initial veto on support for Ukraine also led to an open discussion on whether the EU should finally use the sanctioning arm of Article 7, including the possibility of suspending the voting rights of a Member State in the European Council. Even if the EP launched the Article 7 procedure against Hungary already in 2018, the Council has not yet come to a decision on referring the matter to the European Council. Previously, Poland's former government was understood to block any attempt to move in this direction, given that the Commission had launched the Article 7 process against rule of law challenges in the country in 2017. The recent change of government in Poland, however, has energised the discussion on Article 7.

Article 7 has been predominantly discussed as the "nuclear option" present in the Treaties to sanction a Member State which has been determined to be in serious and persistent breach of the Union's fundamental values. Suspension of voting rights in the Council would surely be a radical action, yet this discussion seems to overlook the fact that the Article 7(3) enables, more broadly, suspension of certain rights deriving from the application of Treaties, including the voting rights.

Accordingly, sanctioning of a Member State could take many forms, including suspension of EU funds while the obligations of the Member State remain in place. Importantly, the possibility of suspending the voting rights can also be understood as a way to protect EU decision-making against disruptive behaviour of a Member State under other forms of sanctions decisions related to breach of EU fundamental values.

Underlining the Article 7(3) as a "protective option" to safeguard EU decision-making is important also due to potentially unhelpful confusion related to its purpose and scope. In the heated debate regarding Orbán's blocking tactics, some political and expert statements suggested that the article could be used to overcome Hungary's opposition in EU decision-making concerning the Union's vital strategic interests in supporting Ukraine.

However, Article 7, including its sanctioning arm, was created to tackle breaches of EU fundamental values, and not a Member State's opposition towards vital and strategic EU decisions. Upholding clarity on this issue is crucial, as finding consensus to use Article 7 is still uncertain. Somewhat loose talk regarding its applicability and scope is likely to work against it, given that Member States still hesitate to use it.

Finally, recent blocking tactics in the European Council suggest that a reform of the mechanisms protecting EU fundamental values is urgently needed. Revisiting Article 7, including moving towards (super) QMV to utilise its sanctioning arm, should be thoroughly considered in the eve of major EU enlargement.

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Balancing act: upholding EU values and promoting enlargement amindst the Orbán conundrum

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So close, yet so far: with the prospect of EU enlargement back on the table after over a decade, the spectre of the rule of law crisis looms large over the democratic and European hopes of the Eastern neighbourhood.

The question is: is Hungarian Prime Minister Viktor Orbán going to allow for the process of accession of new Member States to carry forward? For as long as he holds decision making power, the common strategic interests of the EU are in jeopardy.

Hungary has been recognised as a "hybrid regime of electoral autocracy" by the EP in a resolution of 2022, following the findings of authoritative democracy indexes like V-Dem and Freedom House, as well as concerns over the last general elections found to be "marred by the absence of a level playing field" by the full-scale OSCE Office for Democratic Institutions and Human Rights election observation mission.

Due the lack of prompt action by the Commission, as guardian of the Treaties, EU institutions have been slow in recognising the threat of an autocratising Member State in their midst, as such compromising the legitimacy of the decision-making process. For example, despite Article 10(2) TEU providing that the European Council shall be comprised of Heads of State or Government that are democratically accountable, to be read in conjunction with Article 10(1) on representative democracy, Orbán continues to occupy his seat on the European Council – except for when he conveniently leaves the room at the time of voting, as he did during the December 2023 summit, allowing the remaining Member States to vote to start accession negotiations with Ukraine.

Concerningly, the game of cat and mouse that Orbán has been playing with the EU institutions, leveraging his power to veto decisions taken under the Common Foreign and Security Policy, has also weakened the rule of law toolbox. The decision by the Commission to release EUR 10.2 billion previously withheld due to rule of law deficiencies, was exposed by scholars as misguided due to the lack of meaningful improvements to the domestic situation, leading some to speculate that there was a correlation between the timing of the release and the crucial European Council summit of December 2023 to decide on Ukraine's membership prospects.

This level of extortion sets a twofold precedent that may prove very dangerous for the future of the EU. In the first place, Orbán has repeatedly proven to be an unreliable partner, who is estimated to have over 70 opportunities to obstruct Ukraine's (and for that matter Moldova's, Georgia's, or any other aspiring candidate's) path towards membership, as well as the common efforts in response to Russia's war of aggression. Recent reports suggest that after systematically watering down most sanction packages against the Kremlin, Hungary is once again threatening

to block the upcoming 13th package. This buys precious time for Russia and displays the EU's internal weakness and disunity.

Secondly, it signals that the EU is incapable of dealing with internal crises of values, shattering the long held belief that European integration is a tool for lasting democratisation and peace. At the eve of an enlargement that could take EU membership to 30+, values enforcement must be a priority, both before and after accession, in order to prevent irreparable fragmentation of the EU legal order.

Over a decade of democratic backsliding in EU Member States has certainly highlighted the paradox which then-Commission Vice-President Viviane Reding dubbed the "Copenhagen dilemma," whereby the EU is successful in exercising leverage over values vis-à-vis third countries, but loses such power after their accession. However, the value enforcement toolbox has since been vastly expanded in order to address this pitfall. Today, the EU has a variety of remedies at its disposal, a combination of legal and political, found in primary and secondary legislation, which the institutions, in particular the Commission, the Council and the European Council, have a responsibility to effectively deploy.

Arguably, the most important test at the moment lies in the application of budget conditionality. While the Commission gave up part of its leverage and undermined the entire system by conceding EUR 10.2 billion to Hungary in what was described as a "Faustian bargain," there is room for course correction.

In line with calls to action expressed by the EP based on evidence of continued backsliding in Hungary, European leaders through the European Council itself can put pressure on the Commission to re-block the Cohesion Funds, which is allowed by the terms of the official document that authorised the release. Furthermore, there are clear grounds for freezing 100% of the EU budget allocated to Hungary on the basis of widespread corruption posing a direct danger to the funds (as per the standard set by the ECJ in the twin conditionality judgements), by employing the Conditionality Regulation. On top of applying pressure for reform in the country, this would be a strong signal for candidates that EU institutions are serious about upholding EU law and values.

Moreover, in order to isolate the threat of non-democratic infiltration in decision-making, the Treaty provisions that allow for the suspension of voting rights should be utilised. Most prominently Article 7(2)-(3) TEU, which for so long as Poland was also on a backsliding trajectory could not be used due to unanimity requirements, has now become feasible again. Its activation remains in the hands of the European Council and Council of theEU, and considering that Hungary is scheduled to take over the Presidency of the latter in June 2024, it is more urgent than ever. Injecting new life in the so-called "nuclear option" may be the only way to prevent Orbán from setting the Council's decision-making agenda at such a crucial time for Europe.

Similarly, the aforementioned Article 10 TEU could be operationalised by the Commission. The fact that a recognised non-democracy is allowed to enjoy the perks of membership is an obvious breach of EU law and as such can be subject to infringement proceedings. While the Commission has invoked Article 2 TEU as a standalone plea in law against Hungary for the first time in 2022, it only ever referred to Article 10 against Poland, in a case that is unlikely to be carried forward since the change in government. However, this may be about to change since the Commission launched an infringement procedure on February 7th, 2024, alleging that the new Hungarian sovereignty law breaches "the democratic values of the Union."

This is a crucial move; the ECJ has long proven itself a staunch defender of values, and affirming the justiciability of the rule of law and democracy would advance the EU's capabilities in value enforcement and protection even

further, setting strong foundations to welcome new Member States and to keep them on the path of democratisation. Therefore, the upcoming judgements on Article 2 and Article 10 promise to be some of the most momentous developments in this decade-long rule of law crisis.

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The EU 30+ should overhaul its rule of law toolkit to meet the challenges of further enlargement

Prospective EU enlargement to Eastern and South-Eastern European countries has raised a debate about preserving high rule of law standards in the Union. Concerns stem from at least three broad considerations: a) the imperfect functioning of Union instruments meant to safeguard the rule of law in the recent past, b) the severe deterioration of the rule of law in two Member States that joined the EU after the 2004 enlargement, and c) the idea that the EU is accelerating enlargement negotiations and procedures for geopolitical reasons (to counter Russia following its attack on Ukraine) and potentially at the expense of some of the Union's foundational values. In this context, it is important to review key EU instruments to preserve the rule of law and reflect on how they can be adapted to ensure they fulfil their purpose in a newly enlarged Union.

In this contribution, we will address several mechanisms the EU has devised to safeguard the rule of law, starting from the Cooperation and Verification Mechanism (CVM), which was in force until 7 October 2023.

As is well known, the CVM was created to address pressing rule of law issues affecting Romania and Bulgaria at the time of their accession. Due to insufficient progress in areas such as the fight against corruption and the administration of justice, these two Member States were given tailor-made benchmarks to achieve after their accession, with the aim of avoiding the latter to be delayed by shortcomings in this area. In other words, Bulgaria and Romania were given additional time to meet the Copenhagen criteria while already being EU Member States.

The CVM was not uncontroversial. From a legal perspective, the main problem was that some rules of EU primary law (such as Article 2 TEU, or parts thereof) were temporarily suspended through an act of secondary law, namely a Commission decision. This is a valid objection but not an insurmountable obstacle. If a new version of the CVM is included (or at least mentioned) in the Accession Treaty of new Member States, the problem may be solved as indirectly stated by the ECJ in the *Asociaţia* ruling (para. 147 ff.). For accession instruments are part of EU primary law. However, it bears noting that not all primary rules are equal. Since at least the Kadi case law, it is correct to admit the existence of a hierarchy between primary rules, with the foundational principles being placed at the top of it. The rule of law is undoubtedly one such principle.

The CVM has also proven problematic from a practical perspective. Although Bulgaria and Romania have made much progress in the areas concerned by the CVM, the overall rule of law situation in these countries is still quite worrisome 17 years after accession, as demonstrated by the 2023 Rule of Law Report (RLR). For these and other

reasons, the CVM was not applied to Croatia despite the structural deficiencies in this Member State, which were (and to a large extent still are) similar to Bulgaria and Romania.

The EU rule of law toolbox includes the Rule of Law Mechanism (RLM), of which the RLR is the cornerstone. The RLM/RLR are helpful soft instruments that stimulate inter-institutional dialogue and encourage cooperation in relation to some essential aspects of the rule of law, such as the administration of justice and corruption. Yet, some equally essential elements are not covered. An important example is the rights of minorities, which is a delicate issue in some candidate countries. For the RLM/RLR to remain a valid (yet not decisive) tool after enlargement, it might be a good idea to expand its scope.

The next tool in the box is the Conditionality Regulation. The main issue is that a "genuine link" between breaches of the rule of law and the Union budget is required for the Regulation to be applicable. This aspect has been confirmed by the ECJ (see para. 138 ff. of its judgment). The ECJ has clarified that only the violations that "are relevant to the sound financial management of the Union budget or to the protection of the financial interests of the Union" come within the scope of the regulation. This aspect of the regulation was already criticised before the ECJ handed down its ruling.

The ECJ's strong emphasis on it means that some breaches of the rule of law will be less likely to be captured by this instrument. Considering that the heterogeneity of the Union will only increase with further enlargement, the Conditionality Regulation may become less effective. For example, it might be challenging to establish a genuine link with the financial interest of the Union for breaches regarding, say, the rights of sexual minorities – a domain in which current candidate countries perform well below the EU average. At the very least, it will be more challenging than for breaches regarding public procurement rules, as is the case with Hungary.

Another instrument is the infringement procedure. Needless to say, it was not specifically designed to protect the rule of law, but it has been used successfully to this end. This is true, in particular, in connection with some aspects of the rule of law, such as the independence of the judiciary, which can be sanctioned owing to the ECJ's interpretation of Article 19 TEU. It is doubtful whether the infringement procedure can be equally effective regarding breaches of the rule of law other than those affecting the judiciary. With the next round of accessions, this tool may, therefore, also decline in significance.

As a last resort, we are left with Article 7 TEU. That is the nuclear option, which is undoubtedly not nuclear and possibly not an option at all, at least in its current shape. The best-case scenario is a modification of Article 7 TEU that would make it less burdensome from a procedural perspective. Yet, doing that would entail a formal treaty amendment under Article 48 TEU. While this may be difficult, past experience and prospective challenges call for bold reform action, as suggested in the previous issue of this Debrief by Jaap de Zwaan (pp. 28-29).

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Beyond economic incentives: crafting a strategic approach to rule of law

Even when the EU was mainly a utopian idea to avoid any other future continental war, the rule of law was always considered a necessary condition to deepen and widen its institutions and reach. Indeed, respect of the rule of law is central to the functioning of democracies within the European institutional setting and has become even more relevant in light of the Russian aggression against Ukraine and the consequent modification of the global liberal order upon which the European system of governance was based.

Within an unregulated international arena, keeping the bar high when it comes to respect of the rule of law is fundamental, especially in view of a possible EU 30+ enlargement. Indeed, rule of law is the set of regulations, institutions, entities, and general conditions that allow citizens to live in a safe and prosperous environment, where the norms of human rights, transparency, and fairness at the very basis of a functioning democracy are protected and enforced.

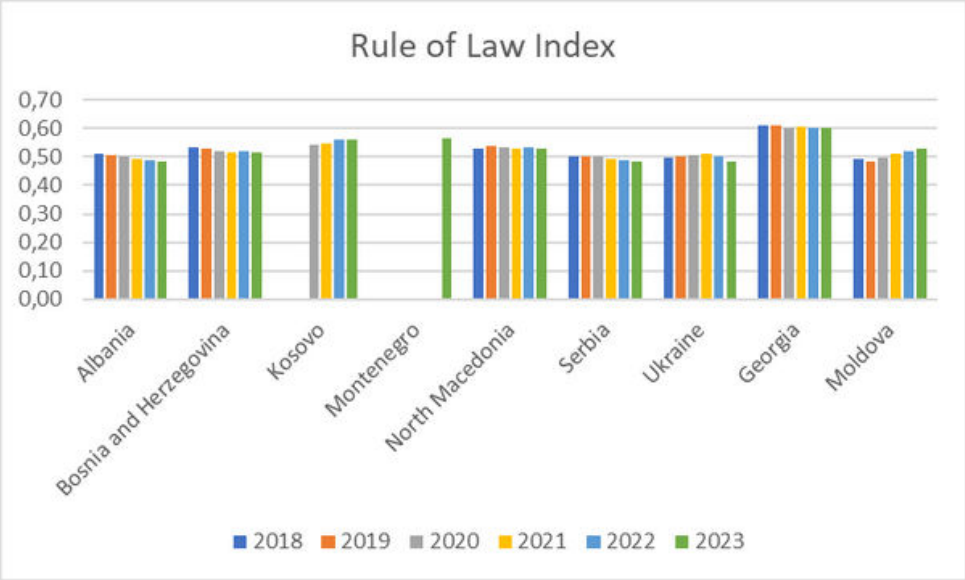
Yet, the EU is already facing significant challenges in safeguarding the rule of law within some of its Member States, such as in Hungary, which is set to hold the next Council Presidency in July 2024. So far, Article 7 TEU has not been very effective and, lately, the EU has been using budget conditionality to keep countries respecting rule of law. Although this mechanism can be applied only when rule of law infringements risk hampering the financial interests of the Union, the use of economic sanctions to increase the respect of the rule of law has been boosted in the aftermath of the COVID-19 pandemic. Indeed, the funds of the NextGenerationEU have been allowing the Commission to push Member States to respect specific recommendations, including on rule of

Rule of Law Index in some EU member Countries						
Year	Austria	Belgium	Bulgaria	Croatia	Cyprus	Czechia
2018	0,82	0,77	0,54	0,61		0,74
2019	0,82	0,79	0,54	0,61		0,73
2020	0,82	0,79	0,55	0,61		0,73
2021	0,81	0,79	0,54	0,61		0,73
2022	0,80	0,79	0,55	0,61	0,68	0,73
2023	0,80	0,78	0,56	0,61	0,68	0,73
	Denmark	Estonia	Finland	France	Germany	Greece
2018	0,89	0,80	0,87	0,74	0,84	0,61
2019	0,90	0,81	0,87	0,74	0,84	0,62
2020	0,90	0,81	0,87	0,73	0,84	0,61
2021	0,90	0,81	0,88	0,72	0,84	0,61
2022	0,90	0,82	0,87	0,73	0,83	0,61
2023	0,90	0,82	0,87	0,73	0,83	0,61
	Hungary	Ireland	Italy	Lithuania	Luxembourg	Malta
2018	0,55		0,65			
2019	0,53		0,65			
2020	0,53		0,66			
2021	0,52		0,66			
2022	0,52	0,81	0,67	0,76	0,83	0,68
2023	0,51	0,81	0,67	0,77	0,83	0,68
	Netherlands	Poland	Portugal	Romania	Slovenia	Spain
2018	0,85	0,67	0,72	0,66	0,67	0,70
2019	0,84	0,66	0,71	0,64	0,67	0,72
2020	0,84	0,66	0,70	0,63	0,69	0,73
2021	0,83	0,64	0,70	0,63	0,68	0,73
2022	0,83	0,64	0,69	0,63	0,68	0,73
2023	0,83	0,64	0,68	0,63	0,69	0,72

Source: World Justice Project and personal data analysis

law, with economic tools. However, solely building the need to respect rule of law on economic benefits might not pay off in the long run. For instance, despite economic sanctions having led to some reforms in the judicial system, Hungary still ranks at the lowest in the EU when it comes to rule of law enforcement. According to data from the World Justice Program, in 2023 Hungary achieved a ranking of 0.51 out of 1, well below the EU average of 0.72. Moreover, beyond Hungary, other EU countries like Bulgaria (0.56/1), Croatia (0.61/1), Romania (0.63/1), and Greece (0.61/1), to cite a few, did not perform at their best.

Rule of Law Index	Albania	Bosnia and Herzegovina	Kosovo	Montenegro	North Macedonia	Serbia	Ukraine	Georgia	Moldova
2018	0,51	0,53			0,53	0,50	0,50	0,61	0,49
2019	0,51	0,53			0,54	0,50	0,50	0,61	0,49
2020	0,50	0,52	0,54		0,53	0,50	0,51	0,60	0,50
2021	0,49	0,52	0,55		0,53	0,49	0,51	0,61	0,51
2022	0,49	0,52	0,56		0,53	0,49	0,50	0,60	0,52
2023	0,48	0,51	0,56	0,56	0,53	0,48	0,49	0,60	0,53



Source: Rule of Law Index data and personal data analysis

Considering its internal trends, the EU has been progressively placing greater emphasis on the quality of the rule of law reforms in candidate countries and there are two negotiating chapters dedicated to the development of institutions in line with specific democracy and human rights principles: Chapter 23 on Judiciary and Fundamental Rights and Chapter 24 on Justice, Freedom and Security. Nonetheless, in the Western Balkans, with the exception of Kosovo and Montenegro where data are no data available, the rule of law index decreased in the last five years and does not reach a minimum threshold of six. Against this backdrop and considering the comparatively positive trends registered in Georgia and Moldova, where citizens' support for the EU is probably at its highest, it might be worth for the EU to address rule of law concerns also through a different approach. Indeed, in time of rising discontent, when only one third of Europeans believes democracy is a top European value to defend, attaching mechanism for controlling the respect of rule of law to economic needs and sanctions might be practical, but not strategic. To fundamentally strengthen EU values, there is the need to convince citizens about the EU's commitment to upholding these principles for the benefit of all. This can be done by conducting public awareness campaigns to engage Europeans from Member States and candidate countries in open discussions on the rule of law. Although this might seem like a long shot, in times of multiple crises and fundamental cultural and political shifts within the global arena, attaching the respect of European fundamental values only to economic sanctions might conduct to moral hazard and not prevent potential law breaches from escalating. On the contrary,

building the respect of EU rule of law on a community of informed citizens can contribute to spread a culture of justice and hold national governments more accountable.

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The previous enlargements offer important lessons in ensuring rule of law

The EU conducted an unprecedented wave of enlargement in 2004-2007. Altogether 12 countries joined, of which 10 were members of the former Communist bloc, thus had to transform their political and economic systems as well as their societies from decades of non-democratic political experiences. In the Communist system rule of law meant – in line with the Soviet legal theory - that law had to serve as a tool of power over the citizens, instead of protecting citizens from the power.

The heritage of this old logic constitutes the *leitmotif* of the democratic backsliding that one may observe in Poland, Hungary, Slovakia, and a number of other countries. In most cases, these governments have not *violated* the law; instead, they have *abused* it by changing it in their own favour. So far, Hungary ventured the furthest on the road: as Viktor Orbán has had constitutional supermajority, he has had the power to re-write even the constitution for his own power.

Two main lessons may be learnt from the two decades of experience gained since the 2004 enlargement. The first one concerns the accession process, i.e., the period when the given countries are not yet inside the EU. Experience of the 2004-2007 period demonstrates that the institutions created back then did not provide a lasting guarantee for ensuring the rule of law. In some countries they functioned very well, for example, in Estonia, Slovenia or the Czech Republic. However, in others, major backsliding took place, even though all 12 countries had to go through the same accession process.

Hence, already during the accession process rule of law related guarantees need to become a lot stronger than they were before. Demanding only certain institutional changes is not enough, as institutions can be taken over, weakened, replaced, or even closed down. Therefore, the very functioning of these new institutions also needs to be monitored, at least for a whole electoral cycle, before the given accession criteria is declared to be met. The same applies to legal changes, particularly regarding the functioning of key checks and balances. This is particularly true for the post-Soviet countries aspiring for EU membership, as in these states the Soviet legal heritage had stronger effects and even their post-Cold War period was characterised by frequent, widespread, and systemic abuses of the law.

The second lesson is about protecting the rule of law in those countries that are already within the EU. So far, the most successful tool has been the consistent use of financial incentives, including punitive ones. Various infringement procedures, and even the Article 7 TEU procedure have all largely failed to prevent systemic violations of rule of law. This has been particularly so, because the perpetrating countries, once inside the EU, could slow down and already hamper the procedures from within.

Meanwhile, financial pressure has functioned a lot better. Similarly to the 2004-2007 period, the countries now aspiring for EU membership are significantly poorer than the EU average. This is particularly true for aspiring countries of the post-Soviet region, all of which have suffered from separatist conflicts and some of them of interstate wars. Hence, in an EU 30+ the new members will all desperately need the EU's financial support, empowering the EU with strong leverage over them.

Hence, budget conditionality on protecting the EU's financial interests would need to be employed from the very first moment of their accession. While the present conditionality mechanism is not designed to protect rule of law *per se*, only the EU's financial interests, the logic of strong financial pressure could still be applied for sanctioning non-compliance with the rule of law. A possible way to go is to introduce fines for not respecting rulings of the ECJ. By doing so, violating the rule of law would still result in immediate financial losses, albeit not in the framework of the conditionality mechanism. While in certain cases perpetrating governments have been ready to endure certain losses – for example, Poland rather kept paying a daily (!) fine of EUR one million to maintain governmental influence over its judiciary system –, as a general rule financial pressure has so far functioned better than any other tools in protecting the rule of law. Hence, this should be the general approach towards any new countries intending to join the EU in the future.

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THE EU rule of law mechanisms - a basis of EU identity

Human rights and democracy are at the core of the EU treaties. Article 2 of the Lisbon Treaty states that "the Union is founded on the values for human dignity, freedom, democracy, equality, the rule of law and respect for human rights including the rights of persons belonging to minorities". These are criteria all European states must respect to be allowed to apply for membership (Art. 49) and serious breaches of these values by a Member State may lead to a suspension of some of its rights resulting from membership (Art. 7).

When these texts were first discussed, in the framework of the European Convention in 2002, they did not raise major objections. When the Lisbon Treaty was concluded, the texts from the Constitutional Treaty related to EU values were adopted without discussion. The EU Charter was given the same value as the treaties, and, shortly thereafter, the EU acceded to the Council of Europe's Convention for the Protection of Human Rights and Fundamental Freedoms.

We are now in 2024, and what do we see? These values, as well as our democratic liberalism are put seriously into question – inside and outside the EU.

Inside, they are challenged by nationalist-populist movements; extreme right parties hostile to our liberal system have gained ground, from one national election to the next. Outside, dictatorship returned to Russia, was reinforced in China, and threatens countries like India and most countries in Africa - where "European values" are increasingly presented as post-colonial imperialist remnants.

This raises two questions: are our values really universal? And, if not, why and how to impose them internally to current and future Member States?

It can be argued that "European values", as described in Article 2 of the Lisbon Treaty and in other texts, originate from what is called the Western 'civilisation', developed in Europe and America since the time of Enlightenment in the eighteenth century - democracy, the rule of law, independence of the judiciary, individual rights for the citizen. New principles were added later following the evolution of society – notably, the equality between men and women, and more recently gay marriage, etc...

It would be wrong to insist that all these values and rules should be shared by the whole world, only because they are implemented in Europe. Even if it is desirable, Europeans have to admit that they do not fit in the same way, for instance, in systems in which society is dominated by a religion or organised around a group (or groups) of people, as in China or India. This allows the Chinese, for example, to argue that their system is more democratic than ours.

But, even if there are limits to the universality of the European model, this does not mean that the model can be challenged inside the EU itself. Indeed, the values clearly mentioned in the Lisbon Treaty are at the basis of the EU identity and legitimacy as a Union. There obviously is room for more conservatism, or more liberalism in national policies of the Member States, but there is no room for autocracy, control of the judiciary by the executive, or illiberalism when it challenges the values mentioned in the Treaty. This is why Article 7 goes as far as allowing the withdrawal of a Member State's voting rights in the Council, should they violate these values.

In addition to Article 7, other procedures help the EU institutions ensure respect of the rule of law. For example, the ordinary infringement procedure (Art. 258 of the Treaty on the Functioning of the European Union (TFEU)), a judicial procedure, initiated by the European Commission at the ECJ, to establish that a Member State has failed to comply with an obligation under the treaties. There is also the so-called preliminary procedure (Art. 267 TFEU), which organises a system of cooperation between national courts and tribunals and the ECJ in Luxembourg about questions related to the interpretation of EU law provisions.

A new instrument was launched in 2020 with the adoption of the new MFF 2021-2027 and the COVID recovery package: a regulation aiming more specifically at protecting the financial interests of the EU against breaches of the rule of law. It was, for obvious reasons, challenged by Poland and Hungary – but was used successfully to force them to address the issue in their domestic policy; these instruments are playing an important role in bringing them back to the respect of the EU rules.

The Article 7 procedure has been launched twice - against Poland by the Commission in 2017 and against Hungary by the EP in 2018 -, but not completed until now. It remains, however, for the reasons mentioned above, essential for the cohesion of the EU. If deviations from the rule of law were tolerated without sanction, the whole European construction could become fragile. There is, for that reason, no question of cancelling or weakening the article in the context of the new enlargement.

This has nothing to do with the universality of values; the reason is that the EU has chosen to build its identity on a strict set of norms and principles which cannot be put into question without changing the treaties themselves – and the spirit in which they have been agreed.

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EU's instruments for protecting the rule of law – a two-way approach for upholding the European values and advancing the enlargement agenda

The EU has advanced peace and prosperity on the European continent first by pursuing value-based objectives and later by introducing a set of instruments aiming at upholding these values. To this end, the rule of law has been the subject of new legislative proposals in the last four years, a shift that marked the beginning of a new approach in the EU. More specifically, in the European Council conclusions from 17-21 July 2020, it was noted that the "Union's financial interests shall be protected in accordance with the general principles embedded in the Union Treaties, in particular the values in Article 2 TEU," and that the protection of the financial interests of the EU is to be tied to the respect of the rule of law.

Against this background, we witnessed, in 2020, the introduction of the RLM and the adoption of the Rule of Law Conditionality Regulation. These two instruments brought the EU's rule of law toolbox, which previously included Article 7 TEU response, the rule of law framework from 2014, and the infringement procedures, to a new level. Two observations are to be made in this sense. Firstly, Article 7 does not refer only to the rule of law, but to any of the values embodied in Article 2 (human dignity, freedom, democracy, equality, the rule of law, and respect for human rights). Secondly, in addition to the tools previously mentioned, the EU also relies on the horizontal enabling condition of the EU Charter, which ensures that Member States use Cohesion Policy funds in compliance with the EU Charter. For example, in 2022, the European Commission informed, in the context of signing the Partnership Agreement with Hungary, that this Member State does not meet the horizontal enabling condition of the EU Charter due to its actions related to child protection, academic freedom, and the right to asylum.

Referring to the new instruments introduced, the first one (i.e., the RLM) is a preventive instrument, aiming at identifying from an early stage a deterioration in the rule of law status, while the latter (i.e., Conditionality Regulation) implies a coercive authority which can be activated if breaches of the principles of the rule of law endangering the financial interests of the EU are ascertained. The rule of law mechanism entails the publishing of annual country reports (focused on four pillars: justice, anti-corruption, media freedom and pluralism, and broader institutional issues related to checks and balances) based on an annual dialogue between the European institutions (the Commission, the EP, and the Council) with the Member States and other institutional/civil society stakeholders. Prior to the report due to be published in summer 2024, four of these yearly reports have been released by the European Commission with recommendations to the Member States.

The Conditionality Regulation reflected the agreement of the European leaders expressed in the European Council conclusions from 10 and 11 December 2020, namely the protection of the EU's budget against fraud, corruption,

and conflict of interest. After some difficult discussions, the leaders agreed that the adoption of guidelines by the Commission should occur only after the ECJ's decision following an action for annulment introduced by Poland and supported by Hungary; the ECJ dismissed the case in February 2022, underlining that "the laws and practices of Member States should continue to comply with the common values on which the Union is founded". Following the ECJ judgement, the European Commission issued guidelines on the application of the Regulation in March 2022. Previously, it made available a public complaint form on the breach of the principles of the rule of law (September 2021).

In January 2024, the European Commission published a Communication on the application of the Regulation and addressed the effectiveness of the procedure. In the only case brought up to this moment (Hungary), it was mentioned that the procedure can be implemented from five to nine months starting from the moment when a written notification is sent. With regards to the assessment, in December 2023, the Commission shared that "the situation leading to the adoption of measures has not been remedied [n. ed. in Hungary] and the Union's budget remains at the same level of risk", this being the case one year after a Decision to launch a procedure was adopted.

The EUCO conclusions from 14-15 December 2023 state that "both future Member States and the EU need to be ready at the time of accession" and that "aspiring members need to step up their reform efforts, notably in the area of the rule of law". With this political orientation in mind and considering the legislative development previously mentioned, one could see that the next enlargement wave will be strongly tied to upholding European values, both domestically and externally. If initially it was considered that the accession talks represent an effective reform process for the future Member States, now, through the two instruments introduced, the EU has made sure that the rule of law will be safeguarded following accession.