ESTABLISHED EU RULE OF LAW INSTRUMENTS

STATE-OF-THE-ART WORKING PAPER

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LISTE OF ABREVIATIONS

AG: Advocate General
AMR: Alert Mechanism Report
ASGS: Autumn Package consisting of the Annual Sustainable Growth Survey
CEECs: the Central and Eastern European countries
CP: Cohesion Policy
CSRs: Country-Specific Recommendations
CVM: Cooperation and Verification Mechanism
DRF: EU Pact for Democracy, the Rule of Law and Fundamental Rights
EAW: European Arrest Warrant
ECA: European Court of Auditors
ECB: European Central Bank
ECHR: European Convention of Human Right
ECJ: European Court of Justice
ECtHR: The European Court of Human Rights
EMU: Economic and Monetary Union
EP: European Parliament
EPPO: European Public Prosecutor's Office
EU: European Union
EUCO: European Council
EUJS: EU Justice Scoreboard
IMF: International Monetary Fund
MFF: Multiannual Financial Framework
MIP: Macroeconomic Imbalance Procedure
MS: Member State(s)
NCAs: national competition authorities
NGEU: Next Generation EU package
NGO: Non-governmental organization
NRRPs: National Recovery and Resilience Plans
OLAF: European Anti-Fraud Office
OMC: Open Method of Coordination
PRP: Preliminary Reference Procedure
RLRC: Rule of Law Review Cycle
RoL: Rule of Law
RRF: Recovery and Resilience Facility
SCPs stability and convergence programmes
SGCY: the Support Group for Cyprus
SGP Stability and Growth Pact
SRSP Structural Reform Support Programme
TEU: Treaty of the European Union
TFEU: Treaty of the Functioning of the European Union
TFGR: Task Force for Greece
The Charter: EU Charter of Fundamental Rights
TSI: Technical support instrument

1. INTRODUCTION

Tackling Rule of Law Problems in the EU with a Growing set of Instruments: Which Consensus?

Cristina Fasone (LUISS University)

Dissensus on the rule of law instruments as the object of analysis

As the rule of problems have gradually worsened inside the EU, over the years and especially since 2014, EU institutions have deployed an **increasing number of instruments of varied nature** (Closa and Kochenov 2016; Jakab and Kochenov 2017). Those tools range from mechanisms regulated under EU primary law (section 2) and by EU legislation (section 3), to soft law measures (section 4) and instruments linked to the EU budget and to economic interests (section 5).

The growing "arsenal" devised by the EU, however, has been **the target of mounting dissensus among scholars and at institutional level** and it is precisely such a dissensus that is the object of the present working paper when analysing existing EU rule of law instruments in action. While the working paper is not meant to endorse a specific or strict definition of dissensus nor to provide an analytic examination of each tool across time and space (on the point, see, e.g., Coman 2022, 37 ff), it rather explores the emergence of contrasting academic views on the functioning of the various instruments and/or the contestation of their effectiveness, the criticism raised from within the EU institutions and potential conflicts, including inter-institutional conflicts, that have been triggered by the implementation of the various tools.

Framed under this term, the dissensus can materialize under different forms. It can be led by **criticism on the doubtful enforcement of a particular tool**, starting from Article 7 TEU, and the lack of follow-up on the activation of its paragraph 1 against Poland and Hungary, looking at how the literature has dealt with this questionable stalemate (section 2.1.). **Dissensus** can be also **triggered by the interpretation of one of the legal instruments** at stake, as it is for the reach and the scope of application of the Charter of fundamental rights, in particular Article 47, in combination with other Treaty provisions (section 2.4.). Moreover, as it is for some procedures shaping the process of EU integration from the very beginning, like the **infringement proceeding and the preliminary ruling procedure (PRP)** (sections 2.2. and 2.3.), they have been **adapted to also serve the protection of the rule of law principles** and have become the **channels of dissensus either in the struggle between the EU and the Member State** under review or **between private parties and the national authorities contested**, with the Court of Justice (EJC) and national courts acting as arbiters in the disputes. The same ECJ has been criticized, however, for its inconsistent and ambiguous attitude toward the rule of law and, especially, the compliance with the standards of judicial independence (Kochenov and Bárd 2022). The **rise in the number of courts' cases dealing with rule of law issues** in the EU is already a proof of the level of dissensus we experience at present and that politics has been unable to solve, being quite difficult to compromise on fundamental values such as the rule of law. Even when a (questionable) political compromise was sealed, for example on the rule of law conditionality regulation (Sheppele, Pech and Platon 2020; Baraggia and Bonelli 2022; section 5.3.), this has not prevented the use of strategic litigation in front of the ECJ (see cases C-156/21 and C-157/21).

The dissensus surrounding the use of the EU rule of law instruments is somewhat inherent in their design, especially for the binding ones and for those with most far-reaching consequences in principle. They certainly touch upon the **very sensitive area of domestic constitutional law, principles and values very closely related of what is left of national sovereignty**, which is typically used to resist to EU law. Not by chance the alleged variety of (national) definitions of the rule of law has been mobilized to this end (Pech and Grogan 2020, 45 ff.).

Dissensus, also in legal terms, is certainly not new in the EU. Just to make an example, it is sufficient to recall here the "jurisprudence of constitutional conflict" (Bobić 2022) featuring the relationship between the ECJ and national constitutional judges, which on the rule of law tends to be quite destructive on the national side and to move away from the basic principle of sincere cooperation (Article 4, para 3 TEU). Possibly, **also the level of inter-institutional dissensus has increased on the rule of law**, with the European Parliament being usually more vocal on rule of law concerns than the Council and the Commission as well-exemplified by the threatened action for failure to act (Article 265 TFEU) by the European Parliament against the Commission for failure to act for delaying the implementation of the rule of law conditionality Regulation, however problematic that was from the point of view of effectiveness (Platon 2021).

Trends

From the review of the various instruments **three elements and trends seem to deserve special attention** from the perspective of dissensus. First, the circumstance that the **growing set of rule of law instruments is not necessarily promoting better results**, as the detachment between the theory and the practice of the rule of law seems to prove. **The relationship between the various instruments is to a large extent unsettled**, thereby creating some confusion as to when it is appropriate to use each of them. Some tools, like the PRP or the rule of law conditionality regulation are certainly complementary to the already existing ones, some being more generic (e.g. the infringement proceeding) and some being narrower in the focus (e.g. the technical support instrument, on which see section 3.1.). In general, the dissensus can be also seen, at least from an academic perspective, as criticism and disappointment against the **uncoordinated proliferation of soft law instruments** (rule of law reports, rule of law dialogue, etc.: section 4) none of them alone decisive to tackle rule of law problems. There is also the issue of **overlapping between instruments** as it is, just to mention one case, between the Cooperation and Verification Mechanism (section 2.5.) and the Rule of Law Reports (section 4.3.), with the latter destined to replace the former.

The growing set of rule of law instruments is not necessarily promoting better results as the detachment between the theory and the practice of the rule of law seems to prove.

Second, there is a certain degree of disagreement and, hence, of **dissensus, especially in the literature, on the qualitative and quantitative indicators setting the scoreboard** for the assessment of the national performance on the rule of law and, in general, on a how to check the compliance with the rule of law principles in a systematic manner. For example the EU Justice Scoreboard, which forms the basis for drafting the rule of law reports, has been contested both in terms of methodology and for the mechanism of data evaluation. If there is no convergence on the scoreboard to be used, then any position taken by the Commission can be subject to contestation and accused of arbitrariness and too broad discretion, which run exactly in contrast to what the values of legal certainty and predictability the rule of law aims to represent.

The third element that is interesting to consider is the extent to which the **economic and financial leverage to deal with rule of law issues has become an element of dissensus.**

The rise of spending conditionality and the greater attention for the protection of the EU financial interests have indirectly led to a further politicization and polarization of the debate on the rule of law.

This is clear, for instance, from the reach of the country-specific recommendations within the European Semester that have come to cover judicial reforms and the adoption of antic-corruption measures (section 5.1.) and from the way EU competition rules have been used to deal with problems of media freedoms (section 5.5.). The increasing use of the economic leverage and of EU funds to tackle rule of law issues is also prompting a more active involvement of OLAF and, in prospect of EPPO, as the fight against EU frauds and the protection of the rule of law principles can now more easily be paired (Rubio et al. 2023). Indeed, over the last five years and especially since the Next Generation EU package has been adopted (see sections 5.2. and 5.4.), **the rise of spending conditionality and the greater attention for the protection of the EU financial interests** have indirectly led to a **further politicization and polarization of the debate on the rule of law.** While this change is not necessarily problematic insofar as it triggers a public debate and it is conducive to alleviate the rule of law problems, it may foster more divisions inside the EU between the East and the West and between the North and the South and could create disparities between European citizens across the Member States. Relatedly, another contested dimension of spending conditionality refers to the **alleged "democratic blackmail"** it triggers (Baraggia 2023) insofar as it involves procedures directly affecting rights and benefits of the citizens of the targeted Member State for faults of their own government, which then would be induced to adopt corrective measures in exchange for money. As it has been effectively pointed out, these conditionality mechanisms imply the trading of rule of law and democracy for EU funds and recovery (Fromont and Van Waeyemberge 2021).

Structure and contents

The working paper is structured as follows. First, it reviews the instruments foreseen in EU primary law to tackle rule of law problems and the dissensus surrounding their use. From this perspective, by far the most criticized tool, not only at academic level, is Article 7 TEU, characterized by a striking difference between its design as a "nuclear option", especially its paras 2 and 3, and its use in practice as Ramona Coman and Pauline Thinus very clearly highlight (section 2.1.). Coping with the deficiencies of the Article 7 TEU's procedures, the infringement proceeding has been widely employed despite its general scope, not being conceived specifically for rule of law problems (Article 258 TFEU). With this regard, Giovanni Piccirilli emphasizes that the debate and the dissensus have focused mainly on whether infringement proceedings are really fit for the purpose considering their "low political profile" compared to the mentioned "nuclear option" and their tailored focus on selected violation of EU law rather than on systemic deficiencies (section 2.2.). Next, Lorenzo Cecchetti guides us through the versatile use of the PRP (Article 267 TFEU) for rule of law purposes as a complementary rule to infringement proceedings. In particular, section 2.3. focuses on the value of the preliminary rulings to protect the independence of the judiciary, in two sensitive fields, notably the controversial enforcement of the European Arrest Warrant and the exercise of the European mandate by national courts (Article 19 TEU). Very much linked to these judicial tools has been the interpretation of the Charter of fundamental rights for the sake of upholding rule of law values, especially the guarantee of effective judicial protection and legal remedies (Article 47 of the Charter), constructed as the basic right from which all the other stem. Lorenzo Cecchetti underlines the tension between the use of the Charter to this end and the limited scope of application under Article 51, which has triggered some criticism on the effectiveness of the tool (section 2.4.). Last, the Cooperation and Verification Mechanism (CVM), though formally enshrined in the EU primary law – in the Treaty of accession of Bulgaria and Romania –, as correctly highlighted by Adriano Dirri (section 2.5.) it has never been used as a standard for review by the

ECJ (see the missed opportunity in the AFJR judgment, joined cases C-83/19, C-127/19, C-195/19, C-291/19, C-355/19, C-397/19). This de facto downgrading of the legal significance of the CMV legal basis has been coupled by the criticism on the effectiveness of the tool from the rule of law perspective: as argued by Adriano Dirri, on the one hand, the outcome of the CMV assessment has departed from the evidence produced by the EU Justice Scoreboard thereby amplifying the level of dissensus; on the other, the CMV is expected to be replaced by the Rule of Law Reports.
The following part of the working paper is then devoted to legislative instruments (indirectly) protecting the rule of law, as they were conceived for the general purpose of supporting the correct enforcement of EU law and to protect the EU budget.

The Technical Support Instrument (TSI) is now perceived as a crucial instrument to foster the enforcement of reforms connected to the enhancement of the rule of law.

Adriano Dirri and Ylenia Guerra reflect on the multifaceted nature of the Technical Support Instrument (TSI), aimed to provide technical assistance to Member States for the implementation of institutional and administrative reforms, particularly of those linked to the European Semester (section 3.1.). Foreseen under the Multiannual Financial Framework 2021-2027 and covered by Regulation 2021/241, the RRF Regulation, the TSI is now perceived as a crucial instrument foster the enforcement of reforms connected to the enhancement of the rule of law, to consolidate the national administrative capacity and the independence of the judiciary. Yet, the TSI has also been the target of criticism as long as it appears more directed to endorse fiscal consolidation and austerity rather than growth and, as such, according to the European Court of Auditors, for example, the instrument has not reached the targets for which it was created.

Alessandro Nato, instead, focuses on the various legislative instruments protecting the EU financial interests, e.g. Directive No. 2017/1371, and on the emergence of a questionable "financial rule of law" in the EU (section 3.2.). In other words, lately the EU's approach to the rule of law has become more and more steered by financial considerations. In this vein, the role of the European Anti-Fraud Office (OLAF) and the European Public Prosecutor Office (EPPO) has acquired prominence and so have the systems of administrative and criminal control. This shift, however, has also brought to the forefront new problems: indeed, if the OLAF and the EPPO are expected indirectly contribute to the protection of rule of law, the scope of action of these bodies can create new rule of law challenges, for example when it comes to identify their specific mandate and the need to properly arrange their mutual collaboration, today remained largely unsettled; or, for the EPPO, the very limited avenues to subject its act to judicial review by the EJC.

The fourth part of the working paper, then, move on from binding to soft law instruments, which have been devised over the last few years, mainly by the Commission. The tools discussed in this part define preventive mechanisms, meant to avoid the escalation of rule of law problems, that are not strictly tailored to the reach of the EU competences. The rule of law framework and dialogue, launched in 2014 (section 4.1.), the EU Justice Scoreboard (section 4.2.) and the rule of law reports (section 4.3.) are intimately related to one another and they are complementary tools vis-à-vis the binding ones. Dealing with the rule of law framework, Maciej Serowaniec discusses its subsidiary nature and the aim to target the systemic nature of the threat to the rule of law. The dialogue that can be activated by the Commission within the framework can even lead to an infringement proceeding or to trigger Article 7 TEU. The practice, however, has revealed the flaws of this mechanism, which was activated only once, in 2016, against the first judicial reforms in Poland. Speaking of reforms of the judicial system, a soft law instrument established since 2013 and now part of the EU rule of law toolbox is the EU Justice Scoreboard.

As clearly described by Ylenia Guerra, this Scoreboard provides a grid to assess the performance of national judicial systems, save for criminal courts. As such, it is based on a series of indicators measured through a complex mix of qualitative and quantitative methodologies, which have happened to become a major source of disagreement amongst experts, between Member States and between them and the EU. This is of special concern as the critique against the reliability of the EU Justice Scoreboard's methodology can undermine its legitimacy and authoritativeness and impair the effectiveness of the rule of law reports, which indeed are drawn also based on the evidence produced through the Scoreboard assessment. Finally, Ylenia Maria Citino guides us through the design and use of the latest EU soft law instrument put forward, the rule of law reports launched for the first time in 2020, as part of the annual cycle of the rule of law mechanism. In this case the criticism has revolved around both its too broad scope and lack of precision in targeting specific violation of the rule of law principles and its inability to stop or slow down the processes of autocratisation taking place in certain Eastern countries. The rule of law reports draw on data collected through the EU justice Scoreboard and the European Semester to foster a dialogue between EU institutions, the Member State concerned and the stakeholders. Aiming to respond to the allegations highlighting the too abstract nature of the Commission's review, in the 2022 review cycle country specific recommendations have been referred to in the reports (see also section 5.4). Yet, especially with a view to the incorporation of the CVM into the rule of law reports – as the two instruments largely overlap today – a serious reflection on the added value of this tool, even more so after the RRF and the rule of law conditionality Regulation, is deemed desirable.

The fifth part of the working paper engages with a variety of legal instruments, mostly embedded in binding provisions and, for competition law, also in Treaty provisions, next to soft law tools, all of them relying on the economic leverage to foster compliance with the rule of law principles in the EU.

Andrea Capati and Thomas Christiansen elaborate on the role of the European Semester as a framework for the indirect enforcement of the rule of law. Country-specific recommendations and their widened scope, in particular, have become the linchpins for steering a continuous assessment of the commitment and enforcement of rule of law principles through economic governance mechanisms, thereby fostering a lively debate on the desirability of such a mix (section 5.1.). Drawing on this apparent contradiction, Cristina Fasone and Marta Simoncini deal with the spreading of conditionality as a tool of internal governance in the EU. (section 5.2.). After having reviewed the main types of conditionality regimes established under EU law, the problematic resorting to strict conditionality during the Eurozone crisis as an example of rule of law degradation, and focusing on the combination of multiple conditionality mechanisms under the Next Generation EU, they reflect on the hybrid nature and ambiguities of conditionality as a source of dissensus in the Union. Dora Hegedűs and Thomas Christiansen, then, zoom on the process of adoption and the early implementation of the Rule of law conditionality Regulation (section 5.3.). In doing so, they accompany the reader through the complexity of the legislative procedure leading to the approval of the Regulation, highlighting the main points of dissensus, and then focus on the delayed enforcement of the measure, which also prompted to controversies between the EU and the Member States, including actions for annulment in front of the ECJ. Nicola Lupo focuses on the Recovery and Resilience Facility as one of the major tools to tackle rule of law problems in today's EU (section 5.4.). Conceived to foster resilience and a speedy recovery from the pandemic, through national recovery and resilience plans and a set of specific reforms (and investments), the Facility is expected to become even more effective than ad hoc instruments to address rule of law problems. Indeed, by making the EU payment conditional upon the satisfactory achievement of milestones and targets, the design of the Facility aims to put even the more reluctant Member States, such as Hungary and Poland, on track to promote judicial reforms and anti-corruption policies, amongst other things.

Finally, Kati Cseres highlights the significance of EU competition rules for upholding the rule of law principles in the Union. Indeed, in section 5.5. she emphasizes how substantive norms of competition policy, by keeping the concentration of economic power under control, enhance the value of democratic competition and the protection of individual rights. Moreover, the decentralized system of enforcement of competition rules requires to pay specific attention to the autonomy and independence of national competition authorities from politics, as recently emphasized by the General Court in the Spred-Pro judgment. Last but not least, EU competition law is also instrumental to protect the sound financial management under the rule of law conditionality regulation due to its influence on public procurement rules and is able to protect media pluralism by intervening on public broadcasting and state advertising through state aid provisions.

The concluding section will then underline the many procedural linkages between the various tools reviewed and sum up the main points of dissensus on the state-of-the-art of the EU rule of law instruments while also recalling the proposals to expand the European toolbox further.

The working paper will be also complemented by three appendixes, with a table and two figure aiming, to provide a visual map on the static and the dynamic of the EU rule of law tools.

The decentralized system of enforcement of competition rules requires to pay specific attention to the autonomy and independence of national competition authorities from politics.

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2. THE INSTRUMENTS PROVIDED BY EU PRIMARY LAW

2.1 Article 7 TEU in the Academic Literature: Historical Evolution and Institutional Perspectives

Ramona Coman and Pauline Thinus (ULB)

2023 marks **30 years since the adoption of the Copenhagen criteria** by the European Council which have been at the **core of the political decision of enlarging the EU**. This key political moment has reshaped the future of the continent and has marked a step forward in the **constitutionalisation of values** in the EU polity. **Their gradual integration** in the treaties and references in the jurisprudence of the Court of Justice complemented such a process (Weiler 2003:16) undertaken since the Treaty of Rome. If the Preamble of the TEU confirmed the signatories' attachment to the principles of liberty, democracy and respects for human rights and fundamental freedoms and of the rule of law, the Amsterdam Treaty marked a step forward in this direction, stipulating that "the Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms and the rule of law, principles which are common to the member states. If these provisions, now enshrined in **Article 2 TEU, encapsulate the core identity of the EU, Article 7 TEU provides preventive and sanctioning mechanisms** to be used when member states fail to respect the set of common values.

Both Article 2 and Article 7 TEU have received considerable attention, the former being often examined to underline the political foundations of the EU and the specificities of its polity (Weiler 2003), the latter more recently amid the blatant violations of the rule of law since 2010s onwards in Poland and Hungary (Closa and Kochenov 2016; Schroeder 2016). Over the past decade, political scientists and lawyers have examined threats to the rule of law in the EU, the former scrutinizing how and why elected governments move from de-Europeanization to autocratisation, the latter looking at enforcement issues and legal interpretation, and both examining the EU's tools designed to douse the flames of the rule of law existential crisis.

Despite the centrality of the topic for the EU, **the literature devoted strictly to Article 7 TEU has remained limited**. After its entry into force, **scholars** mainly discussed its raison d'être, centrality, and role in the EU polity, recalling that such treaty provisions were not drafted with the intention of actually being used (e.g., Heringa 2018; Perakis 2019). Both lawyers and political scientists have examined the origins of this mechanism in its specific political context (e.g., Sadurski 2010; Kochenov 2021; Bugarič 2016; Moberg 2020). **On the one hand, the enlargement** to Central and Eastern European countries after the collapse of communism **raised the idea of a sanctioning mechanism that would protect European values** in these new – thus potentially fragile – democracies in case of non-compliance. **On the other hand, the rise of far-right parties in the 1990s peaked with the "Haider affair" in October 1999**[1] and the participation of such a party in the Austrian government coalition in 2000 (Merlingen, Mudde and Sedelmeier 2001, p. 60; Cramér and Wrange 2000; Coman 2022). Although this electoral success was considered as a threat for the Union (Coman 2018), **the 14 EU member states did not use Article 7 TEU against Austria** but proceeded with a 'diplomatic isolation', despite criticism of this political decision by the Commission (not in favor of adopting sanctions) and the EP (rather in favor of triggering Article 7 TEU) (Coman 2018).

This event flagged the limits of the sanctioning mechanism available in the Treaties and led to the inclusion of a preventing one by the Treaty of Nice in 2001: Article 7(1) TEU.

The academic debate eventually flourished again in the late 2010s, when the Fidesz government in Hungary and the PiS government in Poland came to power with a political program **dismantling** one by one the pillars of liberal democracy and replacing all the provisions adopted in the pre-enlargement context to strengthen the independence of the judiciary with new, contested ones, putting the Union at risk of a systemic infringement of one of its founding values and raising the **idea of an activation of Article 7(1) TEU**. A number of authors recalled in detail the steps that led to such a situation through the study of these two countries (Coman 2022; De Búrca 2022), including Moberg (2020) or Pech & Jaraczewski (2023) regarding Poland, and Bugarič (2016) or Bakó (2021) for Hungary.

Against this backdrop, **a large part of the literature on Article 7 TEU also consists in the analysis of the instrument**, either in a **legal perspective** (Kochenov 2021; Perakis 2019; Tichý 2018) or with a **focus on politics** (Besselink 2017; Coman 2022; Coman & Thinus, forthcoming).

On the one hand, it provides a detailed review and **legal interpretation of Article 7** TEU provisions: its scope of application (Besselink 2017; Perakis 2019; Tichý 2018), the type of **sanctions** that can be adopted (Besselink 2017), the **procedural requirements** (Kochenov 2021, Perakis 2019), etc. In this regard, scholars underlined the high **voting requirements related to the procedure**: Article 7(1) necessitates a 4/5th majority in the Council to state the "clear risk of a serious breach" of a European value, whereas Article 7(2) requires the unanimous vote of the European Council to confirm a "serious and persistent breach", which can then be complemented by sanctions if the Council of the EU decides so by a qualified majority according to Article 7(3). **Pech's metaphor of a "Sisyphean procedure"** (2020) illustrates the impression of an endless process with multiple steps and high hurdles, although the preventive and sanctioning mechanisms are independent from each other (Moberg 2020; Kochenov 2021). In addition, recommendations can be issued via the preventive branch (Pech & Jaraczewski 2023).

On the other hand, particular attention has been devoted to the **politics of Article 7 TEU**, with a focus on how this procedure has been triggered by the Commission against Poland in December 2017 (Closa 2018; Coman 2022) and by the EP against Hungary in September 2018 (Meijers et al 2019; Herman et al 2021), explaining the reluctance of EU institutional actors to act (Bugarič 2016; De Búrca 2022; Kochenov 2017; Sedelmeier 2017; Closa 2018).

Through the lens of discursive institutionalism, Emmons & Pavone explain the **"rhetoric of inaction" adopted by EU institutions**, consisting in "a 'coordinative discourse' wielded by a constellation of national and supranational actors to legitimate stasis by appealing to the very policies and values threatened by a crisis" (2021, 2).

From a more rationalist/institutionalist perspective, it has been demonstrated that European actors seem driven by the defense of their competences and interests regarding the rule of law issue in the interinstitutional arena (Closa 2019, 2021), especially intergovernmental structures like the Council of the EU or the European Council (Bakó 2021). The Commission needs the support of the member states to act (Closa 2018). In the Council, populist governments maintain the EU in a state of permanent crisis, mainstream governments scarify policy reforms for the sake of upholding a fragile equilibrium in the EU decision-making (Zaun and Ripoll-Servent 2022), where the norm of consensus that prevail in the Union is challenged (Coman 2022; Coman & Thinus, forthcoming; De Búrca 2022; Sedelmeier 2017). Similar calculations play also in the EP, where for a long time, the European People's Party (EPP) in the European Parliament depended on the Fidesz MEPs' seats and votes to maintain its majority in the assembly or to support the candidacy of its member (Juncker) for the Commission Presidency in 2014 (Bugarič 2016; Sedelmeier 2017; Closa 2021). Closa proposed an in-depth analysis of the institutional logics of all actors involved (2021).

Rational and ideational factors together **explain tensions around the development or activation of rule of law policy instruments**, like the Commission's Rule of Law Framework or the Council's Rule of Law Dialogue (Coman 2022; Emmons & Pavone 2022; Kochenov 2021) as well as Article 7 TEU. Not only institutional considerations, but also ideological partisan politics have impacted the course of the procedure towards Hungary and Poland and the threat it represents, enabling an "authoritarian equilibrium" according to Kelemen (2020) or "mutual indulgence" according to Bakó (2021, 37).

If European leaders characterized Article 7 TEU as a "nuclear option" – such as the former Commission President Barroso in the 2012 and 2013 State of the Union addresses – because of its confrontational nature, **political sensitivity** (Perakis 2019), or the sanctions it can lead to (e.g., Besselink 2017), **scholars deplored the use of this metaphor, being counterproductive and reinforcing the unwillingness of European institutions and governments to use it** (Pech 2020; Kochenov 2017; Tichý 2018). More recent studies have analyzed the role **of the Council presidencies** (Coman and Thinus, forthcoming; Hernandez, forthcoming; Tuominen 2022; Puetter 2022) in dealing with Article 7 TEU, **the institutionalization of the procedure** (Pech, 2020; Priebus 2022; Coman 2022; Coman & Thinus, forthcoming), **Article 7(1) hearings** (Priebus 2022; Coman and Thinus, forthcoming; Emmons & Pavone 2021), **the role of the member states in the Council and their willingness or reluctance** to question the practices of another member state, despite the lack of **transparency** of the **process. Fewer articles exist on the role of the European Parliament**, probably because of its more limited role in comparison to the European Commission (Pech 2020; Coman and Thinus, forthcoming), despite its support of the procedure via means of interinstitutional pressure or resolutions (Platon 2022; Closa 2021; De Búrca 2018).

Scholars deplored the use of the "nuclear option" metaphor for Art 7 TEU for reinforcing the unwillingness of European institutions and governments to use it.

After five years, the problematic situation in Poland and Hungary has not been solved despite the (indefinite) continuation of the two proceedings including the conduct of regular hearings. This has led scholars to reflect on its **limited outcomes**, explaining the lack of positive results beyond the institutional reluctance by its inappropriate use (Kochenov 2021; Perakis 2019) or the limited effects of sanctions to solve EU law violations in general (Sedelmeier 2017; Kochenov 2021; Closa 2021). **Some also argue that one could not expect a different outcome**. On the one hand, Article 7 TEU was not designed to generate political change but to adopt recommendations or sanctions against (potential) systemic violations of the rule of law within a member state (Kochenov 2021; Bakó 2021). On the other hand, authors invoke the logics behind this Treaty provision, arguing that it involves actors with different functioning but without coordination (Moberg 2020; Closa 2021), or that it is opposed to the logic of the internal market prevailing within the Union which is not equipped to deal with political or value-laden issues without generating important economic costs for both the EU and its member states (Kochenov 2020, 2021).

Although Article 7 TEU is a stand-alone procedure, it is **used in relation with other rule of law tools** established since 2010s (e.g., Heringa 2018). This includes for instance the Rule of Law Framework designed by the European Commission in 2014 (Besselink 2017), or the Rule of Law Dialogue as a response of the Council of the EU in 2015 (Coman 2022) as well as the Rule of Law conditionality mechanism established by Regulation 2020/2092, adopted after a difficult and contested process in December 2020 (Hillion 2020; Baraggia and Bonelli 2021; Hillion 2021). **In addition**, the potential of **older instruments** to address rule of law violations is also highlighted, such as infringement procedures that are dedicated to specific and not systemic breaches of European values (Bakó 2021; Heringa 2018). When it comes to other values, some authors argue that Article 7 TEU could deal with systemic violations of human rights (also protected by Article 2 TEU) in articulation with the European Court of Human Rights (Heringa 2018).

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Endnotes

1 Four years after Austria's accession to the EU, the openly racist and xenophobic Austrian Freedom Party (FPÖ) received 26.9% of the vote in the parliamentary elections.

2.2. The infringement Proceeding

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The infringement proceeding is a **key instrument of European law since its foundation.** It was foreseen already by the original texts of the ECSC Treaty (Article 88) and the EEC Treaty (Article 169, identical to Article 141 EAEC Treaty), aiming at guaranteeing the respect and effectiveness of European law in all Member States. Over time, Treaties' provisions on the infringement proceeding have been repeatedly amended in order to make it more streamlined and effective. In particular, these multiple changes have sought to overcome the duplications envisaged in the original model, which had proved only partially effective in pushing Member States towards greater coherence (Kilbey 2007). Lastly, with the Treaty of Lisbon (taking up ideas already present in the unapproved Constitutional Treaty), the infringement procedure was modified in two distinct directions, however converging in making it much more effective as a deterrent. On the one hand, the pre-litigation phase has been shortened (Article 260(2) TFEU) (Peers 2012); on the other, it was foreseen the possibility of applying financial penalties already under the first infringement procedure (Article 260(3) TFEU) (Várnay 2017). It is therefore a tool conceived with **general purposes**, and precisely for this reason its specific functionality in dealing with issues related to the rule of law can be questioned, in the light of the much broader set of more dedicated instruments (Coman 2022).

The first reaction of the Commission to the emerging situation of rule of law crisis in specific Member States was to affirm the necessity of a 'better developed set of instruments' to tackle this challenge (European Commission, President Barroso 2012) [2], so implying the limits of the existing ones. In the scholarly debate, some authors underlined the limits of using infringement proceedings in this context. Some underlined that they may lead only to symbolic effects, when the Member State concerned enacts only a formal compliance with Commission's requests (Batory 2016). Others even pointed out that in the context of a rule of law crisis, infringement proceedings may even result counterproductive, considering their impact on a compromised domestic public opinion (Schlipphak & Treib 2016).

Also in the light of the evolution of the situation in Hungary, Romania and Poland, the debate on the possible use of infringement proceeding offered further opinions, proposing **specific adaptations of the tool to make it more adequate to promote the rule of law** (Besselink 2017; Moberg 2020). For example, its use in a more systemic way has been fostered in order to deal with multiple and composite threats, as is typical of risks concerned by rule of law backsliding (Scheppele 2016). Then, a new interpretation of the procedural rules of the ECJ has been proposed, aimed at creating a fast track for the infringement procedures with implications related to the rule of law, so as to increase promptness and certainty of the penalty resulting from its violation (Bárd & Śledzińska-Simon 2019).

As it can be seen, scholarly reflection on infringement procedure and its capacity to promote the rule of law, have been **much more low-profile than the "nuclear option"** of the instrument ideally specifically devised on the same subject, i.e. art. 7 TEU. Without supporting formal amendments to Treaties' provisions, those proposals were in the sense of re-interpreting the tool, stretching to the maximum the potential of an existing and, so to speak, "ordinary" instrument.

Such **ordinary nature of the infringement proceeding** brings a number of advantages and disadvantages.

To a certain extent, the possibility of referring to a **consolidated framework** and a now widespread and well-known institutional praxis is certainly useful (Heringa 2018; Bakó 2021). Hence, the infringement procedure may bring in the set of tools managing the rule of law crisis the extremely effective leverage represented by **fines** (Pohjankoski 2021).

However, in debating about using infringement proceedings to contrast rule of law backsliding, one should not underestimate the effect of degrading the constitutional tone of the conflict. Considering the seriousness and the systematic nature of the violations, the use of the ordinary instrument may be seen inadequate to the values put at risk by the Member State receiving the procedure. In the end, it would imply to react to a comprehensive rule of law backsliding by a Member State of the EU in a way that is similar to the delay in implementing whatever minor directive. In other words, the question is twofold: whether the **limited scope** of infringement procedures, conceived to focus on a single act or law, may miss the bigger picture of systematic violations of the rule of law (von Bogdandy & Ioannidis 2014); and whether such an ordinary instrument is proportionate to an extreme threat to the values referred to in art. 2 TEU.

Also the Commission seems to have experienced a clear evolution in the interpretation of the functionality of the infringement procedure in relation to its ability to contain violations of the rule of law. Still in the Communication of January 2017 on *EU law: Better results through better application* (2017/C 18/02) it seemed to have a preference for the informal tools of the *Rule of Law Framework* , recognizing that some threats in this field cannot be addressed through infringement proceedings (see p. 1). Later, probably due to the problematic evolution happened in some Member States (and in particular in Hungary and Poland), the Commission changed its mind on this matter. In the Communication *Strengthening the rule of law within the Union. In a blueprint for action* of July 2019 [3] , it presented an action plan which, among other things, aims to respond effectively to violations of the rule of law through a wide-ranging use of powers of the Commission itself as "guardian" of the Treaties, in order to ensure compliance with what is provided by Union law in relation to the rule of law. In this perspective, the Commission announced a **"strategic approach" to infringement proceedings in this area.** Such a strategic approach is not limited to the role of the Commission in activating infringement procedures (and in the timing to do so), but it also includes a more widespread involvement of the CJEU, through "requesting expedited proceedings and interim measures whenever necessary" (p. 14).

The Commission seems to have evolved in the interpretation of the functionality of the infringement procedure in relation to its ability to contain violations of the rule of law.

This change of attitude on the side of the Commission has led to an emphasis on the complementarity between the general instrument of the infringement procedure and the specific one of the Article 7 TEU procedures (on which section 2.1.). Indeed, these procedures are not mutually exclusive. In contrast with this conclusion, the nature as lex specialis for Article 7 TEU had been hypothesized (Kochenov & Pech 2015), so to preclude the possibility of activating, for similar reasons or in any case against the same Member State, an infringement procedure relating to compliance with the rule of law. This statement was challenged in the literature first (Schmidt & Bogdanowicz 2018) and then overcome by the practice: both the Conclusions of Advocate General Tanchev in C-619/18 Commission v Poland (§48-51), as well as the aforementioned Communication of the Commission of 2019 (see p. 9) clarified that these are complementary tools in the pursuit of the same goal.

In the light of this complementarity, as well as of the poor results of Article 7 TEU procedures in recent years (Puetter 2022), the potential of infringement procedures in promoting compliance with the rule of law deserves all the more attention.

Some characteristics of this institute may offer **answers to the limitations shown by the procedures of Article 7** TEU. In particular, the infringement procedure is a purely legal instrument, which can be activated by the Commission. Albeit subject to the discretion of the latter (Stone Sweet 2004) it is not conditioned to filters of a political nature by the other Member States. The requirements for the activation of an infringement procedure are more concrete, as they are related to an effective violation of an obligation imposed by European law, not being sufficient "a clear risk of" a (serious) breach. Regardless of the preconditions and mechanisms for triggering the procedure, the difference between Article 7 TEU and Article 258 TFEU is most evident in terms of sanctions that can be applied to the State concerned, which are consistent with the political or legal nature of the instrument through which they are determined. Instead, the objection related to the different scope of application of the two tools seems to be less decisive: at first glance, the mechanism of Article 7 TEU would appear to be directed also towards acts not limited to the principle of conferral, involving also the inner functioning of the Member State (Kochenov & Pech 2015); however, the practice has shown that acts generally affecting the functioning of the judiciary (i.e. the first and essential safeguard of compliance with the rule of law) end up being "attracted" under the EU competence, as they are functional to the application of European law as well (C-619/18, Commission v Poland , §50) (Bard 2021).

The **most recent practice** of the tool is related to the multiple issues concerning the independence of the judiciary in Poland. In the last few years, no fewer than three infringement procedures have been initiated. A first one (launched on 3 April 2019) on the new disciplinary regime of judges, considered harmful to the independence of Polish judges with respect to political power.

This strategy of the Commission may determine an escalation in the clash between the Commission and the targeted Member State.

A second one (29 April 2020, moreover during the most difficult phase of the pandemic) in relation to multiple acts on the functioning of the judicial system in Poland. A third (22 December 2021) is particularly interesting because it relates to the jurisprudence of the Polish Constitutional Tribunal on the primacy of Union law. In the first two cases, the Court of Justice already supported Commission's objections, whereas the third case has been recently referred to ECJ (15 February 2023): after a reasoned opinion sent in July 2022, the Commission did not find satisfactory how Poland addressed the concerns related to Article 19(1) TEU, deciding to activate the subsequent step of the procedure.

As for the financial consequences of this strategy, the pression put on Poland is potentially extremely high. Only with regard to the second case (C-204/21 R), the CJEU, upon the request of the Commission, ordered Poland to pay a fine of one million euros per day for not having suspended the provisions relating to the Disciplinary Chamber of the Supreme Court (order issued on 27 October 2021). Actually, Poland seems not willing to fulfil this obligation, in a certain way confirming that this strategy of the Commission may determine an escalation in the clash between the Commission and the targeted Member State (Anders & Priebus 2021).

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2 Barroso, J.M., (2012). State of the Union 2012, Plenary session of the European Parliament, Strasbourg, 12 September 2012. Available here.
3 Available here.

2.3. The Preliminary Reference Procedure

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Introduction

The **Preliminary Reference Procedure (PRP) is the 'keystone'** of the European Union ('EU') judicial system (Opinion 2/13, para. 176). In the literature, it has been defined as the **'most important aspect of the work of the Court'** (Brown and Jacobs 1977, 131), the 'jewel in the Crown' of the European Court of Justice ('ECJ')'s jurisdiction (Craig and de Búrca 2020, 496; Langer 2019, 455), and the 'genius' without which core principles, such as direct effect and primacy, could have not been conceived (Weiler 2013, 11). The PRP procedure has shaped and **continues to shape profoundly the EU** legal order and the relationships between the EU and the Member States. This procedure represents 'the central pillar of the Union's cooperative federalism for it combines the central interpretation of Union law by the Court of Justice with the decentralized application of European law by the national courts' (Schütze 2021, 357).

Why has the Preliminary Ruling Procedure played a role in the protection of EU values?

These considerations hold true with regard to the Rule-of-Law crisis. To understand why this procedure has proved **important in this context over the last few years, two additional remarks are needed.**

First, although Article 267 TFEU only refers to questions on the 'interpretation' or 'validity' of EU law, since van Gend & Loos (Case 26/62) is evident that **preliminary questions can also concern the effects of certain provisions of EU law in the Member States.** As stressed in the literature, uniform interpretation encompasses both the 'unité de signification positive' and the 'uniformity' of the effects that an EU law norm is endowed with in the Member States' legal orders ('uniformité de la validité et de l'efficacité') (Pescatore 1971, 54-56; Barav 1977, 11-13).

Second, and consequently, although overtly conceived for securing the uniform application of Union law throughout the Member States, the **PRP has been used, *de facto*, to monitor the compatibility of national measures with EU law.** By this means, the ECJ has been carrying out a judicial review of Member State action (Tridimas 2011), which proves essential for any federal-type structure (Mancini 1989, 604 ff.). Tizzano defined it as the **'alternative use' of the PRP** (Tizzano 1995, 17). Considering the extent to which such 'alternative use' has typically occurred, it has been highlighted that the PRP has become a sort of 'infringement procedure for European Citizens' (Pescatore 2010, 7; de Witte 2013, 95-97).

The foregoing explains why PRP has served as a **central instrument to tackle Rule of Law issues in the EU.** It is indeed in the context of this procedure that **several milestones** in the history of the protection of the EU by the ECJ have been laid down. Consider, for instance, the well-known ***Associação Sindical dos Juízes Portugueses* ('ASJP')** case (Case C-64/16), where the inner link between Article 2 TEU, Article 19 TEU, and Article 47 of the Charter of Fundamental Rights of the EU (the 'Charter') has been first clarified by the ECJ: in 'the fields covered by Union law', irrespective of Article 51(1) of the Charter, Member States must ensure that national courts meet the requirements essential to effective judicial protection. Most notably, the ECJ held that they must (a) establish a system of legal remedies sufficient to ensure effective judicial protection and (b) ensure judicial independence of national courts and tribunals. The ECJ added that 'the independence of national courts and tribunals is, in particular, essential to the proper working of the judicial cooperation system embodied by the preliminary ruling mechanism under Article 267 TFEU' (Case C-64/16, para. 43).

Relying on its previous case law, and to a considerable extent on its findings in Wilson (Case C-506/04), the Court specified that '[t]he concept of independence presupposes, in particular, that the body concerned exercises its judicial functions wholly autonomously, without being subject to any hierarchical constraint or subordinated to any other body and without taking orders or instructions from any source whatsoever, and that it is thus protected against external interventions or pressure liable to impair the independent judgment of its members and to influence their decisions' (Case C-64/16, para. 44).

The interpretation of Article 19 TEU provided for in such judgment has been defined 'creative' (Bonelli and Claes 2018, 640) and considered a 'spectacular innovation reshaping the constitutional system of the Union' (Kochenov and Bárd 2020, 245). It was indeed a **paradigm shift** , which has allowed the Kirchberg Court 'to move to the centre of the stage in the Polish crisis', thereby – to some extent – talking '[t]he difficulties in operationalising Article 7 TEU' (Bonelli and Claes 2018, 639-40). From a broader theoretical perspective, it has been argued that **ASJP** opened '**a new chapter of European constitutionalism'**, where the presumption that the strict enforcement of the acquis is sufficient to guarantee adherence to the values has been rebutted and where the inter-court dialogue concerns not only issues of 'interpretation' and 'validity' of EU law but the fundamental principles of the Union legal order (Kochenov and Bárd 2020, 245).

The **paradigm shift** brought about **by ASJP** has been **swiftly followed by several other decisions** , to a significant extent rendered upon references from national courts. The 'speed' characterising the following steps forward down this line of jurisprudence has been highlighted by Scholars (CMLR Editorial Comments 2019, 17). As regards the subsequent developments, Kochenov and Bárd have classified them into two 'categories': (a) cases giving voice to ' horizontal rule of law concerns , leading to a significant refinement of the principle of mutual recognition'(Kochenov and Bárd 2020 , 245) in the Area of Freedom, Security and Justice ('AFSJ'); and (b) those raising ' vertical concerns related to the independence of the judiciary', that being cases affecting the cooperative relationship between the ECJ and national courts (Kochenov and Bárd 2020, 245). This working paper will focus on these two categories, which will be examined in the next subsections (for a comprehensive account of the ECJ's case law on the Rule of Law crisis, see Pech and Kochenov 2021).

The independence of national courts 'on trial': the European Arrest Warrant as a Test Bench

As regards the **'horizontal concerns' in the AFSJ**, soon after ASJP, the importance of the PRP procedure as a mean to enforce Union values has come under the spotlight in the context of the European Arrest Warrant ('EAW').

In ***LM*** (C-216/18 PPU), the ECJ advanced the protection of the right to a **fair trial**, with specific regard to the right to an **independent tribunal**, in situations of systemic or general deficiencies as regards the rule of law. Most notably, **building on its previous decision in *Aranyosi*** (Joined Cases C-404/15 e C-659/15 PPU), the Court held that – although mutual trust is the general rule – the executing judicial authorities can, after having applied a two-step procedure, suspend the surrender of the requested person. To this end, that authority shall, first of all, make a finding of general or systemic deficiencies in the protections provided in the issuing Member State and, second, 'specifically and precisely [assess] whether, in the particular circumstances of the case, there are substantial grounds for believing that, following his surrender to the issuing Member State, the requested person will run that risk' (C-216/18 PPU, para. 68). Such two-step assessment has been also c**riticised by several scholars** for being unpracticable (Bárd and van Ballegooij 2018; Bárd and Morijn 2020; see also Biernat and Filipek; and Frąckowiak-Adamska 2021).

Conversely, as Konstandinides put it, LM is 'a small victory, but a victory nonetheless' (Konstadinides 2019, 769). There is no doubt that LM 'has considerably reinforced Article 7 TEU' (Sarmiento 2018, 386). From this perspective, some authors have highlighted that these developments wouldn't have been possible without the cooperation between the

decentralised level of the composite 'European judiciary', namely the cooperation of domestic courts and tribunals, and that such judicial cooperation served to offset the 'inaction of the supranational and national political institutions' (von Bogdandy, Bogdanowicz, Canor, Rugge, Schmidt, and Taborowski 2021, 385-6). **Bonelli disentangled three different 'messages' from this judgment**. Two of them directly concern the **complementarity character of the judicial protection of the Rule of Law via the PRP, and thus need to be briefly outlined.** The first message is linked to the space dedicated to the Commission's reasoned proposal under Article 7(1) TEU, which is considered 'particularly relevant' for the assessment to be conducted by national courts (in the first prong of the scrutiny) (Bonelli 2021, 471).

ASJP opened 'a new chapter of European constitutionalism', where the presumption that the strict enforcement of the acquis is sufficient to guarantee adherence to the values has been rebutted.

A second preliminary ruling , rendered by the ECJ in this context, is L and P (Joined Cases C-354/20 PPU and C-412/20 PPU), which, in essence, confirmed that Aranyosi - LM was still good law, despite the worsening of the Rule of Law situation in Poland . Indeed, here, the Court firmly refused to give the green-light to Polish national courts to skip the second prong of the Aranyosi - LM test (the assessment of the particular circumstances of the cases). Nor accepted it to consider that Polish courts unfit for being qualify as 'judicial authorities' within the EAW framework decision (Frąckowiak-Adamska 2022, 115). To this refusal, some Authors considered quite understandable a 'bottom-up resistance from national courts' refusing to give execution to EAW (Pech, Wachowiec, Mazur 2021, 32-38; Pech 2021, 162).

This is the reason why, it has been claimed that '[f]rom the point of view of the fight for the rule of law in the EU, the L and P (and LM) ruling cannot be rated highly' (Frąckowiak-Adamska 2022, 148). In the same vein, Saenz Perez concludes that the PRP 'has not been an effective tool for the ECJ to develop a thick interpretation of the rule of law linked to fundamental rights. Instead, **the Court has used Article 19(1) TEU and Article 267 TFEU to prioritise interpretations that safeguard the coherence and effective enforcement of EU law**' (Saenz Perez 2022, 532).

The independence of national courts 'on trial': the European Mandate of National Courts as a Test Bench

The **limitations** on the possibility for **national courts to exercise their 'European mandate'** (Claes 2006) **is nothing new** (consider, for instance, Case 106/77, *Simmenthal* or Case C-210/06, *Cartesio*; for an account, see Broberg and Fenger 2021, 83 ff.). By 'European mandate', we are referring to the national courts' **possibility to *freely* (a) refer preliminary questions** to the ECJ, **(b) interpret national law in conformity with EU law, and (c) set aside national provisions that are not compatible with Union law norms having direct effect**. Nor this phenomenon concerns Member States experiencing Rule-of-Law issues only. It is however precisely in this context that these longstanding and multifaceted issues have recently come under the spotlight on the *Kirchberg* plateau. **In relation to Hungary,** suffice it to recall the Court's ruling in *IS* (Case C-564/19). With regard to Poland, *Miasto Łowicz* (Joined Cases C-558/18 and C-563/18), *A.B., C.D., E.F., G.H., I.J.* (Case C-824/18), and *A.K. and others* (Joined Cases C-585/18, C-624/18 and 625/18) can be mentioned. **As to the Romanian legal system**, reference can be made to *Asociaţia* (Joined Cases C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19), *Euro Box Promotion and Others* (Joined Cases C-357/19, C-379/19, C-547/19, C-811/19 and C-840/19), and *RS* (Case C-430/21). Closely connected issued have emerged in relation to the appointment of Maltese judges in *Repubblika* (Case C-896/19).

All cases have been rendered in the context of PRP and deal with national rules or practices which are able, *de facto* or *de jure* , to hinder ordinary national courts from raising a preliminary question under Article 267 TFEU and/or to set aside national measures incompatible with EU law. Differently from previous case law on

similar limitations, **many of these recent cases are characterised by the need to ensure the independence of national judges and by the questioning – or, sometimes, by an actual denial** (Palladino and Festa 2022) – **of the principle of primacy of Union law** and of some of the essential prerogatives forming part of the Rule of Law.

As regards **Romania** , the issues concerned the reform introduced in 2017-2019 to the disciplinary, civil and criminal liability of judges. **The preliminary ruling rendered in Asociaţia laid very important principles for the protection of the rule of law in the EU:** (a) it introduced the principle of progression towards achieving EU rule of law standards; (b) it extended the 'judicial independence parameters for all types of judicial liability regimes, beyond the disciplinary one which has repeatedly appeared in the Polish case law'; and (c) it can be considered as 'a strong restatement of the legally binding principle of primacy of EU law for constitutional courts' (Moraru and Bercea 2022, 83). Nonetheless, according to the same authors the 'effective application' of these principles has been swiftly undermined by the Romanian Constitutional Court's case law (Moraru and Bercea 2022, 83). These considerations prove to be right, as the following 'episodes' in the 'Romanian saga' show (Bellenghi 2022). Among these, RS has been welcomed for having reaffirmed the core principles of EU law, including primacy, loyal cooperation and Article 267, and 'interpretative autonomy' of the ECJ, while dealing with the concept of Member States' national identity under Article 4(2) TEU (Gallo 2022).

In relation to **Poland**, the preliminary rulings rendered in this context have been considered ***not* effective and useful to tackle the exacerbation of the issues in that Member State** (Zelazna 2019). A.K. and Others , for instance, has been considered by some commentators to 'rais[e] more questions than it answers (Leloup 2020, 168-9). Miasto Łowicz , where the reference under Article 267 TFEU was considered inadmissible as the questions referred did not 'concern an interpretation of EU law which meets an objective need for the resolution of those disputes, but are of a general nature' (para. 53), have reinforced the comments on a 'timid' use of PRP, i.e. , the ECJ has been considered 'less likely to engage with systemic issues on the rule of law in the preliminary ruling procedure' (Platon 2020, 1866). In other words, it has been clarified that 'even in the context of the crucial fight for judicial independence Article 267 TFEU is not a passpartout solution, since the courts must still find the 'substantive' link to EU law' (Scheppele, Kochenov, and Grabowska-Moroz 2020, 70). In A.B., C.D., E.F., G.H., I.J. (Case C-824/18), moreover, the ECJ 'focused on the analysis of the right to an effective remedy under Article 19(1) TEU as instrumental to ensuring effective legal protection for individuals in the field of EU law' (Saenz Perez 2022, 351). **Overall, these preliminary rulings on the judicial independence in Poland has been read as primarily aimed at ensuring 'the smooth operation of the EU's decentralised judicial system, including the preliminary reference procedure'** (Bornemann 2022, 662). The ECJ has thus applied one of its most characteristic interpretative yardsticks of Union law (Bonelli and Claes 2018, 631; Bornemann 2022, 662).

In the **Hungarian case** (C-564/19, IS), although the Court was confronted with a preliminary question on Article 19 TFEU, the ruling heavily relied on its case law on Article 267 TFEU, not even quoted in the order submitted by the referring court. Focusing on this equally effective – but arguably less conflicting – line of case law has been considered as a 'strategic choice' (Lattanzi 2022; Amalfitano and Cecchetti 2022). Other Authors however suggested that the preliminary ruling would not be 'sufficient' or effective (Correra 2022).

Finally, Repubblika (Case C-896/19), on the appointment of **Maltese judges**, shall not underestimated. As stressed by Łazowski, its true importance lies in **the principle of non-regression**, according to which Member States are precluded 'from adopting national rules which would amount to a regression in their compliance with the standards of the rule of law' (Łazowski 2022, 1804). According to some Authors, the Court's findings in this preliminary ruling have contributed to solve the so-called 'Copenhagen dilemma' (Leloup, Kochenov, Dimitrovs 2021).

The preliminary reference procedure at the crossroad of the rule of law degradation

Undoubtedly, via PRP, the ECJ has played a pivotal role in 'rescuing' judicial independence in the Union (Bonelli and Claes 2018; Pech and Platon 2018). As illustrated so far, it is precisely in the context of preliminary rulings that several milestones for the judicial protection of the EU values and the Rule of Law have been set.

This notwithstanding, **many scholars have considered the PRP as 'weak and tepid' tool to face many of the ongoing severe challenging to the Union values.** For instance, Pech, Wachowiec, Mazur have argued that, differently from the infringement procedure, preliminary rulings 'have failed' to contain the irreparable damage done to judicial independence. Such approach, they added, increased 'the risk of (understandable) bottom-up resistance from national courts keen to prevent Poland's autocratisation from spreading to their systems via EU mutual trust-based mechanisms such as the European Arrest Warrant' (Pech, Wachowiec, Mazur 2021, 32-38). Judgments like L and P have been deemed to nudge national courts towards this direction (Pech 2021, 162). The use of PRP has been labelled as 'timid', and the ECJ is generally considered 'less likely to engage with systemic issues on the rule of law in the preliminary ruling procedure' (Platon 2020, 1866).

I**n the context of the AFSJ, the PRP 'has not been an effective tool for the ECJ to develop a thick interpretation of the rule of law linked to fundamental rights'** (Saenz Perez 2022, 532). As brilliantly observed by the same author, '**the Court has used Article 19(1) TEU and Article 267 TFEU to prioritise interpretations that safeguard the coherence and effective enforcement of EU law'** (Saenz Perez 2022, 532). Similar considerations seem to hold true in relation to the limitations on the European mandate of national judges, where the Court's focused has been placed on ensuring 'the smooth operation of the EU's decentralised judicial system, including the preliminary reference procedure' (Bornemann 2022, 662).

To sum up, one could say that, differently from the infringement procedure, PRP has proved not to 'bite' in the context of severe crisis of Union values. Nonetheless, **it should not be overlooked that it is precisely the preliminary ruling procedure that** – by interpreting EU law norms – **allowed the creation of the essential 'bridges'** for enforcing the respect of Rule of Law in the EU. This should however come as no surprise. It seems instead a necessary corollary of the procedure's inner rationale and objectives (both outlined above). Differently from what happens in the context of the infringement procedure and Article 7 TEU, **the important role played by the PRP has been possible thanks to the *cooperation* of national courts** (in relation to specific cases, it has been also argued that these courts have abused of this channel of cooperation, see Pech and Platon 2021), which have been traditionally considered as one of the 'mighty allies' of the ECJ, along with the Commission (Mancini 1989, 597) – each of them, of course, within the remit of their respective functions. Therefore, **PRP** shall be understood **as *complementary tool* vis-à-vis the procedure under Article 7 TEU and the infringement procedure** (see sections 2.1. and 2.2.), a 'mighty ally' of the other procedures rather than being a substitute for them.

PRP

The preliminary ruling procedure has allowed the creation of the essential 'bridges' for enforcing the respect of Rule of Law in the European Union.

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2.4. The Charter of Fundamental Rights of the EU

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Introduction

In **2000**, von Bogdandy already noticed that the **Charter of Fundamental Right of the European Union (the Charter)** would have been part of 'an ongoing process that has the potential to **transform substantially** the Union and its legal system' (von Bodgandy, 1308). Its 'centralising force' **was soon highlighted in the literature and linked to the importance placed** – in drafting the Charter – **on the delimitation of its scope of application** (Eeckhout, 945). As is well-known, its Article 51(1) prescribes that the Charter's provisions 'are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law'(emphasis added) and that '[t]hey shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers and respecting the limits of the powers of the Union as conferred on it in the Treaties'. Such provision, which rhymes with several other 'safeguards' against centralising forces laid down or reinforced by the Lisbon Treaty, is completed by Article 51(2). Under this provision, '[t]he Charter does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks as defined in the Treaties'.

Article 51 of Charter is the keystone of the vertical allocation of powers between the Union and the Member States (Knook 2005; Lenaerts and Gutiérrez-Fons 2010). Although a thorough analysis of the abundant literature on Article 51 falls beyond the scope of this working paper (on this provision see, among others, Hancox 2013; Tizzano 2014; Fontanelli 2014; von Danwitz and Paraschas 2017; Lazzerini 2018; and Ward 2021), it is worth noting that the 'incorporation' of the State action is not a new phenomenon to federal-type entities (the very notion of 'incorporation' in EU law has been borrowed from the constitutional history of the United States, see Weiler 1991, 2441-2). These issues call for a **reflection** on the ultimate **purposes of the adoption of the Charter – its 'constitutional dimensions'** (Poiares Maduro 2003) – and on its added value (see Muir 2020).

As of today, **only some measures of the Member States fall within the EU fundamental rights' reach,** and the major issues consist in assessing whether there is a sufficient link between a certain national measure and EU law (Lenaerts and Gutiérrez-Fons 2021, 1713). The term 'implementation' is thus normally considered as a synonym of 'situation governed by EU law' (Lenaerts and Gutiérrez-Fons 2021, 1713). In this light, the EU system can be described in terms of 'selective incorporation' (Schütze 2021, 476).

It is against this backdrop that the Charter's role and limits in facing the rule of law crisis in the EU can be better grasped. It is necessary to stress, however, that the Charter's role cannot be considered separately from the procedural tools analysed in sections 2.1., 2.2., and 2.3. This said, first, we will **focus on the literature analysing the ECJ's use of Charter in relation to the issue of judicial independence**. Then, we will provide some examples of the Charter's use beyond this issue.

Article 51(1) of the Charter, effective judicial protection and the 'independence' of national judges and courts

Following the Lisbon Treaty, the second subparagraph of **Article 19(1)** TEU reads 'Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law' (on the duty to ensure effective judicial protection, see Albors-Llorens 2021, 1743). As outlined in above (section 2.3), in ***Associação Sindical dos Juízes Portugueses*** (Case C-64/16) ('ASJP'), the ECJ highlighted the inextricable knot between the Union values laid down in Article 2 TEU, Article 19(1) – which gives specific expression to these values –, and Article 47 of the Charter (paras. 32 and 35). In so doing, however, it drew a **distinction between the scope of application of the Charter under its Article 51(1)** (limited to situations of 'implementation' of Union law) and **'the material scope of the second subparagraph of Article 19(1) TEU,** [which] relates to 'the fields covered by Union law" (para. 29). Here, the ECJ has linked the legal content of **Article 19 (1) TEU with that of Article 47 of the Charter:** the legal obligations stemming from the two provisions overlap (Krajewski 2018, 402). Some Authors stressed that, in Repubblika (Case C-896/19), the ECJ confirmed such connection: Article 47 of the Charter must be duly taken into consideration for the purposes of interpreting Article 19 TEU (Groussot and Thor Pétursson 2022, 253).

In the academic reflection on these developments, four major patterns can be identified.

First, it has been highlighted that this line of jurisprudence is based on a **'wide material scope' of Article 19 TEU** and of the principle of effective judicial protection (Editorial Comments 2019, 17) that – to some extent – seems to go beyond the limits set in Article 51(1) of the Charter (Mori 2021, 83; Vosa 2023, 2022-4; on these aspects see also Lazzerini 2019; for proposals on how to limit the application of Article 19 TEU, see Prechal 2022). Indeed, **the organisation of justice** falls within the competence of the Member States and **is linked to the national identities** of the Member States under Article 4(2) TEU. Such principle has been explicitly upheld by the ECJ itself in several recent judgments, even in the context of the Rule of Law crisis, see, for instance RS (C-430/21, paras. 38 and 43) and Euro Box Promotion and Others (Joined Cases C-357/19, C-379/19, C-547/19, C-811/19 and C-840/19, paras. 133, 216, 229). Nonetheless, **many scholars agree on considering the Charter in combination with Article 2 TEU and Article 19 TEU as 'an efficient instrument** (at least more efficient than Art. 7 TEU) to counter the systematic, perpetual attacks committed by the illiberal States on the rule of law' (Groussot and Thor Pétursson 2022, 241) and to preserve the constitutional principles of the EU legal order (Gallo 2022).

The Charter, in combination with Art. 2 TEU and Art.19 TEU are considered 'efficient instruments to counter the systematic, perpetual attacks committed by the illiberal States on the rule of law'.

A second aspect that has been highlighted is the following one: such limited scope of the Charter has led the ECJ to prioritise the **use of Article 19 (1)** TEU and Article 267 TFEU to tackle situations of **violation of Union** values in the Member States (Saenz Perez 2022, 533). This preference for those 'alternative' and 'less contested' yardsticks can be noted even in relation to challenges to the rule of law in Hungary and Romania (Lattanzi 2022; Amalfitano and Cecchetti 2022; Moraru and Bercea 2022, 102).

A third argument that has been put forward **by scholars is the need to reinforce the application of the Charter in the context of the Rule of Law crisis** . It has been maintained that – 'strikingly' – the Charter 'has played only a slight and ambiguous role in this process' (Kochenov and Morijn 2021, 760-61), mainly as 'a 'sidekick' for Article 19(1) TEU' (Pech and Kochenov 2021, 222-3). These authors have also appreciated the use of the Charter in A.K. and others (Joined Cases C-585/18, C-624/18 and 625/18) (in relation to the notorious 'Disciplinary Chamber' of the Polish Supreme Court) and called for 'much more serious consideration [of the Charter] to ensure that the standards of the independence of the judiciary in the EU do not fall below the minimum standards laid down in the case law of the European Court of Human Rights' (Pech and Kochenov 2021, 222-3).

In the same vein, fourthly , the expansion of the application of the Charter to purely domestic cases has been advocated by some scholars, either by amending or interpreting extensively its Article 51(1) (Jakab and L. Kirchmair 2022). Torres Pérez, for instance, contended that '[w]hile such an outcome might currently seem politically unsound, [...] a progressive case-by-case expansion of the applicability of the Charter to the Member States would be welcome from the standpoint of a robust notion of the rule of law in the EU' (Torres Pérez 2020).

The Charter beyond the 'independence' criterion

The Charter's role in ensuring the protection of rule of law in the **sensitive context of the European Arrest Warrant has been underscored by many scholars (**Anagnostaras 2016; Łazowski 2018, 12). In the Area of Freedom, Security, and Justice the Charter allowed national judges to become 'mouths of the rule of Law' (Groussot and Martinico 2020, 11-2). These authors refer mainly to the ECJ's judgments in Aranyosi (Joined Cases C-404/15 e C-659/15), LM (Case C-216/18 PPU), L and P (Joined Cases C-354/20 PPU and C-412/20 PPU).

Besides, it is worth noting that the use of the Charter in infringement proceedings , which was an open issue until recently, proved successful (Bonelli, 2022, 40 ff.). This holds specifically true with regard to Hungary . Suffice it to recall Commission v Hungary (Enseignement supérieur) (Case C-66/18) and Commission v Hungary (Transparency of associations) (Case C-78/18). In this context, the Court's approach of relying on the treaty provisions and on the Charter – rather than on Article 19 TEU – has been appreciated by some scholars . It has been argued that such approach 'cleverly set a balance between two opposite needs, namely that of suppressing national rules and measures that grossly violate fundamental rights and threaten the rule of law, on the one hand, and of preserving a purely technical – and therefore apolitical – legal and judicial reasoning' (Marchioro 2021, 38).

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2.5. The Cooperation and Verification Mechanism

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The Cooperation and Verification Mechanism (CVM) was introduced in 2006 to address shortcomings and deficiencies related to the rule of law with specific regard to Bulgaria and Romania. The Commission adopted two CVM decisions (2006/928/EC - Romania) and (2006/929/EC - Bulgaria) because at the time of their accession the two countries did not satisfy many European standards related to the rule of law. Thus, **the CVM is a binding post-accession oversight tool enacted only for Romania and Bulgaria**, and it was established after the Treaty of Accession of Romania and Bulgaria, signed on 31 March 2005. In fact, both countries were not part of the first phase of the fifth enlargement, which eventually took place in 2004, because they did not meet requirements set by the Copenhagen criteria; even though this specific rule of law oversight was adopted at the same time of the accession, it needs to be contextualized within the pre-accession conditionality for the enlargement. While negotiations with most Eastern European countries led to the acquisition of their membership status in 2004, for Bulgaria and Romania the path appeared to be slowed by their deficiencies in rule of law related matters. The approach of the EU institutions may be read on the one hand, in a fairly positive way because it indicated the desire to tackle specific challenges of each candidate State but, on the other hand, it made clear that Romania and Bulgaria were not ready to meet requirements and obligations of the membership by the date of accession (Vassileva, 2020). Hence, the CVM represented an additional evaluation tool for monitoring and evaluating the two countries and has been rightfully described as "a tool to maintain the reform momentum in the two countries and prevent reversal of the rule of law reforms" (Vachudova, Spendzharova, 2012; 2).

The **legal basis of the CVM is found in article 37** of the Treaty of Accession of Romania and Bulgaria. This provision gave mandate to the European Commission to adopt measures to tackle a serious risk to the functioning of the internal market coming from these Member States; in fact, while the rule of law is simply recalled as a common principle to all Member States, the CVM Decisions empowered the Commission "to take appropriate measures in case of imminent risk that […] would cause a breach in the functioning of the internal market by a failure to implement the commitments it has undertaken", alongside with "the remaining issues in the accountability and efficiency of the judicial system and law enforcement bodies". The assessment is made by monitoring results and the adopted measures entered into force at time of accession; moreover, according to the same provision, such measures must be lifted when the commitments are fulfilled, but without specifying timeframe or deadlines. However, **criticisms** have been laid down on the post-accession assessment tool since in practice it granted the membership to countries that did not meet crucial requirements related to the rule of law (Carp, 2014: 6).

In fact, this monitoring procedure was intended to assist and control the reforms of the two countries in not secondary sectors of the acquis communautaire. Bulgaria and Romania were tasked to satisfy benchmarks set by the respective Decision: Bulgaria had to meet European standards in matter of independence and accountability of the judicial system; a more transparent and efficient judicial process by adopting a new civil procedure code; judicial system reform; corruption to be fought and put under control; fight against organized crime. Not differently, benchmarks set for Romania were: reform for enhancing judicial independence and accountability; integrity framework regarding incompatibilities and potential conflicts of interest; anti-corruption policies. The size of the challenges were significant and the **Commission**, in the last Report (2006)[4] before the accession,

raised **several concerns** despite some improvements. For example, it was noted that even though progress were assessed in areas such as judicial reform and corruption, "further tangible results are needed". To this end the Commission asked for a "sustained support" from the EU and was (still) looking forward to welcoming Bulgaria and Romania as "fully-fledged members of the European Union". **This assessment triggered some dissensus between the European institutions** since the Commission anxieties did not match with the enthusiasm showed by the European Parliament (EP),[5] which insisted on the "speedy ratification of the Accession Treaty"; in the same Motion, EP was animated more by "hopes" rather than tangible results, more focused on the progress made rather than over the reforms to be adopted.

Art. 37 of the Treaty of Accession of Romania and Bulgaria gave the European Commission the mandate to adopt measures to tackle a serious risk to the functioning of the internal market.

The enlargement was undoubtedly curbed by a deep faith over the integration of the Eastern European States in the common market, as well as their desire to be part of a common system of fundamental rights, despite relevant concerns were raised by Member States such as Germany, France and the Netherlands (Dimitrov, Plachkova 2021: 174).

The role played by the CVM has been the enforcement of dialogue between the two Member States under review and the Commission, whose assessment are published annually in *ad hoc* report where the benchmarks under scrutiny are being analysed. Hence, since 2007 the Commission started to evaluate the reforms enacted as well as progress related to the benchmarks;[6] thus, the CVM is basically a tool for assessing, recommending, and addressing the authorities of the two countries over the obligations taken according to the treaties of accession.

The methodology of the CVM reports is based upon the exchange of information between the governmental institutions of Romania and Bulgaria and the European Commission. The former are obliged to send detailed reports on the benchmarks to the Commission, which receives analyses also from the EC Representation Office, Member States diplomatic missions in Bulgaria and Romania, and civil society organisations. The goal of the Commission is also to gather information independently on progresses claimed by the governments. The assessments of the Commission are published every sixth months in detailed reports where the progress on the benchmarks is evaluated together with potential urgent measures to be taken before the subsequent report; in this manner the Commission specifies the most demanding issues where the two countries must intervene. There are **two types of report:** the **"progress report"** published generally in July and the **"technical report"** in February. The **"progress report"** is a factual update, which resembles a "political report", since it does not provide precise assessments of results achieved but current normative trends in areas relevant to the benchmarks; moreover, it also laid down an overview of the assistance granted together with eventual gaps in the support to the two countries. The **"technical report"** instead outlines the information used by the Commission for setting up countries' assessment progress under the CVM; these sources are collected from relevant public authorities as well as from non-governmental organisations active in the areas of the benchmarks. The Commission reports are grounded on studies drafted by international institutions and independent observers such as the Venice Commission. The technical report, to summarize, contains a deep analysis on the yearly recommendations as well as over those developments which may affect the fulfilment of the CVM benchmarks.

The CVM has been the target to several **critiques** by scholars focusing on their implementation in practice. In fact, in the post-accession period Romania and Bulgaria found themselves in a sort of "limbo" being the acquis formally respected and the conditionality lost traction since the membership was ensured, but the countries were

ot equipped with the same "rights" as other Member States, for example for what concerned the free circulation of people, which was denied until the CVM benchmarks were satisfied (Ganev 2013; Levitz, Pop-Elches, 2010). **From the methodological standpoint**, it has been argued that the problem of the CVM lies in the absence of a system of sanctions and rewards (Gateva, 2015: 93). Thus, the main problem of the CVM seems to be the lack of effective enforcement mechanism because the dialogue it entails has proven to be weak in terms of outcomes. Even more sharp criticism has been raised by those who underlined the incapacity of the CVM in bringing substantive reforms (Pech, 2016; Kochenov, 2014); for them, the CVM was based on an unrealistic definition of the Bulgarian and Romanian framework, coupled with blind belief in the EU "transformative power". The problem was a pure formal approach disregarding the "socio-structural changes that would guarantee respect for the rule of law", in order to infuse different political behaviour towards an accountable democracy. The enforcement problem emerged dramatically because it was considered only an internal issue of the two countries (Dimitrov – Plachkova, 2021: 175-176). However, the problem was probably taken into account by the European institutions, since the Commission stated that the CVM would not be considered for future accession treaties.

A minority of voices has spoken slightly in favour of the CVM on the ground of empirical evaluations, for example in the field of anti-corruption measures; indeed, despite the lack of sanctioning power, it has been argued that positive results have been registered given the institutional change and because the CVM operates as instruments of "social pressure" (Lacatus, Sedelmeier, 2020). Nevertheless, as a matter of fact, the CVM has proven to be more effective where tangible consequences were foreseen as, for example, when EU funds for Bulgaria were frozen in 2008 [7] as well as the Decision to block the Schengen entry, which has triggered reform in both Bulgaria and Romania (Vachudova, Spendzharova, 2012: 13; Noutcheva, Aydun-Duzgit, 2014).

Regarding the CVM "in action", **concrete examples** may help in defining briefly its shortcomings. Drawing on official documents of the EU Institutions it is possible to underscore the lack of effectiveness of the tool. The facts involved the so-called Kolevi case and Yaneva Case in Bulgaria, controversies which involved the status of the General Prosecutor's powers, judicial independence, and high level of corruption. In 2011 the CVM report specifically asked for a reform of Bulgaria's prosecution system for the first time, a crucial aspect which was perhaps overlooked till then because of the priority to fight against corruption. Moreover, one year after, the Commission published worrisome reports on both countries; regarding Bulgaria, although some progress was made, the Commission, recalling the Kolevi case, raised concerns due to the lack of implementation of reforms (see, European Commission, press release: "Bulgaria: Stepping up reforms needed to reach rule of law objectives", 18 July 2012),[8] in order for the process of improvement to become "irreversible". Even more anxiety was shown about Romania, whose events, according to the President of the European Commission Barroso,[9] "have shaken our trust", with reference to intimidation of judges, the undermining of the constitutional court and the overturning of established procedures, as well as checks and balances. In this case, the Commission concerns were quite similar to those of the scholars about the effectiveness of the CVM; this represented a sort of implicit admission of the CVM shortcomings (Dimitrov, Plachkova, 2021: 178).

The application of the CVM to Bulgaria has become interesting due to the dissensus provoked by the decision of the Commission in 2018 to move away from the legal benchmarks of the judicial independence and of the Prosecutor General, which were considered solved. The closure of three benchmarks in 2018 [10] and then the remaining three in 2019 [11] (continued judicial reform, high level corruption, general corruption) was not welcomed by scholars and experts such as Joeri Buhrer Tavanier, former European Commission's Resident Adviser to Bulgaria for the CVM; the Commission was considered "blind" and lenient on unsolved problem of the Bulgarian judicial system as well as the governmental conduct over corruption (Vassileva, 2019) and, when the fulfilment of the CVM benchmarks was assessed by the Commission, relevant NGO protested against the conclusions of

the CVM monitoring process. It has appeared as a desire of the Commission to close the CVM after Juncker declared in 2016 that Bulgaria would have fulfilled the benchmarks by 2019. **In sharp contrast with that outcome was the EU Justice Scoreboard** (see section 4.2.) which painted a different picture of the Bulgarian judicial system and similar **dissensus** was manifested by the Commissioner for Justice Věra Jourová (Vassileva, 2019). **Still more criticisms** came from the EP Assessment of the 10 years' Cooperation and Verification (Chandler, Lale-Demoz, Malan, Kreutzer 2018), which was released in the same year of the CVM closure for Bulgaria. According to the EP Assessment the progress "toward some benchmarks has not been as rapid as was initially anticipated, and significant deficiencies remain"; in Bulgaria it was noted that, although reforms have been implemented in the area of judicial system, some issues, such as the political influence on the judiciary, remain controversial. On Bulgaria, **the Assessment did not forecast the ending of the CVM** in a short period of time and proposed to continue with the Mechanism or with a similar framework. In fact, the overall conclusions emphasized the shortcomings of the CVM since it depended on the political desire to pursue the requested reforms.

The Romanian case was increasingly worrisome given the results published by the 2017-2019 reports, which were characterised by a "waning reform momentum". In this period, some issues considered closed were reopened and more recommendations, shared by the EP and the Council, were made. [12] Nevertheless, valuable progress was assessed in the 2021 and 2022 reports with many tasks considered completed. The 2022 report [13] is interesting because it has stated the "end" of the CVM in two sense: on the one hand, the Commission has considered sufficient the progress made by Romania related to the benchmarks set in the CVM but, on the other hand, it has recalled that the EU has developed new tools for upholding the rule of law. Among them there are those considered relevant for supporting the Romanian reform process and "as a result, there are a number of monitoring tracks now in place looking at issues covered by the CVM benchmarks"; the Commission specifically mentions the Rule of Law Reports (see section 4.3.), where the areas covered previously by the CVM are assessed and evaluated for each Member State.

Similarly, in the conclusion of the 2022 Report it is argued that "it is important that Romania continues to work consistently [...] within the annual Rule of Law Report cycle and with the support of other parts of the EU rule of law toolbox". **This remark makes clear the inevitable assessment of the CVM shortcomings given its "inclusion" within the Rule of Law Reports:** such remark stems from the last report where it is stated that "it is important that Romania continues to work consistently on translating the remaining commitments specified in this report into concrete legislation and on continued implementation, within the annual Rule of Law cycle [...]". However, other questions have been raised in light of the formally non-binding nature of the annual reports, if compared with the CVM, designed as a binding tool for two specific countries (Dimotrovs, Kochenov, 2021). To this regard it is interesting to note different points of view on the CMV emerged between the Advocate General (A.G.) Bobek and the ECJ in Joined Cases C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19, in matter of judicial independence. All the six preliminary references questioned the nature of the CVM and while the A.G. held that the CMV is part of the binding EU law and as such proposed to use the CVM as one of the parameters of the judgement, the Grand Chamber of the ECJ dismissed this argument and grounded its reasoning mainly on Article 19 TEU, which "covered" and "subsumed" the CVM (Kadlec,Kosar, 2022: 1833). Whether this move by the ECJ implies the lack of acknowledgment of the binding nature of the CMV on the part of the Court, it is not easy to tell, but certainly the CMV became as a legal tool in the judgment.

In conclusion the CVM has been contested since its inception. Therefore, despite the assessment of some progress in Bulgaria and Romania, several deficiencies remained, and it has shown that the CVM has not worked as expected. The consequences of these deficiencies have triggered criticism not only by academics, but also by some EU Institutions. In particular, it is significant the recent "replacement" of the CMV by the Rule of Law Reports. Moreover, following the evolution of the ECJ's case law, may appear CVM as groundless given the now consolidated jurisprudence in areas "previously" covered by the CVM.

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3. THE TOOLS OFFERED BY EU LEGISLATION

3.1. The Technical Support Instrument

Adriano Dirri and Ylenia Guerra (LUISS University)

The **Technical Support Instrument** (TSI) is part of the Multiannual Financial Framework (MFF) 2021-2027 and of the Recovery and Resilience Facility which has been enacted by Regulation 2021/240; it is an additional measure to provide technical expertise and administrative support to EU Member States, with the purpose to implement their own reforms especially related to the National recovery and Resilience Plans (NRRPs) (Dermine, 2022: 91).

The legal basis of this policy tool is found in articles 120 and 121 TFEU, where the EU is granted the possibility to support the public administrations of the Member States in the achievement of the Union objectives, and in article 175 TFEU, which asks Member States to coordinate their economic policies to achieve economic, social, and territorial cohesion. Indeed, the ultimate goal is supporting a "sustainable and fair economic recovery and convergence, achieve resilience, reduce poverty and inequality […]" (Regulation 2021/240, recital 8). More precisely, the objective should be to assist national authorities in developing reforms "and to prepare, amend, implement and revise recovery and resilience plans under Regulation (EU) 2021/241" (Regulation 2021/240, recital n. 9). An additional feature of the present TSI refers to the budget which has increased significantly if compared to similar instruments (infra); in fact, **EUR 864 million have been allocated for the period 2021-2027**, and it suggests that this tool is likely to play a key role in the implementation of the MFF and the NRRPs. At the time of writing the TSI and its predecessors have helped the Implementation of more than 1500 projects in Member States; in March 2023 only (Press release: Commission supports 151 reform projects in Member States to strengthen resilience and competitiveness, 21 March 2023), the Commission has approved 151 projects to support the implementation of up to 326 cutting-edge reforms in 2023. Moreover, it seems that the TSI aims at strengthening cooperation among Member States through cross-country projects, with 33 multi-country and 10 multi-regional projects.

The **genesis** of the TSI lies in its predecessor, the Structural Reform Support Programme (SRSP) (Dolls, Fuest, Krolage, Neumeier and Stöhlker, 2018) that, since 2017, has contributed to the implementation of more than 1,400 technical support projects in all MS (see EU Regulation n. 2017/825 as amended by Regulation EU 2018/1671). The SRSP, with a budget of **€142.8 million for the period 2017 to 2020** , set up a European programme to provide support for institutional, administrative and growth-enhancing structural reforms in the EU Member States. The scope of the SRSP was to substantially assists MS in the journey of reforms. The Regulation expressively highlighted the Union considerable experience in providing to Member States capacity building and similar actions in certain sectors and in relation to the cohesion policy; to this regard the Commission set the support Programme upon request by any Member State in a wide range of areas, from cohesion policy and competitiveness to rural development and fisheries (Regulation 2017/825, recitals 6, 9). Especially, as expressed in the mentioned regulation, "Reforms are by their very nature complex processes that require a full chain of highly specialised knowledge and skills, as well as a long-term vision. As their effects often take time to materialise, structural reforms in a wide range of public policy areas are challenging. Designing and implementing them in a timely and efficient manner is therefore crucial, whether for crisis-hit or structurally weak economies. In this context, Union support in the form of technical assistance has been important in supporting the economic

adjustment of Greece and Cyprus in recent years" (Regulation 2017/825, recital 4). In fact, it is worth mentioning that the TSI was originally nothing more than an ad hoc measure specifically created for providing technical assistance to Greece and Cyprus in implementing their economic adjustment programmes. In the beginning there were two task forces within the Commission, the Task Force for Greece (TFGR) and the Support Group for Cyprus (SGCY) respectively in 2011 and in 2013, and both were deemed necessary to provide technical assistance. The mandate ended in 2015 and 2016 and the Commission evaluated the results positively; nevertheless, the European Court of Auditors was of a different opinion (ECA, Special report no 19/2015: *More attention to results needed to improve the delivery of technical assistance to Greece*), since it highlighted the shortcomings of the TFGR, mainly the low influence of the assistance despite the efforts made. Several recommendations were raised, and this gave way to an overall revision of this kind of assistance; the consequence, as also noted by the European Parliament (see Study of DG for Internal Policies - Policy Department, *Public Sector Reform: How the EU budget is used to encourage it* IP/D/ALL/FWC/2015-001/LOT2, 31 August 2016), was the introduction of a permanent structure with clear objectives (the abovementioned SRSP), as it was also previously endorsed by the Court of Auditors. It is noteworthy that the dawn of the technical assistance was evaluated slightly well by the Commission, under whose auspices the task forces were created and fairly bad by other EU Institutions; it is also interesting that the path undertaken by the Commission after this first stage was in line with those reports who criticised the measures adopted thus promoting a "novel approach" (Ongaro, 2022: 9).

The **type** of support is very broad, meaning that Member States could ask for assistance in implementing resilience-enhancing reforms in the context of EU economic governance (also in relation to the European Semester) and by virtue of implementing EU law; preparing, amending, implementing and revising national recovery and resilience plans under the Recovery and Resilience Facility; implementing economic adjustment programmes; implementing reforms undertaken at their own initiative. Furthermore, the Regulation specifies that the TSI asks for a strong cooperation from and with the Member States in the improvement of their administrative capacities, since the general objective of the instrument is the promotion of "the Union's economic, social and territorial cohesion by supporting Member States' efforts to implement reforms" (Regulation 2021/240, articles 3, 4). All in all, the TSI provided technical expertise in on the drafting and implementation of the NRRPs or upon request by Member States, beyond the NRRPs. This might mean that the TSI, being strictly connected to the NRRPs, is subjected to conditionality mechanisms since the TSI is designed to support the implementation of projects under the umbrella of various European funds (Schramm, Krotz, De Witte 2022: 5).

The **object** of the tool is also very broad since it includes among others, green and digital transition, health and long-term care, education, public administration and governance, competitiveness, financial sector and social and labour protection (Some of the projects mentioned will become 'projects in the spotlight', i.e. selected projects from different policy areas and different countries which, on the basis of effective implementation, show promising results on the ground and have the potential to be replicated across the EU. In this way, the Commission aims to promote best practice).

The TSI has attracted some criticism by scholars. For example, in light of the not always positive outcomes, it has been suggested the possibility of an alternative framework to the TSI in which Member States agree on convergence targets and roadmaps, alongside with specific timeframe, for achieving such common targets (Dolls, Fuest, Krolage, Neumeier and Stöhlker, 2018).

864MM € *Have been allocated for the Technical Support Instrument (TSI) for 2021-2027. This tool is likely to play a key role in the implementation of the MFF and the NRRPs.*

In other words, some have supported a limitation of the target indicators to a small set of structural outcome variables, such as per capita income and the unemployment rate. This will not only allow for better policy targeting, but also for greater flexibility in achieving these targets. At the same time, just before the pandemic some suggested the development of a different narrative for the EU structural reform support, more in association with the Cohesion Policy. Indeed, the role of the TSI was questioned above all with regard to the interplay with the Cohesion Policy (CP), because the Commission was quite reluctant to connect structural reforms with the purpose of the CP. For example, back in 2018 it was argued that positive outcomes were observed by the ongoing negotiations on the 2021-2027 MFF due to the increasing effort to highlight "the added value of Cohesion Policy in promoting economic capability, territorial balance and social inclusiveness in the EU" (Noel, Hunter and Zuleeg, 2018: 26).

At the level of the political debate, it seems that criticism has never triggered an actual dissensus within and among the national and EU Institutions. For instance, from the EP debate has emerged that TSI should not be used as an excuse to prescribe austerity policies through country-specific recommendations and the use of the most far-reaching measures of the European Semester . The BUDG-ECON joint committee of the EP requested an additional financial amount of €1.45 billion for the TSI. It also stressed that Member States should be entitled to use part of their Recovery and Resilience Facility budget for the instrument to strengthen the technical assistance available to them to prepare and improve their recovery and resilience plans. In addition, the report pointed out that the Instrument should be applied in full accordance with the rules on the protection of the EU budget, considering the respect for the rule of law (Spinaci 2021).

National Parliaments have expressed similar views. In particular, the Portuguese Parliament welcomed the establishment of a programme offering technical and financial assistance for reforms that were considered crucial for convergence and competitiveness (Opinion, 2018). The Czech Senate supported the establishment of the TSI but warned that a situation where the programme could lead the Member States to condition their reform efforts on the availability of EU financial support should be avoided (Opinion, 2018). It highlighted that efforts should be motivated by national needs and EU support should only be supplementary. Moreover, in a more general resolution on the governance of the euro area of 23 June 2018, the French National Assembly supported the EU's efforts to strengthen structural reforms and the use of instruments for this purpose under the new MFF.

All in all, the main problem emerged from the TSI for Member States has been its link with policies for fiscal consolidation and reduction of public expenditures rather than on those fostering growth and cohesion policy.

To conclude, the evolution of the TSI tool has shown that initially it was not properly linked to the rule of law; rather, it was purposedly created to address specific (and contested) economic issues in Greece and Cyprus and only afterward it became more linked to structural reforms in all Member States. The role of the TSI was boosted by the NRRPs as a supporting tool for the implementation of the plans. Still, its connection with the rule of law may be considered weak since the main purpose is represented by the administrative support for the Member States; this also leads to questioning how much the TSI and its predecessors have been envisaged as ad hoc tools and how as "structural" tool for administrative support; in fact, the TSI has evolved from targeting specific countries to an all-encompassing instrument in support of and at disposal to all Member States administrations; what matters here is to highlight that the Commission, in helping structural reforms for Member States, is pursuing both the administrative harmonisation as well as the support to specific project when a country asks for it. Hence, the TSI may be considered an effort to strengthen a sort of multilevel administrative governance with the purpose to make the implementation of the reforms timely and more efficient. To this end, the Commission will be launching another ancillary initiative – the Public Administration Cooperation Exchange (PACE) - for strengthening administrative capacity of Member States. In the end it may be argued that the NRRPs have been given a chance to rethink and rework the entire rationale of the TSI, grounded on the new MFF and on the NRRPs and its goals.

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The evolution of the TSI tool has shown that initially it was not properly linked to the rule of law; rather, it was purposedly created to address specific (and contested) economic issues in Greece and Cyprus and only afterward it became more linked to structural reforms in all Member States. The role of the TSI was boosted by the NRRPs as a supporting tool for the implementation of the plans. Still, its connection with the rule of law may be considered weak since the main purpose is represented by the administrative support for the Member States.

3.2. The Role of OLAF and EPPO in the Protection of the Rule of Law

Alessandro Nato (University of Teramo)

TThe recital No. 1 of the Directive No. 2017/1371 [14] set up the definition of the protection of the Union's financial interests. Following this definition, the protection EU financial interests "concerns not only the management of budget appropriations but extends to all measures which negatively affect, or which threaten to negatively impact its assets and those of the Member States, to the extent that those measures are of relevance to Union policies". Furthermore, the EU financial interest is defined by art. 2, Directive No. 2017/1371 as "all revenues, expenditure and assets covered by, acquired through, or due to: (i) the Union budget; (ii) the budgets of the Union institutions, bodies, offices and agencies established pursuant to the Treaties or budgets directly or indirectly managed and monitored by them".

Before EU Regulation n. 883/2013 [15], safeguarding the financial interests of the European Union was an important but not central issue, not least because the European budget was much smaller than those of the Member States themselves (White, 1998; Crijns, Haentjens, 2022; Berlin, Martucci, Picod, 2017). There has also always been very little interest from the legal and economic sciences in the study of this topic, which has been investigated mainly from the angle of criminal law, to combat frauds (Izzi, Lorena Jimenez Galli, 2016; Vengoni, 2018; Pizzolante, 2019). Nevertheless, it has recently become crucial to defend the EU's financial interests, even becoming, as it were, a fundamental component of the European Union legal system. This shift in perspective is linked to the increase in the financial endowment of Union through its new tools and in the rise of spending conditionality? (see sections 5.2, 5.3 and 5.4.). The EU budget is the financial instrument that allows the European Institutions to translate their policies into concrete reality (Laffan, 1997; Benedetto, 2013). After the Next Generation EU, the EU budget was almost doubled, though temporarily, and the EU institutions and Member States understood that it is necessary to strengthen the protection of this vital interest.

The protection of the financial interests of the EU has had effects in the multilevel collaboration between criminal control and administrative control. Especially, the protection of EU financial interests has increased the national and supranational collaboration between institutions that conduct administrative investigations and those that conduct criminal investigations. The process of European integration receives a substantial reinforcement from the organizational structures and from the administrative and criminal procedures that closely connect the European and national institutions, both as regards the public administrations and, even more, for what pertaining to judicial systems. But **which are the supranational bodies and agencies that protect the EU's financial interest? How do these helps protect the EU's financial interests, and how is this connected to the rule of law?**

To answer these questions a central stage is occupied by the role and the cooperation between European Anti-Fraud Office (OLAF) and the European Public Prosecutor Office (EPPO).

From the so-called Convention for the Protection of the European Communities financial interests of 1995 to the recent EU Directive 1371/2017, the Union relied upon the instrument of harmonization of the criminal law provisions of the Member States, with measures relating, inter alia, to frauds and other offenses against the Union's financial interests and concerning both natural and legal persons. The focus of this system has been OLAF for a long time.

The scope of **OLAF's action covers any fraud, administrative irregularities, or other detrimental activity that can damage the financial interests of the EU.** However, the main problem is that OLAF has the power to conduct investigations, but it does not issue sanctions. It can formulate a report, and recommendations at the end of the investigations. The Court of Justice – see T-289/16, *Inox Mare srl*, par. 28 – clarified that such recommendation has no binding legal effect on EU or Member States authorities. It is a decision to the EU institution or Member States authorities to apply them and to proceed to take administrative or judicial action (Kratsas, 2012, 65).

The primary aim of the EPPO is to investigate and prosecute crimes affecting the EU's financial interests.

The **European Public Prosecutor Office (EPPO) represents a sensational innovation in EU legal framework.** Before, the EU has had no power to investigate and bring to judgement the committers of crime against the EU financial interests. Existing EU bodies – such as OLAF, Eurojust and Europol – do not have, and cannot be given, the mandate to conduct criminal investigations and not have coercive powers if the Member States refuse to carry out OLAF's investigations. Therefore, only national authorities could investigate and prosecute EU-fraud, but their jurisdiction stops at national borders. The EPPO fills this institutional gap. After an enhanced co-operation, 20 Member States adopted in 2017 the Council Regulation (EU) 2017/1939 [16] establishing the EPPO. This regulation is now binding in its entirety and directly applicable in 22 Member States [17].

The primary aim of the **EPPO is to investigate and prosecute crimes affecting the EU's financial interest** in a more efficient and effective way than the Member States through a specialized and well-equipped office (Varvaele, 2018, 17). To this end, the EPPO is "competent in respect of criminal offences affecting the financial interests of the Union that are provided for in Directive EU 2017/1371", as implemented by national law, irrespective of whether the same criminal conduct could be classified as another type of offence under national law – see art. 22, par. 1, EU Regulation 2017/1939. The crimes directly affect the EU' budget by depriving it of huge amounts and are disadvantageous to all the EU citizens (De Amicis, Kostoris, 2018, 240). Furthermore, EPPO is competent for any other criminal offence that is inextricably linked to criminal conduct that falls within the scope of art. 22, par. 1, EU Regulation 2017/1939.

The EPPO is integrated with the national legal frameworks.

The **EPPO and OLAF's field of operation are nonetheless closely linked**. The common aim of both bodies is to increase fraud detection at EU level and to maximize the recovery of damages to the EU budget. Moreover, both EU bodies are combining their investigative and other capacities to improve the protection of the EU financial interests. To avoid duplication of work, the working arrangement between OLAF and EPPO is of utmost importance for their relationship. Currently it is evident from the institution activity report for 2021 that the cooperation between OLAF and EPPO is proceeding smoothly and that all obstacles, if any, are being resolved without major problems – See OLAF, The OLAF Report 2021, 1, 37 (2022) [18]; EPPO, 2021 Annual Report, 1, 88 (2022) [19].

Unambiguous criticism regards when the case of complementary investigations and it will need to be addressed within a working arrangement. Though, in more general terms, it is the very role of the administrative arm of the system that will need to be reassessed in a context in which the EPPO becomes fully operational. From this viewpoint, it has been argued that two different visions of OLAF's role could theoretically be considered. On the one hand, OLAF could be transformed into a sort of 'EPPO's investigatory arm', responding to EPPO's priorities and orders – supporting a merger, claiming that this solution would provide a more efficient allocation of resources (Bellacosa, De Bellis, 2023, 26; Kratsas, 2012, 95). On the other hand, OLAF and the EPPO should work as two autonomous bodies, while the

main operative support to EPPO should come from the national authorities (Bellacosa, De Bellis, 2023, 26; Weyembergh, Brière, 2018, 75-76). The primary role of OLAF and EPPO is to protect the financial interest of the European Union. Therefore, we can consider them as indirect tools for the protection of the rule of law.

On the contrary, the EPPO causes some problems to the rule of law. The **EPPO Regulation presents a significant rule of law deficit in terms of judicial protection by establishing very limited jurisdiction of the Court of Justice in reviewing EPPO acts**, which is linked to the reliance of the EPPO on the legal orders of Member States in terms of the applicability of national law and criminal justice mechanisms (Mitsilegas V., 2021, p. 260). The role of the Court of Justice in holding the EPPO judicially accountable remains limited in the EPPO Regulation. The EPPO Regulation grants the Court of Justice jurisdiction to give preliminary rulings in three cases: a) on the validity of procedural acts of the EPPO; b) on the interpretation or validity of provisions of EU law, including the EPPO Regulation; c) in relation to any conflict of competence between the EPPO and the national authorities (see Art. 42, par. 2, Regulation EU 2017/1939). Furthermore, a rule of law deficit emerges from the significant limits that the EPPO Regulation imposes on the Court of Justice under art. 263 TFUE. The Court of Justice has very limited role in actions for annulment of EPPO acts under art. 263 TFEU, covering only decisions of the EPPO to dismiss a case in so far as they are contested directly because of EU law (see art. 42, par. 3, Regulation EU 2017/1939; Gohler J., 2015, p. 102). **This limited review is justified because of the 'exceptional' nature of the EPPO in relation to other EU agencies** (see recital 86 of Council Regulation EU 2017/1939; Mitsilegas V., 2021, 260).

Furthermore, if initially it was thought to exploit the protection of the financial interest to protect the rule of law, the growth of the EU budget meant that the relationship was reversed. Certainly, the protection of the EU financial interest has become central to the process of European integration. The safeguarding of this supranational objective relies to a large extent on cooperation, on the one hand, between EU and Member State levels. On the other, the coordination and effective action of EU bodies such as EPPO and OLAF plays a crucial role. If these two bodies manage to dialogue with each other and with national authorities, frauds against the financial interest will be circumscribed. If not, they will impair the success of the Next Generation EU and the European integration of administrative and criminal controls. However, the exponential growth in the importance of protecting the Union's financial interest is also reflected in the relationship between this principle and the rule of law . Indeed, this process leads to the creation of a financial rule of law in the EU legal system (Sandulli, Nato, forthcoming).

EPPO Regulation presents a significant rule of law deficit in terms of judicial protection by establishing very limited jurisdiction of the Court of Justice in reviewing its acts.

This seems obvious with the creation of the EU regulation 2020/2092. Especially, the close link between the EU's financial interests and the rule of law, or rather, the **quasi-subordination of values to the objective of protecting the EU's financial interests**, evidently arises from the conditions that activate the conditionality mechanism. Article 4 of EU Regulation 2020/2092 states that measures against Member States can only be taken if two conditions are met. First, there must be a violation of the principles of the rule of law. Secondly, such a breach must undermine, or pose a serious risk to, the sound financial management of the Union's budget or the protection of the Union's financial interests in a direct and tangible way (Tridimas 2020). In essence, breaches of the rule of law principles must seriously undermine or risk undermining in a sufficiently direct way the sound financial management of the EU budget or the protection of the EU's financial interests. On this point, the Court of Justice clarified that the objective of Regulation 2020/2092 is to safeguard the EU budget from negative effects resulting directly from breaches of the rule of law in a Member State, rather than imposing penalties for such violations. Consequently, according to the relevant literature, the conditionality mechanism

should no longer be classified only in the rule of law section, but also in the budget section of the European Commission's enforcement library (Staudinger 2022, 730; Baraggia 2022, p. 688; Łacny 2021, p. 83). In essence, Regulation 2020/2092 should not be considered a direct tool for implementing the principles of the rule of law. Instead, it is to be understood as an additional mechanism to protect EU financial assets from violations of the EU treaties and from the negative financial consequences resulting from the violation of the rule of law (Kölling 2022, 9). Nonetheless, it must bear in mind that the link between financial interests and the rule of law, which should form the basis of European legal identity, may mean that **the rule of law is subordinated to economic and financial considerations.** This further entails the need to strengthen the EU's financial interests, which can complement the content of the rule of law in the European Union. It remains to be seen, in the medium to long term, whether this link will lead to fundamental changes to the EU rule of law (Sandulli, Nato, forthcoming).

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17 The first 20 Member States were: Austria, Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Estonia, Germany, Greece, Spain, Finland, France, Italy, Latvia, Lithuania, Luxembourg, Portugal, Romania, Slovenia, and Slovakia. In 2018, Manta and the Netherlands joined the EPPO.
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4. THE EFFECTIVENESS OF SOFT LAW TOOLS

4.1. The Rule of Law Framework and Dialogue

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The European Commission proposed the mechanism in its Communication of 11 March 2014. 'A new EU Framework to strengthen the Rule of Law' (COM(2014) 158 final)20 aims to ensure 'effective and consistent protection of the rule of law across all Member States' (Crabit & Bel, 2016). This mechanism reflects two objectives of the Union: to protect the Union's fundamental values and **to achieve a higher level of mutual trust and integration in an area of freedom, security and justice without internal borders** (Kochenov & Pech, 2016).

The Communication creates a basis for examining the situation in a particular Member State in terms of compliance with the rule of law under Article 2 TEU and for providing information to the authorities of that State on the risks perceived. In this way, a framework is created which enables the Commission to engage with the national authorities, who are allowed to present their views and exchange arguments with the Commission. Proceedings based on the Communication also enable the Commission to formulate allegations of a breach of the rule of law, which will form the basis of a proposal for an Article 7 TEU procedure. Moreover, the exchange of arguments even before the Article 7 TEU procedure is initiated allows other Member States to observe the positions of the Commission and the Member State subject to proceedings under the Communication in the longer term. This increases the transparency and predictability of the Commission's proceedings and makes it possible to determine whether a perceived breach of the rule of law can be considered serious and persistent. Proceedings under the Communication have thus been presented as a separate mechanism to protect the rule of law. However, **its main function is to monitor the situation in the Member States and prepare the Commission for proceedings under Article 7 TEU** (Kochenov & Pech, 2015).

The Communication refers to Member States' respect for the rule of law. Its scope therefore includes only one value among those indicated in Article 2 TEU, which in this context significantly limits the Commission's field of action (von Bogdandy, Antpöhler, Ioannidis, 2016). For the purposes of the Communication, the Commission has adopted an autonomous definition of the rule of law and identified a core of constitutive elements, considering the case law of the Court of Justice of the EU and the Council of Europe acquis. As a reminder - the rule of law within the meaning of Article 2 TEU includes, in the Commission's view, legality, which means a transparent, accountable, democratic and pluralistic law-making process, legal certainty, prohibition of arbitrariness in the action of the executive, independent and impartial courts, effective judicial review, including review of respect for fundamental rights, and equality before the law (Kochenov, 2017).

Under the Commission's definition of the rule of law, the scope of possible action under the Communication is determined by the scope of Article 7 TEU itself. As the Commission argues, proceedings under the Communication are intended to address future threats to the rule of law in Member States before the conditions for triggering the mechanisms of Article 7 TEU are met (Closa, 2018). In this regard, the Commission distinguishes between situations that fall within the scope of EU law and situations that do not. In doing so, it recognises that the Article 258 TFEU mechanism can only be triggered within the scope of application of EU law. By contrast, **the procedure under**

Article 7 TEU and the proceedings under the Communication can be applied irrespective of whether Member States' actions in breach of Article 2 TEU fall within the scope of application of EU law. Consequently, the initiation and conduct of proceedings under the Communication is not limited by the need for the Commission to demonstrate that there is an EU element to the alleged infringement beyond the mere breach of the rule of law.

The mechanism contained in the Communication is **intended to prevent the emergence of a systemic threat to the rule of law** that could develop into a situation where there is a clear risk of a serious breach of the rule of law in a Member State (and thus the conditions for triggering Article 7(1) TEU are met). Accordingly, proceedings under the Communication should be triggered when the Commission becomes aware that there are "clear indications" of a systemic threat to the rule of law in a Member State.

The Commission recognises that a systemic threat to the rule of law and the functioning of the EU arises in cases where the national mechanisms cease to function effectively.

For proceedings to be initiated, three conditions must be met:

1. Proceedings under the Communication are subsidiary to measures available to individual Member States to address rule of law concerns. Proceedings will be implemented when Member State authorities adopt measures or tolerate situations that may have a systematic negative impact on the integrity, stability or proper functioning of institutions and protective mechanisms established at national level to ensure the rule of law. The mechanism contained in the Communication will be applied when national safeguards for the rule of law appear to be ineffective in countering these threats.
2. Proceedings under the Communication will be initiated if other mechanisms at Union level cannot address threats to the rule of law. The Commission considers that existing instruments at EU level cannot in all circumstances effectively address a systemic threat to the rule of law. At the same time, the Commission mentions in this regard in particular the Article 7 TEU procedure. It states that the thresholds for its activation are very high, making it to be considered as a 'last resort'.
3. Proceedings under the Communication are triggered when there is a suspicion that there may be a systemic threat to the rule of law in a Member State. In this regard, the Commission recognises that a systemic threat to the rule of law and the functioning of the EU arises in cases 'where the mechanisms established at national level to ensure the rule of law cease to function effectively'. The Commission considers that a systemic threat to the rule of law and the functioning of the EU exists in cases 'where the mechanisms established at national level to ensure the rule of law cease to function effectively'. Thus, national mechanisms have a dual function: not only do they play a role in the context of the subsidiarity of proceedings under the Communication, but if they cease to operate effectively, they are a premise for triggering proceedings under the Communication.

In addition, proceedings under the Communication cannot concern 'isolated cases of fundamental rights violations or judicial errors, insofar as these cases can and should be dealt with by national judicial systems and in the context of the control mechanisms established under the ECHR, to which all EU Member States are parties. Therefore, this is not a systemic risk. Thus, it is not a systemic threat if there are isolated violations of fundamental rights or errors in judicial decisions in a Member State (implicitly to be understood that these errors must be committed to the detriment of individuals). In principle, however, as protected under EU law, fundamental rights are not all part of the definition of the rule of law adopted for the purposes of the Communication (apart from, for example, the principle of effective judicial protection). Thus, it seems that what must be at stake here is a situation in which, irrespective of individual substantive errors, the legal mechanisms in a Member State are, in principle, working well and guaranteeing individuals (at an

abstract level) effective protection and the chance that individual substantive breaches of the law can be remedied.

Conversely, suppose there are massive violations of fundamental rights and jurisprudential errors (also not involving elements of the rule of law) which the national system cannot neutralise. In that case, this will mean that the situation begins to threaten the rule of law as defined by the Commission. This understanding of a systemic threat to the rule of law is confirmed by the remainder of the Communication, according to which 'the political, institutional or legal order of a Member State as such, the constitutional structure of that State, the separation of powers, the independence or impartiality of the judiciary or the system of judicial review, including constitutional justice where it exists - for example, as a result of the adoption of new measures or widespread practices by public authorities and the absence of legal remedies at national level - must be at risk'.

Concerning the criteria adopted by the Commission as to the systemic nature of the threat to the rule of law, it should be noted that the situations indicated above, resulting from the Communication, define systemic threats not by specifying what the threat is supposed to be, but mainly by specifying what is supposed to be at stake: the integrity, stability and proper functioning of institutions and protective mechanisms for the rule of law, as well as the threat to the political, legal and constitutional order, the separation of powers or the judiciary (Coman, 2022).

Proceedings are based on several principles: an **emphasis on dialogue** with the State under investigation, an objective and thorough assessment of the situation by the Commission, followed by an indication of swift and concrete steps that the member state could take to address the signalled systemic threat to the rule of law and avoid triggering an Article 7 TEU procedure. The proceedings are also to be based on respect for the principle of equal treatment of Member States. This is an important Treaty principle stemming from Article 4(2) TEU, which is considered the constitutional basis for the principle of mutual trust between EU Member States.

The proceedings under the **Communication consist of three stages** . During the proceedings, the Commission keeps the European Parliament and the Council of the EU informed and may also draw on the expertise of third parties. The Communication mentions in this respect, for example, the EU Agency for Fundamental Rights, the Network of the Presidents of the Supreme Judicial Courts of the European Union, the Association of the Councils of State and Supreme Administrative Jurisdictions of the European Union or the European Network of Councils for the Judiciary, the Council of Europe and the Venice Commission. The Commission will coordinate its analysis with them for all cases that these bodies consider and analyse. The course of action under the Communication is shaped so that the Commission can have a soft impact on a Member State suspected of a breach of the rule of law. The first stage is initiated if there are 'clear indications of a systemic threat to the rule of law'. Such signals can come from any 'available' sources and from recognised institutions, including in particular Council of Europe bodies or the EU Agency for Fundamental Rights. The first stage is for the Commission to assess the situation and establish a dialogue with the Member State. If the Commission considers the information received credible, it will initiate a dialogue. This will be made public. The dialogue will consist of, among other things, correspondence or meetings with the competent authorities of the Member State. This initial phase will culminate in a confidential Commission opinion on the rule of law addressed to the Member State in which the Commission sets out its concerns with reasons. Again, the public will only be informed that an opinion has been issued. The Member State has the right to respond to it. The Commission considers that from the first stage of the proceedings under the Communication, relations with the Member State concerned are covered by the principle of loyalty (Article 4(3) TEU). Accordingly, it expects the Member State, firstly, to cooperate with the Commission in the exchange of information and arguments in the assessment process and, secondly, to refrain from adopting any irreversible measures concerning the issues of concern raised by the Commission until the conclusion of the proceedings under the Communication.

Failure to comply with the principle of loyalty will affect the assessment of the seriousness of the breach of the rule of law. The Communication therefore does not announce the initiation of more far-reaching consequences possible under the case law of the Court of Justice of the EU, i.e., the initiation of proceedings under Article 258 TFEU in the event of a breach of the principle of loyalty. Such wording in the Communication may have certain consequences in assessing the legal status and the legal effects of the Communication and the documents (opinions, recommendations) issued on its basis. The second stage will occur if the first stage does not produce a satisfactory result. Due to the emphasis on dialogue, there may be further exchanges of correspondence or meetings with Member State authorities each time, regardless of the stage (Kochenov & Bard, 2018). If these remain unsuccessful and the Commission considers that there is 'objective evidence' of a systemic threat, a 'recommendation on the rule of law' will be issued. Unlike the Commission's opinion that precedes it, this recommendation is public. The fact that it has been sent and its essential content will be made public. The recommendation may contain indications as to how and how to remedy the situation and set a deadline for the Member State to comply with the recommendation. The third stage consists of monitoring the Member State's action against the recommendation issued. If the measures taken in the framework of the established dialogue do not have an adequate effect, the Commission will propose to initiate the procedure under Article 7 TEU. Here, the Commission's role ends and the subsequent fate of the proposal is decided by the Member States within either the Council of the EU (Article 7(1)) or the European Council (Article 7(2) TEU). The Commission cannot propose the sanctions procedure (Article 7(3) TEU).

Proceedings based on the Communication therefore prepare the Commission for the potential initiation of an Article 7 TEU procedure. From this perspective, **the mechanism established based on the Communication has a preparatory function for the Article 7 TEU procedure** (Pech, 2020b). Furthermore, recommendations on the rule of law contain the Commission's legal position vis-à-vis perceived irregularities. However, it should be noted that once a request has been made under either Article 7(1) TEU or Article 7(2) TEU, the Commission does not host further proceedings. This means that the legal assessments formulated by the Commission have no direct bearing on further proceedings by the Member States gathered in the Council of the EU or the European Council. From this perspective, states are free not to share the Commission's assessments, make their own findings, and make separate recommendations to the member state subject to the procedure (Article 7(1) TEU).

Failure to comply with the principle of loyalty will affect the assessment of the seriousness of the breach of the rule of law.

Furthermore, states can also interpret the criteria underlying the triggering of an Article 7 TEU procedure (Pech, 2020a). In this respect, documents produced based on the Communication can only influence further proceedings under their persuasive content, objective assessment and authority. Finally, the conduct of proceedings based on the Communication does not prevent the direct application of the mechanisms of Article 7 TEU if a sudden deterioration of the situation in a Member State calls for a more decisive response from the EU (Nowak-Far, 2021).

On 16 December 2014, the General Affairs Council and the Member States meeting within the Council - taking note of the Presidency's note of respect for the rule of law and recognising that the rule of law is one of the fundamental values of the Union - adopted the tenets of a dialogue between Member States to promote and protect the rule of law within the framework of the Treaties.

The following principles of dialogue were adopted: objectivity, non-discrimination, equal treatment of Member States, and an impartial and evidence-based approach. At the same time, 3 limitations to the dialogue were identified: the principle of conferred powers, respect for the national identity

of Member States and the core functions of the State, and the principle of loyal cooperation. Furthermore, the dialogue is to promote a culture of respect for the rule of law, complement the work of other EU institutions and international organisations, avoid duplication, and take account of existing instruments. The Council and the Member States meeting within the Council agreed that the existing instruments in the area of the rule of law in the Union are the infringement procedure (Articles 258-260 TFUE, in case of violation of EU law) and the procedure set out in Article 7 TEU.

The Council and the Member States meeting in the Council decided that the dialogue, prepared by COREPER, would take place in the General Affairs Council once a year, also in the format of thematic debates.

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4.2. The EU Justice Scoreboard

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The EU Justice Scoreboard (EUJS) is part of the EU's Rule of Law toolbox and essentially provides an annual overview of indicators on "the performance of national judicial systems" (A. Strelkov 2019, 15, see also A. Dori 2021, 281). Since its creation in 2013 (under the so-called "consecutive leadership of J. Barroso and J.C. Junker, [Strelkov 2019, 15]), the EUJS represents a quantitative and qualitative tool in the hands of the European Commission, added to the pool of EU policy instruments in the field of Justice and Home Affairs. Examining the EUJS in the line of the EU Rule of Law instruments, it is a **soft prescriptive instrument,** drawing on modality that shapes behaviour through dialogue and persuasion (Coman 2022, 13). In the Communication *"The EU Justice Scoreboard. A tool to promote effective justice and growth"* [21], at point 1, the Commission sets out the general scope of the EUJS: "The objective of the EU Justice Scoreboard [...] is to assist the EU and the Member States to achieve more effective justice by providing objective, reliable and comparable data on the functioning of the justice systems of all Member States. Quality, independence and efficiency are the key components of an 'effective justice system'. Providing information on these components in all Member States contributes to identifying potential shortcomings and good examples and supports the development of justice policies at national and at EU level" (see also Dori 2021, 281, nt. 5). In this way, through the EUJS, the EU pursues access to an effective justice system as an essential right "at the foundation of European democracies and enshrined in the constitutional traditions common to the Member States"[22] (see also Velicogna 2013 and Coman 2015, 183)[23] and the guarantee of the effectiveness of EU law. Since the EUJS focuses on non-criminal justice, in particular civil, commercial and administrative litigation, it does not cover the entire judicial system.

The **main** (initial) **elements** of the Scoreboard are: – a comparative method for comparative data, which covers all Member States without paying specific attention to the national constitutional and administrative tradition; – an inter-temporal approach, meaning that through each annual report it is possible to evidence any evolution; – a non-binding instrument in an open dialogue with the Member States; and – an evolving tool in the light of the societal and political dynamics.

The **main** (initial) **indicators** used as a benchmark for measurement are: (i) the *efficiency* of the procedures through the *length of the proceedings* (i.e. time needed to decide a case at first instance), the *clearance rate* (meaning the ratio of the number of resolved cases over the number of incoming cases) and the *number of pending cases* [24]); (ii) the *perceived independence* of the justice system.

The **genesis** of the EUJS can be traced back to the EU economic and financial crisis of 2008, in which the EU institutions assumed that national justice systems could play a key role in the restoration of confidence and the return to growth. Indeed, the introduction of the EUJS "was presented by EU Commissioner Viviane Reding (2013) as an answer to the so-called Copenhagen dilemma" i.e. insufficient control over MS' compliance with EU founding values after the accession (Strelkov 2019, 17; see also Coman 2022, 103; Benelli 2017, 189 and Pech 2021, 322), in particular on the independence of the judiciary (Guazzarotti 2022, 14 and, significantly, the so-called Tavares Report[25] , on which see Scheppele 2013). For the first elaboration of this Scoreboard, the Council of Europe's Commission for the Evaluation of the Efficiency of Justice (CEPEJ) was asked by the European Commission to collect data and provide analysis. The most relevant and representative information were used by the European Commission for the construction of the EUJS. Data from other sources, such as the World Bank, the World Economic Forum and the World Justice Project, were also included in the first scenario (Communication, COM(2013) 160 final, 3; see also Pech 2021, 322-323 and Alina Onţanu, Velicogna 2020, 250). Given the construction, the **methodology** used for

the EUJS implied the collection of a large amount of data from three main categories of sources: data collected at the EU interinstitutional level, pilot exercises or field studies, and EU external sources in line with the CEPEJ methodology (Dori 2015, 24). The first category - data collected at the EU inter-institutional level, which is the vast majority (87% until 2015, cf. Dori 2015, 24) - involves the cooperation of the ministerial and judicial offices of the Member States, with the result that there isn't any kind of verification mechanism on the reliability of such data. The reason for this is that data do not come from an external and independent source, but rather from the Member States themselves.

On this basis, the Commission proposes Country-Specific Recommendations (CSRs) in the European Semester, as discussed in section 5.1.

As a symbol of the "inevitable **evolution** of such tools, the dimensions covered by the Scoreboard have changed over time to focus on new and pressing issues, such as the independence of the judiciary" (Coman 2022, 105), as happened, for example, in 2021 when the EUJS was used to provide an overview of the institutions involved in the appointment of judges to the Supreme Courts of the MS (Coman 2022, 105).

Looking at the **praxis**, the Commission has adopted ten communications (2013-2022) from which it is possible to draw some preliminary evidence, which are taken as a basis in the following analysis of the *dissensus*. The first formal evidence is the increasing length of such communications: from 22 pages in 201326 to 62 pages in the 2022 Report [27] In terms of substance, a number of important steps have been taken to get to the current features of the EUJS. In the 2014 Report (Communication, *"The 2014 EU Justice Scoreboard"* COM/2014/0155 final), the Commission tried to overcome the gap between the *perception* of judicial independence and *structural* judicial independence, through the provisions of several elements that strengthen the above mentioned independence (these are five indicators: the safeguards regarding the transfer of judges without their consent, the dismissal of judges, the allocation of incoming cases within a court, the withdrawal and recusal of judges and the threat against the independence of a judge[28]). One year later, in its 2015 Report[29] , the European Commission underlined the importance of intensifying *dialogue* with the MS as a basis for structural cooperation aimed to improve the reform of the national judicial systems. This cooperation is backed up by financial support from the European Structural and Investment Funds (ESI Funds), which support the Member States' efforts to improve the functioning of their judicial systems. 2016[30] marks the transition from country-based data, which to a certain extent is not entirely impartial or complete, to a (cautious) *technicalisation* of the indicators and the sources. In this sense, in order to assess the quality of the justice systems, the Commission started to work with the group of contact persons on national justice systems specifically on the standards related to the functioning of justice systems (in particular, two contact persons, one from the judiciary and one from the ministry of justice). The centrality of the justice system and the protection of its independence have become a primarily political objective. Indeed, in the 2017 Report[31] , the first consideration was a quotation of former Commission President Barroso in which he emphasised the link between (the protection of) the EU Rule of Law and judicial independence: *"The rule of law is not optional in the European Union. It is a must. The rule of law means that law and justice are upheld by an independent judiciary"*. 2018 (Communication "The 2018 Eu Justice Scoreboard"[32] , was the year of expansion of the tool: the European Commission extended its monitoring of the judicial system through the News Indicators. This was achieved mainly by assessing the independence of the Councils of the Judiciary, developing a section dedicated to criminal justice systems (in particular money laundering) and introducing some indicators on the organisation of prosecution services in the Member States. After 2018, the EU Justice Scoreboard became part of the EU's toolbox. The Communication on Further strengthening the Rule of Law within the Union - State of play and possible further steps (COM(2019) 163 final) identified the EU Justice Scoreboard as part of the EU's toolbox to strengthen the Rule of Law by contributing to supporting judicial reforms and rule of law standards. A confirmation of the new approach came from the actions taken: for instance, in September 2018, the Commission referred Poland to the ECJ for violation of judicial irremovability and independence by the Law on the Supreme Court (see Pech, Wachowiec, Mazur, 2021;

Bárd 2022; section 2.2. here). At the same time, (inversely) several national courts seized the ECJ through the PRP (article 267 TFEU), requesting clarifications on the EU law requirements for judicial independence[33], see also Pech 2021, 323; section 2.3 here). As announced in the political guidelines of President von der Leyen, the Commission has established a comprehensive European Rule of Law Mechanism to deepen its monitoring of the situation in Member States in which the implementation of the EU Justice Scoreboard has experienced problems (EUJS Report 2020 and EUJS Report on 2021).[34]
Finally, ten years after its launch, the EUJS 2022 Report focuses on the implication of the Covid-19 pandemic on the justice systems.

The EUJS is a soft & prescriptive instrument drawing on modalities that shape behaviour through dialogue and persuasion.

What **dissensus** (and what *type of dissensus*) exists on these tools? For the sake of clarity, it is useful to provide subcategories: *(i)* **chronologically** *(ii)* **categorially** (in respect of which there is, obviously, an intersection). *(i)* In the beginning of the established tool, as observed by Ramona Coman (2016 and 2022), some MS fearing the empowerment of the Commission "by stealth", opposed that this type of quantitative and qualitative data (i.e.: statistics and indicators) on the performance of the judiciary was already provided by other regional organisations, such as the Council of Europe and the Venice Commission, and therefore the Commission should not reproduce them[35] (Coman, 2016; cf. Velicogna 2016 that emphasised the misunderstanding of MS concerning the tool). Moreover, in its early days, the EUJS was criticised not only by the Member States but also by (some) academics. For Cappellina, the method by which the EU Commission selected the team of experts demonstrated the lack of socio-legal measurement and evaluation (in fact, most of the experts mentioned are lawyers with no experience in the specific field of socio-legal measurement and evaluation, cf. Cappellina 2020, 148).

This criticism could lead to question whether the EUJS is an appropriate instrument to assessing outputs consistent with indicators since the choice of the method, that implies the choice of indicators, directly affects the final results. This point emerges evidently if one considers the specific indicators set out by the European Commission through which it measures the effectiveness of judiciary. In the European Parliament Report *"On the EU Justice Scoreboard - civil and administrative justice in the Member States"*[36] , rapporteur T. Zwiefka emphasized the importance of meeting certain fundamental criteria such as the equal treatment of MS, objectivity and the comparability of data. In general, MEPs represent a stimulus for the Commission. In this sense, MEPs pushed for the extension of the scope of the tool (to include corruption) and one MEP asked for the introduction of the mandatory transmission of data by Member States.[37]

(ii) With regard to the category of contestation, scholars focus on **methodology** and **data evaluation**. In particular, scholars have dealt with how the result is processed and whether the process is capable of explaining the dimension of judicial effectiveness. In this sense, "the way in which data is collected and reported at national level for these European initiatives generates and perpetuates this difficulty in gathering comparable data sets" (Onţanu, Velicogna 2021, 454). Dissensus on the method chosen to collect data persists and leads to a second question, namely whether the data collected impartially reflect the inner meaning of each indicator set by the EU Commission. When one considers the use of this data in political debates and court cases, it is easy to see the importance of this point (in the CJEU's case-law, the only official document that expressly mentioned the EUJS is the AG E. Tanchev Opinion in Joined Cases C-585/18, C-624/18 and C-625/18, see Pech 2021, 324, nt. 104[38]). On the merits of the data collected, most of the criticism comes from the MS. The most striking case is Poland. The Polish government uses EUJS data according to its needs. In this sense, when the EUJS provides a positive assessment on the justice system (for example, on

the public expenditure for the justice system), the government highlights the result in comparison with other MS, even though it was condemned by the European Court of Human Rights for the excessive length of the procedure (see Rutkowski and Others v. Poland). On the contrary, when EUJS lead to a negative evaluation, as in the case of above-average effectiveness of the Polish judicial system "the Polish government merely suggested this could be due to unreliable statistics" (Pech 2021, 323). At the same time, Hungary started using the EUJS data as an argument in support of the independence of its own judiciary (e.g. in the context of art. 7 TEU procedure, see Pech 2021, 323-324 and section 2.1. above). The cases mentioned lead to a preliminary conclusion: a distinction must be made between general criticism and dissensus, whereby the essential distinction is that dissensus is impossible to overcome within the political confrontation that marks democratic systems. This is also identifiable in this specific tool (Coman 2022). The proliferation of dissenters, particularly at the level of the Member States, brings with it the technical dimension of data and evaluation. For this reason, in order to improve the use of the EUJS (which implies the effectiveness of this tool), it could be essential to overcome the problems of methodology and data evaluation.

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[23] See also article 47 of the Charter of Fundamental Rights of the European Union.

[24] Other indicators directly related to the efficiency are: the monitoring and evaluation of court activities, the Information and Communication Technology (ICT) systems, the alternative dispute resolution (ADR) and the training of judges (see Communication, COM(2013) 160 final, 4-5, available here).

[25] See point 36: "Welcomes the Commission's proposal for a permanent scoreboard on justice in all 27 EU Member States as put forward by Vice-President Reding, which shows that safeguarding the independence of the judiciary is a general concern of the EU; underlines the fact that in some Member States serious concerns might be raised on these issues;calls for an enlargement of the justice scoreboard also to cover criminal justice, fundamental rights, the rule of law and democracy, as already requested".

[26] See The 2014 Eu Justice Scoreboard. Available here.
[27]. See The 2022 Eu Justice Scoreboard. Available here.
[28] See Communication, "The 2014 EU Justice Scoreboard" COM/2014/0155 final.
[29] Available here.
[30] Available here.
[31] Available here.
[32] Available here.

[33] See Communication from the Commission "The 2019 EU Justice Scoreboard", COM(2019) 198 final. Available here.

[34] Available here and here.

[35] On the denouncing of duplication see also the oral speech in the EP by Rebecca Taylor (ALDE): "Mr President, the oral amendment on behalf of the ALDE Group is as follows: 'Takes note of the EU Justice Scoreboard with great interest; calls on the Commission, in consultation with the European Parliament, to take this exercise forward in accordance with the Treaties with the engagement of the Member States, while bearing in mind the need to avoid unnecessary duplication of work with other bodies" (www.europarl.europa.eu/doceo/document/CRE-7-2014-02-04-INT-2-118-000_EN.html).

[36] Available here.
[37] Question for written answer by Antony Hook, E-002534-19 to the Commission, Rule 138. Available here.
[38] The information is also updated at 3 march 2023.

4.3. The Rule of Law Reports

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Built as a response to growing fears about the erosion of democratic principles and the worrying trend of democratic backsliding, the EU Rule of Law Report (RoL Report) is a yearly publication edited by the European Commission to monitor the state of rule of law in the Member States. Being the core commitment of the EU Rule of Law Mechanism, it provides insight into rising challenges or promising developments. To achieve as such, it encourages the involvement of national parliaments, national and local authorities and other stakeholders in discussing emerging defies and solutions.

Since its first edition, dating back to 30 September 2020, the RoL Report includes a synthetic communication on the overall situation across the Union as well as individual chapters on each of the 27 Member States assessing the country-specific situation. The report evaluates the rule of law based on factors such as judicial independence, corruption, and protection of basic rights, and groups these developments into four categories: the national justice system, anti-corruption measures, media pluralism and freedom, and other institutional checks and balances. These categories have been thoroughly evaluated by scholars with regard to their helpfulness in assessing the level of conformity with the RoL (Mannella, Paoletti and Raspadori, 2022, 30 ff.)

As a **soft preventive instrument**, this annual publication differs from the other EU's rule of law toolbox instruments at disposal since it allows for early warning and information. However, reportedly the follow-up is limp as the outcome of the report only fosters interparliamentary cooperation and debates between the European Parliament and national parliaments as well as consultations within the Council. In this vein, the RoL Report helps the EU institutions to identify and address potential rule of law issues before they become more serious or have a broader impact on the EU as a whole. In other words, it serves as evidence of the EU's commitment to the rule of law as part of the wide-ranging set of procedures established by the European Rule of Law Mechanism, although it cannot respond to serious breaches, which are to be addressed by other tools.

The **methodology** of the report involves a specific timetable and relies on a combination of written contributions by MS and non-governmental organisations, experts' opinions and targeted stakeholders' consultation, the Commission's country visits based on a network of national contact points, as well as publicly available information. Recent studies suggest that this evidence-based and expert-led approach is a depoliticization strategy enacted when facing bottom-up political pressure (Schimmelfennig, 2020; Bressanelli, Koop and Reh, 2020).

The **aim** of the report is to engage in and facilitate an exchange between the European Commission and those Member States where a problem is identified. If the dialogue fails and does not induce Member States in undertaking reforms, the Commission may release country recommendations, outlining steps that need to be taken to restore the rule of law.

The **genesis** of the report can be traced back to the EU's commitment to promoting and safeguarding the rule of law as a fundamental value of the EU, as enshrined in Article 2 TEU. Since 2016, the European Parliament (EP) firmly urged the Commission and the Council to sign an EU Pact for Democracy, the Rule of Law and Fundamental Rights (DRF) through an inter-institutional agreement including both preventive and corrective elements. This pledge is contained in a set of Resolutions (see at least the ones of European Parliament resolution of 25 October 2016 with recommendations to the Commission on the establishment of an EU mechanism on democracy, the rule of law and fundamental rights[39] .

The European Commission initially had some reservations about the recommendations made by Parliament, primarily due to concerns about their concrete and legal practicability. However, in 2019, it took a major step forward by launching the Rule of Law Review Cycle (RLRC), later renamed the Rule of Law Mechanism. This initiative received support from the Council proceeding with the strengthening of its Annual Rule of Law Dialogue. In this sense, in its conclusions on the "Evaluation of the Annual Rule of Law Dialogue"[40], it agreed that the effort "could be effectively furthered by undertaking a yearly stocktaking exercise concerning the state of play and key developments as regards the rule of law" (para. 8) and that the cyclical exercise "could make use of the Commission's annual rule of law reports, which would create synergies between the institutions" (para. 10). However, in a comment issued before the note, the Council underlined how consensus on this document "could not be reached" on the conclusions, so that the text "was supported or not objected to by 26 delegations" (possibly Hungary abstained: see the press statement from Hungarian Minister of Justice, Judith Varga, 2019).

The EU Rule of Law Report (RoL Report) provides yearly insight into rising challenges or promising developments.

Since the RLRC was designed to be a set of actions based on a "benevolent" and "compliant" Member State paradigm (Pech et al., 2019), concerns were expressed about the effectiveness of the exercise. Additional questions have been raised about the use of local contact persons in the RLRC and the potential impact on the impartiality and accuracy of the reports produced, whether the contributors may have been "politically captured" (ibid.).

However, the Commission explained the rejection of the EP proposal to include in the reporting exercise a panel of independent experts because of the concerns about "the legitimacy, balance of inputs, and accountability of results" (EU Commission, 2019a).

Moreover, the communication of July 2019 (EU Commission, 2019b) failed to effectively tackle rule of law issues in deteriorating illiberal democracies, despite its good intentions (Kochenov, 2019). The blueprint was based on the establishment of constructive dialogue with "would-be" autocrats instead of imposing sanctions. This approach proved to be fruitless, as illiberal democracies leaders were more likely to challenge EU institutions than to cooperate with them (Pech et al., 2019).

Likewise, the reporting exercise, initially based on existing instruments such as the EU Justice scoreboard and the European semester, immediately triggered dissensus among scholars, challenging the added value of the effort to investigate Hungary and Poland next to Finland or the Netherlands, without delving into "constitutional capture" of MS and thus probably deviating from real problems (Kochenov, 2019, 432). In other words, "an increase in the number of novel rule of law instruments is matched by further deterioration" of critical situations in specific MS, instead of effectively restoring legal compliance (Priebus, 2022, 1685).

Dissensus was rooted also in the Parliament's reaction to RLRC, since the resolution of 7 October 2020 (European Parliament resolution of 7 October 2020 on the establishment of an EU Mechanism on Democracy, the Rule of Law and Fundamental Rights (2020/2072(INI)) stressed how the annual assessment failed to embody the areas of democracy and fundamental rights, including freedom of association and the rights of vulnerable groups, thus protracting in some MS breaches of Union values as protected by Article 2(4) TEU. In particular, the RLRC was criticized for "excessively soft language, lack of context, and foreseeing no remedies for diagnosed problems" (Grabowska-Moroz, 2022), thus paving the way to an imminent "densification of the rule of law toolbox" (Pech, 2020).

Announced in the State of the Union Address[41], the publication of the first RoL Report dates on the 30 th of September 2020. It signals the definitive dismissal of the EP's proposal of a DRF

Mechanism. Key differences with the EP's scheme are evidenced in the van Ballegooij Report for the European Parliamentary Research Service (see European added value of an EU mechanism on democracy, the rule of law and fundamental rights Preliminary assessment), underlining that the scope of the RoL Report is more limited than Article 2 TEU, that it does not encompass an interinstitutional agreement and that it does not assign an official role to expert panels (2020, 8). Conversely, most scholars argue that the scope is too broad since the EU institutions can monitor developments and challenges in areas that fall outside the ambit of EU law (Pech, 2022, 38).

However, the RoL Report has several **positive features.** Firstly, the consistency and homogeneity in the four topics and subtopics covered by the pillars provide a clear understanding of the evolution of individual issues over the years. In addition, contributions from Member States and stakeholders offer different perspectives beyond those revealed by country visits. The European Parliament applauds the Commission's efforts to engage in dialogue and to apply the same monitoring criteria and index to all Member States, respecting the principles of equal treatment and proportionality, despite being concerned that the Report falls short in assessing the effectiveness of changes made by each country (EP, 2021, recital E). More in general, the Commission's ability to produce a high-level reporting exercise is highly appreciated, even though the deadlines are always challenging.

On the other side, since the 2020 Report, most scholarly contributions highlight important **pitfalls** , avowing how the experience is "failing to give the necessary context, and to connect the dots" of a "devastating picture" (e.g. Bárd, 2020, 3). Likewise, weaknesses of this kind have been detected in the two following reports, from the reluctance of the Commission to trigger harder remedial tools in dealing with more serious RoL breaches to the use of understatements, "toothless" expressions (Kelemen, 2020) or even "condoning language" (Azmanova and Howard, 2021, 10) to describe worsening realities in autocratic states. Also, the idea that the Report serves as a preventive tool is overly ambitious. In reality, the outcomes demonstrate that it failed to deter Rule of Law breaches. A simple reporting cycle without follow-up mechanisms cannot discourage Member States from acting in violation of Rule of Law values. Furthermore, specific shortcomings related to the four pillars have been identified (Pech, 2022, p. 94), indicating untapped potential and ample room for improvement based on the practice. A more general concern is also underlined by Coman (2022, 14), stressing that the whole set of RoL soft tools is "the result of one or many political battles" between EU institutions, which jeopardize their mutual effectiveness.

Stakeholders' input documents offer valuable insight into how the Rule of Law Report can be modified to address these concerns. Jakab puts forward the necessity to better quantify RoL either by developing a more sophisticated index than the EU Justice Scoreboard or by using a combination of the existing ones, such as the World Justice Project Rule of Law Index (Jakab, 2019, 3). Rohlfing and Wind emphasise that indexing issues are even more serious when indicators are "inattentive to and unable to account for a gradual legalist degradation of democracy" (2022, 2). A vision shared by a large coalition of civil society stakeholders is that an unfavourable evaluation ought to result in more than just suggestions and should entail automatic legal and/or financial repercussions.

The Commission tried to **address the criticisms** by providing some responses to suggestions made by the EP, stakeholders and scholars. The 2022 RoL Report now draws up specific country recommendations for the first time to support MS in planned or ongoing reforms or to address systemic challenges and identify improvements. The Commission clarified that they are now "sufficiently specific to allow Member States to give a concrete and actionable follow-up, taking into account the national competences, legal systems and institutional context, as relevant" (para. 2). However, the Commission remains firm in its stance against involving external experts, citing concerns about legitimacy, input balance, and accountability for results. As such, the RoL Report still reflects the institution's own evaluation, which will be the one answerable for.

After three cycles of reporting, another kind of dissensus emerged. It is referred to as the **East-West dissensus** in managing specific rule of law issues stressed in the Report (Pech, 2022,

128; Waldron, 2021, 121). It is worth noting that this form of dissensus clearly affects the effectiveness of the EU's specific RoL policies, undermining their credibility and contrasting with the dialogue-based nature of the report. It is significant, for example, that among the stakeholder's contributions to the 2022 report, neither Poland nor Hungary did submit any input. In the 2021 MS feedback documents, Hungary preliminarily stated that "based on the negative experience gained in relation to the Rule of Law Report 2020, this cooperation cannot be regarded as a commitment to the Commission's Rule of Law Mechanism". Detailed statement on Hungary's opposition to the instrument can be found in a very tense declaration released by the Minister of Justice, underscoring how the Commission does not act upon any legal basis for the monitoring exercise nor it does proper resources, thus resulting in a totally "arbitrary" report based on external sources.

In conclusion, since its inception the EU's RoL report has undergone rapid and extensive changes, which can be interpreted in both a positive and negative light. On the one hand, it may be viewed positively as a clear indication of a widespread agreement regarding the crucial significance of the rule of law and a growing recognition of the existential danger posed by rule of law backsliding to the EU. On the other hand, this transformation may be seen as a missed opportunity to directly confront those who have intentionally weakened the rule of law in their countries (Oxford Analytica, 2020; Closa, 2018, 696ff.), as the focus could have been directed to stronger action.

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5. THE ECONOMIC AND FISCAL LEVERAGE

5.1. The European Semester: EU Rule of Law Guidance, Monitoring and Enforcement Through Economic Governance Mechanisms

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Until the outbreak of the COVID-19 pandemic, due to the lack of a single comprehensive instrument dedicated to the protection of fundamental values, EU institutions have consistently relied on economic governance mechanisms to safeguard rule of law principles across the Member States (European Commission, 2013). In particular, the **European Semester has arguably become one of the European Commission's preferred institutional frameworks to advance its rule of law agenda**. This section focuses on the role of the European Semester in EU rule of law surveillance, it examines the specific economic governance tools adopted for rule of law guidance and monitoring within the European Semester, and discusses their advantages and limitations.

Since its establishment in 2011 the European Semester has emerged as a key component of the Economic and Monetary Union (EMU) and the main institutional architecture for the coordination of Member States' fiscal and macro-economic policies in the EU (Verdun and Zeitlin, 2018). If anything, the two economic crises the EU has experienced over the last decade – the global financial crisis and the COVID-19 pandemic – have further consolidated the **European Semester as the instrument through which national macro-economic policies are negotiated and possibly enforced**, especially for euro area countries (Vanhercke and Verdun, 2022). The European Semester mainly comes with a set of soft-law tools, including communications, opinions, reports and recommendations. These are intended to facilitate a constructive dialogue between the European Commission and the Member States regarding the timely alignment of national socio-economic policies with EU benchmarks.

The annual cycle of the European Semester starts off in November with an Autumn Package consisting of the Annual Sustainable Growth Survey (ASGS) on the EU's medium-term economic policy agenda, the Alert Mechanism Report (AMR) for countries under the Macroeconomic Imbalance Procedure (MIP) and a Euro area recommendation to address economic policy issues in the currency union. In May, with the Spring Package, the European Commission elaborates a country report, which takes stock of ongoing national reform programmes (NRPs), and a series of country-specific recommendations (CSRs) for each Member State, providing tailored advice on the socio-economic policy measures ahead. While country reports are issued by the European Commission alone, CSRs are proposed by the European Commission and adopted by the Council by qualified majority after unanimous endorsement by the European Council. At the end of the annual cycle, and by 15 October each year, the Member States submit their national draft budgetary plans, which are then evaluated by the European Commission based on the criteria of the Stability and Growth Pact (SGP) and the CSRs (see Figure 1 on page 62).

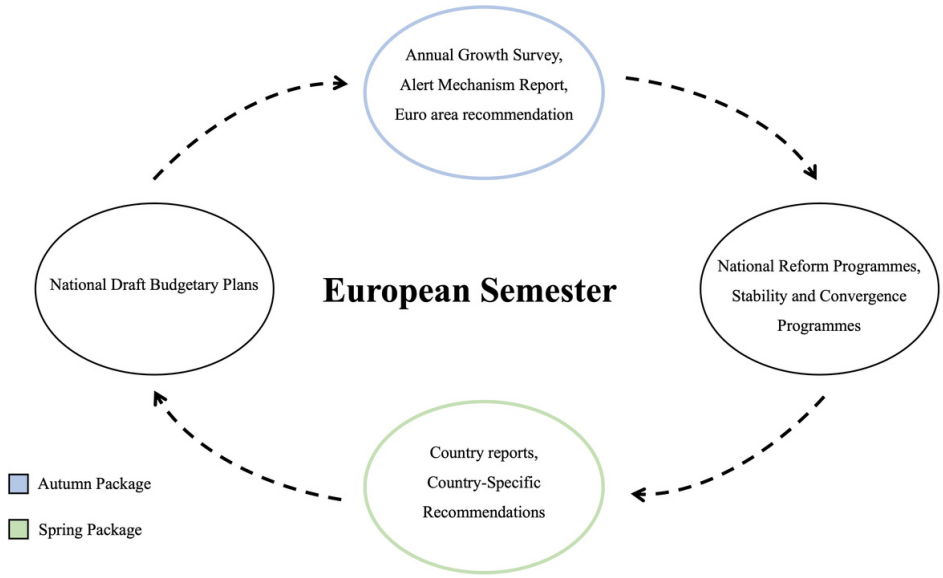

Figure 1 Visual presentation of the European Semester economic coordination cycle.
Source: Authors' own elaboration based on Council of the EU, 2023.

One of the most overlooked aspects of the European Semester in the scholarly literature concerns its consolidated role as an institutional framework for EU rule of law guidance, monitoring and enforcement. In the absence of a single comprehensive rule of law mechanism, **EU institutions had extensively relied on the Spring Package of the European Semester to provide advice on, and monitor compliance with, rule of law principles** and the fundamental values of the Union. Indeed, following its 2014 communication entitled 'A new EU Framework to Strengthen the Rule of Law', the European Commission set out to use the existing framework of economic policy coordination to address rule of law challenges, arguing that the European Semester would provide a unique opportunity to promote the rule of law at the national level. Since 2016, in both country reports and CSRs addressed to the Member States, the European Commission has in fact made systematic reference to the quality of institutions (including the separation of powers and judicial independence), transparency (including access to public information and the quality of the anti-corruption framework), media freedom, political pluralism (including civic oversight, social dialogue and stakeholder engagement) and respect for the primacy of EU law (European Commission, 2022a). Especially in the case of countries with low or deteriorating rule of law credentials – like Hungary and Poland (Pech and Scheppele, 2017) – such economic governance instruments have over time become key for EU institutions to place rule of law concerns at the top of national political agendas while avoiding the more controversial options related to Article 7 TEU or the infringement procedure (on which see sections 2.1 and 2.2. above).

To this effect, country reports take stock of a country's performance in terms of respect for the rule of law and the fundamental values following the submission of NRPs and the stability and convergence programmes (SCPs) by the Member States in April each year. Country reports thus pave the way for specific advice by the Commission and Council in the form of CSRs on the steps that the Member States need to take to make progress on outstanding rule of law issues. To be sure, references to the rule of law in country reports and CSRs, as an integral part of the European Semester, are always associated with macro-economic considerations (Fromont and van Waeyenberge, 2022). In its 2022 CSRs to Hungary and Poland, for instance, the European Commission made clear that 'the independence, efficiency and quality of the justice system are crucial to attracting business and enabling economic growth', as they contribute to 'a stable and predictable business environment and a friendly investment climate' (European Commission 2022a; 2022b).

The practice of enforcing rule of law principles by means of economic governance instruments under the European Semester has its advantages and limitations, both stemming from their nature as soft-law tools . Soft law refers to 'rules of conduct which, in principle, have no legally binding force but which nevertheless may have practical effects' (Snyder, 1993). EU rule of law monitoring under the European Semester is thus non-binding and takes place along the lines of the

Open Method of Coordination (OMC), a form of intergovernmental governance based on benchmarking, peer pressure, and naming and shaming (Heritier and Rhodes, 2010). It starts with setting EU-level standards, which are addressed by the Member States in their NRPs, which are then in turn assessed in the country reports and CSRs by EU institutions, notably the European Commission and Council, with nothing but the expectation that the Member States will work towards meeting those standards. **Differently from the CSRs targeting national macro-economic policies under the European Semester, those concerning rule of law issues do not fall within the 'corrective arm' of the SGP, the so-called 'Excessive Deficit Procedure'** (Bekker, 2021). In other words, in case of non-compliance, no further procedure is activated, thus ruling out the use of sanctions.

Differently from the CSRs targeting national macro-economic policies under the European Semester, those concerning rule of law issues do not fall within the 'corrective arm' of the SGP, the so-called 'Excessive Deficit Procedure' (Bekker, 2021).

On the one hand, soft-law instruments of a non-binding nature such as country reports and CSRs targeting rule of law issues can also induce changes in the institutions and practices of the Member States in the medium- to long-term. Non-binding tools 'can gradually become politically, socially, and morally binding for the actors involved' (Jacobsson, 2004, p. 359) due to the intervention of factors beyond the legal force of an act, such as knowledge and meaning-making (Stefan, 2017). To this effect, soft-law instruments can foster a common understanding of the challenges and policy goals of the Union across the Member States, thus increasing the scope for voluntary cooperation. In a recent study, for instance, Zeitlin and Vanhercke (2018) have found that the implementation of CSRs at the national level is increasingly facilitated by the emergence of peer review, deliberation and consensus-seeking practices among Member State governments at the EU level. On the other hand, due to lack of legally binding force, any type of coercion to enforce soft-law mechanisms is excluded, leaving negotiations as the only game in town (Chinkin, 1989). Without coercive means, most notably the use of sanctions, EU institutions are deprived of a crucial deterrent against potential non-compliance by individual Member States, which by itself makes free-riding on rule of law issues inexpensive. This may well explain why, while most CSRs are followed by at least 'some progress' in terms of implementation at the national level, full or substantial implementation levels remain low and the European Commission's monitoring is itself not always complete (European Court of Auditors, 2020; see also Darvas and Leandro, 2015).

To conclude, following the outbreak of the pandemic crisis, the European Semester has become the governance framework for the assessment of the National Recovery and Resilience Plans (NRRPs) presented by the Member States under the Recovery and Resilience Facility (RRF). To be approved, national reform programmes thus need to be in line with the economic policy objectives of the EU as well as the CSRs (Crum, 2020). In this respect, the RRF regulation (2021) provides the European Commission and Council within the European Semester with the additional power to suspend the disbursement of financial assistance to individual Member States in case of persistent macroeconomic imbalances or failure to take the recommended corrective action. In and of itself, the RRF regulation does not explicitly include rule of law issues among the grounds for triggering the suspension of funds , although it refers to the rule of law conditionality regulation for its implementation (Article 8; see section 5.3.). It thus remains to be seen how the practice of enforcing rule of law principles by means of economic governance tools within the European Semester will evolve in light of such a recent development and against the backdrop of the advantages and limitations discussed above.

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5.2. The Ambiguities of Conditionality as an Instrument of EU Internal Governance

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Conditionality is a means of EU governance inspired by the practice of other international organisations (e.g. Council of Europe, International Monetary Fund, World Bank) (Coman 2022, 88). The EU has used it firstly to govern its **external action**. For example, in **bilateral agreements negotiated by the EU**, clauses that make the granting of financial **assistance or development aid conditional upon the respect of human rights**, in different sectors, have regularly been codified (Gráinne de Búrca, 2011, 685). In addition, conditionality has been used to control the **accession of new States to the EU**. During the fifth enlargement process, in particular, the constitutional tone of the mechanism emerged in its most evident nature and affected the substance of the national Constitutions. Conditional access was meant not only to timely adapt the domestic legal system to the *acquis communautaire*, but also to introduce, practice and develop democratic and the rule of law principles (Cremona 2002; Pinelli 2004; Coman 2022). Conditionality was needed precisely to ensure a *'win-win'* solution: namely to allow, on the one hand, the Eastern European countries to proceed in parallel with the democratic transition and consolidation and with the accession and, on the other hand, the Union to oversee the transition process, on its own terms, predefining the path to the entry and avoiding a destabilizing effect on the integration process (Bartole 2020).

Many have pointed out that a major change in the Union's interpretation of conditionality took place with the conclusions **of the Luxembourg European Council in 1997** (Kochenov 2008)[42], when a sort of 'hierarchy' was established among the Copenhagen criteria, giving the **primacy to the 'block' of political criteria**, the fulfilment of which became a prerequisite for the opening of any negotiations on accession (Tucny 2000). This has led to contestation and to a number of enforcement issues, the consequences of which are perhaps still being faced today. While the European Commission, the institution entrusted with monitoring the progress of countries towards the Copenhagen criteria, had no problem in defining and detailing technical standards for the implementation of the *acquis communautaire*, it did **not** set **clear guidelines and parameters on the overarching political criteria**, which have been considered even more vague than those developed, for instance, by the Venice Commission (Kochenov 2008). At the same time, given the very sensitive nature of the subject-matter the cautious approach of the Commission was instrumental not to interfere too much with domestic constitutional discretion by imposing "specific institutional solutions and devices" and it better preferred to set "general templates and thresholds" (Sadurski 2006, 31).

The weakness of conditionality in the accession stage and the backlash it can trigger are probably linked to the dilemma that traps the instrument. To avoid any direct violation of national sovereignty, supranational institutions setting the conditions need to be quite cautious on what they can do, especially if the constitutional architecture may be affected. To prevent allegations of ultra vires action, normally the **bargaining nature of conditionality allows to claim that the conditions are not imposed but are rather negotiated between the parties** (Bartole 2020, 21-24). Yet, sometimes the line between negotiation and imposition is blurred. This has clearly emerged in the use of conditionality as an instrument of internal governance. **The experience of the financial assistance during the Eurozone crisis has shown in fact that when conditionality is implemented in a very strict manner**, without leaving any margin of manoeuvre to one of the parties, lacking any leverage in the negotiations, it can be turned into a severe constraint on national autonomy (Kilpatrick 2015; Markakis 2020).

This was the very first intensive use of conditionality for internal governance outside the domain of **cohesion policy,** which **since the 1990s used to be the main example of systematic application of the instrument as a means to directing the EU internal action.** Compared to the ordinary management of conditionality in the framework of the European external action and of cohesion funds, the financial crisis that hit Europe in 2010 has somehow led to an upgrade in the use of emergency conditionality as a tool to respond to asymmetric shocks, since the European Treaties do not provide clear legal bases to intervene (Leino-Sandberg and Ruffert 2022).

The Eurozone crisis paved the way to a transformation in the understanding of conditionality in the EU. In general terms, the **strict application of conditionality** does not set a special conditionality arrangement. Its specificity rests upon the way the implementing rules are tightly applied, and it served to accept that public financial assistance could be offered to Eurozone countries (Ioannidis 2016). For instance, the various Memoranda of Understanding (MoU) concluded between the Government of the rescue country (i.e. Greece, Portugal, Ireland, Spain, Cyprus), the Board of Governors of the European Stability Mechanism (ESM) and the European Commission detailed the reforms needed in exchange for financial assistance to a degree that was never envisaged before, and it concerned issues that were not necessarily linked to EU matters (e.g. wage and pension reforms, in particular in the public sector) (Faraguna, Fasone and Tega 2019). Often **targets and reforms were to be achieved within very tight deadlines in order to continue to benefit from the loans, with review missions on the territory of the beneficiary States at least every six months** (the well-known Troika missions, composed of representatives of the IMF, the ECB, and the Commission). Certainly, the conditions set were not the result of an arbitrary imposition by the Troika. They were proposed by the requesting country, carefully examined by those who managed the funds and by the EU institutions, revised if necessary, and finally co-determined in the MoU. The same legal nature of the MoU has raised more than one doubt, dividing scholars between those who have argued for their binding force (Correia Baptista 2011) and those who speak of soft law (Katrougalos 2013). However, it cannot be neglected that the negotiating capacity of a bailout country is quite limited and it may be inclined to accept whatever condition is imposed under the risk of the collapse of the economic and financial system. Furthermore, the conditions of the rescue package extended well beyond the loan period to the ex post surveillance phase, which can lasts for decades, until at least 75% of the debt incurred (and the interests on the debt) has been paid off [43].

When conditionality is implemented in a very strict manner , without leaving any margin of manoeuvre to one of the parties, lacking any leverage in the negotiations, it can be turned into a severe constraint on national autonomy (Kilpatrick 2015; Markakis 2020).

The backlash of the implementation of strict conditionality regimes during the Eurozone crisis triggered a reconsideration of the mix of conditions and procedures in the new funding instruments to face the Covid-19 multiple crises. The **Next Generation EU package (NGEU) and particularly the Recovery and Resilience Facility (RRF)** aimed to balance the positive and negative conditionality in the negotiation scheme. Access to **funding is in fact remarkably based on the compliance with multiple conditionality regimes**, according to which the EU budget should serve specific EU law and policy goals and spending should protect the EU financial interests.

The **flexible use of conditionality** makes it applicable to wide variety of sectors and policies with different results. Scholars highlighted a series of advantages and disadvantages in the use of conditionality at the national level (Vita 2018), which contributed to polarising the debate on the use of conditionality. Regarding the **advantages** , conditionality ensures minimum standards of unity and uniformity in the supply of public services, in the guarantee of rights and in the enjoyment of public goods; it ensures cooperative, negotiated and

generally shared solutions to problems of an economic and institutional nature, given the inherent asymmetry that governs its application; it allows the effective management of some critical issues, such as in cases of interdependence, externalities and free-riders; it promotes forms of vertical and horizontal solidarity and enhances the role of citizens.

With respect to the **disadvantages**, conditionality can lead to an encroachment of competences by the 'higher' level of government towards the 'lower' ones; can undermine the quality and transparency of decision-making processes; can diminish or alter the value of democratic accountability channels, shifting the responsibility of choices and decisions on a level of government other than the one that actually takes them; can surreptitiously limit or modify the enjoyment and distribution of rights and goods among citizens.

After all, **conditionality always assumes a certain level of mistrust or limited trust on the subject on which the conditions are placed**. It appears, then, that in all the cases where conditionality has been applied there was a degree of **asymmetry between the parties**: the actor requiring conditions had the final say on both setting the conditions and on the monitoring of their implementation. This inner ambiguity of conditionality can even lead to question, in the most extreme cases, its compliance with rule of law principles particularly when it entails an exercise of too broad discretion without any effective judicial remedy (Kilpatrick 2015) against the decision of the "condition-maker".

It follows that various accounts have been confronted on the **nature of conditionality**, well-exemplifying the level of **scholarly dissensus** that surrounds the tool. Some consider conditionality a mechanism of "reinforcement by reward" (Schimmelfennig, Engert, Knobel 2003, 496); others view conditionality as a coercive tool (Salmoni 2021) or as a tool of "colonization" (Smilov 2006, 331) however implemented without the imposition of formal binding prescriptions; for others, eventually, conditionality can hardly be differentiated by the idea of sanctions, in positive or negative terms, considering that a certain conduct by the State triggers a financial benefit or a punishment (Montaldo, Costamagna, and Miglio 2020).

According to the scope of application and the effects, scholars have identified different types of conditionality. Firstly, **conditionality can be positive**, when incentives are provided to meet the criteria laid down, or **negative**, when the final effect is punitive, such as when funds that otherwise would have been disbursed to the beneficiary are withheld (Fierro 2003). For example, the RRF Regulation entails both positive and negative conditionality mechanisms. The former applies to the approval of national recovery and resilience plans (Article 20) as well as to the satisfactorily fulfilment of milestones and targets (Article 24), thus entailing the disbursement of the relevant instalment. However, as further clarified by the Commission's RRF Communication of 21 February 2023 [44], the RRF conditionality can also be negative and can entail the suspension or the withdrawal of funds according to a methodology devised by the Commission itself that counts the relative weight – the coefficient - of each reform and investment out of the overall system of milestones and targets envisaged by the plan [45].

Secondly, **conditionality can operate either ex ante or ex post** (Vita 2018, 18). Conditionality works ex ante when the Member States have to meet the conditions set prior to disbursement of the funds, such as in the case of structural funds; the macroeconomic conditionality under the European Semester, instead, works ex post, as compliance with the conditions is verified and monitored during the financial period under review or after the fiscal year.

Thirdly, **input-oriented conditionality** is based on inputs provided when the actions and steps to be followed are predetermined in detail in order to obtain a series of results (according to the so-called 'check list method'): the rule for all structural and investment funds. In contrast, **output-oriented conditionality** is not yet followed in cohesion policies, but it applies to the RRF and predetermines, not only a certain purpose constraint, but also concrete results in terms of policies (Vita 2018, 19).

Fourthly, **conditionality may affect the same sector in which the expenditure is made** , as it is for Structural Funds' investment expenditure in the waste sector, which must be in compliance with the provisions of the Waste

Framework Directive, no. 2008/98/EC (Regulation no. 2021/1060, Annex IV). **It can come across several sectors**, for instance the respect of gender equality as a condition for the promotion of non-discrimination in the Union has to be followed in all the actions of the structural and investment funds (see Annex IV). Or, finally, conditionality can be a "diagonal" as it is the case where macroeconomic conditionality makes the possibility of spending the structural funds conditional on the compliance with the criteria set for the financial assistance at EU and at international level (Art. 19, para 8, lit. d, Regulation no. 2021/1060) (Bieber and Maiani 2014). That said, the conditions set usually remain conceptually distinct from the specific objectives that the EU spending action envisages: this is the case, for example, for infrastructural investments that must be subject to environmental sustainability conditions.

Three main kinds of conditionality regimes can be identified in the RRF: thematic conditions, macroeconomic conditions & the general regime for the protection of the Union budget through the rule of law.

NGEU introduces a range of conditionality regimes, which for the first time have been used to devise what has been described as a new method of government in the EU (Lupo 2022). In particular, the RRF has further implemented the different modes of operation of conditionality by providing intertwining regimes of conditions whose interplay shapes Member States' investments and reforms (section 5.4.). Scholars have provided different taxonomies to define the several conditions that govern access to funding under the RRF (Pisani-Ferry 2020, 6-7; Domorenok and Guardiancich 2022, 192). **Three main kinds of conditionality regimes can be identified in the RRF**. Firstly, **thematic conditions** aim at the implementation of EU public goods in fields like green, digital, inter-generational, gender policies[46] and, after the REPowerEU reform of the RRF regulation, the security of energy supply[47]. Under this regime, environmental goals assume specific relevance, as the principle of "do no significant harm" applies as a stringent limit to any economic activity pursued under the programme[48] and prioritises environmental protection over other relevant public interests. Only the need to meet immediate security of gas supply allows for derogation from the principle, under the control of the Commission[49]. In addition, the **macroeconomic conditions** exist with the aim of implementing the Countries Specific Recommendations (CSRs) adopted in the European Semester (see section 5.1.)[50].On the top of these conditions, another conditionality regime assists the implementation of the RRF amongst other funds. This is the **general regime for the protection of the Union budget through the rule of law,** which aims at the enforcement of EU law values as a means to protect the EU financial interests (see section 5.3.)[51]. The co-existence of these different regimes shall guide national reforms and investments towards specific goals fostering EU environmental, fiscal and democratic sustainability. Internal governance by conditionality allows the EU to control the performance of Member States under the NGEU and decide whether their action complies with EU policy goals, but the extent to which these mechanisms ensure **sufficient democratic oversight and ownership by domestic institutions and citizens** (rather than further strengthening technocratic governance) has been questioned (Dani, Chiti, Mendes, Menéndez, Schepel, and Wilkinson 2021, 326; Rittberger 2023).

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Endnotes

[42] Luxembourg European Council, 12-13 December 1997, para. 25.

[43] Art. 14, Regulation (EU) no. 472/2013 of the European Parliament and of the Council of 21 May 2013 on strengthening the economic and budgetary surveillance of Member States in the euro area which are or are in danger of experiencing serious difficulties with regard to their financial stability, OJ L 140, 27.5.2013, p. 1-10.

[44] European Commission, Communication on Recovery and Resilience Facility: Two years on. A unique instrument at the heart of the EU's green and digital transformation, COM (2023) 99 final, 21.2.2023, Annex II, drawing on the provisions of Article 24 of the RRF Regulation.

[45] See European Commission, Next Generation EU: European Commission endorses a partially positive preliminary assessment of Lithuania's first payment request under the Recovery and Resilience Facility, Press Release, 28.2.2023.

[46] Art. 18, Regulation 2021/241; points 2.5 and 2.6, Annex V, Regulation 2021/241.

[47] See Regulation no. 2023/435 of the European Parliament and of the Council amending Regulation (EU) 2021/241 as regards REPowerEU chapters in recovery and resilience plans and amending Regulation (EU) 2021/1060, Regulation (EU) 2021/2115, Directive 2003/87/EC and Decision (EU) 2015/1814.

[48] Art. 5 (2), Regulation 2021/241.

[49] Recital 13, Regulation no. 2023/435.

[50] Art. 17 (3) and 18 (4) b), Regulation 2021/241; point 2.2., Annex V, Regulation 2021/241.

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

5.3 The Adoption and Implementation of the "Rule of Law (RoL) Conditionality Regulation"

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Introduction

Although the EU has a range of well-established tools to notify and punish deviant members - some of which are consultative (see sections 4.1. to 4.3. above), while others have serious material and moral consequences (see sections 2.1 and 2.2. above) - none of them has managed to bring this corrosive trend to a halt. As a consequence **in 2018 the Commission proposed a new regulation for the "protection of the Union's budget" in case of generalised RoL deficiencies** (European Commission, 2018). The EU's new cycle of the Multiannual Financial Framework (MFF 2021-27), and later the Next Generation EU (NGEU) financial aid package reinvigorated the impetus to establish a novel tool for the protection of EU funds. However, the idea of a new instrument, which has the scope to intervene in the internal workings of a member state using financial sanctions, had not gained overarching support in academic circles. Further fault lines emerged between the supporters and critics of the "RoL Conditionality Regulation" following the negotiation, adoption, and delayed implementation of the conditionality mechanism. Each step will be reviewed in turn.

The prelude to the 2018 Commission proposal

Despite criticising EU inaction, some scholars did not condone the introduction of a new conditionality regime. Sedelmeier argued that conditionality could function when a highly valued prize is at stake (such as joining the EU), nonetheless, "material sanctions have limits as an instrument to rein in breaches of liberal democracy" (Sedelmeier, 2016:340). According to him, **the stronger the illiberal grip gets, the more difficult it becomes to advance changes against the backdrop of financial sanctions.** He equally drew attention to unintended negative consequences, such as making a scapegoat of the EU, and mobilising support for recalcitrant, illiberal governments (Sedelmeier, 2016:343). Therefore, Sedelmeier attributed greater potential to the naming and shaming element of the Commission's 2014 consultative RoL Framework. However, in hindsight it is clear that **consultative tools have not been utilised wisely**. The Council was adamant to engage in an inter-institutional competition with the Commission to reinstate its status via drawing up similar, parallel and highly ineffective tools (Kochenov & Pech, 2015), such as the yearly Council dialogues (Council, 2014) and later the peer review mechanism (Germany's Presidency of the Council, 2020).

Regardless of the above criticism, **the vast majority of scholars have been urging a more resolute reaction from the EU** (Halmai, 2018; Müller, 2015; Kelemen, 2020; Kirst,2021; Scheppele, 2016; Scheppele, Kelemen & Morijn, 2021; von Bogdandy et al., 2012). Yet, accord has been sparse, when it comes to the exact form and nature of an alternative RoL tool. Questions emerged whether the solution should be political or legal, and whether it should consist in creating a new legislation (Müller's Copenhagen Commission), or reforming some existing ones (Scheppele's systematic infringement). Briefly reflecting on the wider academic debate is vital to illustrate that the MFF and NGEU conditionality was not simple, straightforward choice.

Figure 1 Timeline of negotiating and implementing the "RoL Conditionality Regulation". Source: Author's own elaboration.

The creation of the conditionality mechanism

The Commission's 2018 proposal shows palpable differences compared to the final form of the regulation. Critics described the transformation of the tool as a transition from a RoL-focussed, procedurally robust instrument, to a weak, "mere budgetary conditionality mechanism" (Staudinger, 2022:737). In fact, also in light of the 2018 opinion of the Council's legal service, the text of the **regulation reiterates that the mechanism might be triggered only in case the Commission demonstrates "a sufficient and direct link between detected RoL violations and the sound financial management of the Union"** (Staudinger, 2022:737). Furthermore, the application of the tool became restricted to a "closed list of homogenous elements" instead of detecting "generalised RoL deficiencies" (Scheppele, Pech & Platon, 2020). In a similar vein, the title of Regulation 2020/2092 tellingly omits the reference to the "Rule of Law" altogether, as opposed to the initial Commission proposal title (Baraggia & Bonelli, 2022). Lastly, critics were also ready to point out substantive changes in the process of implementing the conditionality mechanism. Originally, the Commission's suggestions to impose sanctions were supposed to pass by reverse QMV in the Council, which was altered to simple QMV in July 2020 by the EUCO (2020b). According to Kirst, keeping reverse QMV[52] arrangements would have created an even more robust tool, "since it would have put the burden of proof upon the accused member state" (Kirst, 2021:106). Thus, simple QMV was interpreted as another blow on the efficiency of the new RoL instrument.

To the contrary, Łacny (2021) **welcomed the reformed, restricted scope of the conditionality mechanism, which** should increase the probability of deploying the tool, as opposed to earlier, vague RoL instruments. On another note, von Bogdandy and Łacny (2020) find reverse QMV incompatible with EU treaties, as "no legal provision under EU primary law authorises reverse QMV arrangements in the Council" (von Bogdandy & Łacny, 2020:9). Therefore, in sharp contrast to the previous group of scholars, von Bogdandy and Łacny (2020) believe that reforms were utmost necessary for the legitimate application of the RoL Mechanism. Likewise, even though Baraggia and Bonelli recognised some limitations in the regulation's final version, they do not consider all changes to be "watered-down compromises" (Baraggia & Bonelli, 2022:131). Not only do they agree with von Bogdandy & Łacny's interpretation of reverse QMV in the Council, but also, they echo the Council's Legal Services (2018) on the inevitable need to draw a clear distinction between Article 7 TEU and the RoL Conditionality Mechanism, to avoid producing parallel tools. Accordingly, they hail that part of the agreement, which compels the Commission to justify a clear link between RoL violations and protecting the EU's budget (Baraggia & Bonelli, 2022), to firmly anchor the RoL conditionality in Article 322 TFEU. In conclusion, scholarly dissensus has manifested along remarkably clear fault lines regarding the evaluation of the new RoL Conditionality Mechanism. The two sides encompass those, who wished to see the establishment of a widely applicable tool to counter RoL breaches, versus those, who intended to place greater emphasis on protecting the EU's budget in the framework of a narrower, budget-oriented instrument.

Implementation

The final rubber-stamping and **implementation of the RoL mechanism was engulfed in fierce institutional debates owing to the Polish and Hungarian veto threat**, which was offset with a controversial compromise. The conditionality mechanism could have been adopted in the absence of full consensus; yet, due to issue linkage with the EU's MFF and the own resources decision (Schramm & Wessels, 2022:9), it became indirectly susceptible to veto threats, and subject to quasi-unanimity decision. **The EUCO in its December 2020 conclusions (European Council, 2020a) presented a deal, which attached two time-consuming conditions to the implementation of the new regulation.** First, it was expressly acknowledged that an **action for annulment** could be brought in front of the ECJ, even though on a general level this is an implicit option with regard to any Union legal act (Article 263 TFEU). Secondly, after the ECJ's judgements, the **Commission was asked to establish detailed implementation guidelines** (European Council, 2020a). In response, the EP promptly accepted a stiff resolution, in which the institution scolded the EUCO for overstepping its treaty functions, and reminded the EUCO that its conclusions should be regarded as a political declaration instead of binding, legislative rules (European Parliament, 2020c:2). The EP already saw as problematic the EUCO's actions, when in July 2020 the EUCO altered reverse QMV to simple QMV in its conclusions on a whim, without proper institutional deliberation (European Parliament, 2020a and 2020b). Even if necessary inter-institutional bargaining took place at a later stage, the EP was not able to reinstate reverse QMV.

The scholarly debate following the actions for annulment by Hungary and Poland was equally divided into two opposing camps. **Academics in support of a wider RoL tool took wholeheartedly the EP's side, drawing attention to an unfair institutional imbalance, which propels the dominance of the EUCO** (Scheppele, Pech, & Platon, 2020; Schramm & Wessels, 2022). Scheppele, Kelemen and Morijn went as far as requesting the European Commission to trigger the conditionality mechanism immediately (Scheppele, Kelemen, & Morijn, 2021:6). Provided their appeal was published prior to the CJEU's judgements, it essentially encouraged the Commission to disregard the EUCO's conclusions. In stark opposition, once the decisions were delivered (C-156/21 and C-157/21), Fisicaro has **praised the ECJ for delivering a rigorous judgement, and coming to the "rescue of EU political institutions in the RoL battlefield"** (Fisicaro, 2022:352). He equally praised the Court for compartmentalising in well-delineated boxes the EU's RoL tools to dispel any doubts of overlaps (Fisicaro, 2022). Albeit, he also pointed out that the Court was too zealous to root the RoL mechanism in Article 322 TFEU, and as a result, the ECJ diminished the regulation's RoL element to an insignificant component, stating that sanctions "must be lifted where the impact on the implementation of the budget ceases, even though the breaches of the principles of the rule of law found may persist" (Fisicaro, 2022:347). Lastly, Baraggia and Bonelli (2022) **emphasised the unintended positive normative consequences of the judgement, such as reaffirming the EU's competences in ensuring judicial independence in its member states, pursuant to Article 19 TEU** (Fisicaro, 2022:147). Furthermore, the case was also an opportunity for the ECJ to "reflect more broadly on the legitimacy of conditionality tools", which was severely neglected during the Eurocrisis (Fisicaro, 2022:145).

The final rubber-stamping and implementation of the RoL mechanism was engulfed in fierce institutional debates owing to the Polish and Hungarian veto threat, which was offset with a controversial compromise.

This review of the RoL conditionality Regulation has demonstrated that conditionality was not considered to be an ultimate panacea to resolve the RoL crisis. Moreover, the final form and delayed implementation of the mechanism ignited fierce academic and institutional debates between those who wished to see the creation of a broad RoL instrument, and those who intended to place a narrow focus on protecting the EU's budget. As of May 2023, sanctions have been officially imposed only against Hungary on 16 December 2022 . According to the Council deal, cohesion funds have been partially frozen, though to a lesser extent compared to the Commission proposal, leeway for Hungary to receive all funds, in particular under the RRF has been maintained, should the country comply with the "27 super milestones" identified within the national recovery and resilience plans in the next two years (Tidey, 2022; Council of the EU, 2022). Therefore, only time can tell whether concerns raised by some scholars become a grim reality, or the RoL instrument will live up to its promise.

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Endnote

[52] The Commission's proposal is adopted unless a qualified majority of member states reject the proposal in the Council.

5.4. The Recovery and Resilience Facility and its Effects on the Rule of Law conditionality

Nicola Lupo (LUISS University)

The genesis of NGEU and RRF: The reaction to the pandemic and beyond

The Recovery and Resilience Facility constitutes the most important element of the Next Generation EU (NGEU), which is the package that the European Union issued, between the second half of 2020 and the first months of 2021, in order to face the economic consequences of the Covid-19 pandemic. After some initial hesitation, the EU decided to not only relax or suspend the financial rules that were in force, but also to start a common action comprising new reforms and investments carried out at the national level, using EU funds and framed according to supranational priorities and targets.

As it often happens, a crisis offers the opportunity to overcome veto powers, in this case the powers regarding EU debt issuance as a tool for financing the EU budget and the expansion of EU spending conditionality across various sectors (Howard-Schild, 2021). Although conceived as a one-off instrument, the Recovery and Resilience Facility (RRF) has a time-horizon of more than 5 years (until 31 December 2026), and, most of all, is the outcome of debates and proposals which developed in the European Union during the previous 10 years.

These features explain why the original **"method of government" that the RRF has put in place has been deemed to represent, according to many, a turning point** (F. Fabbrini, 2022, p. 36), if not a "Hamiltonian moment", as it has been argued by the then German Minister of Finance, Olaf Scholz, in a parallel with the US construction of a federal public debt at the end of the XVIII century (Lionello, 2020, p. 22). Given its encouraging start in the years 2021 and 2022, the same "method of government" has been extended to address new emergencies, such as the energy crisis arising from the war in Ukraine, and might also inspire the reform of the SGP for ordinary times.

A significant part of this "method of government" is represented by the required compliance with the (then just approved) Rule of Law Regulation (No. 2020/2092), to be ensured during the implementation of the National Recovery and Resilience Plans. This is an element that, as it will be remarked, strengthens the conditionality already embedded in this Regulation and is able to determine powerful effects in ensuring a more effective protection of the Rule of Law in critical MS.

The new "method of government" designed by the RRF and its first encouraging effects

As an effect of the RRF, for the first time the Union has borrowed large quantities of resources from the markets to finance, through grants and loans, a series of reforms and investments in each MS, co-determined with them. The **disbursement of these resources to each MS has been made conditional on the satisfactory achievement of a series of measures, defined through milestones and targets**, to be implemented over a five-year period, until 31 December 2026, in accordance with a precise timetable, codified in the individual NRRPs and in the operational arrangements that accompany them.

This "method of government" has been designed according to mechanisms of spending conditionality which began to be tested as tools of EU internal governance in the second half of the previous decade (Baraggia, 2015) but which, under NGEU and the RRF, fundamentally depart from the problematic standard of strict conditionality experienced during the Euro-crisis and the rescue programmes (see supra, section 5.2). The new method, instead, has considerable potential to ensure **the coexistence of and complementarity between EU-wide and domestic priorities** (Vita, 2017).

What had not happened for years, namely that the Union borrowed resources to fund investments in individual MS, was promoted in order to address the economic consequences of the COVID-19 pandemic and to foster recovery, making use of a creative interpretation of Treaty provisions. The adoption of NGEU has been described as an exercise in "creative legal engineering", aimed at allowing "a major shift in EU economic policy" (De Witte, 2021). Due to the substantial impossibility of revising the Treaties, an evolutive interpretation had to be quickly devised to enable the Union to financially support the recovery of its economy.

The European Commission based the **draft legislative acts composing NGEU on a multi-faceted legal constellation** (Fabbrini, 2022, p. 46). The legal basis for the first two Regulations adopted to deal with the Covid-19 pandemic was identified as being Article 122 TFEU[53]. To this end, **an innovative interpretation of Article 122 TFEU was proposed, relying on the joint reading of both its paragraphs** (Cannizzaro, 2020). On the one hand, paragraph 1, recalling the "spirit of solidarity between Member States" and lacking any concrete effect in the legislative practice until 2020 (Flynn, 2019; Chamon, 2021). On the other hand, paragraph 2 of Article 122 TFEU has been interpreted broadly in so far as it allows the European Union to grant "financial assistance2, under certain conditions, to a MS which "is in difficulties or is seriously threatened with severe difficulties caused by natural disasters or exceptional occurrences beyond its control". This last clause, which had already been used in 2010 as a legal basis for the regulation establishing the European Financial Stabilization Mechanism (EFSM)[54], has been very extensively re-interpreted and referred to all MS (Chamon, 2021).

The legal basis of Regulation (EU) 2021/241, which established the RRF, is provided, instead, by Article 175(3) TFEU, which allows for specific actions other than those implemented through those funds, which are also aimed at strengthening economic, social and territorial cohesion. The RRF falls within the scope of Article 175(3): financed in part by resources allocated to the structural funds, but mainly through borrowing. This debt is justified by the exceptional nature of the measure and the governance of the RRF follows procedural rules which are largely different from those featuring the structural funds, despite sharing with them both general and specific objectives.

Such an innovative and creative use of the legal bases has aroused criticisms by scholars who have questioned the respect for the principles of financial responsibility (art. 125 TFEU) and of balanced budget (art. 310 TFEU). Indeed, it has been argued that, in order to legitimize such a paradigm shift, a Treaty reform is needed, so as to transparently strengthen the Union's fiscal integration and to create an autonomous fiscal capacity (Leino-Sandberg, Ruffert, 2022). At the same time, other scholars (Crowe, 2021; De Witte, 2022) have defended the legitimacy and correctness of this interpretative effort, which has first been carried out by the legal services of the EU institutions.

The original "method of government" that the RRF has put in place has been deemed to represent a turning point (F. Fabbrini, 2022, p. 36), if not a "Hamiltonian moment", as argued by the then German Minister of Finance, Olaf Scholz.

The intertwinement with the Rule of Law conditionality, the legal provisions

The key legal provision ensuring a point of contact between the RRF and the Rule of Law conditionality is represented by Article 8 Regulation 2021/241, according to which "The Facility shall be implemented by the Commission in direct management in accordance with the relevant rules adopted pursuant to Article 322 TFEU, in particular the Financial Regulation and the Regulation (EU, Euratom) 2020/2092 of the European Parliament and of the Council". In this way, **the compliance with the Rule of Law Regulation becomes a general condition for each MS to obtain from the European Commission the payment of the agreed instalments.** Eventually, the worlds of the Rule of Law and Economic Governance meet, as it was wished by many (Dermine, 2022, p. 345).

However, as the wording of the provision refers uniquely to the implementation of the RRF, it needs to be remarked that the compliance with Regulation 2020/2092 **is not devised as a proper legal pre-requisite for the approval of the Plans by the EU institutions.** Indeed, this option would have probably made even more sense in theory, but it was not feasible in practice because of the commitment, taken by the European Commission, not to propose any measure according to the new Regulation 2020/2092 until the Court of Justice of the European Union had delivered its judgments on the actions for annulment brought by Hungary and Poland against it (Thu Nguyen, 2020, p. 4). It is worth reminding that this commitment – harshly criticized especially from a legal perspective (Scheppele, Pech, Platon, 2020; Alemanno, Chamon, 2020; contra, Fasone-Lindseth, 2020; Thu Nguyen, 2020) – revealed itself crucial in order to reach the compromise, within the European Council, needed to approve the Multiannual Financial Framework 2021-2027, and thus to define the financial part of the Next Generation EU (Baraggia, Bonelli, 2021, p. 132 f.; Hillion, 2021, p. 272 f.; Coman, 2022, p. 232 f.; section 5.3 above). Therefore, confirming, even at the level of highly political decisions, the several intertwinements between RRF and Rule of Law policies.

It is thus during the implementation phase that the compliance with the Rule of Law needs to be verified by the Commission, which is called upon to condition the actual payments of the RRF funds to a positive assessment on the milestones of the NRRP that are deemed essential under a Rule of Law perspective.

For the sake of completeness, a connection is also stated by one of the "whereas" of Regulation 2020/2092 (no. 7), with a wording that sounds fully compatible with Article 8 Regulation 2021/241 (Scheppele, Morijn, 2022 , speak of a " nearly identical language"): " Whenever Member States implement the Union budget, including resources allocated through the European Union Recovery Instrument established pursuant to Council Regulation (EU) 2020/2094, and through loans and other instruments guaranteed by the Union budget, and whatever method of implementation they use, respect for the rule of law is an essential precondition for compliance with the principles of sound financial management enshrined in Article 317 of the Treaty on the Functioning of the European Union (TFEU) ". However, there is no specific provision on this within Regulation 2020/2092, and it could not have been there, indeed, as the procedure for the RRF still had to be regulated: it happened through the Regulation 2021/241 and specifically by the abovementioned Article 8 thereof, at that time in the final steps of its approval process.

The 2022 Rule of Law report by the Commission and the opening statements of the country specific recommendations

Once the ECJ rejected the actions for annulment brought by Hungary and Poland through the judgments of 16 February 2022 (cases C-156-2021 and C-157-2021, respectively, on which, among many, Bonelli, 2022; Fisicaro, 2022; for further discussion see also supra, par. 5.3) – and also once the Polish NRRP had been approved, on 14 June 2022, at the end of a rather controversial process (for a strong critical voice against the Commission see: Pech, 2022) triggering several lawsuits by the four main European judges' organizations in front of the EU General Court for the annulment of the Council's approval of the Polish Recovery and Resilience Plan and then of the Financing and Loan Agreements[55] – the **third annual Rule of Law report**, was issued by the European Commission, on 13 July 2022 (on the first two see Pech, Bárd, 2022 and section 4.3.). **It included, for the first time, country-specific recommendations (CSR)** (see supra, par. 4.2). Through these recommendations, thus, the Commission asked each Member State to tackle and solve the problems observed during the Rule of Law assessment. This means that each Member State has been the addressee of several recommendations, but what needs **to be highlighted, for our aims, is mainly the opening clause of each list of country-specific recommendations.**

For **a first group of MS (Austria, Denmark, Estonia, Finland, France, Germany, Ireland, Lithuania, Luxembourg, the Netherlands, Sweden)**, a very general sentence is used: "It is recommended to [name of the country] to: (...)".

For a **second group of MS (Belgium, Bulgaria, Croatia, Cyprus, Czechia, Greece, Italy, Latvia, Malta, Portugal, Romania, Slovakia, Slovenia, Spain)**, the clause recalls the need to comply with additional commitments deriving from the NRRPs and other instruments already activated in order to improve the respect the Rule of Law

Regulation. These CSR are preceded by the following clause: "In addition to recalling the commitments made under the national Recovery and Resilience Plan relating to certain aspects of the justice system [and the anti-corruption framework], it is recommended to [name of the country] (...)". In the cases of **Bulgaria and Romania**, also a reference to "the remaining commitments under the Cooperation and Verification Mechanism" is made, in order to recall the already existing obligations that these two countries took, after their accession, in order to progress in the fields of judicial reform, corruption and (for Bulgaria) fight against the organized crime (see supra , par. 2.5).

The third annual Rule of Law report issued by the Commission included, for the first time, country-specific recommendations through which it asked each Member State to tackle and solve the problems observed during the Rule of Law assessment.

Finally, in the cases of **Hungary and Poland** these opening clauses are even more detailed and stringent. For Poland the following clause is adopted: "In addition to recalling the need to address the serious concerns relating to judicial independence, in particular those set out in the Article 7 TEU procedure initiated by the Commission, as well as the obligation to comply with the rule of law related rulings of the ECJ and the rule of law related infringement procedures referred to in the country chapter, the commitments made under the National Recovery and Resilience Plan relating to certain aspects of the justice system and the checks and balances, and recalling the relevant country-specific recommendations under the European Semester, it is recommended to Poland to (...)".

The formulation adopted for Hungary is rather similar, although the reference to the NRRP is missing, obviously given the fact that at the time of the publication of the 2022 Rule of Law Report (13 July 2022) the Hungarian plan had been submitted but not yet approved: "In addition to recalling the obligation to comply with the rule of law-related rulings of the ECJ and the rule of law related infringement procedures referred to in the country chapter, the concerns raised under the conditionality regulation, the relevant concerns raised in the Article 7 TEU procedure initiated by the European Parliament, and recalling the relevant country specific recommendations under the European Semester, it is recommended to Hungary to (...)".

The **Hungarian plan,** submitted on 12 May 2021, and re-submitted other two times following the comments by the Commission, was indeed the last to be **approved, on 15 December 2022.** Also in this case, the decision of the Council raised criticisms (Scheppele, Morijn, 2022), although at the same time the **Council decided to suspend approximately €6.3 billion in budgetary commitments, as a measure for the protection of the Union budget in compliance with Regulation 2020/2092**, as a consequence of breaches of the principles of the rule of law in Hungary, concerning public procurement, the effectiveness of prosecutorial action and the fight against corruption in Hungary. The Commission had indeed asked for the suspension of a bigger amount of funds, amounting to €7.5 billion (65% of the commitments for three operational programs under cohesion policy, while the Council lowered it to 55%).

The NRRPs of Poland and Hungary and their first milestones concerning Rule of Law reforms

It is still too early to see whether and how **Poland and Hungary** complied with the reforms promised in their NRRPs: as of May 2023, both countries **have still to submit their first payment request.** It has to be remarked, however, that **neither Polish nor Hungarian plans have foreseen any pre-financing** (formally due to the fact that they were approved later than December 2021), so the actual disbursement of funds by the Commission requires a positive assessment on the first group of reforms included in the Plan.

In particular, as the **Polish Plan** places among the **very first milestones**, to be accomplished (in theory) by the second trimester of 2022, both the reform aimed at **"strengthening the independence and impartiality of courts"** and the reform "to **remedy the situation of judges affected by the decisions of the Disciplinary Chamber of the Supreme Court** in disciplinary cases and judicial immunity cases", this means that the actual disbursement of funds by the Commission to Poland will necessarily follow a positive assessment on these reforms, clearly deemed essential under a Rule of Law perspective.

For what concerns **Hungary, its Plan, submitted three times to the Commission, includes, in its final version, 29 reforms related to the rule of law** (establishing an integrity authority and an anti-corruption task force; drafting a national anti-corruption strategy and action plan; judicial review; eradicating healthcare bribery; developing an electronic public procurement system to increase transparency; enhancing the transparency of public spending; drafting and anti-fraud and anti-corruption strategy for the use of EU funds; enhancing cooperation with the European Anti-Fraud Office-OLAF; tax reforms; justice system reforms). Furthermore, as **Hungary failed to adequately implement by the agreed deadline of 19 November 2022 central aspects of the necessary 17 remedial measures agreed under the general conditionality mechanism** (related to the effectiveness of the newly established Integrity Authority and the procedure for the judicial review of prosecutorial decisions), these measures, together with other rule of law reforms related to judicial independence, have been qualified as 27 "super milestones" (supra, par. 5.3): this means that **no payment under the RRF is possible until Hungary has fully and correctly implemented these 27 "super milestones".**

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Endnotes

[53] Article 122 TFEU is referred to by both Council Regulation (EU) 2020/672 of 19 May 2020, which, in the very first months following the Covid-19 outbreak, established a European instrument for temporary support to mitigate unemployment risks in the state of emergency (SURE), and Council Regulation (EU) 2020/2094 of 14 December 2020, which established the EU recovery instrument, as well as determining the amount of resources mobilized for that purpose.

[54] Council Regulation (EU) No 407/2010 of 11 May 2010, establishing a European Financial Stabilisation Mechanism (EFSM).

[55] See cases T-530/22 to T-533/22 (on which Donaire Villa, 2022) and case T-116/23, respectively.

5.5. The Role of Competition Law in Defending Rule of Law Values in the EU

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Introduction

Competition law is often seen as a distinctive area of law, as it depends on economic theory to define most of its substantive content and it is functional in nature (Maher, 2013). While both these characteristics put it at some distance from traditional conceptions of the rule of law, **rule of law remains key to guard against arbitrary use of government power and to safeguard individual rights also in competition law cases.** At the same time, **competition as a specific institutional form of the market is conducive to democracy**. Competition law as a key ordering principle of markets and the economy, **keeps control over excessive concentration of economic power** which risks eroding democratic processes and institutions and leads to rent- seeking, oligarchy, and crony capitalism (Deutscher, 2022). The dispersal of public and private economic power is an important feature of both competition and democracy, as it safeguards individual's economic and political freedoms (Deutscher and Makris, 2016). Competitive markets form vital components of, not only functioning market economies but also of democratic legal and political systems (Deutscher, 2022; Cseres, 2023). At the constitutional level, competition defines the boundaries of public power (Prosser, 2005) and by dispersing economic power it ensures the integrity and impartiality of political institutions making interest capture less likely (Deutscher, 2022). By setting bounds to economic power, competition law warrants a free and fair competitive process. **Competitive markets impose checks and balances on private and public market power and guarantee an inviolable sphere of private activity for individuals (Deutscher and Makris, 2016).**

Safeguarding economic freedom through competition rules shows how markets can contribute to democratic societies: markets' ability to multiply possibilities for meaningful economic participation by offering plurality of options and safeguarding the freedom of self-determination and autonomy to choose one's own (Tagiuri, 2020; Dagan & Heller 2017). Hence, individual citizens cannot entirely enjoy their economic and political fundamental rights if their autonomy is limited in the economic sphere by the exercise of arbitrary economic power by other citizens or the state. The exercise of economic freedom plays a similar role to that of political rights: it is essential for the good functioning of a democratic polity.

Accordingly, competition law safeguards the competitive process in the interest of all market players, and curbs overarching economic power that threatens the basic idea of a democratic society: safeguarding autonomy and freedom of choice for equally empowered citizens who exchange their commodities in free markets (Ayal, 2013).

For example, competition law is particularly relevant to safeguard the governance of strategically important sectors for society, such as utilities (energy, telecom, waste), and media markets (Bania, 2015) against abusive market power or corruption by controlling bid-rigging (Cseres, 2022).

In Europe, emerging from one of the key historical lessons, the Ordoliberal School extensively analyzed the question of how repercussions of concentrated market power and political power on the democratic functioning of society should be addressed Ordoliberals proposed a constitutional framework within which competition law played a central role in safeguarding a pluralistic competitive process and maintaining a democratic society. These **Ordoliberal ideas influenced the development of both German** (Künzler and Warlouzet, 2013; Van Waarden and Drahos, 2009) **and**

the European (Patel and Schweitzer, 2013) **competition law systems with strong focus on individual rights and the rule of law** as an apt basis for the structure and strengths of law, as well as enforcement institutions.

The role of competition as a fundamental institution of a democratic system is a salient concept that influenced the drafting of the Rome Treaty and its central role in creating democratic political systems was re-stated in the 1993 Copenhagen (accession) criteria of the EU (Cseres, 2023). **Competition law in Europe developed as a quasi-constitutional foundation of liberal democracy** and the fundamental role of competition law in governing the relationship between competitive markets and democracy has been a core part of the EU integration project from its early days. Constitutionalised at the EU level, it developed into the central pillar of the integration project. (Ioannidis , 2016; Joerges, 2014, 2015). Over the past seven decades EU competition law became a powerful institution to defend markets across Europe, to safeguard European undertakings' freedom of economic activity and consumers' choice.

The Ordoliberal theory of an economic constitution advocated a framework order which was to guarantee economic freedoms but, at the same time, to control them legally through the competition law system (Joerges, 2002). This law-based order committed to the rule of law and economic freedoms helped the Community to acquire legitimacy in the foundational period of the EU and contributed to its 'constitutional' character (Joerges, 2002; Patel and Schweitzer, 2013). In this process of supranational constitution building, competition law took centre stage. Accordingly, **the protection of the competitive process must be seen in fact as an implementation of Article 2 of the Treaty on the European Union (TEU)**, which lists, among others, the EU values of democracy, equality, rule of law and respect for human rights. These values form an 'untouchable core' of EU law (Lavranos, 2009). When states join the EU, they commit to the EU's economic and legal order, which as a 'constitutional charter' explicitly includes the system of undistorted competition. Accordingly, by joining, Member States commit to the values of EU law as laid down in Article 2 TEU and make a mutual promise that in the enforcement of competition law, they recognize and respect the EU's values and objectives. However, unlike the Article 2 TEU values, which are constrained by the EU's limited competences to legislate and enforce, **EU competition law is an exclusive competence of the EU with direct administration and with far-reaching enforcement mechanisms .** In its **Sped-Pro judgment** (Case T-791/19), the **General Court** recently **confirmed** that **compliance with the fundamental values of Article 2 TEU applies to the EU's competition law enforcement mechanisms under Articles 101 and 102 TFEU**[56]. This judgment is an important reminder of the fundamental connection between democracy, the rule of law and competition law, as it will be analysed below.

Competition law in Europe developed as a quasi-constitutional foundation of liberal democracy and the fundamental role of competition law in governing the relationship between competitive markets and democracy has been a core part of the EU integration project (Ioannidis , 2016; Joerges, 2014, 2015).

Crucially, the fundamental role of competition law has also been transplanted from 1990s into the legal systems of all EU Member States as a key and indispensable component of their economic policies. By the late 1990s, successful market integration and the process of EU constitutionalisation combined with solid supranational enforcement mechanisms transformed competition law into a strong legal and policy field. Coupled with increasing Europeanisation of competition norms at the Member State level, competition law became a 'common core' of the EU and its Member States (Drahos, 2002). Unlike the Article 2 TEU values, which draw on the shared legal and constitutional traditions of the Member States (Scheppele, Kochenov, Grabowska-Moroz, 2020), competition law was centrally established and developed with far-reaching powers unmatched in any other EU legal and policy field

(Warlouzet, 2017). By pursuing market integration as a public policy goal, EU competition law has acted as a vehicle for the proliferation of democracy and the rule of law (Ramirez Perez and S van de Scheur, 2013).

An explicit restatement of competition law as a building block of market economies and democratic societies was formulated in the governance mechanism of the accession process for the Central and Eastern European countries (CEECs) from the late 1990s to the 2004 enlargement (Copenhagen). The legal and institutional framework of EU accession and the legal basis for aligning domestic competition laws with that of the EU were laid down in bilateral agreements between the EU and the candidate CEECs (Cseres, 2014).

This means, on the one hand, that EU competition law is a fundamental part of the EU legal order, implemented and enforced by all Member States, and that the protection of competitive markets is a shared value for all Member States. At the same time, competition law is equally threatened and undermined by the systematic erosion of the rule of law and democracy by certain Member States.

The central constitutional role and value of competition law in the EU's economic and legal order, its exceptionally robust and direct form of enforcement by the European Commission and its intimate relationship with the rule of law and democracy, raises the question, how the EU competition rules, and their enforcement can defend the rule of law in the EU. Whether and how EU competition law as a powerful legal and policy instrument can and should shape responses to the challenges of rising political populism, growing political and corporate concentration, also depends on how the authority of EU competition law is challenged by national economic policies that question neo-liberal ideas of free trade and market competition, as well as by the backsliding of certain Member States on their commitment to the rule of law and democracy in the EU (Cseres, 2023). The next sections explain this role, which is more indirect compared to other mechanisms discussed above in this Working Paper. Nevertheless, their potential should not be overlooked.

Substantive EU competition rules, procedures and enforcement

Competition law is the legal instrument to ensure that the valuable process of the market mechanism is protected by removing unnecessary restrictions on competition and by preventing significant reduction of competition. EU competition law consists of specific **substantive rules that prohibit** (i) **anti- competitive agreements** (Article 101 TFEU), (ii) **the abuse of significant market power** (Article 102 TFEU), and (iii) **anti-competitive mergers** (Regulation 139/2004). It also contains rules that address Member States, such as Article 106 TFEU **prohibits Member States from adopting, with regard to public undertakings or undertakings bearing special or exclusive rights, any measure that would lead to an infringement of another Treaty provision**, including Articles 101 and 102 TFEU and free movement provisions, and Article 107 TFEU, which contains a **general prohibition of State aid** in order to prevent distortions of competition in the internal market that could result from the granting of selective advantages to certain companies.

Hence, these rules impose important checks on private but also public economic power and as such are instrumental in protecting democracy and the rule of law in the EU legal order.

EU competition law also contains procedural rules: Regulation 1/2003 lays down the enforcement and procedural framework for Articles 101 and 102 TFEU, Regulation 139/2004 for mergers and Article 108 TFEU and Regulation 2015/1589 for state aid.

The Commission is the principal enforcer of EU competition rules. It has the power and responsibility to investigate suspected anticompetitive conduct, to issue prohibition decisions and to impose fines. Within the Commission, the Directorate-General for Competition (DG COMP) has the responsibility for investigating cases of alleged anticompetitive behaviour and taking the necessary decisions to maintain or restore the proper functioning of competition in the Single Market. The European Commission has broad investigative powers, such as the ability to carry out unannounced inspections at undertakings' premises, or to compel companies to provide evidence relevant for its investigations. **It has powers to directly enforce the Treaty competition rules: monitoring, investigation and sanctioning**, the rules for which are laid down in Regulation 1/2003. In the enforcement of Articles 101 and 102 TFEU, the Commission had a central role until

2004, but this changed fundamentally with the adoption of Regulation 1/2003 in 2004 [57], which delegated enforcement powers to national competition authorities (NCAs) and national courts in order to relieve the Commission of its increasing administrative burden and make enforcement more effective. Regulation 1/2003 is the outcome of a fundamental reform that changed the administrative and adjudicative building blocks of the system. Regulation 1/2003 strengthened the Commission's investigatory powers and remedial powers, and it extended its search and evidence collecting powers. Article 3 (1) of Regulation 1/2003 imposed an obligation on national authorities to apply Articles 101 and 102 TFEU in parallel with their national competition rules when "effect on trade between Member States" can be established.

The Commission is the principal enforcer of EU competition rules with powers to directly enforce the Treaty competition rules: monitoring, investigation and

As a fundamental area of EU law since the establishment of the Treaties of Rome in 1957, competition law has been for four decades the chief example of direct administration by the Commission affecting 'individuals' (legal persons or companies) (Harlow, Rawlings, 2014). The EU competition law procedures form the archetype of administrative procedures in EU law (Mendes, 2011) and its procedural rules were exceptional as they formed one of the few areas of EU law that was equipped with a comprehensive set of administrative framework from its very inception in 1962. As the execution of EU law is still largely ensured by national authorities (indirect administration) and thus is defined by the procedural law of the Member States who enjoy procedural and institutional autonomy, **the direct administration of competition rules by the Commission remains exceptional and relevant for defending the rule of law . As the Commission was granted far-reaching supervisory and investigative powers** and through these powers it could more 'intrusively' intervene in the legal spheres of private persons (Mendes, 2011), the competition law procedural rules in Regulations 17/62 and 99/63 were the first to impose constitutional constraints on public power and administrative conduct protecting incriminated undertakings or protect unlawful violation of individual rights and freedoms (Nehl,1999).

The defining characteristic of DG Competition reflects a strong German influence and Ordoliberal view of competition law as part of an economic constitution guaranteeing market freedoms and the importance of *Rechtsstaat* values over *ad hoc* political decision-making (Harlow and Rawling, 2014). The independent monopoly office was regarded as a sine qua non of the modern *Rechtsstaat*, as essential as a highest court (Gerber, 1999). Hence, **the European Commission and the NCAs, as 'public enforcers', have a central and fundamental role in guaranteeing effective enforcement of competition law across the EU** (Maher, 2013). They are the ' driving institutional motor behind effective implementation of competition policy' (Maher, 2013) and form essential pillars for 'proper enforcement'[58] of the EU competition rules. Competition authorities are technocratic expert organisations that are 'required to separate politics from administration', and they must be legally and functionally separated from market parties and from the legislative and executive powers. Their independence has traditionally been justified by the technical complexity of the regulated markets and thus the need for expert decision-making (Maher, 2013; Brook and Cseres, forthcoming).

However, with decentralisation, the institutional design and autonomy of all the NCAs became crucial for enforcement of Articles 101 and 102 TFEU, as EU law enforcement came to rely on members states' procedures and administrative capacity. Despite the diversity of Member States' institutional settings as based on the principle of procedural and institutional autonomy[59], the NCAs remain subject to a number of fundamental obligations under EU law. First is their obligation of cooperation with the Commission and other NCAs, founded 'on equality, respect, and solidarity and especially on the idea that Member States accept that their enforcement systems differ but nonetheless mutually recognize the standards of each other's system as a basis for cooperation'[60]. The decentralised system rests on the implicit safeguarding of mutual trust and sincere cooperation[61], in which all trust each other in making use of their investigative and fining

powers in order to deter uncompetitive conduct [62]. The creation of decentralised enforcement was an important part of the idea of giving competition policy more democratic support in Europe [63].However, by bringing decision-making closer to citizens, there was also a risk that member states would push their own national interests within the EU enforcement framework. These concerns seem to have been fully realized in Poland today as the above mentioned Sped-Pro case shows.

Rule of law, effective judicial protection and effective competition law enforcement

In the above mentioned **Sped-Pro judgment**, the General Court for the first time established a **direct link between systematic rule of law deficiencies in the legal order of a Member State and the ability of its competition authority to investigate and take enforcement action** under EU law and properly protect a complainant's rights. The General Court **addressed issues of rule of law as an element of effective competition law enforcement** and the case allocation principles between the Commission and NCAs under the decentralized enforcement system of Regulation 1/2003. The General Court now requires the Commission, when handling complaints, to examine whether a NCA can actually enforce EU law effectively. In its *Sped-Pro*, the General Court addressed rule of law issues to be considered when assessing whether a national competition authority is capable of effectively enforcing competition law and adequately safeguarding a complainant's rights (Cseres, Hwija, 2023 forthcoming). Referring to its own case law developed in the area of the European Arrest Warrant (EAW)[64], the General Court found that, just as in the area of freedom, security and justice, the cooperation between the Commission, the competition authorities of the Member States and the national courts for the purposes of applying Articles 101 and 102 TFEU is based on the principles of mutual recognition, mutual trust and loyal cooperation[65]. According to these principles, **each of these authorities and courts must presume that, save in exceptional circumstances**[66], **all the others respect Union law and, more particularly, the fundamental rights recognised by that law**[67]. Meanwhile, the Commission must take account of the additional condition of rule of law backsliding concerns when deciding to reject complaints and allocating cases[68]. Hence, the General Court's judgment marks an important milestone in the interpretation of these principles in EU competition law. It shows that **the lack of independence of NCAs, analogous with the lack of judicial independence of authorities issuing the EAW, can justify the suspension of cooperation between Member States.**

This is even more so, considering the fact that **the European Commission and NCAs have 'court-like' functions** (Wright, 2009, Maher, 2000) as they protect the legal position of undertakings as well as citizens' rights to economic activity and free choice in markets (Gerber, 2001). As such, **effective enforcement of competition law** not only is crucial for safeguarding undistorted competition within the internal market, but also **forms part of effective judicial protection as laid down in Articles 19 TEU and 47 of the Charter of Fundamental Rights (CFR)**, relevant to both defendants and victims in the competition context (Dunne, 2016). **The *Sped-Pro* judgment introduced the exceptional circumstances of mutual trust and recognition from the EAW case law to competition law**. Alongside the judicial independence in *LM*, it added a new condition of rule of law to the exceptional circumstances. Hence, it opened the way for the exceptions to mutual trust to expand to broader fields of law, thus protecting a broader group of private parties from legal and political deficiencies in Member States. The pace and scope of constitutional re-engineering in Hungary and Poland and competition law enforcement raises questions beyond the context of this present judgment. One such question is the constitutional position and role of national competition authorities. As public enforcers, the Commission and national competition authorities have a fundamental role to ensure effective enforcement of (EU) competition law across Europe. The second subparagraph of Article 4(3) TFEU requires Member States to take all appropriate measures, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union. This also means that the Member States must use their sovereign powers to enforce the Treaty's competition rules as effectively as possible (Cseres, 2023; Cseres and Hwija, 2023). With this judgment, the General Court has also laid down an important new role for the Commission in the enforcement system of EU competition law. In future, the Commission will have to examine

more thoroughly whether an NCA can act de iure and de facto independently from the executive in the Member State and whether there are independent courts that can review the competition authority's decision and adequately protect the rights of complainants.

Role of competition law in public procurement and protection of EU funds

Active enforcement of **competition rules is not only a key component of respecting the rule of law but also protecting the sound financial management of EU funds** as laid down in the Conditionality Regulation 2020/2092. Regulation 2020/2092 developed from a commonly shared view that systematic deficiencies of the rule of law in certain Member States had to be addressed beyond the politically sensitive and largely ineffective Article 7 procedure. Accordingly, the Regulation creates a 'general regime of conditionality' that makes Member States' access to money from the EU budget conditional on respecting the principles of the rule of law, that are enlisted in Article 2 TEU. As interpreted by the ECJ in C-156/21, the sole violation of rule of law principles in a Member State would not suffice to trigger the mechanism as its scope only covers those rule of law violations that explicitly affect the Union's budget in a *sufficiently* direct way. **The Commission has been frequently addressing the "systemic irregularities, deficiencies and weaknesses in public procurement procedures" in Hungary and the lack of competition in public procurement procedures.** On 27 April 2022, the **Commission** officially triggered the conditionality mechanism against Hungary and on 18 September, it has **proposed to suspend 65 percent of the cohesion funds while demanding the implementation of 17 key measures.** On 30 November, 2022 the Commission concluded that the conditions for applying the Conditionality mechanism under Regulation 2020/2092 in Hungary remained (Press release, Commission finds that Hungary has not progressed enough, 2022) and Hungary needed to take further and more credible action to eliminate the remaining risks for the EU budget (see sections 5.3. and 5.4.). **The measures, among others, addressed longstanding criticism concerning the lack of competition in Hungary's public procurement system**, which has been regularly pointed out by both the Council and the Commission since 2014, most recently in its 2022 country-specific recommendations (2022 European Semester: Country Specific Recommendation/ Commission Recommendation – Hungary).

The Commission can also address issues related to "systemic irregularities, deficiencies and weaknesses in public procurement procedures" through the competition law framework. Safeguarding competition and effectively enforcing competition rules is complementary to fighting corruption since both aim to correct dysfunctions in market mechanisms. For this reason, the Commission can address the lack of effective competition (cartel) law enforcement in public tender procedures, for example in Hungary, under the Conditionality Regulation (Cseres, 2022 a and b).

Lack of competition in public procurement can have various root causes, including deficiencies of the public procurement procedure. However, the lack of effective enforcement of competition law, for example tolerating collusion among undertakings is commonly seen as one of the main threats for the integrity of public procurement processes (OECD, 2010). With regard to Hungary, it has often been underlined that the legal framework for safeguarding and promoting competition is not effectively made use of. The competition authority is not sufficiently active in sectors with high risk of collusion and with few market studies and decisions (OECD, 2021; European Semester, 2019, 2022).

The ineffective control of companies, who should be genuinely competing in public procurement process, provides fertile ground for collusion (so-called bid-rigging) to fix their bids, thereby raising prices and/or lowering the quality of the goods or services that they offer. In turn, the public and EU budget is directly harmed (through higher an unnecessary expenditure) while the quality of services rendered to citizens deteriorates. Bid-rigging in public procurement procedures qualify as so-called hard-core cartels and are prohibited under competition law. Hence, the active enforcement of competition law is particularly relevant to ensure efficient public procurement procedures and thus to safeguard the governance of strategically important sectors for society, such as utilities.

Fighting bid rigging is crucial to ensuring that public procurement procedures are competitive, and competition authorities around the world are seen to prioritize investigating and prosecuting bid-rigging cartels, including the Hungarian competition authority (GVH, 2020). However, the space for competition has been drastically shrinking in various sectors of the Hungarian economy over the past twelve years. In those years, the Hungarian government has used a variety of law-making strategies to restructure numerous sectors of the economy and to override market mechanisms in plain sight (Papp, Varju, 2016; Cseres, 2019). Consequently, it is crucial to address publicly-created distortions of competition as a result of the exercise of buying power by the public sector, or the creation of regulatory barriers to access public procurement markets.

The question, how EU competition law can protect rule of law values, can be the most directly and positively answered regarding media markets and media pluralism.

Commission could act in this area because anticompetitive practices in the area of public procurement can lead to significant economic harm in the form of overcharges to national (and EU) budgets and large opportunity costs: by some estimates, conduct such as bid rigging may increase prices for public procurement by as much as 20 percent. (Cseres, 2022 b).

Accordingly, the Commission should, by referring to its own findings as part of the European Semester ask the Hungarian government how the enforcement of the competition rules guarantee (or undermine) the protection of EU money. And more specifically, how the Hungarian government complies with the demand of EU law not to render the implementation of EU law impossible in practice or excessively difficult (C-453/99 Courage, para 29) and ensures that the national rules which they establish or apply do not jeopardise the effective application of EU law (C-360/09 – Pfleiderer, para 24).

Protecting media pluralism through competition law and state aid

The question, **how EU competition law can protect rule of law values**, can be the most directly and positively answered regarding **media markets and media pluralism**.

EU competition law in general, and merger control in particular, can play an important role in controlling and preventing the accumulation of significant power in media markets. By investigating in an ex ante manner, the compatibility of a media concentration with the common market it can assess an increasingly large number of concentrations affecting European markets and citizens (Bania, 2015). Competition law has primarily been an instrument in the hands of the EU Commission to address the economic aspects related to media market (Bania, 2015). While the most obvious examples of applying competition law is in cases of concentration of ownership and abuse of dominant positions, the application of the EU state aid rules concerning public services is equally important.

Media pluralism has generally been recognized as a core component of well-functioning democracies, free and open societies. It contributes significantly to the formation of public opinion allowing citizens to make informed choices in their political decisions. In EU law and policy, media pluralism is recognised as one of the core values on which the European Union is founded (Article 11 of the Charter of Fundamental Rights).[69] It is an indispensable condition for exercising citizenship and fostering participation in a democratic society by enabling media to fulfil their role in providing complete, balanced, and accurate information, and holding power to account (Brogi et al, 2021). The Commission has placed media freedom at the heart of its rule of law reporting. The Rule of Law Report dedicates a key section to media freedom and pluralism, which examines media regulatory authorities and bodies, the transparency of media ownership and government interference and the framework for the protection of journalists.

Even though media freedom and pluralism have been generally accepted as fundamental to the common values prevailing within the EU, the legal instruments of EU law remain limited in this area. The EU, in fact, "has very little "hard" law on media pluralism" (Garcia Pires, 2017). Still, one of the potential instruments of EU law in relation to government activities in the media is EU competition law including **state aid law.**

While competition law is primarily an instrument to address the economic aspects related to media markets, its control mechanisms can be used in order to ensure that citizens' right to free and plural media is not undermined by the manipulation of public opinion and the concentration of power or political influence over public and private media (Bania, 2015).

In the field of media, the EU shares competence with the Member States, and the EU may only take action to support national initiatives and hence, according to Article 167(5) TFEU, this action may not take the form of an instrument harmonizing national media laws and regulations. Still, on the basis of the Treaty and the Merger Regulation (Regulation 139/2004), the Commission is explicitly entrusted with assessing whether a concentration of a Union dimension (for mergers without Union dimension see also Article 22 for referrals Regulation 139/2004) may significantly impede effective competition. While the legal framework is less outspoken about the Commission's merger assessment for the protection of media pluralism and its competences are limited concerning culture, **Articles 167(4) TFEU and 11(2) and 51(1) of the Charter lay down a duty for the Commission to have regard to non-economic goals when implementing the Union's competition policy** (Bania, 2013).

The application of competition law in the media sector is to prevent anti-competitive practices and to reduce concentration in the media sector by focusing on mainly the price dimension of the competitive process. However, the application of competition law could contribute to enhance media pluralism, by making use of its control mechanisms that could safeguard not only a narrowly defined consumer welfare standard but a more inclusive "citizen welfare" standard (Bania, 2015; Cengiz, 2021). The citizen welfare standard would include broader consumer interests than just price, for example quality of products and services such as diversity of media outlets. Enforcement of competition law and decisional practice could be based on this welfare standard.

While pluralism related concerns may not override competition concerns in the assessment of mergers, still **the Commission can address pluralism-specific issues under its merger practice** . According to Bania's research, something it has been reluctant to do so in the past (Bania, 2013, 2015, 2019).

Nevertheless, media freedom is more than ever on the agenda of the EU and its regulatory policy.

With the adoption of the **European Media Freedom Act proposal** in September 2022, on the basis of Article 114 TFEU (the internal market legal basis), the Commission seems to move towards a more robust and serio us approach to address media capture by some Member States, national regulatory abuses in the state control of the media and state advertising. This regulation (which also contains complementary rules to those of competition law, on media concentration and state advertising and allocation of state resources) signals a new approach by the Commission taking its internal market and hence, competition law competences to address abuse of state regulatory and economic powers as drivers of media capture. EMFA could be improved to develop a framework that strongly supports and complements competition law rules and enforcement mechanisms both at EU and national level (Bayer and Cseres, 2023 forthcoming). However, this should not take away EU competition law's existing potential to take proper account of media pluralism concerns (quality, variety and originality) and make appropriate use of its tools as they exist in the current EU legal framework (Bania, 2023).

Concerning state aid, two important areas need mentioning, **public broadcasting and state advertising**.

State aid is generally prohibited by EU law, but state measures that support public broadcasting services, traditionally seen as Services of General Economic Interest may qualify for an exemption from state aid and competition rules on the basis of Article 106 (2) TFEU. Hence, Member States who entrust media organizations with providing quality and varied programming in order to safeguard media pluralism and which, for the performance of this mission, grants aid to these organizations, are entitled to request for a derogation from the general State aid prohibition. State aid is not assessed on the basis of the effects on competition only, but also

on the basis of social welfare standard, which besides economic considerations, also takes equity objectives into account (Bania, 2015). The interpretative Protocol on the System of Public Broadcasting in the Member States (the Amsterdam Protocol) endorses the role of public broadcasting in fulfilling the democratic, social and cultural needs of a given society as well as the need to preserve and promote media pluralism and explicitly provides that it is up to the Member States to define and organize the public service remit in a manner of their own choosing. However, **it also lays down that State financing of broadcasting activities may not bring about distortions of competition that are not necessary for fulfilling the public service mission.** Therefore, in the same way as the derogation under Article 106(2) TFEU, the Protocol does not go so far as to provide a full exemption from the Treaty rules. Both Article 106(2) TFEU and the Amsterdam Protocol demand in essence a balance between national interests and the Union interests but do not explain how this balance may be achieved. Pursuant to Article 106(3) TFEU, the Commission is the competent body to strike this balance. (Bania, 2015).

I Lastly, state advertising and its control by state ad law has to be mentioned. **State advertising has emerged as a key player in distorting the media landscape and jeopardising both fair competition and media independence in various EU member States.** For example, several complaints have been filed concerning subsidies for pro-government media outlets in the newspaper, online and television markets in Hungary (Mertek/Atlatszo, 2019).

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[56] Case T-791/19 Sped Pro v Commission [2022] EU:T:2022:67, para 85.
[57] Council Regulation (EC) 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2003] OJ L1/1.
[58] Council Regulation (EC) No 1/2003 Recital 6.
[59] Case C-33/76 Rewe-Zentral AG v Landwirtschaftskammer für das Saarland [1976] EC:C:1976:188, para 5.
[60] Joint statement of the Council and the Commission on the functioning of the network of competition authorities, https://competition-policy.ec.europa.eu/system/files/2021-07/joint_statement_en.pdf. Point 7.
[61] The decentralised enforcement framework relies heavily on the principle of 'sincere cooperation' laid down in Art 4(3) TEU and imposed on national courts and governments acting as agents of EU law.
[62] Opinion 2/13 of the Court of Justice of the European Union [2014] EU:C:2014:2454, paras 167–168.
[63] White Paper on Modernisation of the Rules Implementing Articles 85 and 86 of the EC Treaty decentralization (Commission Programme No 99/027, 28.04.1999), point 46.
[64] To recall, the mutual recognition and execution of EAW's was always based on 'the high degree of trust and solidarity between the Member States' that national authorities would dutifully execute EU law. More simply put, the act of accession to the EU constitutes an act of recognition and acceptance of the values of the EU, and in equal measure a promise that these values will be respected whenever EU law is enforced. Case C-216/118 LM v Ireland [2018] EU:C:2018:586.
[65] Case T-791/19 Sped Pro v Commission paras 81–88.
[66] Exceptional circumstances doctrine is a two-step test that has been developed by the ECJ in the specific context of the EAW. The 1 introduced this fundamental rights exception in Aranyosi and Căldăraru (Joined Cases C-404/15 and C-659/15 Pál Aranyosi and Robert Căldăraru v Generalstaatsanwaltschaft Bremen 2016] EU:C:2016:198). The rebuttal of the presumption of mutual trust serves to refuse execution of the EAW on the basis of possible fundamental rights violations in the issuing State. Therefore, the 'exceptional circumstances doctrine' and 'fundamental rights exception' in the EAW can be used interchangeably, as the law stands at present.
[67] Case T-791/19 Sped Pro v Commission para 88.
[68] The Court concludes that respect for the principles of the rule of law is a relevant factor that the Commission had to take into account in determining the most appropriate competition authority to investigate a complaint and before rejecting a complaint for lack of an EU interest, to ensure that the national authorities are in a position adequately to safeguard the complainant's rights, para 92.
[69] Charter of Fundamental Rights of the European Union, Article 11; Treaty on European Union, Articles 2 and 6. Free and pluralist media reinforces the principle of democracy on which the Union is founded.

6. CONCLUSION

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The analysis carried out in this working paper has elaborated on the adoption and use of a **wide array of supranational tools and procedures** to combat the rule of law backsliding in the EU. They differ in several ways. First of all, as shown in Table 1 - Appendix III, **some** of those **instruments were conceived ad hoc to deal with rule of law issues, whereas a slight majority of them was envisaged as a general tool of EU law** or for other purposes, e.g. coordination of economic policies, and was subsequently re-adapted to also serve the interest of rule of law principles.

Second, as illustrated in Figure 1 - Appendix III, the EU rule of law instruments range between those having a **preventive nature**, to avoid widespread or systemic rule of law deficiencies (e.g. the EU Justice Scoreboard, the Rule of Law Report and the European Semester), those designed as rule of law **enforcement measures** (e.g. the PRP and the Charter combined, competition rules on public procurement, the RRF, and Article 7(1) TEU), and, finally, the **corrective or sanctioning measures** (e.g. infringement proceedings, the combined activity of OLAF and EPPO, the rule of la conditionality regulation and Article 7(2-3) TEU). The implementation of these various tools, however, highlight that the **boundaries between the three categories are rather blurred.** For example, the evidence produced through the EU Justice Scoreboard can provide the ground to start an infringement proceeding, to activate the rule of law conditionality or the Article 7 procedure; by the same token, the milestones and targets of the NRRPs can be instrumental to implement rule of law reforms, but as long as the conditionality is triggered, with the suspension or withdrawal of RRF funds, they also serve as corrective and sanctioning measures.

Third, the **EU rule of law instruments** can be divided – as the structure of this working paper seems to suggest – **according to the level of cogency and the degree of bindingness** of the relevant source of the law. Some are formally soft law tools; others are enshrined in secondary or primary law. Yet the concrete use of these instruments points to a much less straightforward categorization. For example, with the inclusion of the RRF governance into the European Semester framework and the new two-way relationship between RRF milestones and targets and the CSRs dealing with rule of law problems, the value of those recommendations seem to shift from soft law to binding law as an effect of conditionality. By contrast, the legal force of the CVM has been challenged by both its forthcoming channelling through the rule of law reports and by the lack of CJEU's acknowledgment of its formal legal rank and as a standard for review in the *Asociatia "Forumul Judecaˇtorilor din România" and others v. Inspect¸ia Judiciaraˇ and others (AFJR)* preliminary ruling unlike what AG Bobek had argued for. In addition to this, the contributions collected here underline that not necessarily the rank of the EU legal source affects the effectiveness of the EU action, as the story surrounding the implementation of Article 7 TEU sadly tells.

One of the main findings highlighted by the working paper refers to the intertwinement between the various EU tools and procedures to counter the rule of law degradation . They build on one another and there are many more mutual connections between them than one may initially think. As Figure 2 – Appendix III illustrates, no instrument can be seen in isolation . Just think of the reciprocal influence between competition law and rule of law "policy" in the EU. While it is clear that EU competition rules, for instance, on public procurement and state aid, can make a great impact on media pluralism at national level, a cornerstone of the rule law, by the same token, the ECJ rule of law

case law dealing with the execution of the European Arrest Warrant since the LM preliminary ruling has now contributed to set clear standards also for the independence on national competition authorities in order to ensure mutual trust and sincere cooperation (Sped Pro judgment, T-791/19). To give other examples, in relation to Hungary and Poland, multiple instruments have been used at the same time to cope with corruption problems affecting EU funds (from the rule of law framework and dialogue to CSRs, competition rules, OLAF and the RRF) or with the lack of judicial independence (the EU Justice Scoreboard, rule of law reports, the Charter in combination with Articles 2 and 19 TEU through preliminary reference procedures and infringement proceedings, and the rule of law conditionality regulation). As long as it remains in operation, until 2026, the **main procedural catalyst against the rule of law problems seems to be the RRF through the NRRPs due to the multiple conditionality regimes** it embeds and the clear focus the plans have on strong democratic and judicial institutions as a key asset for promoting investments and reforms foreseen as milestones and targets.

It is clear that over the last decade the EU rule of law instruments have grown exponentially, within and outside of the official toolbox, and many of them have managed to build *de facto* or *de iure* increasing synergies. Yet, the **proliferation of the tools has taken place to a large extent in an uncoordinated manner** upon the urgency to respond to the weakness of some of the instruments or to their delayed implementation. The status quo points to the **need to rationalize and streamline the governance of the rule of law inside the EU** avoiding duplications and confusion, also for the average citizen that should be the final beneficiary of the Union rule of law policy. At the same time EU institutions could seriously ponder and reflect on the many proposals put forward to strengthen the European action in this field and **how to combine the new initiatives with the plethora of existing tools** (Figure 1 – Appendix III). The former range from preventive measures, such as the enhanced role of the EU Agency for fundamental rights and the setting up of the "Copenhagen" Commission (Tuori 2016); to enforcement measures, for example stemming from a revamped EU Pact-Inter-institutional agreement for democracy, the rule of law and fundamental rights and from the EU accession to the ECHR, whose new attempt is currently ongoing; to corrective measures, like systemic infringement actions (Sheppele 2016) and the reverse *Solange* doctrine to be practiced by the ECJ (von Bogdandy et al 2012). Ideas on how to fruitfully integrate these old and new instruments have already circulated and the future institutional and academic elaboration should start from here (von Bogdandy, Antpölher and Ioannidis 2017).

The **growth in the number of rule of law instruments devised and deployed, often time not successfully, has led an increasing dissensus to emerge. On the one hand, the use of a strategy combining different tools** together increases the chances of achieving the targeted objectives – this is what the EU has tried to do against the controversial Disciplinary Chamber of the Polish Supreme Court, but does not help in understanding which of the instrument has been decisive; on the other hand, however, the pursuing of an **incremental strategy may delay the achievement of the desired aim and can spark concerns about the discretion left to the EU institutions**. The adoption and implementation of the rule of law conditionality regulation next to the RRF is quite telling in that respect. The European Council's political compromise on the former to seal the deal on the MMF 2021-2027 and on the RRF has been widely criticized as well the following inaction of the Commission (Alemanno and Chamon 2020, amongst others). Then the Commission has not only questionably applied a double standard to Hungary and to Poland on the activation of the rule of law conditionality mechanisms for eminently geopolitical considerations, notably due to the different stance of the two countries vis-à-vis the war in Ukraine (Bárd and Kochenov 2021, 49); the Commission has also played with Hungary at least on two tables, that of the rule of law conditionality and of the approval of the NRRP until the decision was taken in December 2022 and it can continue to do the same also with other countries for the payment of the various RRF instalments. Here two views can be confronted with: some may argue that this strategy of threatening the use of various instruments at

the same time is welcome and strongly needed insofar as it is effective as a deterrent against the further worsening of the rule of law degradation; others, instead, may think that the strategy leaves too much discretion to the EU institutions, is unpredictable, undemocratic and controversial from the perspective of the legal certainty and of the legitimate expectations of the citizens. As effectively pointed out, the double-standard critique to the EU rule of law strategy has even led to endorse a manipulative interpretation of legal values and institutions in other Member States by the rule of law backsliding countries that paves the way to **"abusive comparativism"** (see, amongst many, Grabowska-Moroz 2022, 340).

To some extent, also for these reasons, the rise of dissensus on the EU rule of law instruments is not very surprising. **The EU institutions themselves tend to disagree on how to counter rule of law issues**, with the Council and the European Council being much more reluctant than the other EU bodies in the adoption of corrective measures and the Commission being often stuck between intergovernmental institutions and the European Parliament. If not turned into conflicts, a certain degree of dissensus on the rule of law policy is also inherent to any democratic system and it is an outcome of complex deliberative processes, featuring multiple veto players potentially.

The dissensus also stems from the unclear scope of the EU action on the rule of law problems: for some too narrow; for others too broad. There is probably **a competence issue to be addressed** in relation to EU values, including the rule of law. Indeed, formally the EU lacks a general competence to address rule of law issues, even more so in purely domestic situations, unless the enforcement of EU policies and norms is directly affected. **The ECJ has tried to expand the role of the EU** and, hence, its "mandate" on the protection of the rule of law at national level, in particular since the landmark ruling in *Associação Sindical dos Juízes Portugueses* (C-64/16), in 2018, **witnessing the largely silent and ineffective role of EU (and domestic) politics.** If it is evident that we now have a clear and well-defined notion of the rule of law in the Union (Pech 2022), also thanks to the many ECJ rulings and the codification in EU Regulation 2092/2020 (Article 2), the reach and scope of the EU action on the rule of law itself is less straightforward. **The ECJ has been accused of not elaborating standards consistent with the ECtHR case law** on a key dimension of the rule of law, judicial independence (Bárd and Kochenov), and most important of **not applying them in a coherent manner to the Member States and to itself** (Kochenov and Butler 2021). At the same time, while the ECJ has come as far as to acknowledge that the rule of law, under Article 2 TEU, can be a self-standing standard for judicial review at EU level (cases C-156 and C-157/21), however, it has not yet clarified if and to what extent a violation of the EU fundamental values by a Member State trumps concerns regarding the EU competence constraints and whether those fundamental values amount to supreme principles of EU constitutional law.

These considerations acquire new significance in light of the direction the EU is taking in countering rule of law problems, by predominantly relying on the economic leverage . Especially conditionality can increase the confrontation on the Union rule of law policy and it is indeed a "trojan horse" for the expansion of the EU competences if applied in a decisive manner: through self-commitments and self-constraints, conditionality mechanisms can let the EU intervene in domestic areas, like the judiciary and the civil service, where the EU is not formally the competent authority to act. Once those commitment have been made, the difference between nudging and coercion on the EU side, to use the US Supreme Court terminology, becomes questionable – as also the experience of the Eurozone crisis revealed – if there are no clear boundaries to ascertain the legality of the EU intervention (Baraggia and Bonelli 2022). Further reflections on the wider democratic implications (and backslash) of the EU rule of law conditionality, also in terms of accountability, responsiveness and rate of dissensus should inform the future academic work on the topic, whereas, on the contrary, for the time being most scholars consider that the Union's institutions could and should have used spending conditionality, for example through structural funds (Kelemen and Scheppele, 2018; Halmai 2019), against the illiberal regimes for a long time already, but refused to do so thereby undermining the EU's credibility.

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Appendix I – List of relevant legal texts and documents

Primary Law

TEU

Article 2 TEU
Article 4 TEU
Article 7 TEU
Article 19 TEU

TFEU

Article 19 TFEU
Articles 101 TFEU
Article 102 TFEU
Article 106 TFEU
Article 107 TFEU
Article 108 TFEU
Article 114 TFEU
Article 120 TFEU
Article 121 TFEU
Article 125 TFEU
Article 167 TFEU
Article 175 TFEU
Article 258 TFEU
Article 260 TFEU
Article 265 TFEU
Article 267 TFEU
Article 310 TFEU
Article 317 TFEU
Article 322 TFEU

Charter of fundamental rights of the EU

Article 11
Article 47
Article 51

EU Legislation

Regulation 1/2003
Regulation 407/2010
Regulation 472/2013
Regulation 883/2013
Regulation 825/2017
Regulation 1939/2017
Regulation 1671/2018
Regulation 672/2020
Regulation 2092/2020
Regulation 2094/2020
Regulation 240/2021
Regulation 241/2021
Regulation 1060/2021
Regulation 2115/2021
Regulation 435/2023

Directive 2003/87/EC
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Appendix III – Table and figures

Table 1. Old and new instruments to tackle rule of law problems

Existing general instruments	***Ad hoc instruments***
Infringement proceeding	*Article 7 TEU*
Preliminary ruling procedure	*The cooperation and verification mechanism*
Technical Support Instrument	*Rule of law Framework and Dialogue*
OLAF and EPPO	*EU Justice Scoreboard*
European Semester	*Rule of Law Reports*
Recovery and Resilience Facility	*Rule of Law conditionality Regulation*
Competition law	

Appendix III – Table and figures

Figure 1: Rule of Law Tools - Categories of measures "by aim"

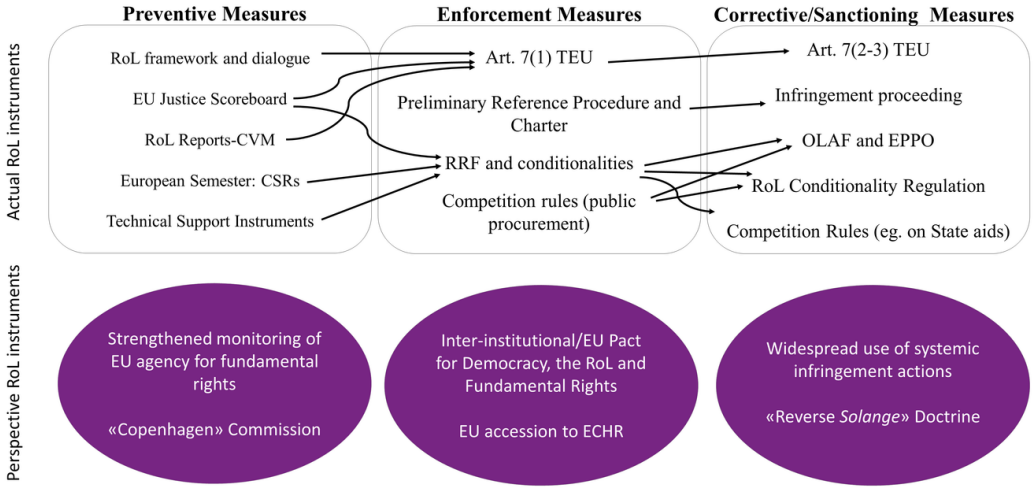
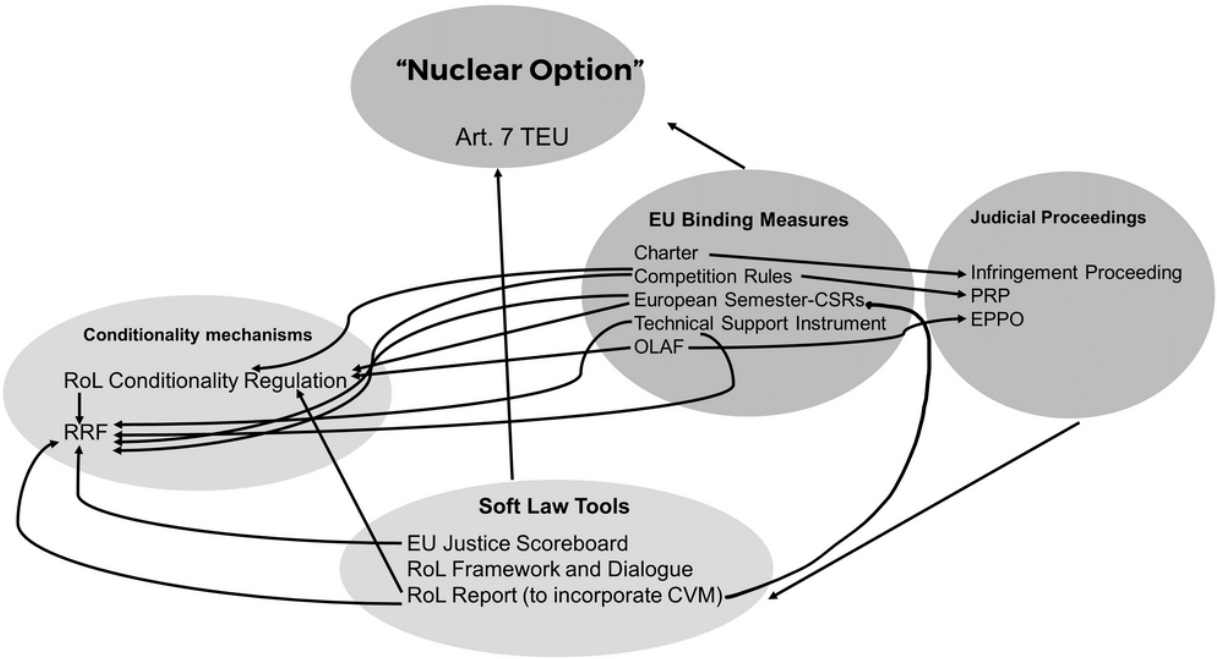


Figure 2: Procedural Linkages between EU RoL Instruments



ESTABLISHED EU RULE OF LAW INSTRUMENTS

STATE-OF-THE-ART WORKING PAPER

Milestone n°5

By Cristina Fasone, Adriano Dirri & Ylenia Guerra (eds.)

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