



An EU mechanism on democracy, the rule of law and fundamental rights

European Added Value Assessment
accompanying the legislative
initiative report
(Rapporteur: Sophie in 't Veld)

IN-DEPTH ANALYSIS

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European Added Value Assessment

In-Depth Analysis

Abstract

European Parliament legislative initiative reports drawn up on the basis of Article 225 of the Treaty on the Functioning of the European Union are automatically accompanied by a European Added Value Assessment (EAVA). Such assessments are aimed at evaluating the potential impacts, and identifying the advantages, of proposals made in legislative initiative reports.

This EAVA accompanies a resolution based on a legislative initiative report prepared by Parliament's Committee on Civil Liberties, Justice and Home Affairs (LIBE) (rapporteur: Sophie in 't Veld (ALDE, the Netherlands), presenting recommendations to the Commission on an EU mechanism on democracy, the rule of law and fundamental rights (P8_TA-PROV (2016) 0409). The main conclusion of the EAVA is that there is a gap between the proclamation of the rights and values listed in Article 2 TEU and actual compliance by EU institutions and Member States, resulting in significant economic, social and political costs. The root causes of this lack of compliance are to be found in certain weaknesses in the existing EU legal and policy framework on democracy, the rule of law and fundamental rights. These weaknesses could be overcome by the conclusion of an EU Pact for Democracy, the Rule of Law and Fundamental Rights (DRF) in the form of an interinstitutional agreement (IIA). This IIA should lay down arrangements for (i) the development of an annual European report on the state of democracy, the rule of law and fundamental rights in the Member States with country-specific recommendations assessing compliance with DRF, and (ii) a policy cycle for DRF, involving EU institutions and national parliaments, with country-specific recommendations aimed at monitoring and enforcing Member State compliance, including a DRF policy cycle within the institutions of the Union.

This could be done at relatively low cost, particularly if the right synergies are found with international organisations, whilst at the same time having significant benefits, notably fostering mutual trust and recognition, attracting more investment, and providing higher welfare standards.

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Executive summary

In accordance with Article 2 of the Treaty on European Union (TEU), the Union and its Member States subscribe to respect for the values of democracy, the rule of law and fundamental rights.¹ However, there is a gap between the proclamation of these rights and values and actual compliance with them on the part of the European Union (EU) and its Member States.² The root causes of this lack of compliance are to be found in weaknesses in the existing EU legal and policy framework on democracy, the rule of law and fundamental rights. Those weaknesses relate to: firstly, discussions on the scope of EU competence to enforce the rights and values listed in Article 2 TEU, including a discussion on their exact meaning; secondly, to the (consequent) division of monitoring responsibilities between the EU and its Member States as well as between EU bodies; and thirdly, the lack of effectiveness of existing enforcement mechanisms.

The European Commission and the Council of the European Union have devised certain mechanisms to strengthen the rule of law in the EU. In 2014, the Commission issued a Communication on 'A new EU framework to strengthen the Rule of Law'.³ The Communication comprises an 'early warning tool' leading to a 'structured dialogue' with the Member State concerned, aimed at addressing emerging threats to the rule of law before they escalate. The framework has only been activated once, with regard to Polish legislation affecting the powers and composition of the constitutional tribunal and the management of state TV and radio broadcasters. The structured dialogue has not yet been completed.⁴

In conclusions adopted on 16 December 2014, the Council of the EU and the Member States meeting within the Council committed themselves to establishing an annual dialogue among all Member States within the (General Affairs) Council to promote and safeguard the rule of law in the framework of the Treaties. The process should be evaluated by the end of 2016.⁵

Neither the Commission nor the Council initiatives have convinced the European Parliament of their capacity to fill completely the gaps and barriers in the existing EU legal and policy framework on democracy, the rule of law and fundamental rights.⁶ Based on a legislative initiative report, Parliament now calls for an EU Pact on

¹ Article 2 TEU: 'The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.'

² For more details, see the EPRS briefings '[Member States and the rule of law, dealing with a breach of EU values](#)' and '[Understanding the EU Rule of Law Mechanisms](#)'

³ For more details, see the EPRS Briefing '[Understanding the EU Rule of Law mechanisms](#)'

⁴ [Rule of law in Poland: Commission starts dialogue; Poland: MEPs debate rule of law issues with Prime Minister Szydło](#);

⁵ [Conclusions of the Council of the EU and the Member States meeting within the Council on ensuring respect for the rule of law](#), Council doc 17014/14

⁶ P8_TA-PROV(2015)0227, paragraph 12

democracy, rule of law and fundamental rights.⁷ The proposed Pact entails the establishment of a comprehensive Union mechanism for democracy, the rule of law and fundamental rights, integrating, aligning and complementing existing mechanisms. The mechanism has two core elements:

- an annual European report on the state of democracy, the rule of law and fundamental rights in the Member States; and
- an EU policy cycle for democracy, the rule of law and fundamental rights, involving EU institutions and national parliaments, including a DRF policy cycle within the institutions of the Union

This European Added Value Assessment (EAVA) evaluates the potential impacts, and identifies the advantages, of these core elements of the EU Pact on democracy, rule of law and fundamental rights. It does so based on the evidence provided by two in-depth research papers specifically commissioned for the purpose of this EAVA.⁸

The EAVA discusses the legal basis, subsidiarity and proportionality, methodology, and the division of responsibility for drafting the annual European report on the state of democracy, the rule of law and fundamental rights in the Member States. Based on expert research, it concludes that the EU has the competence to establish such a monitoring report with a view to protecting its 'constitutional core', i.e. the values it shares with the Member States.⁹ This obligation also extends to matters where Member States act outside the scope of the implementation of EU law.¹⁰

As regards the legal basis for the adoption of an EU Pact on democracy, rule of law and fundamental rights (DRF), several options have been suggested in the two in-depth research papers, including an interinstitutional agreement based on Article 295 TFEU, which is Parliament's preferred option. Another suggestion is Article 352 TFEU, which, for example, also constituted the legal basis for the regulation establishing the Fundamental Rights Agency.¹¹

The gaps identified in DRF monitoring and enforcement cannot be filled by Member States acting alone. The added value of action at EU level is that responsibility for DRF monitoring and evaluation exercises can be clearly allocated and coordination ensured. The proportionality of EU intervention will be guaranteed through the proposed methodology for a European report on the state of democracy, the rule of law and

⁷ 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 (2015/2254(INL)), [P8_TA-PROV](#) (2016) 0409, para. 1, Annex, article 1 ; This excludes proposals that would require Treaty revision, as contained in para. 20 of the Resolution

⁸ See supra note 4.

⁹ Bárd et al (2016), section 3.2; EP Resolution recital D

¹⁰ This is because Article 2 TEU does not contain a similar limitation in the scope of its application to the one found in Article 51 of the Charter of Fundamental Rights of the European Union (O.J. C 326, 26.10.2012).

¹¹ Council of the European Union, [Council Regulation \(EC\) No 168/2007 of 15 February 2007 establishing a European Union Agency for Fundamental Rights](#), O.J. L 53 of 22.2.2007.

fundamental rights in the Member States, which is not unduly burdensome or costly in terms of data collection and reporting requests to Member States. The development of a European Fundamental Rights Information System (EFRIS) by the Fundamental Rights Agency, based on existing sources of information and evaluations of instruments already in place in this field,¹² could help to achieve this aim. However, standards, sources, data, data-handling methods and the interpretations of each of the various sets of tools are so different in nature and fundamentals, that they require a tedious methodological exercise in order to make international mechanisms comparable, and to allow for meaningful conclusions and findings.¹³ The DRF European report should combine dialogue, monitoring, benchmarking and evaluation exercises with various actors and methods.¹⁴ Parliament's recommendations offer sufficient flexibility to recognise the different ways Member States have found to respect DRF by combining a quantitative and qualitative analysis of the data and information available.¹⁵ Finally, Parliament calls for the Commission to draw up the DRF report in consultation with an independent panel of experts (DRF Expert panel).¹⁶

One of the expert research papers takes a slightly different approach to that of Parliament, making the independent panel of experts directly responsible for the drafting of the annual report. However, for the other experts, this approach seems broadly compatible with the ideas put forward in Parliament's Resolution, which also places the DRF European report in the context of an EU policy cycle.¹⁷

The EU can only claim legitimacy to enforce the observance of the rights and values listed in Article 2 internally if it observes those standards itself. A comprehensive legislative policy cycle is required, in which the effects of envisaged EU legislation on fundamental rights are forecast and evaluated. In this context, more effective use could be made of the instruments already available to the EU institutions. Parliament also calls for the DRF expert panel to assess DRF compliance by the institutions.¹⁸ A fundamental rights and rule of law compliance culture should be spread and enhanced in Impact Assessments.

As regards the Pact's costs and benefits, it should be pointed out that societies in which democracy, the rule of law and fundamental rights are respected tend to attract more

¹² EP Resolution, Annex, Article 6; An EU internal strategic framework for fundamental rights: joining forces to achieve better results, FRA, 2015, p. 17: 'The EU could also provide funds for the creation of a European fundamental rights information system that would form a hub, bringing together, in an accessible manner, existing information from the United Nations, the Council of Europe, the Organization for Security and Co-operation in Europe and the EU. Such a system would enhance transparency and objectivity and increase awareness about European and international standards, especially those of the Council of Europe in the EU context. It would also allow practitioners to make an informed assessment of a given country's fundamental rights situation in a specific area.'

¹³ Bárd et al (2016), section 4.4

¹⁴ Bárd et al (2016), section 4.

¹⁵ EP Resolution, Annex, Article 8.

¹⁶ EP Resolution, Annex, Article 4.

¹⁷ Bárd et al (2016), section 4.6

¹⁸ EP Resolution, Annex, Article 11

investment and to benefit from higher welfare standards.¹⁹ Conversely, in societies where this is not the case, a negative impact on the economy is noticeable. Control of corruption, institutional checks on government, protection of property rights, and mitigation of violence are all in close correlation with economic performance. In a recent Cost of Non-Europe Report on Organised Crime and Corruption, the cost of corruption to the European economy in terms of GDP was estimated at between 218 and 282 billion euro annually.²⁰ There is also a negative impact on mutual trust between Member States, which is based on a presumption of fundamental rights standards being enforced by an independent judiciary. This presumption may not always be appropriate, given the fact that rights intrinsically related to the rule of law and democracy, such as the right to a fair trial, timely proceedings and to a legal remedy, are among those most often violated by the Member States.²¹

Parliament's Resolution stresses that any financial implications of the requested proposals for the budget of the Union should be covered by the existing budgetary allocations.²² It is clear, however, that there will be costs and benefits both at EU and Member State level, which will need to be taken into account. According to Parliament's Resolution, the costs related to the provision of a secretariat to the DRF expert panel are to be borne by the Commission. Providing a secretariat will enable the panel to function efficiently, in particular by facilitating the gathering of data and information sources to be reviewed and assessed, and by providing administrative support during the drafting process.²³ The members of the independent panel of experts would also need to be paid. Given the competences requested, based on data from the 2014 European Commission for the Efficiency of Justice (CEPEJ), an average yearly salary of 90 000 euro per expert should be taken as a basis.²⁴

The operational costs of the DRF European report (no economies of scale) can be estimated at 4 million euro per year, based on the experience of the Council of Europe's Venice Commission.²⁵ Through the cooperation envisaged with the Council of Europe and other bodies, some important economies of scale can be realised.²⁶ Further synergies could be achieved by the fact that the DRF European report is to replace the Cooperation and Verification Mechanism (CVM) for Bulgaria and Romania. This would apply to both the human resources devoted to drawing up the CVM reports and

¹⁹ Pech et al (2016), executive summary, chapter 4; (2016), Bárd et al, executive summary, Annex 4 (thematic contribution by Marneffe).

²⁰ EPRS Organised Crime and Corruption: Cost of Non-Europe Report, PE 558.779, 2016; EP Resolution, Recital P.

²¹ ECHR, [violations by Article and respondent state](#), 2015

²² EP Resolution, paragraph 22.

²³ EP Resolution, Annex, Article 8.3

²⁴ CEPEJ Report on 'European judicial systems - Edition 2014 (2012 data): efficiency and quality of justice', p. 309 (Gross and net annual salaries of judges and prosecutors at the Supreme Court or at the last instance in 2012).

²⁵ http://www.venice.coe.int/WebForms/pages/?p=01_Presentation&lang=EN

²⁶ Bárd et al (2016), Annex 4 (Thematic contribution by Marneffe); EP Resolution, Annex, Article 6

the related funding and technical assistance.²⁷ However, an uncertain cost factor lies in the degree of specificity of the DRF European report (which data sources can and cannot be used, which additional data have to be collected).

Building the Council's rule of law dialogue into a debate on the DRF European report would require a more detailed and in depth discussion, involving more time and human resources devoted to meetings in Brussels and commenting on the developments in other Member States. A positive impact could be that Member States would feel more comfortable in discussing matters in a peer-to-peer situation. However, this may not be the case with Member States for which a (clear risk of) a serious breach of EU values occurs. A new inter-parliamentary dialogue fostered by the European Parliament would require delegations to travel to Brussels. National parliaments would also need to make human resources available to assess their country reports. Additional costs could arise due to expert consultations and follow-up reports.

A comprehensive legislative policy cycle in which the effects of envisaged EU legislation on fundamental rights are forecast and evaluated, would be likely to result in more (in-depth) ex ante and ex post impact assessments, consultations and related costs. There would, however, be a better chance of avoiding EU measures and actions violating fundamental rights, undermining the credibility of the EU to act internally and externally, as well as the potential costs of compensating victims and repairing legislation.

²⁷ EP Resolution, Annex, Article 5; European Commission - [Fact Sheet, Reports on Progress under the Cooperation and Verification Mechanism in Bulgaria and Romania](#)

Introduction

European Parliament legislative initiative reports drawn up on the basis of Article 225 of the Treaty on the Functioning of the European Union are automatically accompanied by a European Added Value Assessment (EAVA).²⁸ EAVAs are aimed at evaluating the potential impacts, and identifying the advantages, of proposals made in legislative initiative reports.

This EAVA accompanies a Resolution based on a legislative initiative report prepared by Parliament's Committee on Civil Liberties, Justice and Home Affairs (LIBE), Rapporteur Sophie in 't Veld (ALDE, the Netherlands), on an EU mechanism on democracy, the rule of law and fundamental rights.²⁹ The Resolution presents recommendations to the Commission on the establishment of such a mechanism 'as a tool for compliance with and enforcement of the Charter and Treaties as signed by all Member States, relying on common and objective indicators', as called for in Parliament's resolution of 10 June 2015 on the situation in Hungary³⁰.

This EAVA builds on two in-depth research papers by expert consortia specialised in the rule of law and fundamental rights and impact assessment analysis.³¹ It is structured as follows:

- an identification of the shortcomings and gaps in the existing EU legal and policy framework on democracy, the rule of law and fundamental rights;
- an identification and assessment of legislative and non-legislative policy options to address these shortcomings and gaps; and
- a cost-benefit analysis of the policy options identified.

Given the scope and complexity of the topic, a wide spectrum of recommendations are made. However, part two of this EAVA concentrates on the main elements of the EU

²⁸ Prepared by the European Added Value Unit of the Directorate for Impact Assessment and European Added Value, within the European Parliament's Directorate-General for Parliamentary Research Services.

²⁹ European Parliament resolution of 25 October 2016 Report with recommendations to the Commission on the establishment of an EU mechanism on democracy, the rule of law and fundamental rights (2015/2254(INL)), A8-0823/2016P8_TA-PROV (2016) 0409

³⁰ P8_TA-PROV(2015)0227, paragraph 12. This builds on several past EP resolutions including the resolution of 27 February 2014 on the situation of fundamental rights in the European Union (2012), P7_TA(2014)0173; resolution of 3 July 2013 on the situation of fundamental rights: standards and practices in Hungary (pursuant to the resolution of 16 February 2012), P7_TA(2013)0315. Parliament has also more recently expressed its views on the matter in its Resolution of 8 September 2015 on the situation of fundamental rights in the European Union (2013-2014), P8_TA-PROV(2015)0286; and a follow-up resolution on the situation in Hungary adopted on 16 December 2015, P8_TA-PROV(2015)0461.

³¹ The two research papers specifically commissioned for the purpose of this EAVA are: 'The establishment of an EU mechanism on democracy the rule of law and fundamental rights' by Laurent Pech, Erik Wennerström, Vanessa Leigh, Agnieszka Markowska, Linda De Keyser, Ana Gómez Rojo and Hana Spanikova, and 'Assessing the need and possibilities for the establishment of an EU scoreboard on democracy, the rule of law and fundamental rights' by Petra Bárd, Sergio Carrera, Elspeth Guild and Dimitry Kochenov, with a thematic contribution by Wim Marneffe.

Pact for Democracy, Rule of Law and Fundamental Rights proposed by Parliament. This Pact entails the establishment of a comprehensive Union mechanism for democracy, the rule of law and fundamental rights integrating, aligning and complementing existing mechanisms, and has two core elements:

- an annual European report on the state of democracy, the rule of law and fundamental rights in the Member States; and
- an EU policy cycle for democracy, the rule of law and fundamental rights (DRF), involving EU institutions and national parliaments, including a DRF policy cycle within the institutions of the Union

Part three of this EAVA then considers the social, economic and political costs and benefits of this policy option compared to the current situation.

1. Shortcomings and gaps in the existing EU legal and policy framework on democracy, the rule of law and fundamental rights

In accordance with Article 2 of the Treaty on European Union (TEU), the Union and its Member States subscribe to democracy, the rule of law and fundamental rights.³² However, there is a gap between the proclamation of these rights and values and actual compliance with them by the EU and its Member States.³³ The root causes for this lack of compliance are to be found in weaknesses in the existing EU legal and policy framework on democracy, the rule of law and fundamental rights. Those weaknesses relate firstly, to ongoing discussions on the scope of EU competence to enforce the rights and values listed in Article 2 TEU, including a discussion on their exact meaning; secondly, to the (consequent) division of monitoring responsibilities between the EU and its Member States as well as between EU bodies, and thirdly, the lack of effectiveness of existing enforcement mechanisms.

The analysis of the three main weaknesses of the current EU framework on rule of law and fundamental rights requires first an assessment of the compliance problems in the context of international law. The current problems related to the rule of law and fundamental rights in the EU Member States are not limited to the monitoring and supervision by the EU of Member States, which depart from being a democracy based on the rule of law and fundamental rights.³⁴ Member States' compliance with United Nations and Council of Europe instruments,³⁵ and the implementation of European Court of Human Rights judgments, leads to formidable challenges in EU Member States.³⁶ This problematic situation has a direct effect on EU measures and cooperation as they are based on the presumption of compliance with these international obligations. An example is found in the area of detention where several Member States have been found to have systemic problems as regards prison conditions, notably overcrowding amounting to inhuman or degrading treatment,³⁷ putting at risk the principles of mutual trust and mutual recognition of judicial decisions in criminal matters. Parliament has called for measures to improve standards of detention,

³² Article 2 TEU: 'The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.'

³³ For more details, see the EPRS briefings '[Member States and the rule of law, dealing with a breach of EU values](#)' and '[Understanding the EU Rule of Law Mechanisms](#)'

³⁴ Other terms used for this process and further explained in the research papers by Pech et al (2016) and Bárd et al (2016) are 'rule of law backsliding', 'constitutional capture' and the building of an 'illiberal democracy'. On this, see also the working document by Frank Engel (EPP shadow rapporteur, Luxembourg) on a European Pattern of Governance.

³⁵ For details see Bárd et al (2016), section 1.3, Annex 1 and Annex 3.

³⁶ Further discussed in the working document by Laura Ferrara (EFDD shadow rapporteur, Italy) on litigation by citizens as a tool for private enforcement.

³⁷ In breach of Article 3 ECHR and 4 EU Charter; For figures see the [Council of Europe Annual Penal Statistics, SPACE I, Prison populations, Survey 2014](#), PC-CP((2015)(7)

including legislative proposals on the conditions of pre-trial detention.³⁸ So far the Commission has not responded to this call. The issue has become even more pertinent now that it has become clear that poor detention conditions are also undermining the fight against terrorism.³⁹

The issues related to compliance concern not only the Member States but equally EU institutions. The EU can only claim full democratic legitimacy to enforce and promote the rights and values listed in Article 2 TEU in internal and external policies⁴⁰ if it observes those standards itself. The EU, however, still lacks a comprehensive legislative policy cycle in which the effects of envisaged EU legislation on fundamental rights are forecast and evaluated.⁴¹ The accession of the EU to the European Convention on Human Rights (ECHR), as required by Article 6.2 of the TEU, is currently on hold. It is argued that accession to the ECHR would enhance compliance of the EU institutions with fundamental rights because it would place their actions under the external scrutiny of the European Court of Human Rights.⁴² However, the proposed draft agreement on the accession was found to be incompatible with EU law by the Court of Justice which raised concerns related to respect for the autonomy of EU law and the principle of mutual recognition on which intra EU cooperation is based.⁴³

The current EU legal and policy framework, which supplements the international law framework, has three main weaknesses: (1) the scope of EU competences; (2) division of responsibilities between EU and MS and (3) enforcement.

(1) The scope of EU competences

According to Articles 2, 3 (1) and 7 TEU the EU has a mandate to intervene to protect its 'constitutional core', i.e. the values it shares with the Member States.⁴⁴ This

³⁸ See [EP resolution of 27 February 2014 with recommendations to the Commission on the review of the European Arrest Warrant \(2013/2109\(INL\)\)](#); [Revising the European arrest warrant, DG EPRS European Added Value Assessment](#)

[accompanying the European Parliament's Legislative Own-Initiative Report](#) (Rapporteur: Baroness Ludford, ALDE, United Kingdom)

³⁹ [EP resolution of 25 November 2015 on the prevention of radicalisation and recruitment of European citizens by terrorist organisations P8_TA-PROV\(2015\)0410](#), paragraph 10: 'encourages Member States to take immediate action against prison overcrowding, which is an acute problem in many Member States which significantly increases the risk of radicalisation and reduces the opportunities for rehabilitation'

⁴⁰ Article 3(1) and 3(5) TEU; Council of the European Union, [EU Strategic Framework and Action Plan on Human Rights and Democracy](#), 25 February 2012; Pech et al (2016) section 2.2.

⁴¹ Further discussed in the working document by Timothy Kirkhope, shadow rapporteur (ECR, United Kingdom) on Democracy, Rule of law and Fundamental rights in impact assessment or screening procedures; see also Pech et al (2016), section 2.1.3 under 'fundamental rights proofing of EU legislative proposals'.

⁴² Pech et al (2016), section 2.4.5.

⁴³ Court of Justice of the European Union, [Opinion 2/13 of 18 December 2014](#). Opinion pursuant to Article 218(11) TFEU - draft international agreement - Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms - Compatibility of the draft agreement with the EU and FEU Treaties.

⁴⁴ Bárd et al (2016), section 3.2

obligation also extends to matters where Member States act outside the scope of the implementation of EU law.⁴⁵ Member States rely on each other's compliance with EU law, rights and values in multiple areas (economic policies, asylum, migration, policing, justice etc.). Therefore, depreciation of EU values in one Member State will have EU-wide effects in many ways, notably undermining the basis for mutual recognition of decisions taken in that Member State.⁴⁶ In light of the obligation to uphold and promote the values of the Union, as well as the duty of sincere cooperation stemming from the Treaties, each Member State is required to actively engage in the attempts of the Union to restore adherence to the values in any part of the Union's territory.⁴⁷ Thus, according to the Treaties, both EU and MS have competences and obligations in the area of fundamental rights and rule of law. However, it is important to understand that there is no single ideal formula to achieve compliance with fundamental rights, democracy and the rule of law⁴⁸ and Member States have found different ways to respect these rights and values.

(2) Allocation of responsibilities between EU and MS as well as between EU bodies for compliance with fundamental rights and rule of law

The EU and its institutions have various monitoring and evaluation processes in place related to democracy, the rule of law and fundamental rights. The range is broad, ranging from accession negotiations guided by the 'Copenhagen criteria' based on Articles 2 and 49 (1) TEU, the Cooperation and Verification Mechanism applicable to Bulgaria and Romania⁴⁹, the 'European Semester' aimed at coordinating the economic policies of the Member States⁵⁰, the EU Justice Scoreboard⁵¹, and the EU Anti-Corruption Report⁵², to peer evaluation of the implementation of Union policies related to the establishment of the Area of Freedom, Security and Justice based on Article 70 TFEU. However, these processes do not seem to be coordinated. Each of the main EU institutions has sought to establish its own mechanism to safeguard Article 2 TEU values at Member State level. Furthermore, there is no institutional effort enabling an overall assessment of compliance with the rights and values of Article 2 TEU.⁵³ The European Union Agency for Fundamental Rights (FRA) provides the EU institutions, bodies, offices and agencies and its Member States with assistance and expertise relating to fundamental rights. Its mandate is, however, limited to Member State

⁴⁵ This is because Article 2 TEU does not contain a similar limitation in the scope of its application to the one found in Article 51 of the Charter of Fundamental Rights of the European Union (O.J. C 326, 26.10.2012).

⁴⁶ Bárd et al (2016), section 4.2

⁴⁷ Bárd et al (2016), section 4.2

⁴⁸ Bárd et al (2016), section 2.1.

⁴⁹ European Commission, Mechanism for cooperation and verification for Bulgaria and Romania

⁵⁰ European Commission, Making it happen, the European Semester

⁵¹ European Commission, EU Justice Scoreboard

⁵² European Commission, Anti-Corruption Report; EPRS Organised Crime and Corruption: Cost of Non-Europe Report, PE 558.779, 2016.

⁵³ Further discussed in the working document by Monika Flašíková Beňová (S&D shadow rapporteur, Slovakia) on the establishment of an EU mechanism on democracy, the rule of law and fundamental rights - Scoreboard on Democracy, Rule of Law and Fundamental rights.

actions when implementing EU law and currently does not allow for systematic monitoring of democracy, the rule of law and fundamental rights in the Member States.⁵⁴

(3) Enforcement

The problems do not limit themselves to allocation of responsibility for and coordination of monitoring and evaluation exercises. They also relate to a lack of supervision and enforcement, particularly when there are serious problems with democracy, the rule of law and fundamental rights in a certain Member State. Article 7 TEU contains a procedure which is meant to address this situation. It allows relevant EU institutions to act in situations where there is 'a clear risk of a serious breach' of EU values by a Member State (Article 7 (1)) or where there is a 'serious and persistent breach' of EU values laid down in Article 2 TEU (Article 7(2)). Ultimately, the Member State concerned can be sanctioned through the suspension of membership rights.⁵⁵ However, since its introduction in the Treaties it has never been used, due to reasons ranging from its institutional design, which bars individuals from bringing actions,⁵⁶ excludes substantive judicial review by the Court of Justice, and contains high thresholds for decision-making,⁵⁷ to the general lack of political willingness among Member States to use it.⁵⁸ The fact that Article 7 has never been used has also led to doubts regarding the ability of the EU to deal with deliberate politico-legal strategies which aim to undermine or result in serious threats or breaches of EU values.⁵⁹ The lack of effective cooperation among EU institutions and between those institutions and Member States may be seen to violate the principle of sincere cooperation in accordance with Articles 4 and 13 TEU.⁶⁰

Thus, the current enforcement framework is limited and proves to be ineffective in solving the existing challenges related to the rule of law in the EU. A coherent approach to the enforcement of the rights and values in Article 2 TEU is required, taking into account the need to respect national identity, subsidiarity and proportionality.⁶¹

⁵⁴ Council Regulation (EC) No 168/2007 of 15 February 2007 establishing a European Union Agency for Fundamental Rights, O.J. L 53 of 22.2.2007.

⁵⁵ For further details see Pech et al (2016), section 2.1.

⁵⁶ ECJ Case T-337/03 of 2 April 2004, Bertelli Gálvez v Commission, ECR 2004 II-01041; This is notwithstanding the right to petition to the European Parliament in accordance with Article 227 TFEU; see the EPRS briefing on 'The right to petition the European Parliament'; and the possibility to launch a European citizens initiative in accordance with Regulation 211/2011 (O.J. L 65, 11.3.2011, p. 1).

⁵⁷ The 'preventive mechanism' of Article 7(1) requires a majority of four-fifths of the Council's members; the 'sanctioning mechanism' of Article 7(2) requires unanimity in the European Council.

⁵⁸ Further discussed in the working document by Barbara Spinelli (GUE/NGL shadow rapporteur, Italy) on using Article 2 and the Charter as a basis for infringement procedures.

⁵⁹ Pech et al (2016), executive summary.

⁶⁰ Pech et al (2016), section 4.1.1.

⁶¹ Article 4(2) TEU: 'The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. It shall respect their essential State functions, including ensuring the

The European Commission and the Council of the European Union have devised certain mechanisms to strengthen the rule of law in the EU. Before addressing in more detail in section 2 the possible policy options for the European Parliament, the following is an overview of the existing actions and their shortcomings.

1.1. Commission framework to strengthen the rule of law

In 2014, the Commission issued a Communication on 'A new EU framework to strengthen the Rule of Law'.⁶² The Communication comprises an 'early warning tool' leading to a 'structured dialogue' with the Member State concerned aimed at addressing emerging threats to the rule of law before they escalate. The structured dialogue itself consists of three possible stages:

1. A 'rule of law opinion' sent by the Commission to the Member State concerned.
2. Potentially followed by a 'rule of law recommendation' with specific indications on how to resolve the situation within a prescribed deadline.
3. A phase in which the implementation of the recommendation is monitored, potentially followed by the activation of Article 7 TEU.

However, different questions remain open concerning this framework, both as regards its theoretical conception and its practical execution. Those questions reflect the more general lack of normative clarity, outstanding differences of opinion concerning the institutional division of labour, and the lack of effective enforcement. This begins with questions as regards the framework's relevance. Some doubts have been raised regarding the real need for such a 'preventive-preventive' process instead of making use of the procedure of Article 7(1).⁶³ Even so, the process is also seen as having shifted the focus 'from an Article 7 TEU emergency-led context towards a discussion on shared European values and legal principles'.⁶⁴ The scholarly debate has critically assessed the Commission framework. The key problematic questions related to the Commission framework are: whether the process is comprehensive enough given its limitation to the rule of law and whether the Commission sufficiently clarified the criteria for triggering the structured dialogue, particularly the determination of a 'systemic threat to the rule of law'. There are also questions regarding the transparency and accountability of the structured dialogue, as well as its ultimate effectiveness in

territorial integrity of the State, maintaining law and order and safeguarding national security. In particular, national security remains the sole responsibility of each Member State.'; Article 5(1) TEU: 'The limits of Union competences are governed by the principle of conferral. The use of Union competences is governed by the principles of subsidiarity and proportionality.'

⁶² For more details, see the EPRS Briefing '[Understanding the EU Rule of Law mechanisms](#)'

⁶³ Pech et al (2016), section 1.5.

⁶⁴ Bárd et al (2016), executive summary.

bringing the Member State concerned 'back on track'.⁶⁵ In the end, if the structured dialogue fails, the Article 7 route will still need to be taken.

However, at this moment not all of these questions can be answered, as the framework has only been activated once, with regard to Polish legislation affecting the powers and composition of the constitutional tribunal and the management of state TV and radio broadcasters, and the structured dialogue has not yet been completed.⁶⁶ Taking into account the assessment of the Venice Commission,⁶⁷ the Commission adopted a rule of law opinion on 1 June 2016.⁶⁸ As exchanges with the Polish government did not lead to a satisfactory solution, and the law adopted by the Polish Parliament on the Constitutional Tribunal on 22 July 2016 failed to satisfactorily address its concerns, the Commission followed up with a rule of law recommendation on 27 July 2016.⁶⁹ It contains a time limit of three months for the Polish government to solve the problems identified (by 27 October 2016). If this does not happen, the Commission could activate the Article 7 procedure. The framework is depicted in Figure 1 below:

⁶⁵ Bárd et al (2016), executive summary.

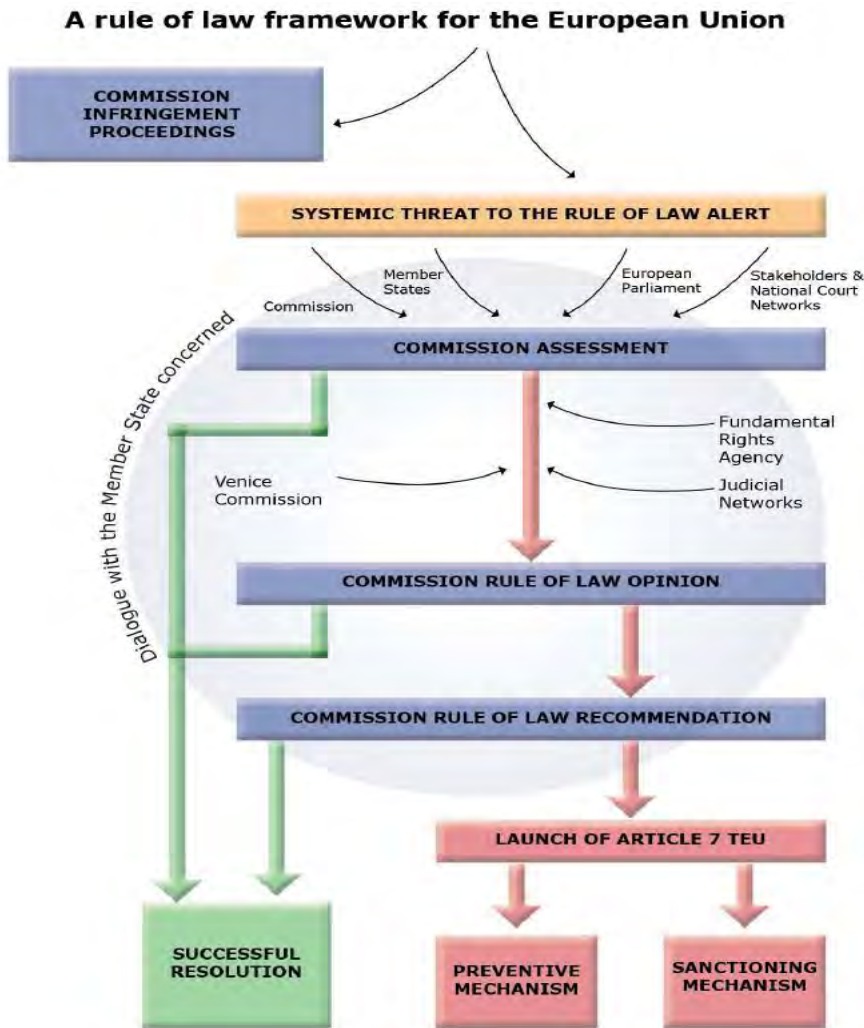
⁶⁶ Rule of law in Poland: Commission starts dialogue; Poland: MEPs debate rule of law issues with Prime Minister Szydło;

⁶⁷ The Venice Commission adopted its opinion on the amendments to the act of the constitutional tribunal on 11 March 2016.

⁶⁸ Annexed to L. Pech, Commission Opinion of 1 June 2016 regarding the Rule of Law in Poland: Full text now available, EU Law Analysis, 19.08.2016.

⁶⁹ Commission Recommendation (EU) 2016/1374 of 27 July 2016 regarding the rule of law in Poland, C/2016/5703, OJ L 217, 12.8.2016, p. 53-68; Commission Recommendation regarding the Rule of Law in Poland: Questions and Answers; European Parliament resolution of 14 September 2016 on the recent developments in Poland and their impact on fundamental rights as laid down in the Charter of Fundamental Rights of the European Union.

Figure 1: A rule of law framework for the European Union



Source: Annex 2, Commission Communication, *A new EU Framework to strengthen the Rule of Law* COM(2014) 158 final, 11.3.2014, at 4.

1.2. Council Rule of Law dialogue

In Conclusions adopted on 16 December 2014, the Council of the EU and the Member States meeting within the Council, committed themselves to establishing an annual dialogue among all Member States within the (General Affairs) Council to promote and safeguard the rule of law in the framework of the Treaties. The first dialogue took place under the Luxembourgish Presidency on the theme of Internet security. The dialogue left it largely to Member States to identify their own shortcomings and advance solutions through a confidential process of self-reflection.⁷⁰ The second dialogue took

⁷⁰ Butler, I., for Liberties EU, *'The Rule of Law Dialogue: 5 Ideas for Future EU Presidencies'*, 23 December 2015.

place under the Netherlands Presidency on the theme of migrant integration and EU fundamental values.⁷¹

The process should be evaluated by the end of 2016.⁷² The European Parliament has welcomed the fact that the Council is holding debates on the rule of law. However, it considers that such debates are not the most effective way to resolve any non-compliance with the fundamental values of the European Union. It has also expressed regret with the fact that Parliament is neither formally informed of, nor involved in, the organisation of these debates.⁷³

Neither the Commission nor the Council initiatives have convinced the Parliament of their ability to fully overcome the gaps and barriers in the existing EU legal and policy framework on democracy, the rule of law and fundamental rights.⁷⁴ The potential impacts and advantages of its recommendations will be discussed in the following sections.

2. Legislative and non-legislative policy recommendations

The shortcomings and gaps identified in the existing EU legal and policy framework on democracy, the rule of law and fundamental rights can only be overcome through vertical and horizontal cooperation between the EU and its Member States, as well as EU institutions and agencies among each other. The analysis of the policy recommendations below builds on this core understanding of the institutional design and cooperation.

This assessment focuses on the main elements of the EU Pact on Democracy, Rule of Law and Fundamental Rights proposed by Parliament,⁷⁵ based on the evidence provided by the two in-depth research papers specifically commissioned for the purpose of this EAVA.⁷⁶ This Pact entails the establishment of a comprehensive Union mechanism for democracy, the rule of law and fundamental rights integrating, aligning and complementing existing mechanisms, and has two core elements:

- an annual European report on the state of democracy, the rule of law and fundamental rights in the Member States; and

⁷¹ Presidency non-paper for the Council (General Affairs) on 24 May 2016 - Rule of law dialogue.

⁷² Conclusions of the Council of the EU and the Member States meeting within the Council on ensuring respect for the rule of law, Council doc 17014/14

⁷³ P8_TA-PROV(2015)0286, paragraph 11.

⁷⁴ P8_TA-PROV(2015)0227, paragraph 12

⁷⁵ EP Resolution, para. 1, Annex; This excludes proposals that would require Treaty revision, as contained in para. 20 of the Report.

⁷⁶ See supra note 4.

- an EU policy cycle for democracy, the rule of law and fundamental rights, involving EU institutions and national parliaments, including a DRF policy cycle within the institutions of the Union

2.1. An annual European report on the state of democracy, the rule of law and fundamental rights in the Member States

Parliament calls for a European report on the state of democracy, the rule of law and fundamental rights in the Member States, with country-specific recommendations.⁷⁷ This proposal still leaves a number of detailed points for further consideration as regards the legal basis, subsidiarity and proportionality, the methodology, and the division of responsibility for drafting the DRF European report.

(1) Legal basis, subsidiarity and proportionality

The first set of points concern the scope for EU action and which legislative and/or non-legislative measures would be required and available to set up an European report on democracy, the rule of law and fundamental rights. As discussed in section 1, the EU has competences and obligations, as provided for in the Treaties, to take actions to protect its 'constitutional core', i.e. the values it shares with the Member States.⁷⁸ This obligation also extends to matters where Member States act outside the scope of the implementation of EU law.⁷⁹

As regards the legal basis for the adoption of an EU annual monitoring system, several options have been suggested in the two in-depth research papers, including an interinstitutional agreement based on Article 295 TFEU. Such an agreement is the preferred option of the LIBE Committee, in acknowledging that the institutions have to act within the limits of the powers conferred on them by the Treaties.⁸⁰ Another suggestion is Article 352 TFEU, which, for example, also constituted the legal basis for the regulation establishing the Fundamental Rights Agency.⁸¹ Article 352 requires the European Parliament's consent and unanimity in Council. The scope of the adopted measures can be broad, with the exclusion of common foreign and security policy measures.

⁷⁷ EP Resolution, Annex, Articles 4-10

⁷⁸ Bárd et al (2016), section 3.2; EP Resolution recital D

⁷⁹ This is because Article 2 TEU does not contain a similar limitation in the scope of its application to the one found in Article 51 of the Charter of Fundamental Rights of the European Union (O.J. C 326, 26.10.2012).

⁸⁰ EP Resolution, Annex, preamble point 9: 'Whereas, in accordance with Article 295 TFEU, the present inter-institutional agreement lays down arrangements only for the European Parliament, the Council and the Commission to facilitate their cooperation and, in accordance with Article 13 (2) TEU, those Institutions shall act within the limits of the powers conferred on them by the Treaties, and in conformity with the procedures, conditions and objectives set out in them; whereas this inter-institutional agreement is without prejudice to the prerogatives of the Court of Justice of the EU in the authentic interpretation of Union law.'

⁸¹ Council of the European Union, Council Regulation (EC) No 168/2007 of 15 February 2007 establishing a European Union Agency for Fundamental Rights, O.J. L 53 of 22.2.2007.

Alternatively, or in parallel, Article 70 TFEU could also be used, as this article would give a sound entry point at least in one area which is specific to EU law, namely mutual recognition of judicial decisions within the Area of Freedom, Security and Justice.⁸² Article 70 requires a qualified majority in Council. However, its restriction to the Area of Freedom, Security and Justice, means that not all aspects of democracy, the rule of law and fundamental rights may be covered.

In accordance with the principles of subsidiarity and proportionality, EU action must be relevant and necessary, offer value beyond what Member State action alone can deliver and not go further than is necessary to resolve the problem or meet the policy objective.⁸³ As outlined in section 1, the DRF monitoring and enforcement gaps identified cannot be sufficiently achieved by Member States acting alone. The added value of action at EU level is that responsibility for DRF monitoring and evaluation exercises could be clearly allocated and coordination ensured. Swifter and more effective cooperation among EU institutions and between those institutions and Member States could be achieved in DRF enforcement.⁸⁴ The proportionality of EU intervention should be guaranteed through a methodology for the European report on the state of democracy, the rule of law and fundamental rights in the Member States which is not unduly burdensome and costly in terms of data collection and reporting requests to Member States. It should also recognise the different ways Member States have found to respect DRF. The division of responsibility for drafting the report should furthermore reflect the need for an independent assessment as well as a proper follow up. Duplication of activities of other international bodies should be avoided.

(2) Methodology

A number of recommendations relate to the methodology for the proposed European report on the state of democracy, the rule of law and fundamental rights in the Member States. One particular question to answer is whether a list of objective indicators reflecting the Copenhagen criteria and the values and rights laid down in Article 2 EU can be established to support the drafting of the annual monitoring report. Can data of sufficient quality and comparability be provided to support monitoring of all Member States? Another question to address related to the role to be given to independent experts, civil society, the Fundamental Rights Agency, the Commission, the European Parliament, Council and other bodies in developing and commenting on the annual report. Finally, necessary safeguards needed to be built-in to ensure that the annual report's findings are objective, of sound scientific quality, transparent and accountable.

Measuring Member State compliance with a set of indicators risks oversimplifying the situation and could lead to a failure to capture future trends. Instead, one should combine dialogue, monitoring, benchmarking and evaluation exercises with various

⁸² 'Bárd et al (2016), section 4.12'

⁸³ Article 5(1) TEU; [European Commission, Better Regulation Tool # 3: Legal basis, subsidiarity and proportionality](#)

⁸⁴ EP Resolution, Recital AA, paragraph 6.

actors and methods.⁸⁵ The emphasis should be placed on a contextual, qualitative assessment of data and a country-specific list of key issues, to grasp interrelations between data and the causalities behind them.⁸⁶ Parliament calls for the European Report to be presented in a harmonised format and accompanied by country-specific recommendations and elaborated with a specific focus on a number of aspects of democracy, the rule of law and fundamental rights listed.⁸⁷ Assessment methods are to be reviewed annually.⁸⁸

As discussed in section 1, while a variety of monitoring mechanisms exist, at the moment, no single reference point provides all the relevant data necessary to allow monitoring of democracy, the rule of law and fundamental rights in the Member States. Parliament supports the development of a European Fundamental Rights Information System (EFRIS) by the Fundamental Rights Agency (FRA), based on existing sources of information and evaluations of instruments already in place in this field.⁸⁹ Bárd et al have, however, cautioned that bringing together data and analysing synergies, or even making comparisons, is an exercise that is close to impossible and more akin to 'alchemy'. Standards, sources, data, data-handling methods and the interpretations of each of the various sets of tools are so different in nature and fundamentals, that they require a tedious methodological exercise to make international mechanisms comparable and conclusions and findings meaningful.⁹⁰

Based on a request from LIBE coordinators, the FRA delivered its own opinion on the matter. In this opinion, published in April 2016,⁹¹ the FRA argues that human rights can be used as an overarching concept capturing most of the three main values listed in article 2 of the TEU (democracy, the rule of law and fundamental rights). Furthermore, it states that indicators can effectively be used to measure compliance with the shared EU values. Those indicators should not only capture the law on the books, but also the reality on the ground. According to the FRA, existing data and information from international monitoring mechanisms, EU and national level bodies provide credible sources for populating indicators and offering additionally needed context. The FRA could operationalise existing data through the development of an EFRIS. This system could be used to populate indicators. EFRIS could also allow the FRA to draft regular

⁸⁵ Bárd et al (2016), section 4.

⁸⁶ Bárd et al (2016), section 4.5

⁸⁷ EP Resolution, Annex, Article 7.

⁸⁸ EP Resolution, Annex, Article 9.

⁸⁹ EP Resolution, Annex, Article 6; An EU internal strategic framework for fundamental rights: joining forces to achieve better results, FRA, 2015, p. 17: 'The EU could also provide funds for the creation of a European fundamental rights information system that would form a hub, bringing together, in an accessible manner, existing information from the United Nations, the Council of Europe, the Organization for Security and Co-operation in Europe and the EU. Such a system would enhance transparency and objectivity and increase awareness about European and international standards, especially those of the Council of Europe in the EU context. It would also allow practitioners to make an informed assessment of a given country's fundamental rights situation in a specific area.'

⁹⁰ Bárd et al (2016), section 4.4

⁹¹ FRA Opinion on the development of an integrated tool of objective fundamental rights indicators able to measure compliance with the shared values listed in Article TEU based on existing sources of information, April 2016.

synthesis reports offering an objective overview of central concerns and identified patterns and trends. The FRA is of the opinion that this would fit within its objective to offer 'assistance and expertise' relating to fundamental rights as enshrined in the Charter.

Beyond EFRIS, the Parliament's Resolution also mentions a number of other sources for the DRF European Report including contributions from the Member States, specialised agencies of the Union such as the European Data Protection Supervisor (EDPS) and the European Institute for Gender Equality (EIGE), experts, academia, civil society organisations, professional associations, the Council of Europe, OECD, OSCE and UN.⁹²

(3) Division of responsibility for drafting the DRF European report

The next point relates to the division of responsibility for drawing up the annual report. Parliament calls for the Commission to draw up the report in consultation with an panel of independent experts.⁹³ The parliament of each Member State should designate one expert. This expert should be a qualified constitutional court or Supreme Court judge, not currently in active service. Ten further experts should be nominated by the European Parliament, with a two-thirds majority, chosen from a list of persons nominated by relevant international organisations, civil society and professional associations.⁹⁴ The Commission should provide the secretariat of the DRF expert panel to enable it to function effectively.⁹⁵

To ensure that EU intervention is proportionate, and does not go further than needed for the protection of democracy, the rule of law and fundamental rights, the risk of duplication should be avoided in terms of international bodies, data collection and reporting obligations for Member States. Possibilities to borrow from existing monitoring and evaluation instruments in other international or regional fora should be explored. The process cannot, however, be 'contracted out' entirely to third parties, since non-EU actors fail to take due account of the relevance of these instruments or their links with existing European law and policies, as well as general principles of EU law, such as that of mutual recognition of decisions as underlined by the Court of Justice in its opinion on the draft agreement on EU accession to the ECHR.⁹⁶ In this

⁹² EP Resolution, Annex, Article 6.

⁹³ EP Resolution, Annex, Article 4.

⁹⁴ EP Resolution, Annex, Article 8.1.

⁹⁵ EP Resolution, Annex, Article 8.3

⁹⁶ Bárd et al (2016), section 4.4; Court of Justice of the European Union, [Opinion 2/13 of 18 December 2014](#), not yet published. Opinion pursuant to Article 218(11) TFEU - Draft international agreement - Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms - Compatibility of the draft agreement with the EU and FEU Treaties, para. 194: 'In so far as the ECHR would, in requiring the EU and the Member States to be considered Contracting Parties not only in their relations with Contracting Parties which are not Member States of the EU but also in their relations with each other, including where such relations are governed by EU law, require a Member State to check that another Member State has observed fundamental rights, even though EU law imposes an obligation of mutual trust between those Member States, accession is liable to upset the underlying balance of the EU and undermine the autonomy of EU law'.

vein, Parliament stresses that the EU mechanism should integrate, align and complement existing mechanisms. It should replace the cooperation and verification mechanism for Bulgaria and Romania.⁹⁷

Bárd et al have suggested three scenarios regarding respect for European values by Member States:

- In the first scenario, the boundaries of democracy, the rule of law and fundamental rights are correctly set by national constitutional law and domestic bills of rights, whereas the enforcement of the values is first and foremost the task of the domestic courts, but other checks and balances also operate well and fulfil their function. In this scenario, an external mechanism is not vital but can have an added value.
- In a second scenario, a Member State still adhering to democracy, the rule of law and fundamental rights might be in violation of individual rights, due to individual mistakes or structural and recurrent problems. In such cases, as a general rule, if domestic mechanisms are incapable of solving the problem, the national law will be overwritten by international law and deficiencies in application of the law will be remedied to some extent by international apex courts. In other cases, chronically lacking capacity to solve systemic problems such as corruption, international norms and fora cannot remedy the problems but can point to them and contribute to domestic efforts to tackle them.
- The third scenario is qualitatively different from the previous two. This is the state with a systemic breach of separation of powers, constitutional adjudication, failure of the ordinary judiciary and the ombudsman system, civil society or the media. Efforts should be made to avoid a state reaching that stage.⁹⁸

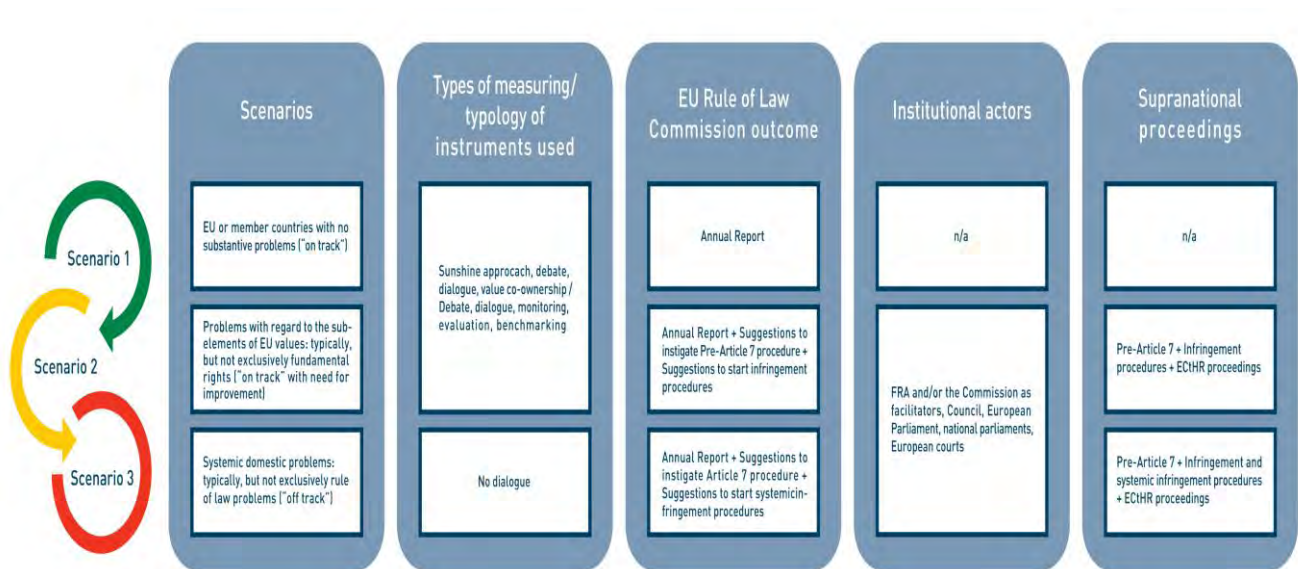
In both the first and second scenarios ('on track'), a 'sunshine policy', may be followed which engages the Member State concerned in a dialogue and relies on soft measures such as capacity building. The third scenario ('off track'), is fundamentally different from the first two. At this stage dialogue is no longer effective. A challenge lies in identifying the point when a Member State enters or is on the path towards the third phase, and to remedy the situation. It is under this scenario that options such as the launch by the Commission of 'systemic infringement proceedings', activating the EU Rule of Law mechanism or Article 7 TEU would come in.

The three scenarios proposed by Bárd et al are depicted in Figure 2 below:

⁹⁷ EP Resolution, Para 1, Annex, Article 5.

⁹⁸ Bárd et al (2016), section 4.6

Figure 2: The three rule of law scenarios and responding mechanisms



Source: Bárd et al (2016)

The proposal by Bárd et al takes a slightly different approach from Parliament, particularly as regards the division of labour between the Commission and the independent panel of experts. Bárd et al propose to make this panel directly responsible for the drafting of the annual report. However, for the rest, this proposal seems broadly compatible with the ideas put forward in Parliament's Resolution, which also places the DRF European report in the context of an EU policy cycle covering both preventive and corrective elements as outlined in section 2.2 below.⁹⁹

2.2 An EU policy cycle for democracy, the rule of law and fundamental rights, involving EU institutions and national parliaments, including a DRF policy cycle within the institutions of the Union

Parliament proposes an EU Pact for democracy, rule of law and fundamental rights. Alongside the development of an annual DRF European report with country-specific recommendations based on compliance with aspects related to democracy, rule of law and fundamental rights, it includes a DRF policy cycle aimed at monitoring Member State compliance and a DRF policy cycle in the institutions of the Union.

(1) DRF policy cycle (Member State compliance)

The adoption of the European report by the Commission shall initiate a DRF inter-parliamentary debate and a debate in Council aimed at addressing the result of the Report and the country specific recommendations. The inter-parliamentary debate should result in the adoption of a resolution, whereas the Council debate should result

⁹⁹ EP Resolution, Para 3.

in conclusions, inviting national parliaments to provide a response to the DRF European report, proposals or reforms.¹⁰⁰ The debate should be organised in such a way as to set benchmarks and goals to be attained, and to provide the means to evaluate changes from one year to another within the existing Union consensus on democracy, the rule of law and fundamental rights. The debate should be part of a multi-annual structured dialogue between the European Parliament, national parliaments, the Commission and the Council. It shall involve civil society, the FRA and the Council of Europe.¹⁰¹

On the basis of the DRF European report, the Commission may decide to launch systemic infringement action under Article 2 TEU and Article 258 TFEU, bundling several infringement cases together.¹⁰² This option primarily entails a new approach under the existing infringement procedure on the basis of which the Commission would present a 'bundle' of infringement cases to the Court of Justice in order to present a clear picture of systemic non-compliance with Article 2 TEU. It would depend on the willingness of the Commission to launch such infringement proceedings and of the Court of Justice to treat them together. The open-ended nature of Article 2 could furthermore lead to criticism of political bias on the side of the Commission. An alternative option, mentioned by Pech et al, could be for the Commission to argue that the Member State concerned is jeopardising the attainment of the Union's objectives in violation of the principle of solidarity (ex Article 4 (3) TEU). The option of subtracting EU funds from the concerned Member State most likely would require legislative - or even Treaty - change.¹⁰³

The Commission may also decide to submit a proposal for an evaluation of the implementation by Member States of Union policies in the area of freedom, security and justice under Article 70 TFEU.¹⁰⁴ Article 70 provides a sound entry point at least in one area, which is specific to EU law, namely mutual recognition of judicial decisions within the Area of Freedom, Security and Justice.¹⁰⁵

The DRF European Report envisages four scenarios for action:

1. If a Member State is compliant with all the aspects related to democracy, the rule of law and fundamental rights, no further action shall be necessary;¹⁰⁶
2. If a Member State falls short on one or more aspects listed in Article 8, the Commission will start a dialogue with that Member State without delay, taking into account the country specific recommendations;¹⁰⁷
3. If the country-specific recommendations on a Member State includes the assessment by the expert panel that there is a clear risk of a serious breach of

¹⁰⁰ EP Resolution, Annex, Article 2, 10

¹⁰¹ EP Resolution, Annex, Article 10

¹⁰² EP Resolution, Annex, Article 10

¹⁰³ Pech et al (2016), section 4.2.1.; EP Resolution, para. 20.

¹⁰⁴ EP Resolution, Annex, Article 10

¹⁰⁵ Bárd et al (2016), section 4.12

¹⁰⁶ EP Resolution, Annex, Article 10.1

¹⁰⁷ EP Resolution, Annex, Article 10.2

the values referred to in Article 2 TEU and that there are sufficient grounds for invocation of Article 7(1) TEU, the Commission, the Council and the European Parliament shall each discuss the matters and take a reasoned decision, which shall be made public;¹⁰⁸ and

4. If the country-specific recommendations on a Member State include the assessment by the expert panel that there is a serious and persistent breach (i.e. that breach increases or stays unchanged over a period of at least two years) of the values referred to in Article 2 TEU and that there are sufficient grounds for the invocation of Article 7(2), the Commission, the Council and the European Parliament shall each discuss the matter without delay and take a reasoned decision which shall be made public.¹⁰⁹

(2) DRF policy cycle in the institutions of the Union

Parliament underlines that fundamental rights must be included as part of the impact assessment for all legislative proposals by the Commission, in accordance with Paragraph 25 of the Interinstitutional Agreement on Better Law-Making.¹¹⁰ Parliament also calls for the DRF expert panel to assess DRF compliance by the Commission, the Council and the European Parliament.¹¹¹ Furthermore, Parliament calls for an interinstitutional impact assessment working group ('Working Group') to be set up with a view to improving interinstitutional cooperation on impact assessments, and creating a fundamental rights and rule of law compliance culture. The panel should consult with national experts at an early stage so as to better envisage the implementation challenges in Member States, as well as to help overcome different interpretations and understandings by the different institutions of the Union as regards the impact of fundamental rights and rule of law on legal acts of the Union.¹¹²

As mentioned in section 1, the EU can only claim legitimacy to enforce the observance of the rights and values listed in Article 2 internally if it observes those standards itself. A comprehensive legislative policy cycle is required, in which the effects of envisaged EU legislation on fundamental rights are forecast and evaluated. In this context, more effective use could be made of the instruments already available to the EU institutions. The 'Better Regulation Guidelines' oblige the Commission to look at fundamental rights in its impact assessments,¹¹³ and there is a toolbox with a list of questions to be answered when dealing with impacts on fundamental rights and human rights

¹⁰⁸ EP Resolution, Annex, Annex, article 10.2.1.

¹⁰⁹ EP Resolution, Annex, Annex, article 10.3

¹¹⁰ EP Resolution, Annex, Article 11; Interinstitutional Agreement between the European Parliament, the Council of the European Union and the European Commission on Better Law-Making OJ L 123, 12.5.2016, pp. 1-14, para. 25; see also para. 12: 'Impact assessments should cover the existence, scale and consequences of a problem and the question whether or not Union action is needed. They should map out alternative solutions and, where possible, potential short and long-term costs and benefits, assessing the economic, environmental and social impacts in an integrated and balanced way and using both qualitative and quantitative analyses. The principles of subsidiarity and proportionality should be fully respected, as should fundamental rights.'

¹¹¹ EP Resolution, Annex, Article 11.

¹¹² EP Resolution, Annex, Article 12.

¹¹³ COM (2015) 215, p. 15 'The impact assessments should, in particular, examine the impact of the different options on fundamental rights, when such an assessment is relevant'

(number 24).¹¹⁴ The Council of the European Union has also adopted 'Guidelines on methodological steps to be taken to check fundamental rights compatibility at the Council's Preparatory Bodies'.¹¹⁵ These guidelines offer similar guidance to the Commission's document, but are addressed to the Council's preparatory bodies, e.g. the Council Legal Service, national experts and the Working Party on Fundamental Rights, Citizens Rights and Free Movement of Persons (FREMP).

In the European Parliament, according to the Impact Assessment Handbook adopted by the Conference of Committee Chairs,¹¹⁶ parliamentary committees may invite the Commission to present its impact assessment. They may also ask the Commission to revise its original impact assessment or for the Ex-Ante Impact Assessment Unit of the European Parliamentary Research Service to provide such complementary or substitute impact assessments. Fundamental rights could be covered by these provisions, especially now, as fundamental rights are explicitly mentioned in the text of the new interinstitutional agreement on better law making.¹¹⁷

The IIA specifies that, although 'each of the three institutions is responsible for determining how to organise its impact assessment work', the institutions will 'on a regular basis, cooperate by exchanging information on best practice and methodologies relating to impact assessments, enabling each institution to further improve its own methodology and procedures and the coherence of the overall impact assessment work'.¹¹⁸ There is also a possibility for committees to consult Parliament's legal service or to request an opinion from the Fundamental Rights Agency.¹¹⁹

¹¹⁴ Better regulation 'Toolbox', p. 176 onwards

¹¹⁵ Council of the European Union, 'Guidelines on methodological steps to be taken to check fundamental rights compatibility at the Council's preparatory bodies', Doc No. 10140/11, 18 May 2011; Council of the EU, Doc. 5377/15.

¹¹⁶ European Parliament, Conference of Committee Chairs, Impact Assessment Handbook; paragraph 13-15: '13. [...] Parliamentary committees may invite the Commission to present its impact assessment in a full committee meeting (as foreseen in Paragraph 42 of the Framework Agreement between the European Parliament and the Commission)* or, where appropriate, in a separate meeting agreed by coordinators, in order to explain its analysis and methodology, and respond to any criticisms or apparent shortcomings so far identified; 14. If the methodology and the reasoning fail to meet these criteria [including respect of fundamental rights] or reveal shortcomings, the committee responsible, acting on a proposal from its rapporteur or from the chairman, and with the consent of the coordinators, may ask the Commission to revise its original impact assessment with a view to analysing certain aspects or policy options in greater detail or complementing or updating the analysis of certain aspects; 15. The committee(s) responsible may, under the same procedure, ask the Impact Assessment Unit to undertake or commission the Parliament's own complementary or substitute impact assessment of the aspects dealt with inadequately or not at all in the Commission's original impact assessment.'

¹¹⁷ Interinstitutional Agreement between the European Parliament, the Council of the European Union and the European Commission on Better Law-Making OJ L 123, 12.5.2016, p. 1-14; EPRS at a glance, 'Interinstitutional Agreement on Better Law-Making'

¹¹⁸ European Parliament decision of 9 March 2016 on the conclusion of an Interinstitutional Agreement on Better Law-Making between the European Parliament, the Council of the European Union and the European Commission (2016/2005(ACI)), P8_TA-PROV(2016)0081, paragraph 17

¹¹⁹ Rules of Procedure of the European Parliament, Rule 139

Furthermore, a specific committee, a political group or, at least 40 MEPs, may refer a proposal – or parts of it – to the LIBE Committee, where issues of conformity with the Charter arise.¹²⁰

Parliament also calls on the Commission to present, by June 2017 at the latest, a new draft agreement for EU accession to the European Convention of Human Rights (ECHR), in order to comply with the obligation enshrined in Article 6 TEU, addressing the conclusions made in Opinion 2/13 of the Court of Justice of the European Union (CJEU).¹²¹ Accession to the European Court of Human Rights (ECtHR) would offer better protection to individuals and avoid conflicts between the Strasbourg and Luxembourg Courts; such conflicts would upset the current status quo, in accordance with which the ECtHR deems fundamental rights protection in the EU 'equivalent' to that under the ECHR.¹²²

The envisioned EU Pact on Democracy, the Rule of Law and Fundamental Rights is depicted in figure 3 below:

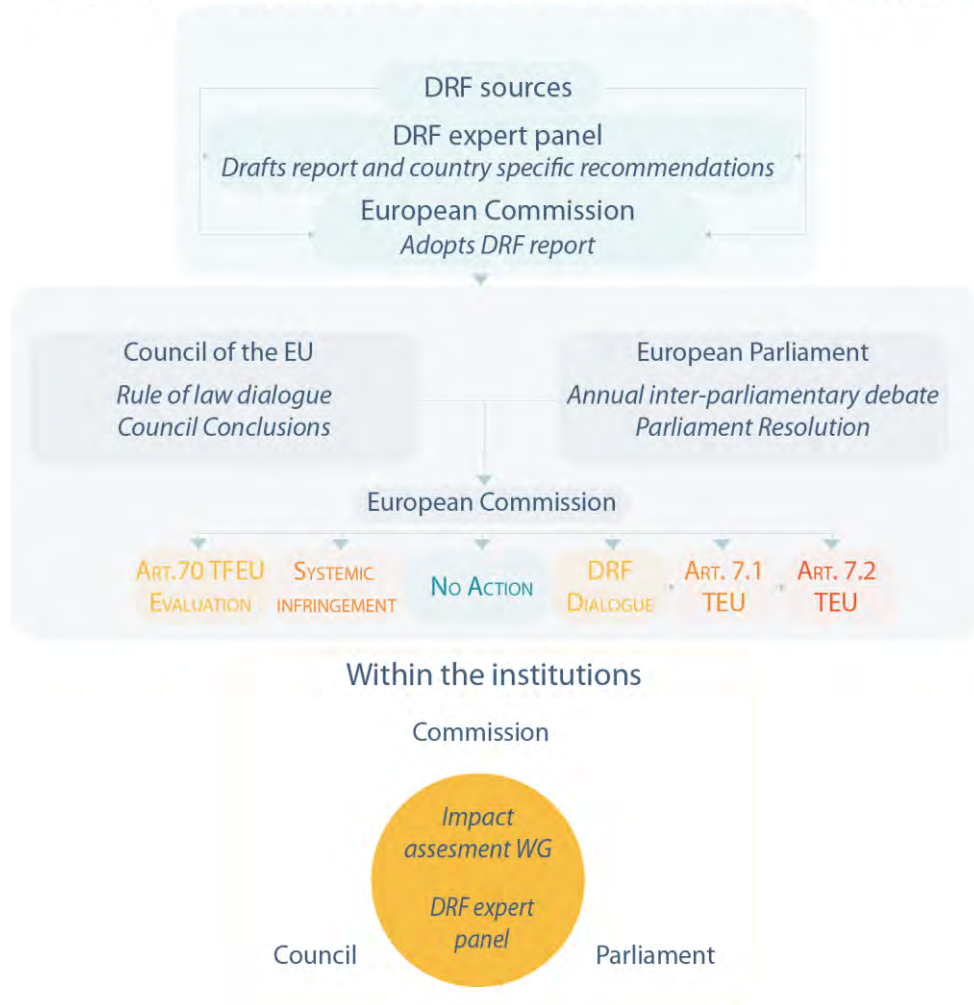
¹²⁰ Rules of Procedure of the European Parliament, Rule 38

¹²¹ EP Resolution, paragraph 11 also calling on the Council of Europe to open the signature of the European Social Charter to third parties, so that the Commission can initiate negotiations for the accession of the EU.

¹²² ECtHR of 30.06.2005, Application No. 45036/68, *Bosphorus Hava Yollari Turizm v Ireland*.

Figure 3 EU Pact on Democracy, the Rule of Law and Fundamental Rights

EU pact on Democracy, the Rule of Law and Fundamental rights



Graphic: Eulalia Claros

The DRF policy cycle could be combined with technical assistance and capacity-building measures targeted at individual Member States,¹²³ measures to ensure access to legal assistance to individuals and organisations litigating cases related to DRF violations by national governments,¹²⁴ and an awareness raising campaign, to enable Union citizens and residents to take full ownership of their rights deriving from the Treaties and from the Charter of Fundamental Rights.¹²⁵

¹²³ Pech et al (2016), section 4.1.1.

¹²⁴ EP Resolution, para 13

¹²⁵ EP Resolution, para 16

3. A cost-benefit analysis of the main recommendations.

This section considers the social, economic and political costs and benefits of the policy options favoured by Parliament. As pointed out in more detail in the research papers commissioned externally,¹²⁶ societies in which democracy, the rule of law and fundamental rights are respected tend to attract more investment and to benefit from higher welfare standards. Conversely, in societies where this is not the case, a negative impact on the economy is noticeable. Rational law presents a necessary condition for economic transactions, and its application creates a sense of predictability on the part of economic agents. The latter is a necessary condition in order for rational economic actions to occur. Control of corruption, institutional checks on government, protection of property rights and mitigation of violence are all in close correlation with economic performance. In a recent Cost of Non-Europe Report on Organised Crime and Corruption, the cost of corruption to the European economy in terms of GDP was estimated at between 218 and 282 billion euro annually.¹²⁷

There is also a negative impact on mutual trust between Member States, which is based on a presumption of fundamental rights standards being enforced by an independent judiciary. This presumption may not always be appropriate given the fact that rights intrinsically related to the rule of law and democracy, such as the right to a fair trial, timely proceedings and to a legal remedy, are among those most violated by the Member States.¹²⁸ Beyond harming nationals of a Member State, all Union citizens in that State will also be detrimentally affected. Accepting one Member State's departure from being a democracy based on the rule of law may encourage other Member States' governments to follow, and subject other countries' citizens to abuse. In other words, rule of law violations – if they are not seen to have consequences – may become contagious. Moreover, all EU citizens beyond the borders of the Member State(s) concerned will to some extent suffer due to the given State's participation in the EU's decision-making mechanism.¹²⁹

Parliament's Resolution stresses that any financial implications of the requested proposals, for the budget of the Union, should be covered by the existing budgetary allocations.¹³⁰ It is clear, however, that there will be costs and savings both at EU and Member State level, which will need to be taken into account.

(1) Annual DRF European report

¹²⁶ Pech et al (2016), executive summary, chapter 4; (2016), Bárd et al, executive summary, Annex 4 (thematic contribution by Marneffe).

¹²⁷ EPRS Organised Crime and Corruption: Cost of Non-Europe Report, PE 558.779, 2016; EP Resolution, Recital P

¹²⁸ ECHR, [violations by Article and respondent state](#), 2015

¹²⁹ Pech et al (2016), executive summary, chapter 4; (2016), Bárd et al, executive summary, Annex 4 (thematic contribution by Marneffe).

¹³⁰ EP Resolution, paragraph 22.

With regard to the costs of annual DRF European report, a distinction should be made between the costs borne by the 'Monitor' (independent panel of experts and the European Commission) and those borne by the monitored States. According to Parliament's Resolution, the costs related to the provision of a secretariat to the DRF expert panel are to be borne by the Commission. Providing a secretariat will enable the panel to function efficiently, in particular by facilitating the gathering of data and information sources to be reviewed and assessed, and by providing administrative support during the drafting process.¹³¹ Regarding the payment of the members of the independent panel of experts, given the competences requested, based on 2014 European Commission for the Efficiency of Justice (CEPEJ) data an average yearly salary of 90 000 euro per expert should be taken as a basis.¹³² Furthermore, a distinction should also be made between preparation and follow up in all the four scenarios of (non-) compliance.

The analysis is based on the concept of a permanent annual insourced DRF European report, drawn up by the Commission in consultation with an independent panel of experts. Bárd et al estimate that the operational costs of the Monitor in the implementation phase of a stand-alone report (no economies of scale) can be estimated at 4 million euro per year, based on the experience of the Council of Europe's Venice Commission.¹³³ Through the envisaged cooperation with the Council of Europe and other bodies, some important economies of scale can be realised.¹³⁴ Further synergies could be achieved by the fact that the DRF European report is to replace the Cooperation and Verification Mechanism for Bulgaria and Romania. This would apply to both the human resources devoted to the drawing up of the CVM reports and the funding and technical assistance related to them.¹³⁵

However, an uncertain cost factor lies in the degree of specificity of the annual European report on DRF (which data sources can and cannot be used, which additional data have to be collected). Another uncertain factor concerns the costs related to follow-up action required under scenarios 2 (dialogue), 3 (Article 7.1) and 4 (Article 7.2).¹³⁶

¹³¹ EP Resolution, Annex, Article 8.3

¹³² CEPEJ Report on "European judicial systems – Edition 2014 (2012 data): efficiency and quality of justice", p. 309 (Gross and net annual salaries of judges and prosecutors at the Supreme Court or at the last instance in 2012).

¹³³ http://www.venice.coe.int/WebForms/pages/?p=01_Presentation&lang=EN

¹³⁴ EP Resolution, Annex, Article 6

¹³⁵ EP Resolution, Annex, Article 5; European Commission - Fact Sheet, Reports on Progress under the Cooperation and Verification Mechanism in Bulgaria and Romania

¹³⁶ See section 2.2. for an explanation of the scenarios.

Table 1: Annual DRF European report costs

		Monitor	Monitored States
Preparatory phase (one-shot costs)	Expert group set-up costs	*	
	Information and planning costs	*	*
	Infrastructural costs	*	*
	Lobbying costs		*
Implementation phase (recurrent costs on annual basis)	Operational costs	*	*
	(Administrative costs)	*	*
	(Monitoring costs)	*	
	Compliance costs (information)		*
	Enforcement costs (information)	*	
	Compliance costs (scenarios 2)		*
	Enforcement costs (scenario 3, 4)	*	*

Source : Bárd et al (2016), Annex IV¹³⁷

(2) DRF policy cycle (Member State compliance)

EU funded capacity building programmes would not openly stigmatise any Member State for ‘improper behaviour’. However, deciding who should receive funding, and on the basis of which process, might present some challenges.¹³⁸

Launching 'systematic infringement' procedures could potentially diminish the administrative costs for the Court of Justice because of the economies of scale (i.e. handling several cases together instead of handling them separately might bring some savings on administrative costs for the Court). However, the process of handling legal cases at the Court of Justice and imposing and executing penalties may last several years, which can ‘water down’ the effects of this measure.¹³⁹

Expanding the Council’s rule of law dialogue into a debate on the DRF European report would require a more detailed and in-depth discussion, involving more time and human resources devoted to meetings in Brussels and commenting on the developments in other Member States. A positive impact could be that Member States would feel more comfortable in discussing matters in a peer-to-peer situation. However, this may not be the case with Member States for which a (clear risk of) a serious breach of EU values occurs (scenarios 3 and 4).

A new inter-parliamentary dialogue fostered by the European Parliament would require delegations to travel to Brussels. National parliaments would also need to make human resources available to assess their country reports. Additional costs could

¹³⁷ As modified in accordance with the outcome of the vote in the LIBE committee.

¹³⁸ Pech et al (2016), section 4.2.1.

¹³⁹ Pech et al (2016), section 4.2.1.

arise due to expert consultations and follow-up reports. The new inter-parliamentary dialogue would allow the representatives of the 'peoples of Europe' to exchange views and best practices on upholding the common values that bind them together under Article 2 TEU.¹⁴⁰

(3) DRF policy cycle in the EU institutions

A comprehensive legislative policy cycle in which the effects of envisaged EU legislation on fundamental rights are forecast and evaluated, with the support of an interinstitutional impact assessment working group ('Working Group'), would be likely to result in more (in-depth) ex-ante and ex-post impact assessments, consultations and related costs.

It would, however, also help to avoid EU measures and actions violating fundamental rights and undermining the credibility of the EU to act internally and externally, as well as the potential costs of compensating victims and repairing legislation.

¹⁴⁰ Pech et al (2016), section 4.2.1.

4. Conclusion

There is a gap between the proclamation of the right and values listed in Article 2 TEU and actual compliance by EU institutions and Member States, resulting in significant economic, social and political costs. In this context it is noted that corruption alone costs the European economy between 218 and 282 billion euro annually.¹⁴¹

The root causes of this lack of compliance are to be found in certain weaknesses in the existing EU legal and policy framework on democracy, the rule of law and fundamental rights. Those weaknesses relate to (i) ongoing discussions on the scope of EU competence to enforce the rights and values listed in Article 2 TEU, including a discussion on their exact meaning, (ii) the (consequent) division of monitoring responsibilities between the EU and its Member States, as well as between EU bodies, and (iii) the lack of effectiveness of existing enforcement mechanisms.

These weaknesses could be overcome by the conclusion of an EU Pact for Democracy, the Rule of Law and Fundamental Rights (DRF) in the form of an interinstitutional agreement laying down arrangements for (i) the development of an annual European report on the state of democracy, the rule of law and fundamental rights in the Member States with country-specific recommendations assessing compliance with aspects related to DRF, (ii) a policy cycle for DRF involving EU institutions and national parliaments, with country-specific recommendations aimed at monitoring and enforcing Member State compliance, including a DRF policy cycle within the institutions of the Union. This could be done at relatively low cost, particularly if the right synergies are found with international organisations, whilst at the same time having significant benefits, notably fostering mutual trust and recognition, attracting more investment and providing higher welfare standards.

RECOMMENDATION

The weaknesses in the existing EU legislative and policy framework on DRF could be overcome by agreeing on an inter-institutional pact further clarifying the scope for EU action and the division of labour between and among the EU institutions, in the areas of monitoring and enforcement of democracy, the rule of law and fundamental rights.

¹⁴¹ EPRS Organised Crime and Corruption: Cost of Non-Europe Report, PE 558.779, 2016.

There is a gap between the proclamation of the rights and values listed in Article 2 of the Treaty on European Union and actual compliance by EU institutions and Member States, resulting in significant economic, social and political costs. The root causes of this lack of compliance are to be found in certain weaknesses in the existing EU legal and policy framework on democracy, the rule of law and fundamental rights. These weaknesses could be overcome by an interinstitutional pact further clarifying the scope for EU action and the division of labour between and among the EU institutions in the areas of monitoring and enforcement. This could be done at relatively low cost, particularly if the right synergies are found with international organisations.

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