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The Other Democratic Deficit

A Toolbox for the EU to Safeguard Democracy
in Member States

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Responsible for this publication in the FES

Matthias Jobelius, Head of Department for Central and Eastern Europe

Editor: Juliane Schulte, Desk Officer, Department for Central and Eastern Europe

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FOREWORD

The European Union is based on the values of democracy, rule of law and fundamental rights – and for some time, it seemed that liberal democracy was uncontested. In fact, however, these values have come under pressure in a number of member states. Recently, EU institutions have shown more commitment to defending fundamental values and EU interventions have garnered more support among member states, yet, to this day, the available instruments have proven insufficient.

The EU must react to violations of its treaties, not least to protect EU citizens and to guarantee their legal security: given the strong interdependence between member states, violations of EU principles in one can affect citizens in others. Moreover, because the EU expects candidate and associate countries to comply with democratic standards and the rule of law, the EU's credibility is at stake.

The Friedrich-Ebert-Stiftung (FES) has been promoting democracy worldwide for decades and therefore has every reason to contribute to the debate on how democracy in the EU can be safeguarded. Building on its European network, in 2017 the FES convened a group of recognized experts from politics and academia. In an open brainstorming process, they discussed how the EU can safeguard and promote its fundamental values in the member states. Various forms of sanctions have been discussed in public, but the FES encouraged the group to also evaluate options for promoting democracy in EU member states. Some of the ideas have been further elaborated and are presented in this publication. Mindful of the EU's already difficult situation, the group focused on realistic instruments that would be viable both politically and technically. We hope that stakeholders in both Brussels and national capitals will consider these instruments as options for future action. In the context of the debate on the future of the EU, the European Parliament elections and the negotiations on the EU's budget after 2020, the next two years

are likely to offer sufficient occasion. Despite all the challenges, one can also see this as a window of opportunity.

We would like to express our gratitude and appreciation to all members of the expert group. This publication is a result of the fruitful and intense exchange between them.¹ All of them contributed valuable ideas, commented on others' ideas and showed great commitment. A full list of all members of the group can be found on page 40. Special thanks go to those who fleshed out the ideas developed in the group, laying them out in papers that form the basis of this publication:

- Michael Meyer-Resende, Executive Director of Democracy Reporting International (Monitoring Democracy in Member States)
- Frithjof Ehm, until 2017 Policy Officer at the Directorate General for Regional and Urban Policy of the European Commission (Conditionality of Funds)
- Miguel Poiates Maduro, Director of the School of Transnational Governance of the European University Institute (Conditionality of Funds; Judicial Enforcement by the European Union).
- Israel Butler, Head of Advocacy, Civil Liberties Union for Europe (Strengthening Civil Society).
- Francesca Fanucci, Centre for Media, Data and Society, Central European University (The EU's Role in Preserving Media Freedom and Pluralism).
- Jo Leinen, Member of the European Parliament, and Fabian Pescher, Policy Advisor to Jo Leinen (Holding European Parties Accountable)

We would also like to thank the team at FES Brussels for supporting us in organising the two workshops in Brussels, and our moderator Dominik Cziesche, who facilitated the brainstorming process.

¹ However, not all of the views expressed in this publication are necessarily shared by the whole expert group.

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Péter Balázs, Director of the Center for European Neighborhood Studies, Central European University, and Chair of the FES expert group

Matthias Jobelius, Head of the Department for Central and Eastern Europe, Friedrich-Ebert-Stiftung

Juliane Schulte, Coordinator of this project, Department for Central and Eastern Europe, Friedrich-Ebert-Stiftung

EXECUTIVE SUMMARY

This publication makes a number of concrete suggestions on how the EU can safeguard and promote democracy in its member states. Some national governments have undermined the EU's fundamental values, as laid out in Article 2 of the Treaty of the European Union, by strengthening their executive power and weakening the separation of powers. In other member states, corruption is rampant and media freedom under pressure. Populists are on the rise across Europe, sometimes participating in government. To date the EU has failed to take effective steps against violations of democratic standards in individual member states.

To lay a solid groundwork for EU action, this paper suggests the establishment of a monitoring mechanism to regularly assess compliance with democratic standards and the rule of law in EU member states. To avoid excessive reporting burdens, such a mechanism should be limited in scope and focus only on issues that are identified as contentious through a dialogue with governments, opposition parties, public institutions, civil society and international organisations. Monitoring could be carried out by the Venice Commission of the Council of Europe or, if that is not possible, by the EU's Fundamental Rights Agency or a Panel of Experts established for this purpose. The findings should be discussed at both national and EU level, with the European Parliament adopting a resolution and the Council discussing the monitoring report as part of the annual rule of law dialogue.

In the context of the discussions about the new Multiannual Financial Framework (MFF) after 2020 it was suggested that the EU's financial leverage be used and access to EU funds linked to respect for European values. However, to avoid discriminating against net recipients of EU structural and investment funds, EU mainstream programmes should also be made conditional. The concept could be implemented by changing the relevant secondary law: either the regulation on the respective funds has to be amended or the Council regulation laying down the next MFF should incorporate clear conditions.

This paper also evaluates possibilities concerning judicial enforcement. It argues that serious violations of the EU's fundamental values not only have an impact on the respective member state's domestic sphere, but necessarily affect that member state's capacity to comply with EU law and

thereby threaten the functioning of the EU legal order as a whole. In such cases, it would be possible and desirable for the European Commission to bring an infringement procedure against the member state in question. The availability of infringement procedures in case of systemic breaches of fundamental rights would provide the Commission with important legal leverage vis-à-vis member states challenging the rule of law. Moreover, having a judicial mechanism would help depoliticize the debate.

Apart from sanctions, this publication also explores how the EU can promote democracy in its member states by supporting NGOs that promote and protect democracy, the rule of law and fundamental rights. Because funding – including EU funding – for NGOs working on European values is insufficient, the EU should create a new, adequately resourced fund (referred to as a »European Values Instrument« or »EVI«). The EVI should support advocacy, monitoring of member state compliance with European and international standards, litigation, public education, support for independent and investigative journalism and capacity building. Moreover, the European Commission should appoint a Special Representative on Civil Society to receive and react to information concerning restrictions on NGOs.

Across the EU, media pluralism is under threat. This paper makes suggestions on how to tackle the problem of vested political influence and media concentration. The European Commission should propose minimum common rules in areas of the internal market that affect media freedom and pluralism. Provisions on transparency of state funding and advertising in the media, media ownership, concentration and defamation should be harmonized across the EU. To counter disinformation, online platforms and social media companies should have to report to the European Parliament on the measures adopted and implemented to halt the spread of »fake news«. Moreover, the European Commission should fund training projects on digital investigative journalism aimed at non-professional journalists, activists and bloggers.

Last but not least, European political parties should be held accountable. The European institutions have no competence to regulate or sanction national parties, but can do so indirectly by sanctioning European political parties (EuPPs). However, more resources are necessary. The newly created Authority for European political parties and European

political foundations should have a dedicated team to control the EuPPs' conduct and to collect evidence in case of breaches of the EU's fundamental values. The European parties themselves can sanction their member parties, even exclude them, but these measures are rarely used and have little impact. The influence of EuPPs on their member parties would grow if they were able to compete for mandates with transnational lists and distribute political power. The effect of sanctions could be increased by better linking EuPPs with their affiliated political groups in the European Parliament.

If suspension from a EuPP also meant suspension from the affiliated political group, the leverage of EuPPs would be considerably higher, as membership of one of the large political groups is essential for access both to resources and to important functions and legislative roles. Moreover, EuPPs should formalize the criteria for sanctions and make decision-making more objective and independent from political considerations. The nomination of standing rapporteurs could render decisions less arbitrary and provide necessary first-hand information.

1

INTRODUCTION: DEMOCRATIC BACKSLIDING AND THE SHORTCOMINGS OF CURRENT EU APPROACHES

Under European Union treaties, member states have committed themselves to respect democracy, the rule of law and fundamental rights. Similarly, the Copenhagen Criteria for EU accession require that prospective members have functioning democratic institutions and respect the rule of law and fundamental rights. But it appears that these fundamental values are no longer binding once a country has become a member of the club: democratic standards are being eroded in Poland and Hungary, where the governments have used broad parliamentary majorities to radically restructure the state, thereby weakening the separation of powers, strengthening executive power and jeopardizing liberal values. In other member states, corruption is rampant and media freedom is under pressure. Populists are on the rise across Europe, questioning democratic values and sometimes participating in government.

Whereas the EU was able to impose economic reforms in countries hit by the financial crisis, it has to date failed to take effective steps against the violation of democratic standards in individual member states. Today, it seems that the EU has exhausted all its means: in the case of Poland – which is neither the first nor the only member state questioning the rule of law – the European Commission for the first time ever invoked the so-called »EU Framework to strengthen the Rule of Law«, an early-warning mechanism introduced in 2014. The aim was to address threats to the rule of law early on through a dialogue with the relevant member state, thereby creating a stage before the »nuclear option« of the Article 7 procedure. The rule of law framework did not yield results in the case of Poland, however, and the Commission thus initiated the Article 7 procedure, which could ultimately entail the suspension of Poland's voting rights in the Council. However, imposing sanctions against Poland requires unanimity in the Council, which is unlikely. Article 7 therefore lacks credibility, making sanctions an empty threat. But what other tools are at the EU's disposal to react to democratic deficits in member states?

In response to the Commission's rule of law framework, also in 2014 the Council of the European Union introduced the rule of law dialogue as a supplementary mechanism (Council of the European Union 2014). This approach differs

from that of the European Commission and demonstrates member states' reservations concerning a stronger role for EU institutions. Accordingly, the rule of law dialogue is an intergovernmental approach envisioning an annual dialogue of member states on an equal footing in the General Affairs Council. Its value is doubtful, however: the topics are defined in advance and member states can choose which of their rule of law-related challenges they want to present. There are no consequences; that is, no recommendations are given that the member states are supposed to follow up on. Because the discussion is not public, it is not possible to pressure problematic member states through naming and shaming. Furthermore, the dialogue is not very formalized, so a lot depends on the commitment of the respective Presidency (Blauberger 2016: 290f; Closa 2016: 32ff).

The political instruments described so far – Article 7, the Commission's rule of law framework and the Council's rule of law dialogue – suffer from severe limitations. The only instrument that – theoretically – has coercive power is Article 7. In practice, however, sanctions are highly improbable. Apart from these political instruments, there is a judicial instrument, but it also has its limits. Based on Article 258 of the Treaty on the Functioning of the European Union, the Commission can launch infringement procedures and bring member states before the European Court of Justice (ECJ). However, this applies only to breaches of specific EU law, not violations of EU values in general. Nevertheless, the Commission can link rule of law or fundamental rights problems with specific EU law, for example, Common Market law or competition law. The Commission successfully did this with regard to Hungary: when Viktor Orbán's government introduced a tax on private TV stations, the Commission argued that this would distort competition. But even though the Commission won, rolling the tax back did not solve the general problem of Hungary's government restricting media pluralism (Blauberger: 295).

It appears that at present no adequate instruments are available to tackle the problem of democratic backsliding in EU member states. But at least the problem itself has been getting more attention. The increasing number of challenges to the rule of law in member states has prompted

the Commission to become more active. Having hesitated for so long, the Commission has shown some determination in the case of Poland, although it lacked such determination in other severe instances. At the same time, its reaction to an October 2016 European Parliament resolution urging the Commission to establish an »EU mechanism on democracy, the rule of law and fundamental rights« has been lukewarm at best. The resolution suggested that this mechanism contain preventive and corrective elements, and integrate existing instruments (European Parliament 2016). But in the »Roadmap for a More United, Stronger and More Democratic Union«, which President Juncker presented with his September 2017 State of the Union address, the Commission announced that it would offer up an initiative to strengthen the rule of law in the EU in October 2018 (European Commission 2017). With regard to the member states, the fact that the General Affairs Council took up the situation in Poland at a May 2017 session, in which a majority supported the Commission in its dialogue with Poland, can be considered progress. But it remains to be seen how the situation will evolve in the course of the Article 7 procedure against Poland. Certain member states have highlighted the importance of the EU's values in the context of the discussions about the EU's post-2020 Multiannual Financial Framework. They have proposed linking fund disbursement to compliance with the rule of law. Furthermore, French President Emmanuel Macron, in his famous speech on the future of Europe at the Sorbonne, declared the values of democracy and rule of law one of the two pillars of the EU and non-negotiable (Office of the President of the Republic 2017). The political debate is mirrored in academia. It is first and foremost legal scholars who are discussing

ways to enforce the rule of law through judicial means; for example, by a more creative use of infringement procedures or individual legal actions related to fundamental rights before national courts and the European Court of Justice.

This publication seeks to contribute to the debate by presenting possibilities for the EU to respond to violations of fundamental values in member states. Determining an adequate reaction to such breaches requires clear criteria. That is why, as a first step, we propose a monitoring mechanism that regularly assesses compliance with democratic standards and the rule of law in EU member states (Chapter 2). We contribute to the current discussions about the next Multiannual Financial Framework by laying out how a conditionality of funds could be implemented (Chapter 3). Moreover, we evaluate the possibilities of judicial enforcement (Chapter 4). Apart from sanctions, this publication also explores how the EU can promote democracy in its member states by supporting civil society (Chapter 5) and strengthening media pluralism (Chapter 6). Last but not least, European party families play a crucial role. Thus, we assess how EU institutions can regulate European political parties and how European political parties themselves can influence problematic national member parties (Chapter 7).

The EU finds itself at a critical juncture. With the Brexit vote, the refugee crisis and the economic crisis – which are yet to be overcome – the integration process has ground to a halt. At the same time, European leaders are aware of the urgent need for reform. This window of opportunity must be used. Several scenarios are on the table, including a differentiated Europe, in which a core moves forward faster than the rest. As regards democracy, however, there should be no such differentiation.

2

LAYING THE GROUNDWORK FOR EU ACTION: MONITORING DEMOCRACY IN MEMBER STATES

AT A GLANCE

- Governments of some EU member states that are alleged to undermine democracy and the rule of law typically argue that their actions are in line with democratic standards and comparable to what other member states are doing. They accuse the EU of being arbitrary and selective.
- A systematic, yet problem-focused monitoring mechanism that compares democracy in all member states would address the problem of selectivity and provide a basis for identifying significant problems in a specific member state.
- The mechanism should be based on a list of criteria proposed in this section, but rather than analysing all criteria in detail in all member states, the mechanism would focus only on issues identified as contentious through a dialogue with governments, opposition parties, public institutions, civil society and international organisations.
- Monitoring could be carried out by the Venice Commission of the Council of Europe or, if that is not possible, by the EU's Fundamental Rights Agency or a Panel of Experts established for this purpose.
- The findings should be discussed at both national and EU level, with the European Parliament adopting a resolution and the Council discussing the monitoring report as part of the annual rule of law dialogue.

2.1 WHAT PROBLEMS WOULD MONITORING SOLVE?

There are three principle problems that systematic monitoring of democracy² in EU member states would solve.

² This paper focuses on democracy based on the understanding that the concept is inextricably linked to the rule of law (in particular the separation and balance of powers and an independent judiciary) and human rights (in particular, political rights) as reflected in Article 2 of the Treaty of the European Union.

Governments of EU member states that stood or stand accused of undermining democratic government and the rule of law in their country typically argue that:

- Their actions are in line with democratic standards and comparable to what other member states are doing. The latter argument has been a standard feature of governments defending their action.
- The EU has no legitimacy or legal basis to get involved.
- They are unfairly targeted for political reasons; in other words, the EU's response is arbitrary and selective.

While many authors have questioned these points in various studies (for an in-depth analysis of this section's subject see: European Parliament Research Service 2016), systematic monitoring of democratic developments in all member states would respond to these points as follows:

- By allowing a comparison of democracy in all member states, it would provide a better basis for identifying significant problems in a specific member state. It would also make it easier to respond to claims that certain legal mechanisms are comparable, because systematic monitoring would better reveal constitutional and legal contexts than mechanical reference to one or another article.
- While a monitoring mechanism would not in itself provide a legal argument in favour of the EU's involvement on democracy questions (the EU Treaty articles provide these arguments), a monitoring mechanism equally applied to all member states would underpin the EU's legitimacy in this area.
- A systematic monitoring system would highlight significant deficiencies in a member state more clearly in comparison with the absence of such problems in other member states and therefore address the alleged problem of selectivity.

2.2 OBJECTIONS TO A MONITORING MECHANISM

There are two principal objections to democracy monitoring, beyond the question of its legitimacy or legal basis. One is that there already are monitoring mechanisms on democracy issues covering EU member states. However, there is no current mechanism that would bring relevant data together systematically:

- The EU Justice Scoreboard compiles data that are partly relevant for the rule of law in a democracy, but it is quantitative in nature and does not distinguish specific challenges. Furthermore, the Scoreboard does not cover other aspects of democracy, such as political participation.
- The Council of Europe has several reporting mechanisms but they do not produce systematic information on the status of democracy in EU member states. For example, its Commission for the Evaluation of the Efficiency of Justice (CEPEJ) gathers rather quantitative data, while the Venice Commission gets involved in specific cases in which constitutional-legal changes are made (more on the Venice Commission below).
- The OSCE observes elections in some EU member states, but not systematically and with varying intensity (full observation mission, »limited« observation mission and »assessment missions«). Its observers' findings are supposed to be fed into monitoring, but they do not represent systematic monitoring in themselves. The OSCE collects other information and has expertise on a range of relevant issues, such as freedom of assembly, but does not collect systematic information or analysis on EU member states.

The other objection tends to be of a practical nature. EU member state governments are already under heavy reporting obligations towards the EU but also towards many other bodies, such as UN Treaty monitoring bodies. Many member state officials feel that the reporting burden is too heavy, absorbing too many resources, particularly in the comparatively small government administrations of smaller member states. This is a legitimate practical concern that speaks in favour of a robust and less detailed mechanism. It is also in the interest of the EU, which does not want to create more bureaucracy.

Even if the reporting burden did not fall on member states, other concerns have been raised against detailed, systematic monitoring. For example, it is argued that aggregating the many existing instruments and existing data would practically amount to 'alchemy' rather than a scientific process (ibid.: Annex II, p. 110).

2.3 WHAT MIGHT A MONITORING MECHANISM LOOK LIKE?

2.3.1 METHOD AND SCOPE OF A POSSIBLE MECHANISM

As argued above, a mechanism should be robust and limited in scope. Conceptually, it should focus on the essential

features of a democracy. All member states agreed to a definition of seven »essential elements of democracy« in the UN General Assembly (United Nations 2005). As the EU has no internal document that defines democracy, these seven elements provide a useful, authoritative framework, with the additional advantage that the EU's external and internal dimensions can be integrated on this basis. The EU would thus apply the framework it supports outside the EU to its own members as well.

The seven elements are:

- (i) separation and balance of powers;
- (ii) independence of the judiciary;
- (iii) pluralistic system of political parties and organisations;
- (iv) respect for the rule of law;
- (v) accountability and transparency;
- (vi) free, independent and pluralistic media;
- (vii) respect for human and political rights; for example, freedom of association and expression; the right to vote and to stand in elections.

These criteria can be also derived from many other hard and soft law instruments to which EU member states are bound (European Convention on Human Rights, International Covenant on Civil and Political Rights, OSCE commitments), but none brings them together in a list (see for an analysis: Democracy Reporting International/Carter Center 2012). The Copenhagen criteria (»stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities«), which candidate countries have to fulfil before accession, do not provide a useful reference framework. First, they do not add anything to what are binding legal obligations under the EU Treaty's Article 2 and second because they suggest that democracy issues may be a matter only for states that joined the EU after 1993 (when the criteria were determined), rather than equally for all member states.

While the monitoring mechanism should be systematic in covering all EU member states, it should not strive to be exhaustive in describing and analysing all seven elements in each member state. Such an undertaking would be enormously resource-intensive and of no major practical value, as they would not reveal anything that is not already known and reported on elsewhere. The concern with democracy in EU member states is, after all, triggered not by a fear of some unknown violations that need to be discovered, but by well-known, controversial legal and policy measures of member state governments.

Instead, the monitoring should focus mainly on *those aspects that are contentious in a member state*. Contentious issues would be established on the basis of a checklist framed by the seven abovementioned criteria. The checklist would serve as a basis for a dialogue with governments, opposition parties, government institutions, civil society actors or international organisations. In other words, the first objective would be to identify which areas are contentious or non-contentious.

Issues that are already contentious between the EU and member states would be part of monitoring

with due regard to the prerogatives of the European Commission and the European Court of Justice. For example, where the Commission may conduct a rule of law dialogue with a member state, the mechanism should not re-evaluate the Commission's findings and recommendations but would highlight them and possibly establish additional facts that may be related to the case.

These contentious issues should be analysed and evaluated in the monitoring report. The premise of focusing on contentious issues is that no EU member state is so repressive that significant political and societal actors could not express their concerns openly. If such actors do not express specific concerns it is not useful for a monitoring mechanism to assess them. Put simply: if nobody in Denmark is concerned about the quality of constitutional justice, it does not make sense for a monitoring mechanism to analyse Denmark's constitutional justice system in detail.

Such an approach reflects the logic of the subsidiarity principle: national institutions and actors are more likely to be able to identify serious challenges than international actors as long as a political system is not utterly manipulated and repressive. The approach would be systematic procedurally; in other words, all member states would be part of such a dialogue. It would not be systematic in analysing all aspects of democratic governance. Issues that became of special concern in one member state could be briefly explored in all member states to create a basis for comparison.

Such a mechanism may be comparable to what the European Parliament Research Service recommends, namely a mechanism that emphasises »a contextual, qualitative assessment of data and a country-specific list of key issues, in order to grasp interrelations between data and the causalities behind them« (European Parliament Research Service 2016: 21). The main difference from this proposal is that the »list of key issues« is informed by concerns raised by principal stakeholders in the country concerned.

This would blunt the accusation of outsiders inventing problems and in truth merely formalise the way in which concerns about democracy in member states usually arise: they are picked up at the European level when they are voiced loudly at the national level.

2.3.2 WHO WOULD BE IN CHARGE?

There are several actors that might carry out such monitoring (for more details see: Democracy Reporting International 2016):

An obvious actor would be the EU's **Fundamental Rights Agency** (FRA). However, its current mandate is limited to reviewing member state action when they are implementing community law (Council Regulation (EC) 2007/168: Article 2). Many questions of democracy are anchored in the EU Treaty's Article 2, but member states do not implement community law in many of these respects. Its mandate would have to be changed. Changing the regulation would require unanimity of member states, which may be difficult to obtain.

Another possible actor would be the Council of Europe's **Venice Commission**. Its track record in

HOW COULD THIS WORK?

Example:

In Germany, opposition parties in parliament do not express significant concerns about the status of democracy. If they have concerns, they can raise cases in the Constitutional Court. One party, the Alternative für Deutschland, has expressed some concerns on particular issues, such as coverage by state broadcasters, alleging that it is biased. Such a party would be asked to substantiate its concerns and to explain in what way domestic mechanisms, such as constitutional or administrative justice, are insufficient to address such problems.

Another issue that may be raised in Germany would be the access of persons with disabilities to vote in elections. The German Institute for Human Rights, a government body, has expressed concerns that the law includes undue restrictions to their ability to vote (German Institute for Human Rights 2016: 12). In response to the Institute's concerns, a monitoring body would assess the extent of the problem and how domestic mechanisms are addressing it.

analysing and comparing the structural-institutional aspects of constitutional democracy in European states is unmatched; according to its website the Commission has adopted more than 500 opinions on 50 countries and 80 comparative studies. Its remit – democracy, the rule of law and human rights – would be fully in line with what is required for a monitoring mechanism.

The Venice Commission is composed of recognised experts who are designated by their governments but act in their individual capacities, a set-up that lends authority and legitimacy to the institution, while guaranteeing sufficient independence. Its plenary sessions provide a form of official peer review, increasing the expert authority of its opinions. The Commission has already reported on developments in many member states and is attuned to the type of dialogue-based monitoring proposed in this section. It regularly sends delegations to member states, to discuss contentious legal acts with various sides.

It would need closer analysis to find out whether the Venice Commission could be tasked to carry out more systematic monitoring, as proposed in this section. Three main questions would need to be addressed. First, capacity: regular dialogue and monitoring of all EU member states would require more financial and human resources. Second, the legal set-up: the EU has a special status in the Venice Commission, the European Commission participates in its meetings and all EU member states are members. In this sense, the Venice Commission includes all necessary actors, but an in-depth assessment would be needed to determine whether such a special, »regional« mandate would be possible under the Commission's

current statute. Initial analysis suggests that such a task could be arranged flexibly under the current statute with no need to involve the Council of Ministers.³

Even if legally possible the biggest difficulties would probably be of a political nature. The EU may not want to »outsource« a sensitive area such as monitoring to a non-EU organisation that includes many other governments from outside the EU. The European Parliament Research Service also mentions objections to non-EU actors on the grounds that the EU has its own distinct legal order. However, the mechanism foreseen does not carry direct legal consequences (European Parliament Research Service 2016: 22). It rather elevates and expands something that already happens: the Venice Commission is involved in democracy-related problems in several member states and EU bodies use its analyses.

Furthermore, even if the European Commission may be able to agree on such a mechanism with the Venice Commission, it would require cooperation between member state governments, for example to participate in dialogues on democracy. In that sense the European Commission and the EU Council Secretariat should explore this option with all member states. Given that the Venice Commission is a known quantity they may prefer such a »soft« dialogue-based mechanism to harder and more intrusive alternatives.

The major advantage of the Venice Commission would be its high reputation and extensive experience in this area; it has been involved with intricate democracy-related problems in many countries for almost two decades. There is already a precedent for EU-Council of Europe cooperation in this regard; the European Commission engaged the Council of Europe's Commission for the Evaluation of the Efficiency of Justice (CEPEJ) to carry out annual studies. The Commission's Justice Score Board relies partly on data produced by CEPEJ (European Commission 2017a: 2).

Another option would be for the EU to establish a **Panel of Experts** to monitor democracy in EU member states, as indicated in the European Parliament resolution on a Pact for Democracy (European Parliament 2016a: Article 8 Annex). The European Commission has voiced its opposition to this option, indicating that the appointment of such a Panel would »raise serious questions of legality, institutional legitimacy and accountability« (European Commission 2017b). Without engaging in deeper analysis, these concerns depend on the exact role of such a Panel. If its role was merely advisory, concerns should be less serious. However, in contrast to the Venice Commission such a Panel would require a completely new start, increase bureaucracy by creating another EU body and need significant time to establish its credibility.

³ »The Commission may supply, within its mandate, opinions upon request submitted by the Committee of Ministers, the Parliamentary Assembly, the Congress of Local and Regional Authorities of Europe, the Secretary General, or by a state or international organisation or body participating in the work of the Commission.« The European Union has a special status with the Venice Commission. In terms of funding a monitoring mechanism, the statute indicates that »the Commission may accept voluntary contributions, which shall be paid into a special account opened under the terms of Article 4.2 of the Financial Regulations of the Council of Europe. Other voluntary contributions can be earmarked for specific research« (Venice Commission 2002).

If appointed by the European Parliament, a Panel would have institutional legitimacy and accountability as other bodies, such as the European Parliament-appointed European Ombudsman. A Panel of Experts should be composed of persons from every EU member state. While they may be appointed by their respective governments they would serve on the panel on an independent basis and not work on matters involving their own country. Voting should take place by majority.

2.3.3 PROCESS OF MONITORING

In order to take account of member states' concerns about too much reporting, monitoring could be undertaken every two years instead of annually.

If a Panel was in charge of monitoring, the process could look as follows (it could work in a similar fashion to other bodies, such as the Venice Commission):

- For each member state three panel members are appointed as fact-finders. They study available data, including reports of existing monitoring mechanisms, and information on the country concerned and then travel to the country to have a dialogue with the main stakeholders, as outlined above.
- Based on their findings they present a report with their assessment to the whole Panel.
- Reports on all member states are discussed and adopted by the full Panel. If in a given member state no actor notes significant problems, its report will be short and describe the democratic system and specific findings only in brief terms.
- The Panel adds a chapter on the status of democracy at the EU level based on the same methodology as the country reports. That report will placate critics who may argue that the EU should first evaluate itself. It would also show that the EU is open and transparent about its democracy-related issues.
- Member state parliaments consult the public and debate the report in a public session and invite civil society organisations to participate. Each parliament focuses on the report of its own country. They adopt a resolution on their country report. Opposition parties with the status of a parliamentary group that do not agree with the majority view can attach their dissenting statement to the resolution. These debates ideally all happen on 15 September, the international day of democracy. The »Conference of Speakers of the European Union Parliaments« could agree on the basic elements of how this debate should be conducted.
- Civil society organisations, extra-parliamentary parties or members of parliament that do not form a group can send shadow reports to the Panel. They will be discussed and referenced in the Panel's report.

- The Panel sends the monitoring report, including the statements of member states' parliaments to the European Parliament, which debates it and adopts a resolution on the report, paying particular attention to the chapter on democracy at the EU level.⁴
- The Council discusses the monitoring report, for example as part of its annual rule of law dialogue, which was launched by the 2015 Luxembourg presidency.

2.4 WHO SHOULD PROPOSE THE MECHANISM?

With the European Commission's refusal to contemplate an Expert Panel the debate on monitoring mechanisms is currently blocked. The European Parliament could initiate alternative ideas, as outlined here – such as empowering the Venice Commission – in another resolution. The European Commission may, however, once more refuse to put such a proposal into practice because it may fear that it would not be able to convince all member states to participate in it.

Given that support would be necessary from all member state governments (they would be a primary interlocutor of fact-finding teams), such a proposal would best be proposed by a group of member states, which would propose it in the Council. Ideally, they would represent governments from across the political spectrum.

⁴ The debate in national parliaments, as well as the European Parliament is aligned with the EP resolution on democracy, the rule of law and fundamental rights (2015/2254) in which the Parliament »emphasises the key role that Parliament and the national parliaments should play in measuring the progress of, and monitoring compliance with, the shared values of the Union, as enshrined in Article 2 TEU« (European Parliament 2016a: point 9).

3

WITH STRINGS ATTACHED: CONDITIONALITY OF FUNDS AS A WAY TO SAFEGUARD DEMOCRACY

AT A GLANCE

- In the context of the discussions about the new Multiannual Financial Framework after 2020 it was suggested in the public debate and by some member states to link access to EU funds to respect for European values.
- Funds represent important leverage for the EU and could strengthen the Commission's role in the rule of law procedure. Putting EU funds under political conditionality is justified because only adherence to democracy and the rule of law ensures effective spending of EU money and a reliable framework for investors.
- Making only the EU structural and investment funds subject to this kind of conditionality risks being perceived as targeting those member states that are net recipients of EU structural and investment funds. That is why all EU funding sources have to be made conditional.
- A gradual system would allow for differentiation: depending on the extent of democracy deficits, funds could be cut back or disbursements suspended. The procedure to decide on sanctions could be similar to that applying to macroeconomic conditionality.
- The concept could be implemented by changing the relevant secondary law: either the regulation on the relevant funds has to be amended or the Council regulation laying down the next Multiannual Financial Framework has to include clear conditions. We call attention, however, to the risks of a possible legal challenge regarding the absence of an adequate legal basis or a possible bypassing of Article 7. Any proposal would have to be construed so as to minimise such risks.

3.1 THE CURRENT DEBATE ON INTRODUCING POLITICAL CONDITIONALITY

Given the fact that the United Kingdom – one of the biggest net contributors – will leave the European Union, the

negotiations for the next Multiannual Financial Framework (MFF) that will enter into force in 2021 will be especially difficult and cuts to existing programmes will be needed. In this context, it was suggested in the public debate and by some governments to link access to EU funds to respect for European values. In January 2018 French European Affairs Minister Nathalie Loiseau said, for example, at a high-level conference on the EU budget after 2020 organised by the European Commission that »conditionality of funds is not a dirty word«. She went on to say that the new budget rules for the cohesion funds need to include »conditionality« provisions that tie cohesion funding to member states' adherence to minimum rule of law provisions (French Ministry for Europe and Foreign Affairs 2018). In a German government paper that was circulated in 2017 it is stated that the European Commission should examine whether the receipt of EU funds »could be linked to [a country's] compliance with the fundamental principles of the rule of law« (German Federal Ministry for Economic Affairs and Energy 2017). One further example is a MFF paper from the Italian government, which states: »Any conditionality mechanism, in cohesion as well as any other EU policy, should be linked, first and foremost, to full respect for EU fundamental values, including the rule of law principles, which constitute the backbone of the European project« (Government of Italy 2017: 3–4).

The European Commission also took up this idea in its Reflection Paper on the Future of EU Finances:

Upholding EU core values when developing and implementing EU policies is key. There have been new suggestions in the public debate to link the disbursement of EU budget funds to the state of the rule of law in Member States. Respect for the rule of law is important for European citizens, but also for business initiatives, innovation and investment, which will flourish most where the legal and institutional framework adheres fully to the common values of the Union. There is hence a clear relationship between the rule of law and an efficient implementation of the private and public investments supported by the EU budget.

It was argued that member states that violate these common values should not be supported financially. Indeed, against the background of worrisome internal developments in some member states funds are an important leverage for the EU to intervene, which it should make use of. The upcoming negotiations for the next MFF are a window of opportunity to introduce such conditionality. In what follows we would like to lay out the form that such conditionality might take.

3.2 THE EFFECTIVENESS OF CONDITIONALITY

The current Multiannual Financial Framework foresees an overall budget of about EUR 1 trillion.⁵ EUR 454 billion of this is dedicated to »Economic, social and territorial cohesion«, in other words, the European Structural and Investment Funds (ESIF). Five main funds work together to support economic development across all EU countries, in line with the objectives of the Europe 2020 Strategy for smart, sustainable and inclusive growth: the European Regional Development Fund (ERDF), the European Social Fund (ESF), the Cohesion Fund, the European Agricultural Fund for Rural Development (EAFRD) and the European Maritime and Fisheries Fund (EMFF).

It is important to note that the release of such funds is already conditional to a certain extent. The common rules for the implementation of the ESIF in the current budgetary period (2014-2020) are laid down in Regulation (EU) No. 1303/2013, also known as the Common Provisions Regulation (Regulation (EU) 2013/1303). Partnership Agreements between the European Commission and the member states set out how the ESIF will be used by the member states. They are drawn up by member states and approved by the Commission following negotiations. Whether the member states comply with the Agreements is monitored by the European Commission. Moreover, the new Common Provisions Regulation introduced a controversial instrument for disciplining member states. This is macroeconomic conditionality, which makes payments from the ESIF conditional on member state compliance with the rules of sound economic governance (Recitals 24–26, Article 23 and Annex III). The Common Provisions Regulation states, *inter alia*, that the »Commission may request a member state to review and propose amendments to its Partnership Agreement and relevant programmes, where this is necessary [...] to maximise the growth and competitiveness impact of the ESIF in member states receiving financial assistance« (Article 23 paragraph 1). Furthermore, »where the member state fails to take effective action in response to a request [...], the Commission may [...] propose to the Council that it suspend part or all of the payments for the programmes or priorities concerned« (Article 23 paragraph 6 sentence 1). This means in concrete terms that the investments to be funded by the structural funds need to be aligned with macroeconomic conditions. In addition, sanctions, in the form of suspension of funding commitments, can be imposed on member states under the excessive deficit procedure (see Article 23 paragraph 11 and 12 CPR).

⁵ As established by Council Regulation (EU, EURATOM) No. 1311/2013 of 2 December 2013 laying down the Multiannual Financial Framework for the years 2014–2020.

The overall purpose of the macroeconomic conditionality is to ensure the effective use of EU funding in the member states.

On this same logic, there have been suggestions to introduce political conditionality by linking EU funding to member states' adherence to EU fundamental values. And indeed there is a clear link between the rule of law and effective spending of EU funds. Innovation and investments will flourish most if there is a reliable and transparent legal and institutional framework. An independent legal system provides security for investors because they have the possibility to appeal to independent courts and can expect competitive procurement processes. The rule of law is also a precondition for the principle of mutual trust in the European single market. Only then can citizens and investors be sure that their rights will be protected everywhere in the European Union. Moreover, checks and balances are needed in order to be sure that EU money is spent properly and not wasted by corruption. Beyond this functional argument, the EU budget should support the objectives of the European Union as set out in the treaties, which is, aside from the promotion of peace and the well-being of its people, the promotion of European values (European Commission 2017c: 11, 22; Šelih et al. 2017: 3).

It is clear that such a move would be enormously sensitive in some countries that are net recipients of cohesion funding. If these solutions are finally implemented, they will serve a repressive and preventive function. They will not, however, be sufficient in themselves to promote and protect democratic principles. Experience has made clear that »forced democracy« is not very effective and that sanctions may sometimes even be counterproductive if they impact on the general population. Therefore, these measures have to go hand in hand with positive measures that focus on democracy promotion.

However, conditionality could at least be part of the toolbox that might be applied if need be. The mere existence of such a tool would put a certain pressure on the member states concerned and lead to more and different discussions when, for example, problematic legislative amendments are being discussed in a national or regional parliament. It would also provide a strong incentive for those member states to engage constructively with the European Commission and, for example, take seriously its recommendations in the context of the rule of law dialogue procedure. Last but not least the introduction of conditionality procedures would be a very effective option for improving the tame procedures under Article 7 of the Treaty of the European Union.

3.3 WHAT A CONDITIONALITY MECHANISM MIGHT LOOK LIKE

The core of the conditionality concept and its rationale requires that all funding sources – and as a consequence all member states – be subject to it; otherwise the whole concept will lack legitimacy. Therefore, if the conditionality concept is put in place, not only the European Structural and Investment (ESI) Funds should be made conditional, but also the EU mainstream programmes. Any other solution risks being perceived as discriminatory, punishing those member states that are net recipients of EU structural and investment funds. This includes,

for example, the LIFE Programme, which is the EU's financial instrument supporting environmental, nature-conservation and climate action projects throughout the EU. Another example is the Connecting Europe Facility (CEF), which is a key EU funding instrument to promote growth, jobs and competitiveness through targeted infrastructure investment at European level. Highly relevant for all member states is of course Horizon 2020, the financial instrument implementing the Innovation Union, a Europe 2020 flagship initiative aimed at securing Europe's global competitiveness, which is also the biggest EU Research and Innovation programme ever, with nearly EUR 80 billion of funding available over seven years (2014 to 2020).

Technically, two options are possible concerning the design of the concept. The first solution would be a complete exclusion from EU funds; the second would be to set up a gradual system that allows for more differentiation. Depending on the extent of democratic deficits, funds could be cut back or disbursements suspended. An additional feature of the second option might be to give member states additional funds or rewards if they manage to overcome democratic deficits.

Any decision to halt the disbursement of funds must be based on a sound mechanism. This could, for example, be a decision-making procedure similar to the one applied to the current macroeconomic conditionality. In this case, the suspension of funds is proposed by the European Commission and »the Council shall decide on that proposal, by means of an implementing act« (Regulation (EU) 2013/1303: Article 23). However, the possibility should be considered to give a co-decision role to the European Parliament in contrast to the current structured dialogue applying to macroeconomic conditionality, which does not involve the same power of the European Parliament as in co-decision.

Conditionality of EU funds must be based on clear criteria. It is extremely important to clarify what constitutes a systemic violation of the EU's fundamental values. Systematic monitoring, as suggested in the previous section, would help to identify such breaches. At the same time it is, unfortunately, fairly likely that the EU will have to deal with »obvious cases«, for which the current criteria are enough. In the long run, one possibility that should be further considered is to further develop the EU democracy *acquis* and create additional legal documents that contain a clear EU commitment to democratic values and better address the current challenges to democracy. This solution has the great advantage that the criteria are established by the EU itself rather than by mere reference to other institutions, such as the Council of Europe and there especially the Venice Commission.

The conditionality mechanism should also be linked to the rule of law dialogue procedure. In other words, it could provide leverage to the European Commission in the context of that dialogue but, equally, sanctions should not be applied before first applying the rule of law dialogue procedure and giving the member state the possibility to be heard and implement the European Commission's recommendations.

Critics of sanctions argue that they would hit ordinary people and turn general pro-European attitudes into Euroscepticism. That is why any sanctions should be accompanied by public diplomacy by the EU institutions. They should invest in explaining to the public in the

countries concerned why the suspension of funds is necessary and what it is aiming at. Finally, any decision to suspend funds should naturally be subject to judicial review by the European Court of Justice. This would mean, concretely, that the member state affected by the measures should be able to seek legal redress before the European Court of Justice, including of course interim legal protection.

3.4 IMPLEMENTATION OF THE CONCEPT

The first and ideal solution for a legal basis of the conditionality concept would certainly be a treaty change, although this is highly unlikely. The second solution is to change the relevant secondary law. On this count there are basically two options. The first is to amend the regulation for the respective funds, Regulation (EU) No. 1303/2013. The second option could be to introduce conditionality as part of the new MFF by referring to the fundamental values laid down in Article 2 TEU and to clearly state that all disbursements are subject to member states' adherence to those values. The MFF is laid down in a regulation that has to be adopted unanimously by the Council of the European Union with the consent of the European Parliament. The post 2020 new Council regulation laying down the next MFF should set clear criteria and conditions that apply to the entire budget. The current Council Regulation No. 1311/2013 (Council Regulation (EU, Euratom) 2013/1311) for example does not even mention the word »democracy«.

The main actor for implementation of this new policy would be the European Commission, but involvement of the Council and European Parliament, under the procedure described above, will also be required. The European Court of Justice would have the final word in case the decision is appealed by the member state.

3.5 RISKS

However, as we are aware that the European Commission is currently verifying the legal feasibility of the conditionality concept we also have to point out that serious legal risks have to be taken into account. It is arguable that the suspension of the ESIF amounts to a suspension of the rights of the respective member state under the Treaties and that this would require a specific legal basis in the Treaty on the European Union; without it, such suspension would be unlawful. Furthermore, it is conceivable, depending on the design of the conditionality concept, that it might constitute an unlawful bypassing of Article 7 TEU and that funds would be suspended as a sanction to pursue another EU policy. It is certainly true that the imposition of monetary fines is nothing new. However, so far such suspension has been linked to the objectives of the funds themselves. That is why it is important to spell out that all funds must serve the values on which the EU is founded according to Article 2 TEU. This means concretely that the disbursement of every EU cent must be linked to democracy and that this needs to be reflected in the legal framework for every fund. Otherwise, there is a risk of imposing sanctions that are not linked to non-compliance with central EU values and therefore improper.

4

GOING TO COURT: JUDICIAL ENFORCEMENT BY THE EUROPEAN UNION

AT A GLANCE

- Article 7 TEU seeks to ensure EU member states' respect for the rule of law and fundamental rights. However, the measures enshrined in Article 7 require a political decision. The hurdles for triggering this decision are extremely high. That is why a judicial process is needed.
- Judicial enforcement seems complicated because the EU's Charter of Fundamental Rights is binding for member states only in the implementation of EU law. However, the growing interdependence between EU members justifies judicial review of national measures by the European Court of Justice. To safeguard the EU's legal and democratic order, which includes effective legal protection, free movement and the free and democratic nature of the Union itself, all states must comply with EU law and the fundamental rights enshrined therein. Serious violations of the fundamental values of Article 2 TEU have an impact not only on the respective member state's domestic sphere, but necessarily on that member state's capacity to comply with EU law and thereby threaten the functioning of the EU legal order as a whole. In such cases, it would be possible and desirable for the European Commission to bring an infringement procedure against the member state in question.
- Implementing this approach does not require amending existing rules. Rather, the Commission must drive this process and become more daring. Specifically, the Commission should bring cases with a systemic impact, such as those described above, before the European Court of Justice.
- The availability of infringement procedures in case of systemic breaches of fundamental rights would provide the Commission with important legal leverage vis-à-vis member states challenging the rule of law. They would take the Commission's recommendations within the rule of law dialogue more seriously. Moreover, having a judicial mechanism would help to depoliticise the debate.

4.1 BACKGROUND: HOW FUNDAMENTAL RIGHTS AND THE RULE OF LAW CAME TO BE INTRODUCED INTO THE EUROPEAN UNION DEBATE

When the European Communities were created a mechanism of fundamental rights protection was absent from its legal order. There are several reasons why the Treaties – and, in particular, the Treaty of the European Economic Community – did not contain a bill of rights or indeed any system of fundamental rights protection (for a more in depth analysis see: Weiler 1986: 1110ff.). First, it must be recalled that when the original Treaties were drafted, the founding states probably did not foresee either their transformation into a constitutional charter (to use the words of the European Court of Justice) or the extent of the powers to be assumed by the European Communities. The concern with fundamental rights, typical of traditional political communities like the member states, was far from the minds of the founders. Second, the original conception of the Treaties as international law instruments creating Communities of limited competences both limited the perception of the threat they could constitute to fundamental rights at national level and led states to assume that, if necessary, they could still control the acts of those European Communities through national fundamental rights. On the one hand, the fact that states perceived Community competences to be clearly limited led them to assume that the scope for possible conflicts between Community acts and fundamental rights was to be extremely small. On the other hand, if conflicts did arise, states probably expected their national constitutions to be the best guarantee of fundamental rights protection.

Third, it must also be remembered that judicial protection of fundamental rights was a relatively recent phenomenon in Europe. Though fundamental rights documents and bills of rights did exist for many years in European states they were understood primarily as giving direction to the political process. They were expected to guide the drafting of laws by the legislator but did not serve to control the validity of such laws. The sovereignty of the legislator

– in the form of either »parliamentary sovereignty« or the »*volonté general*« – dominated the political organisation of European states. The American tradition of constitutional judicial review was introduced in Europe only following the Second World War and the discovery of the risks that the majoritarian will and any form of uncontrolled power may entail. All this may have contributed to the absence of a system and catalogue of fundamental rights protection from the founding Treaties of the Communities.

These expectations were, however, overturned by the constitutional developments of the Community legal order and the scope of the competences assumed by the Communities. On the one hand, the supremacy and direct effect attributed to Community acts meant that national constitutional provisions could no longer be used to guarantee the compatibility between those acts and fundamental rights. On the other hand, the increased perception of the amplitude of the competences assumed by the Communities and of their open and undetermined character highlighted the risk of fundamental rights violations arising from the exercise of such Community powers.

The initial debate on fundamental rights in European integration was, therefore, about the risk that the new powers assumed at the European level might bring to the fundamental rights and rule of law usually guaranteed in its member states. For years, the fundamental rights discourse on European integration was focused on the need for the Community legal order to take fundamental rights seriously in reviewing the powers of Community institutions, not member states. The protection of fundamental rights in states was to be addressed either under national constitutions or under the European Convention of Human Rights and Fundamental Freedoms. Gradually, however, the focus has shifted to the need for the European Union to also guarantee fundamental rights and the rule of law at the level of its member states.

4.2 THE PROTECTION OF FUNDAMENTAL RIGHTS BY THE EU AT THE LEVEL OF THE MEMBER STATES: EXISTING INSTRUMENTS

The expansion of European integration (increasing interdependence between its member states in relation to fundamental rights-sensitive issues), successive enlargements and the incomplete nature of the European Convention of Human Rights system (limited in scope and with weak enforcement mechanisms) have made it necessary to ensure that EU member states comply with the fundamental values now defined in Article 2 TEU. These comprise democracy, the rule of law and fundamental rights. They are also an accession criterion for any accession candidate under Article 49 TEU.

It has become clear, however, that simply controlling compliance with such values at the moment of accession is not enough. It is in this context that Article 7, recently triggered against Poland, was inserted into the Treaties. But Article 7 depends on a political decision and not judicial enforcement and the requirements for triggering that political

decision are extremely hard to satisfy. In particular, it will be extremely difficult, not to say virtually impossible, to obtain the necessary unanimity, excluding the member state concerned, for applying sanctions in case of a serious and persistent violation of the values of Article 2. This difficulty, together with the political character of the assessment has, until now, deterred the EU institutions and member states from even initiating its application. This has fed a perception that Article 7 is largely ineffective and, as a consequence, has little, if any deterrence value. The action recently taken by the Commission against Poland under Article 7 is certainly intended to prove the contrary. It is, however, a high stakes gamble. While the Commission may obtain the four-fifths majority necessary to establish that there is a clear risk of a serious breach of the values of Article 2 it is highly unlikely to get the unanimity necessary to establish that there has been an actual breach and impose the corresponding sanctions. This means that Poland may continue to refuse to comply with the recommendations of the Commission, without the latter being in a position ultimately to enforce them under Article 7. If that is the case, Article 7 will definitely be dead.

The Commission has tried before to use the leverage of Article 7 – without actually triggering its application – by introducing the rule of law dialogue procedure. This was initially thought to be a soft-law mechanism that could serve as an alternative to Article 7, whereby the Commission would engage in a constructive dialogue with the relevant member state and, if necessary, issue recommendations. The expectation was that either such a constructive approach might work in itself or the name-and-shame phase of the procedure would eventually encourage the state to correct the identified risks to the rule of law. However, to date it has not worked that way. The instrument lacks the teeth necessary to push member states into compliance. That is why the European Commission has increasingly been using the threat of triggering Article 7 to get member states to follow its recommendations. Naturally, the effectiveness of this threat is diminished by the difficulties involved in applying Article 7 itself. The Commission's strategy found its existential moment when Poland failed even minimally to address the Commission's recommendations. It de facto called the Commission's bluff on Article 7. The Commission has now bravely assumed its responsibilities and initiated the Article 7 procedure against Poland. In light of the limits of Article 7 already identified, however, it is doubtful that Article 7 itself will survive.

In this context, the Commission has also tried, wherever possible, to link the fundamental rights or rule of law problem with another EU law issue. An example of this is the Hungarian law that instituted a retirement age for judges of 62, thereby paving the way for a massive replacement of judges in Hungary, arguably enabling the ruling party to appoint judges friendlier to its views. The Commission used the Directive prohibiting age discrimination to start an infringement procedure against Hungary and won. However, since the case was not framed in terms of the protection of judicial independence it was possible for Hungary to remedy the situation by compensating the retired judges without reinstating most of them, thereby implementing the government's purported political intention.

In any event, this approach is constrained by the limited number and scope of EU rules that directly address issues that can be related to the rule of law and fundamental rights. This would change only if EU fundamental rights were directly applicable to member states, which has not been the general principle so far. However, it is well known that the European Court of Justice has extended the initial reach of EU fundamental rights also to cover state actions that fall within the scope of application of EU law, notably when they either implement EU law or derogate from it (ECJ 1998; ECJ 1991). In this regard, Article 51 (1) of the Charter could be argued to restrict even that scope since (at least in the English version)⁶ it determines that the provisions of the Charter are applicable to the member states only »when they are implementing Union law«. This would appear indeed to limit the more extensive scope of application previously recognised in ECJ case law. In the latter, as stated, EU fundamental rights may also be applied to state acts that derogate from EU rules. If interpreted literally, Article 51 (1) could thus lead to a more restrictive scope of application for EU fundamental rights. This has not, however, been the case and the Court of Justice has consistently decided that whether a state action is reviewable under EU fundamental rights or not depends on whether that action falls within the scope of application of EU law. That might be the case, as in relation to the Hungarian law on judges' retirement, because there may be a dimension of a particular fundamental right – such as age discrimination – that is directly regulated by EU law or because the action of the state takes place in the context of implementing EU law (for example, transposing a directive) or is an exception to another EU rule (for example, a restriction on free movement). Apart from such a link to another EU provision, however, it is not possible for EU law to be used to enforce fundamental rights and the rule of law in a member state.

In a later case, then Advocate General Miguel Pórigues Maduro proposed to the Court of Justice a more nuanced and systemic approach that, while aiming to introduce some judicial oversight and enforcement of fundamental rights and the rule of law in member states, would not raise the risks just mentioned (ECJ 2008). The Court did not address this proposal in its judgment, deciding the case on a different basis. The proposal has already been picked up by some scholars (see, for example, von Bogdandy et al. 2012: 489–519). It is that proposal that shall now be revisited and refined, also in light of more recent developments of EU law.

4.3 REASONS FOR THE EU ROLE IN ENFORCING THE RULE OF LAW AT NATIONAL LEVEL

There are three possible justifications for a regional organisation or supranational entity intervening in a state's domestic sphere to protect the rule of law, democracy and fundamental rights. The first reason could be based on the moral and political externalities that violations of fundamental rights or the rule of law in a state may cause in

another state. Of course, the concept of moral and political externalities is controversial. However, when states commit themselves to share a certain political and economic space it is legitimate to argue that they are entitled not to want to share the benefits and costs involved in that common endeavour with states that do not respect a certain common set of fundamental values.

As second reason derives from the fact that states themselves may want to be bound by an external instrument and/or document protecting fundamental rights and the rule of law. This amounts to a layer of external constitutional discipline self-imposed by the state. This may be because they do not have a domestic mechanism to guarantee such values and want to use the external mechanism to do it or because, in light of past negative experiences, they want to add an external mechanism of constitutional discipline to the domestic constitution. In these instances, the authority to intervene on the part of the international or supranational body results from a previous self-binding intent on the part of the state: international or supranational law is, in these cases, a form of collective self-discipline that states have imposed upon themselves because past experience has shown that domestic mechanisms of countervailing powers and political and judicial control are not always effective in protecting the fundamental values of the rule of law, human rights and democracy.

The previous two reasons fit the case of the Council of Europe and the European Court of Human Rights (ECtHR), for example. There is, however, a third possible reason, particularly relevant in the case of the European Union. It concerns the extent to which economic and social interdependence between states generates also interdependence at the level of the fundamental foundations of their constitutional orders. In the EU, states have entered into a form of integration generating such interdependence that the violations of the rule of law, democracy and fundamental rights by one state can directly impact on the other states, either because the latter are called in to give effect to decisions of the former state that may have been taken in violation of those values or because the violations of such values by that state hamper the legitimacy and effectiveness of the decisions taken by all. Recent cases show that the European Court of Justice has already largely recognised the extent to which the level of interdependence inherent in EU policies depends on mutual trust between the different legal orders of the member states and their compliance with the rule of law and fundamental rights (ECJ 2016: para 78).⁷

There is an important difference when invoking this third reason. The authority to intervene in protecting the rule of law, fundamental rights or democracy results from the need to protect the legitimate and effective functioning of the

⁶ Some of the other language versions of this provision are more open.

⁷ This section was written in January 2018 and takes into account the case law until that date. Recent judgments appear to confirm the thesis of this section. In a judgment of 27 February 2018 on the pensions of Portuguese judges, the ECJ underlined member states' obligation to guarantee the independence of national courts as a necessary precondition for the European system of judicial cooperation and mutual trust (ECJ 2018). And in March 2018 the Irish High Court stopped the extradition of a man wanted by Poland because of the controversial Polish judicial reforms and referred the case to the ECJ.

space of interdependence generated by EU law. This provides an additional authority for such intervention. The intervention is not only justified to protect the state from itself or because it is claimed that the actions of that state create a moral externality in another state by violating a joint commitment to certain values. The intervention, in this case, takes place also to protect the other states from becoming willing participants in such violations either because they have to, directly or indirectly, enforce them or because they impact on the decisions taken by all and to be implemented by all.

4.4 CORRECTING AND PREVENTING SYSTEMIC RULE OF LAW PROBLEMS IN MEMBER STATES THROUGH JUDICIAL ENFORCEMENT AT EU LEVEL

The provisions that establish the EU's and its member states' commitment to the rule of law, fundamental rights and democracy – notably Article 2 – make clear that compliance with such principles is an existential requirement of the EU legal order. In this respect

a distinction must be drawn between, on the one hand, jurisdiction to review any national measure in the light of fundamental rights and, on the other hand, jurisdiction to examine whether Member States provide the necessary level of protection in relation to fundamental rights in order to be able adequately to fulfil their other obligations as members of the Union. The first type of review does not yet exist and is not within the Unions current competences. However, the second type of review flows logically from the nature of the process of European integration. It serves to guarantee that the basic conditions are in place for the proper functioning of the EU legal order and for the effective exercise of many of the rights granted to European citizens. Though the degree of protection of fundamental rights at national level does not have to be exactly the same as the degree of protection of fundamental rights at the level of the European Union, there must be some measure of equivalence in order to ensure that the law of the Union can operate effectively within the national legal order.

ECJ 2007

In other words, certain systemic violations of fundamental rights and the rule of law in a member state can be of such nature and magnitude as to, indirectly, call into question the application of the EU legal order in that member state and/or lead to the violation of certain fundamental principles or rules of EU law.

A first example concerns the principle of the effectiveness of EU law. The European Court of Justice has made clear that such a principle requires that the member states' own legal orders fully implement and enforce EU law, including at the level of institutions, procedures and remedies available for assuring the protection of the rights granted by EU law to European citizens (ECJ 1963; ECJ 1990; ECJ

1991a; ECJ 1991b; ECJ 2002; ECJ 2007a; ECJ 2009; ECJ 2013). This has, therefore, both procedural and substantive consequences. Since EU law is usually applied via national courts and national procedural law, the principle of effectiveness has been used by the ECJ to review procedural and substantive aspects of national laws regulating the judiciary and judicial protection, including finding that member states were in violation of EU law because they did not provide for an adequate judicial remedy or its procedural requirements made it too difficult to protect a right or obtain redress for a past violation. In other words, through the principle of effectiveness the ECJ can review the extent to which a national judicial system (in its institutional, procedural and substantive dimensions) is capable of guaranteeing the fair, impartial and full application of EU law and protect the rights granted by it to citizens.

In this context, it is clear that a member state with a systemic rule of law problem – notably due to a serious threat to the independence of its judiciary – is not complying with the principle of effective judicial protection. The Commission seems to have taken a step towards this approach with the recent infringement action brought against Poland regarding several amendments to the laws governing the judiciary. Although the details of the reasoned opinion and future pleadings are not yet known it appears that the Commission is indeed making a link between the amendments and the independence of the judiciary and between the latter and the principle of effective protection under EU law. The Commission is also invoking a violation of a specific EU act: Directive 2006/54 prohibiting gender discrimination. This concerns a specific aspect of the Polish legislative amendments: the different retirement ages for male and female judges. Contrary to what happened in the Hungarian case, however, the Commission appears to have based the infringement also on a broader violation of the independence of the judiciary. This is an important step in the direction of linking systemic infringements with the basic conditions necessary for the regular functioning of the EU legal order and the protection of citizens' rights.

A second example concerns the requirement that elections to the European Parliament must be free (Article 14 TEU) and comply with the EU commitment to democracy. The protection of free and fair elections and a democratically elected and functioning European Parliament requires that certain minimum conditions be guaranteed in all member states. If in a certain member state there is a serious threat to freedom of expression or freedom of the press this might affect the democratic character of the elections for the European Parliament in that state, calling into question compliance with Articles 2 and 14 TEU. The same may be the case if elected MEPs are not free in some member states to exercise their functions because, as recently appeared to have happened, they have been threatened, with the complicity of the authorities, due to political positions they have taken. If that is the case, then the freedom of MEPs is restricted and the democratic character of the European Union itself is affected. This would again constitute a sufficient legal basis for an infringement action against the complicit member state where that situation occurred.

More examples could be given, including hindrance of the free movement of persons if there is a systemic problem of fundamental rights or rule of law violation in a member state. The Court has already adopted a somewhat similar approach, focusing on systemic rule of law and fundamental rights challenges, in the context of the area of freedom, security and justice and the execution of a European arrest warrant. The Court prevented a national court from executing such an arrest warrant if there is a systemic problem with the conditions of detention in the requesting member state that entails a violation of Article 4 of the Charter. Two aspects result from the Court's judgment. First, the degree of interdependence generated by the area of freedom, security and justice relies on the trust that all member states are in compliance with the basic values enshrined in Article 2. Second, such compliance is assumed to occur, unless the problem is of a systemic nature.

The position argued for in this note is a natural extension of the logic already embraced by the Court in the area of freedom, security and justice. Where in a member state there is a serious breach of the fundamental values of Article 2 that has a systemic impact, this impact is not limited to the domestic sphere but necessarily affects the capacity of that member state to comply with the fundamental rules and principles underpinning the regular functioning of the EU legal and democratic political orders, such as effective legal protection, free movement or the free and democratic character of the European Parliament and the Union itself. When a breach of such a nature is identified it would therefore be not only possible but also desirable for the European Commission to bring an infringement action under one or more of those legal bases against the member state in question.

4.5 IMPLEMENTATION

Implementation of this approach would therefore be in the hands of the European Commission and does not require any amendment of existing rules. It would require, however, that the European Court of Justice endorse such an interpretation of the Treaties. For the reasons mentioned above the legal arguments supporting such view are strong and could prevail before the Court. Based on this approach, the risk of cases multiplying before the Court of Justice will be fairly limited. The systemic requirement provides a useful instrument of docket control

in two different ways. First, it would limit the application of EU law and the intervention of the Court of Justice to particularly serious and structural violations of fundamental rights susceptible to having the systemic impact necessary to convert them from purely internal situations to situations also affecting the EU legal order. Second, it would be hard for the individual cases brought as preliminary ruling requests to satisfy the procedural and substantive requirements necessary in the context of such systemic violations. Instead the Commission can more easily gather evidence of multiple risks and also bring an abstract case involving legislative amendments that have not yet led to specific individual litigation cases. This will put a particular responsibility on the Commission to »drive« this legal approach to the rule of law in member states. It would require bolder legal action than until recently, but on the other hand it provides the Commission with stronger leverage than Article 7 in the context of its rule of law procedure. It would probably provide it with a much stronger enforcement and deterrence tool with respect to member states challenging the rule of law.

The more important limitation of this approach is timing and its impact on the effectiveness of remedies. Judicial procedures, and infringement actions in particular, take time. This could be a significant problem in the context of fundamental rights or rule of law problems. That said, it is possible for the Court of Justice to use the accelerated procedure in such cases. The conditions for that would normally be fulfilled and that could be an important factor in rendering this solution more effective. In addition, it is possible to make use of interim measures. Whatever one may think of the limits of this approach it will certainly be more time effective than Article 7 in light of the political constraints that make the application of stage two of this procedure so difficult. Finally, the simple availability of infringement actions in this context will provide important legal leverage to the Commission that, either in the non-judicial part of the infringement procedure or the rule of law dialogue, would be taken much more seriously by the member states. In other words, simple recognition of this possibility, once confirmed by the Court of Justice, would be enough to strongly reinforce the rule of law dialogue with member states. It would also depoliticise this debate. Although bringing these issues to the Court of Justice is likely to lead to accusations of judicial activism, the risks of this debate are probably lower than those involved in high stakes political conflicts of the kind Article 7 might trigger.

5

FROM THE BOTTOM UP: STRENGTHENING CIVIL SOCIETY

AT A GLANCE

- NGOs, like an independent judiciary and media, play a vital role in upholding European values. Because of this, they have become subject to a range of restrictive measures in some EU member states, such as smear campaigns, cuts to funding and the imposition of excessive administrative burdens.
- Complementary to the top-down mechanisms designed to apply economic and political pressure on a government, the EU should support NGOs that promote and protect democracy, the rule of law and fundamental rights.
- Because funding – including EU funding – for NGOs working on European values is insufficient, the EU should create a new, adequately resourced fund (referred to as »European Values Instrument« or EVI). The EVI should support advocacy, monitoring of member state compliance with European and international standards, litigation, public education, support for independent and investigative journalism, and capacity building. It should be managed in a decentralised manner by fund operators at national level.
- Moreover, the European Commission should appoint a Special Representative on Civil Society to receive and react to information concerning restrictions imposed on NGOs.

Bottom-up measures designed to foster public support for the rule of law, democracy and fundamental rights constitute an important complement to the top-down mechanisms designed to put economic and political pressure on a government. This section of the paper outlines two measures to support non-governmental organisations (NGOs). The term is used here to refer to formally constituted non-profit-making organisations working for the public interest. NGOs, like an independent judiciary and media, play a vital role in upholding European values. They facilitate democratic participation by informing public debate and offering the public channels (for example, advocacy)

and tools (for example, demonstrations) to express their views to political representatives. NGOs also promote the rule of law and uphold international, European and national law (including the protection of fundamental rights standards) by taking cases to court. Furthermore, NGOs educate the public concerning the meaning and importance of European values, which makes the population more resilient to populist attacks on the judiciary, fundamental rights and democratic institutions. Because of the roles they play and the groups they defend, NGOs have become subject to a range of restrictive measures by populist governments, such as smear campaigns, designed to undermine public trust and support; the diversion of funding; and the imposition of excessive administrative burdens designed to drain limited financial and human resources (Butler 2017). It is argued that the EU could support NGOs with two vehicles. First, through a fund to support NGOs in promoting and protecting European values, as set out in Article 2 of the Treaty on European Union (TEU). This will be referred to as the »European Values Instrument« (EVI). Second, through an EU Special Representative on Civil Society with responsibility to receive and act upon information concerning restrictions against NGOs.

5.1 EUROPEAN VALUES INSTRUMENT

The EVI, as outlined below, is largely modelled on the Active Citizens Fund of the European Economic Area (EEA)/Norway Grants, while incorporating elements of the European Instrument for Democracy and Human Rights (EIDHR) and the European Endowment for Democracy. The main difference from the Active Citizens Fund would be the size of the financial envelope for the EVI. The model set out below would see EU funding to support NGOs promoting and protecting European values inside the EU rise from its current level of zero to at least EUR 2 billion in the next Multiannual Financial Framework to match what the EU spends in third countries and what philanthropic foundations are currently spending in the EU to support NGOs promoting and protecting European values.

5.1.1 WHY IS CURRENT FUNDING INADEQUATE?

A comprehensive overview of funding for NGOs across the EU is not available. Public funding at member state level appears to be the largest source of financing available to the civil society sector in general. Figures for the overall amount of public funding are available for some member states, but even here, this information tends not to be broken down into categories specific enough to allow for a determination of how much is dedicated to supporting NGOs in promoting and protecting fundamental rights, democracy and the rule of law. Evidence suggests that levels of public funding for NGOs to carry out advocacy activities have fallen. Governments have either cut funding for NGOs following the financial crisis or shifted funding away from supporting advocacy activities and towards service provision to compensate for a reduction in government spending on public services. Such cuts and shifts in focus of funding can be found across the EU (FRA 2018: 29–32; Vandor et al. 2017: 16–27). In some member states, populist governments have redirected public funding away from NGOs promoting rights, democracy and the rule of law, with Hungary and Poland as the most extreme examples (Butler 2017: 7–8).

There is strong evidence that when it comes to more specific funding for the purposes of promoting and protecting European values, the largest source of funding is the Norwegian government and philanthropic foundations. In exchange for access to the single market, Norway, Iceland and Liechtenstein contribute financially to the EU by giving financial assistance to certain member states through the financial mechanism of the European Economic Area (EEA)/Norway Grants. These are two separate agreements. The agreement on EEA Grants has been concluded between the EU, Iceland, Liechtenstein and Norway, and the one on Norway Grants is a further separate agreement between Norway and the EU only. The financial mechanism of EEA/Norway Grants in effect represents what Iceland, Liechtenstein and Norway contribute to the European Structural and Investment Funds (ESIF) in exchange for access to the EU's single market. The stated purpose of the EEA/Norway Grants is to »contribute to the reduction of economic and social disparities in the European Economic Area«, the same objective as the ESIF. The Norwegian government is the principal contributor to the EEA/Norway Grants.

A recent evaluation of EEA/Norway Grants' NGO Programme for 2009–2014 found that this fund was the largest single source of funding in the EU for NGOs working on democracy, the rule of law and fundamental rights in the EU (EEA/Norway Grants 2014: 84). The budget of the NGO programme for 2009–2014 amounted to EUR 160 million and covered 16 EU member states (Greece, Spain and Portugal plus the member states that joined the EU after 2004). In the current funding period of 2014–2020 the Active Citizens Fund (formerly, the NGO programme) is worth at least EUR 155 billion, although the final figure is expected to be higher as not all the agreements with beneficiary countries have yet been finalised.

In contrast, EU support for NGOs to promote and protect European values inside the member states can be most

generously described as negligible. EU funding, like member state funding, appears to be a significant source of financing for the general civil society sector in the EU; in some countries it is the biggest source after national funds (Vandor et al. 2017: 17–27). However, these funds are not directed at supporting NGOs that protect and promote European values. Three funding programmes touch on the promotion of European values inside the EU: the Rights Equality and Citizenship programme, the Justice programme and the Europe for Citizens programme (Regulation (EU) 2013/1382; Regulation (EU) 2013/1381; Council Regulation (EU) 2014/390). These programmes tend to treat NGOs as subcontractors assisting the Commission to implement EU law and policy. Judged as a method of supporting NGOs to promote European values, these programmes have a number of severe shortcomings (Butler 2017: 8–9).

It should be noted that completion of the EU accession process has effectively meant a fall in EU funding for NGOs promoting European values. This is because during the accession process the EU does provide financial support to NGOs in candidate countries to promote and protect European values, for example, under the Civil Society Facility of the Instrument for Pre-Accession. But this ceases after accession (Regulation (EU) 2014/231; European Commission 2015a: 73). A similar situation seems to have occurred concerning private philanthropy, at least in Central and Eastern EU member states. There is evidence that philanthropic foundations working to support the transition to democratic rule withdrew from these countries after accession in the belief that EU membership would solidify progress (Vandor et al. 2017: 17–27).

A final piece of evidence concerns unmet demand for funding. The above-noted evaluation of the EEA/Norway Grants' NGO programme, which found this to be the main or only source of funding for this purpose, also found that the NGO programme only had resources to support an average of 10 per cent of the applications received (EEA/Norway Grants 2014: 84–85).

5.1.2 OBJECTIVES, AREAS OF SUPPORT AND ACTIVITIES OF THE EUROPEAN VALUES INSTRUMENT

The objectives of the EVI should be both structural and substantive. The structural objective should be to build a sustainable, healthy NGO sector capable of protecting and promoting the values on which the EU is founded, as set out in Article 2 TEU. The EVI's thematic objectives should be to promote and protect those values, namely: human rights (as set out in the Charter of Fundamental Rights), democracy (including transparency, good governance and participatory democracy) and the rule of law. These match the objectives of the Active Citizens Fund, as well as EU financial instruments supporting NGOs in countries outside the EU, such as the Instrument for Pre-Accession Assistance and the European Instrument for Democracy and Human Rights (EIDHR) (EEA/Norway Grants, no date: 10; Regulation (EU) 2014/235: Articles 1 and 2; Regulation (EU) 2014/231: Article 2(1)).

The range of activities supported by the EVI should include the following: advocacy (including support for research and analysis), monitoring of member state compliance with European and international standards, litigation, public education, support for independent and investigative journalism, and capacity building. These are largely also included in the activities supported by the Active Citizens Fund and the EIDHR. It should be noted that supporting litigation is not without precedent under EU programmes and is permitted under the EU's fund on Environment and Climate Action. When making grants for monitoring activities, the EVI could require grantees to collect information in a standardised format across the member states so that these reports could then feed into the monitoring mechanism proposed in this paper.

By emphasising capacity-building and sustainability, the EVI would ensure that funds are used effectively, to build organisations with high quality infrastructure, management and planning and staff with adequate skills and expertise. Moreover, this could also help to prevent any increase in funding being wasted on a proliferation of ineffective, poorly organised NGOs. Providing core or operational funding together with funding for longer term projects will help to guarantee the long-term survival of NGOs and guarantee that resources are dedicated to their central mission rather than fundraising. The EVI should also pay particular attention to building up the capacity of NGOs to communicate effectively with the public as this has traditionally been neglected in favour of advocacy, monitoring and litigation. The ability to communicate effectively with the public is essential if NGOs are to build grassroots support for European values among the general public.

5.1.3 STRUCTURE OF THE EUROPEAN VALUES INSTRUMENT

Funds administered by the EU are notoriously slow and bureaucratic, imposing particularly heavy administrative burdens on applicants and financial reporting requirements on grantees, to the extent that NGOs are sometimes put off applying at all (Civil Society Europe 2016: 6; European Parliament 2014: 82–96; European Parliament 2010: 45–50; Human European Consultancy 2005: 55, 80). To avoid these difficulties, it is argued that the EVI should adopt a structure that draws on the most advantageous elements of the Active Citizens Fund of EEA/Norway Grants and the European Endowment for Democracy (EED).

Following the structure of the Active Citizens Fund (EEA/Norway Grants, no date: 17–51), the EVI should be managed in a decentralised manner at national level by bodies that are non-profit-making, independent of government, religious institutions or political parties, and have experience working with civil society in the country in question. These fund operators (normally NGOs or foundations) should be selected through an open tender process without the involvement of national authorities (Norwegian Ministry of Foreign Affairs 2016: Article 6.13(4); EEA/Norway Grants 2014: 17–18). After fund operators have been selected,

these would then draw up a strategy and programme of activities based on the aims and objectives of the EVI and needs identified at national level, in agreement with the European Commission. Once the fund is in operation, the fund operator would maintain calls for grant applications. Decisions on beneficiary NGOs would be decided through an independent evaluation process managed at national level by the fund operator, applying objective criteria.

Having national fund operators brings several benefits. First, it becomes easier for the fund operator to raise awareness of the EVI among local NGOs. Second, it ensures that grant-making is carried out by an entity with knowledge of local civil society. Third, it offers a way of avoiding the EU's high eligibility requirements and heavy financial reporting obligations. In this regard, it should be noted that the European Endowment for Democracy is able to function free of these constraints because, despite being a joint creation of the EU and the member states and despite handling EU funds, it is a private foundation established under Belgian law (Council of the European Union 2011; European Endowment for Democracy, no date: Article 1). This allows the EED to be flexible and avoid imposing high administrative burdens on grantees – which was indeed one of the reasons for its creation (European Endowment for Democracy, no date: Article 3(2); European Parliament 2015: para 2). Under the model suggested for the EVI, the EU's financial reporting obligations could fall more on the national fund operators, which in turn could subject grantees to lighter procedures, similar to those followed by the EED. It should also be noted that the use of intermediaries to administer funds is not without precedent under EU financial instruments and is used for the EIDHR, where EU delegations manage «country-based support schemes» (European Commission 2015b).

5.1.4 ELIGIBLE BENEFICIARIES

The EVI's beneficiaries should be exclusively NGOs, subject to two exceptions, outlined below. The EVI could adopt the same definition of NGO as that used by the Active Citizens Fund (EEA/Norway Grants, no date: 35). An NGO is defined as «a non-profit voluntary organisation established as a legal entity, having a non-commercial purpose, independent of local, regional and central government, public entities, political parties and commercial organisations». Religious institutions and political parties are not considered NGOs (Norwegian Ministry of Foreign Affairs 2016: Article 1.6 (n)). The EVI should not normally make grants to national human rights institutions (because these are publicly funded bodies). However, in some member states, national human rights institutions critical of the government are targeted in a similar way to NGOs, and may be subject to smear campaigns and funding cuts, as in Poland (ENNHRI 2016). If a national human rights institution has become so underfunded by the government that it is unable to play a meaningful role in protecting and promoting human rights, it should be eligible for emergency funding from the EVI. Furthermore, it is argued that the EVI should also allow grants to be made to civic movements, as an exception to the requirement that

beneficiaries be formally constituted organisations. Grants to civic movements are also permitted under the European Endowment for Democracy and the European Instrument for Democracy and Human Rights (European Endowment for Democracy: Article 2(2); Regulation (EU) 2014/236: Article 11(2) (e)). Such a provision would be desirable because some member states may make it increasingly difficult for NGOs to continue to operate (HHC/HCLU 2018; Benezic 2018).

5.1.5 SIZE OF THE EUROPEAN VALUES INSTRUMENT

Ideally, one would calculate the value of the fund based on a model of what a healthy civil society sector should look like and how much this would cost to build and maintain in the EU. In the absence of such data this section explores four different methods to arrive at a rough estimate of a financial envelope for the EVI. With reference to these estimates, it is argued that the EVI's financial envelope should amount to at least EUR 2 billion over seven years.

First, the size of the EVI could be calculated by reference to the size of funding for NGOs to promote European values outside the EU. The main instrument dedicated to this is the European Instrument for Democracy and Human Rights (EIDHR), with a budget of EUR 1.3 billion (Regulation (EU) 2014/235; European Commission 2017d: 36). However, at least five other EU financial instruments make additional provision to support NGOs to promote European values in third countries (Muguruza 2014). For example, the Civil Society Facility and Media Programme of the EU's Instrument for Pre-Accession 2014–2020 is designed to build up the capacity of NGOs to enhance participatory democracy and improve conditions for independent media. It seems that this fund alone, which covers eight countries, is worth around EUR 400–500 million over seven years (European Commission 2014: 15–16, 28; European Commission 2015a).⁸ While the total amount of EU funding that supports NGOs promoting European values outside the EU is not available, it is likely to amount to several billion euros.

A second means by which one can estimate an appropriate size for the EVI is with reference to the shortfall in funding recorded in a recent evaluation of EEA/Norway Grants' NGO Programme. As noted, under the former NGO programme, despite having a budget of EUR 160 million covering 16 countries, it was possible to support only 10 per cent of grant applications. On this measure, one could estimate that to meet demand in all 27 member states would require several billion euros.

A third means of calculating the appropriate size of the EVI could be to allocate a percentage of the European Structural and Investment Funds (ESIF) to the EVI. During

the current funding period the ESIF amount to EUR 450 billion (European Commission 2015). Even allocating 0.5 per cent to the EVI would amount to over EUR 2 billion. This seems reasonable as a similar approach is applied by EEA/Norway Grants, which represents these countries' contributions to the ESIF, to calculate the size of its Active Citizens Fund (formerly known as the NGO programme). That is, the size of the Active Citizens Fund is calculated as a proportion of the overall EEA/Norway Grants. The EEA financial mechanism, worth EUR 2 billion for 2014–2021, dedicates a minimum of 10 per cent of its budget to the Active Citizens Fund, which supports NGOs in promoting European values. The Norwegian financial mechanism, which does not contain a similar clause with a minimum allocation for NGOs, is worth around EUR 1.25 billion. This means that over 5 per cent of the ESIF-equivalent contribution of EUR 2.8 billion is dedicated to supporting NGOs. Under the previous funding period EUR 160 million was dedicated to the NGO programme out of a total of around EUR 1.8 billion – almost 9 per cent of the total amount (Council Decision 2010). Thus, allocating 0.5 per cent of the value of the ESIF to the EVI does not seem unreasonable.

A fourth means of roughly calculating the appropriate size of the EVI could be by reference to the contribution made by philanthropic foundations to promote European values through grants to NGOs. As noted, philanthropic foundations granted around EUR 235 million in 2015 in the geographic region of Western Europe. If the EU were merely to match existing philanthropic grant-making for NGOs and scale this figure up to account for the 27 member states, this would easily amount to around EUR 2 billion over a seven-year period.

5.2 SPECIAL REPRESENTATIVE ON CIVIL SOCIETY

A second measure that the EU could take to support NGOs is the creation of a Special Representative on Civil Society (SRCS). The SRCS would be appointed by the First Vice-President of the Commission (who is responsible for the Charter of Fundamental Rights) and given a small staff for administrative support. The office of the SRCS would serve as a point of communication for NGOs wishing to alert the EU about measures that hamper their ability to operate. The SRCS should also be charged with engaging in diplomatic demarches towards national authorities. While NGOs can already report incidents to the UN and Council of Europe, establishing a SRCS for the EU has a number of advantages. First, UN and Council of Europe bodies tend to be preoccupied with attacks on NGOs in countries outside the EU, where restrictions are particularly acute and often life-threatening. Second, demarches with a member state by an EU entity carry more weight than those by the UN and Council of Europe because of the possible consequences; namely, an EU SRCS would have better access to the EU institutions to create political interest and pressure and would generate more interest from the mainstream media than the Council of Europe and the UN.

⁸ EUR 125 million has been allocated to support for the Civil Society Facility and Media Programme for multi-country support over a seven-year period. Additional funds are granted for national activities decided year by year. For 2015 this national supplement amounted to an additional EUR 48.7 million. If this is a typical annual allocation the total amount would fall between EUR 400 and 500 million.

The SRCS could adopt an initially confidential approach to the government in question, becoming progressively more public if the authorities refuse to cooperate. As an initial step the SRCS should verify the restrictions communicated by NGOs to mitigate accusations of political bias. The SRCS could then carry out private intercessions with a view to remedying the situation. Where national authorities fail to remedy the matter, the SRCS could consider public measures, such as: official statements; a country visit to meet NGOs and the government; sending an incident report to relevant EU institutions (the FREMP working party in the Council, the LIBE Committee in the European Parliament and the Commission First Vice President). Such activities are not without precedent for the EU as similar tasks are carried out by the European External Action Service (Council of the European Union 2009).

In contrast to the monitoring mechanism proposed by this paper, which would periodically collect information, the SRCS would exercise a reactive role, responding to incidents targeting NGOs as they occur. However, the SRCS could deliver an annual overview of incidents to the bodies responsible for carrying out rule of law monitoring so that these are also taken up during the regular monitoring process.

5.3 IMPLEMENTATION OF THE INSTRUMENTS SUGGESTED

Even if one agrees with the desirability of the European Values Instrument and the Special Representative on Civil Society, one might raise questions as to their political feasibility. It is argued that the EVI could be created by a regulation using Article 167 of the Treaty on the Functioning of the European Union (TFEU), which requires the ordinary legislative procedure and could thus not be blocked by one or two member states. This provision allows the EU to adopt »incentive measures« for »improvement of

the knowledge and dissemination of the culture and history of the European peoples, conservation and safeguarding of cultural heritage of European significance«. It would seem difficult to disagree that the values listed in Article 2 of the Treaty of the European Union are part of the culture of the EU member states. An alternative legal basis is Article 352 of the TFEU, which allows the adoption of measures if necessary to attain the objectives set out in the Treaties (in our case Articles 2, 3 and 6). This requires unanimity. One might object that this severely diminishes the political feasibility of the EVI, given that governments with authoritarian tendencies would have no interest in consenting to the creation of a financial instrument to support NGOs promoting European values. However, it should be noted that EEA/Norway Grants have encountered and overcome the same issue with the governments of Hungary and Poland. It is likely that EEA/Norway Grants were able to establish the Active Citizens Fund in Hungary and Poland despite resistance because the overall value of the EEA/Norway Grants cooperation agreements (EUR 800 million for Poland and EUR 150 million for Hungary) was more important to these governments than their desire to take control of the Active Citizens Fund. The EU institutions and member states could adopt a similar approach and make the conclusion of partnership agreements and operational programmes relative to the European Structural and Investment Funds contingent on the creation of the EVI. Since the ESIF (currently EUR 86 billion for Poland and EUR 25 billion for Hungary) are worth far more than EEA/Norway Grants, the position of the institutions and supportive member states would be even stronger. Creation of the SRCS is equally feasible. This position can be created by a decision of the European Commission. Article 20 of the Commission's rules of procedure allows it to »in special cases, set up specific structures to deal with particular matters« and »determine their responsibilities and method of operation« (European Commission 2000).

6

MEDIA CAPTURE AND DISINFORMATION: THE EU'S ROLE IN PRESERVING MEDIA FREEDOM AND PLURALISM

AT A GLANCE

- The ability of both traditional and new online media to pursue their democratic function by enabling access to information from diverse, independent sources is increasingly under threat within the EU.
- To foster media freedom and pluralism in its member states, the EU should continue promoting systematic monitoring of the risks to media pluralism and freedom in EU countries on the basis of the Media Pluralism Monitor and integrate this monitoring tool into a broader monitoring procedure assessing the threats to democracy in EU member states.
- The mandate of the Fundamental Human Rights Agency (FRA) should be extended to provide assistance to the EU institutions and member states in the thematic area of media freedom and pluralism.
- The European Commission should propose minimum common rules in areas of the single market that affect media freedom and pluralism, as it has done so far with regard to audiovisual services, open access to online information and data protection. In particular, provisions on transparency of state funding and advertising in the media, media ownership, concentration and defamation should be harmonised across the EU.
- Online platforms and social media companies should have to report to the European Parliament on the measures adopted and implemented to counter the spread of »fake news« and their compatibility with international standards of transparency and freedom of expression. Moreover, the European Commission should fund training projects on digital investigative journalism aimed at non-professional journalists, activists and bloggers.
- The European Commission should promote research on actual media literacy levels in order to maximise the success of media literacy initiatives.

6.1 INTRODUCTION: HOW MEDIA SHAPE DEMOCRACY

Despite a slew of guarantees put forward by EU legal provisions, the ability of both traditional and new online media to pursue their democratic function by enabling access to information from diverse, independent sources is increasingly under threat within the EU (European Union 2000: Articles 7(1) and 11(2)). Recent reports and analyses conducted at EU level have identified a series of challenges to media pluralism and freedom in the EU member states (HLG 2013; CMPF 2016).

The protection of media freedom and pluralism within the EU is crucial to guarantee the substance of the rights granted by the Treaties to EU citizens (HLG 2013: Recommendation No. 1). The jurisprudence of the European Court of Human Rights (ECtHR) on media freedom and pluralism has repeatedly acknowledged that »there can be no democracy without pluralism« as »democracy thrives of freedom of expression« and states have »a positive obligation to put in place an appropriate legislative and administrative framework to guarantee effective pluralism« (ECtHR 2012; ECtHR 2009).

Restrictions on media freedom and pluralism in any of the EU member states ultimately jeopardise the right of EU citizens to representative democracy at EU level by compromising their right to seek, receive and impart reliable information in order to make informed decisions. For this reason, given the right of every citizen to representative democracy acknowledged by Article 10 TEU, the EU should be considered competent to act to protect media freedom and pluralism at state level »whenever the challenges to media freedom and pluralism are serious enough to put into question the very democratic legitimacy of the Union« (HLG 2013: 20). This chapter identifies the main challenges media face in the European Union and recommends instruments to tackle each challenge.

6.2 CHALLENGES TO MEDIA FREEDOM AND PLURALISM IN EU MEMBER STATES AND INSTRUMENTS TO TACKLE THEM

6.2.1 MEDIA CAPTURE: POLITICAL INTERFERENCE, STATE FUNDING, CONCENTRATION AND OWNERSHIP TRANSPARENCY

The functioning of the EU relies on representative democracy and every citizen has the right to participate in its democratic life (European Union 2007: Article 10(1) and (3)). The basic pre-condition for every healthy democracy is a media able to hold political power to account. The free and diverse flow of information and opinions provided by the media affects the ability of EU citizens to make informed choices when they are called to take part in consultations, cast their vote or stand as candidates in electoral processes, both at national and EU level. However, political interference and pressure on the independence of national media regulatory authorities and public service broadcasters is rampant in more than two-thirds of EU countries (CMPF 2016: Chapter 1(3)). Most EU countries do not have effective legal safeguards or monitoring mechanisms to protect media regulators, audiovisual media and newspapers from direct or indirect political control over the appointment of their board members, their decision-making process or their editorial autonomy (CMPF 2016: Chapter 1(3)). The lack of harmonised provisions preventing undue political pressure on media regulators and public service broadcasters ultimately restricts EU citizens' exercise of democracy based on informed decisions.

Moreover, legislation to ensure transparent criteria for the distribution of state advertising or state subsidies to media outlets is also non-existent in most of the EU. Even where the rules exist, information on how state funding is channelled to the media is difficult to access or not straightforward for the general public, according to the same study (CMPF 2016: Chapter 1(3); European Parliament 2016b). That has a major negative impact on the media: disrupted by new distribution technologies and the decline in revenue from traditional sources such as subscriptions and advertising, an increasing number of media outlets have become more dependent on state support for their survival.

Another of the strongest challenges to people's ability to access a variety of viewpoints and information within the EU is the concentration of media ownership: EU countries have different rules on different types of concentration and some countries do not even have specific rules to prevent it (CMPF 2016). In the internet sector in particular, in most countries there are no specific rules regarding concentration of internet service providers (ISP) or content providers and the biggest market shares are those of the top four ISPs (CMPF 2016).

Furthermore, in most EU member states there are limited or ineffective provisions ensuring citizens' access to information about who owns or controls the media operating in their country. Non-harmonised provisions on media concentration and on transparency of beneficial media ownership can also hinder the free movement of media services and obstruct their competition. Media companies may find it difficult to establish their operations or to provide services in

another member state where weaker rules on concentration have enabled market dominance or a lack of transparency with regard to media ownership makes it difficult to assess the market (CMPF 2013: Chapter 3).

A proposal for a new EU Audiovisual Media Services Directive (AVMSD) is currently pending before the European Parliament. The AVMSD establishes minimum principles and provisions to harmonise national legislation on all audiovisual media and media regulatory bodies across the EU. Some of the AVMSD provisions aim at ensuring the independence of regulators of audiovisual media from government, public bodies and industry. The AVMSD also strengthens the role of the European Regulators Group for Audiovisual Media Services (ERGA), which brings together the representatives of national independent regulatory bodies in the field of audiovisual services, to advise the European Commission on the implementation of the AVMSD. In order to improve the independence of both media regulators and public service broadcasters in the EU member states, ERGA should report regularly to the European Commission on the implementation in all EU member states of the AVMSD provisions on the independence of media regulators and audiovisual media, with particular regard to public service broadcasters. If these prerequisites are not effectively implemented, ERGA should also issue concrete recommendations to EU member states on how to do so (European Commission 2013).

In order to further tackle the problem of »media capture« by vested political interests and increase access to information on the real movers and shakers of the media across the EU member states, the mandate of the Fundamental Human Rights Agency of the EU (FRA) should be extended by the EU Justice and Home Affairs Council to provide assistance to the EU institutions and member states in the area of media freedom and pluralism. The current FRA thematic mandate includes only the information society and data protection in particular. Given its general competence on fundamental rights, the FRA's mandate on media freedom and pluralism could rely on Article 11 of the EU Charter of Fundamental Rights and propose common standards to strengthen media freedom and pluralism in the EU member states, in cooperation with the Council of Europe (HLG 2013: Recommendation No. 2).

Furthermore, the EU should continue promoting systematic monitoring of the risks to media pluralism and freedom in EU countries on the basis of the Media Pluralism Monitor (MPM) developed by the Centre for Media Pluralism and Media Freedom (CMPF). In particular, this monitoring tool should be integrated into a broader monitoring procedure formally assessing the threats to democracy in each EU member state, ideally within the framework of the FRA mandate.

The European Commission should also propose minimum harmonisation rules in an ad hoc directive on transparency of state funding and advertising to the media. The Commission should also request that all national audiovisual media regulators and competition authorities set up and consistently update a database with all information related to state funding and advertising to the media.

Finally, the European Commission should propose minimum harmonisation rules to impose transparency in EU

member states not only on nominal media owners (those with legal ownership in their own name) but also on »beneficial« media owners (those who do not have legal ownership in their own name but still enjoy the benefits of ownership, for example by having voting rights or controlling shares). The EU competence to guarantee the free movement of services would justify the harmonisation of the national rules requiring different levels of media ownership transparency (European Union 2007: Articles 26, 56–62). In particular, the Commission should request that all national audiovisual media regulators and competition authorities set up and consistently update a database with all information necessary to identify legal and beneficiary owners – including natural persons – of media outlets and their funding sources. As suggested by the European Parliament 2013 Resolution on standard-setting for media freedom, the current Database on TV and Audiovisual Services and Companies in Europe (MAVISE), funded by the European Commission and run by the European Audiovisual Observatory, should be developed into a Single European Register that would be used as a centralised source of data collection to identify cases of media concentration. Such a database should be freely and easily accessible to the public (European Parliament 2013).

6.2.2 INCONSISTENT PROTECTION OF FREEDOM OF EXPRESSION: LACK OF EU HARMONISED RULES ON DEFAMATION

All EU member states have legislation to protect people's honour and reputation from defamation, especially when the latter is committed via the media. However, the scope and harshness of such provisions vary considerably from country to country. In most countries, the provisions punishing defamation are not compatible with the international standards protecting freedom of expression of both professional and non-professional journalists. As well as disproportionately restricting freedom of expression, inconsistent legislation on defamation across the EU can hamper the free movement of journalists to those countries whose provisions disproportionately limit freedom of expression.

Based on the findings of the MediaLaws Database project run by the International Press Institute, the European Commission should therefore set out a legislative proposal for harmonisation of the national provisions regulating defamation.⁹ The EU competence to harmonise national rules on the free movement of workers could be invoked as a legal basis to harmonise defamation laws, in order to remove EU provisions incompatible with the international standards on freedom of expression and thus protect the right of movement of journalists and media users (European Union 2007: Article 3(2); European Union 2007a: Article 45).

⁹ The MediaLaws Database project researches defamation laws in the EU and EU candidate countries, measures their provisions according to international standards and exposes the threats they pose to freedom of expression. It can be accessed here: <http://legaldb.freemedia.at/legal-database/> (last accessed on 16 February 2018).

6.2.3 DETERIORATION OF QUALITY JOURNALISM, SPREAD OF MALICIOUS MISINFORMATION (AKA »FAKE NEWS«) AND »HATE SPEECH«

The advent and massive proliferation of new digital technologies has made it possible for virtually anyone to produce, post or share news and information online at a speed never experienced before. On the one hand, this has increased global access to and the reach of information, but on the other hand it has also lowered journalistic standards, reducing the time for proper fact-checking and investigation. The abundance of media content now available thanks to new technologies has also altered the way audiences engage with information. Many media users now access news mostly via third-party platforms, particularly social media such as Facebook and Twitter. This tends to expose readers only to what they are already interested in or what confirms their previous beliefs and thus reduces their exposure to diverse and pluralist viewpoints. Furthermore, the new digital technologies have catalysed the spread and impact of *intentional* disinformation – »fake news« – via online media platforms and inadvertently facilitated the rise of populist and authoritarian movements across the EU member states, whose demagogic discourse also thrives on such narratives. Last but not least, in the past few years, the overwhelming majority of cases of »hate speech« reported to the relevant law enforcement authorities across the EU have appeared online, either on traditional media websites, via social-networking platforms (for example, Facebook or Twitter) or on video-sharing platforms (for example, YouTube).

Social media have announced several initiatives to combat misinformation on their platforms, such as increasing manual fact checkers to monitor and flag up disputed content, as well as tools to help readers check the content themselves by accessing related articles. The EU and four major social media platforms have also implemented a Code of Conduct aimed at countering illegal »hate speech« online (European Commission 2016a). However, the level of resources employed by both traditional and new media platforms still appears to be insufficient to tackle these problems effectively and further employment of manual fact checkers, for instance, does not appear to be commercially viable. As a result, political actors at national level have pushed for the establishment of a regulatory framework imposing hefty fines or even threatening the shutdown of online media companies that do not promptly remove fake news or »hate speech« from their platforms.¹⁰ These initiatives ultimately risk imposing disproportionate blanket restrictions on freedom of expression and media independence.

The European Commission also recently launched a public consultation to gather views on the issue of »fake news« and a Eurobarometer public opinion survey to measure EU citizens' perceptions of and concerns about this topic. Furthermore, a High Level Group was set up in January 2018 to advise on policy initiatives to counter »fake

¹⁰ See, for example, the *Netzwerkdurchsetzungsgesetz* (NetzDG) (Network enforcement law) in Germany, which entered into force in October 2017 (BBC News 2018).

news« and the spread of misinformation online (European Commission 2018). The Council of Europe also recently set up a Committee of Experts on Quality of Journalism in the Digital Age (MSI-JOQ), whose one-year mandate consists of preparing a »standard-setting proposal on criteria and measures for ensuring a favourable environment for the practice of quality journalism in the digital age«, drawing upon the existing Council of Europe and European Court of Human Rights standards (Council of Europe 2017).

In order to confront the existing challenges to the quality of journalism and tackle the impact of »fake news« across the EU, the European Commission, in its own capacity or via the newly established High Level Group, should interact and cooperate with the MSI-JOQ in order to identify ways of improving media literacy in the digital environment as a way to stifle the impact of »fake news« online.

The European Parliament should also regularly summon the relevant stakeholders – online platform and social media companies in particular – to report to the Civil Liberties, Justice and Home Affairs (LIBE) Committee on the measures adopted to counter the spread of »fake news« and their compatibility with the international standards of transparency and freedom of expression.

Last but not least, the European Commission should also design, fund and promote digital investigative journalism training projects addressed and accessible not only to professional journalists, but also to a broader group of stakeholders, including civil society organisations, bloggers and grassroots movements actively engaged in the collection, analysis and dissemination of news and information (»citizen journalism«).

6.2.4 UNDERSTANDING MEDIA AND ITS ROLE IN A DEMOCRACY: THE UNDERESTIMATED IMPORTANCE OF MEDIA LITERACY

A worrying pattern has emerged in recent years. EU citizens do not appear to understand or value the crucial role that free and independent media play in a democratic society for the promotion of their civil, political and socio-economic rights. In reply to a public consultation carried out by the European Commission, the majority of citizens opposed recommendations to teach media literacy in schools and to assess the democratic role of media as part of national curricula (European Commission 2016). Furthermore, when the European Initiative for Media Pluralism was launched by a coalition of NGOs, media and professional bodies across Europe to promote a European Citizens Initiative demanding the adoption of an EU Directive on media pluralism, only 200,000 signatures were collected within the one-year deadline instead of the legally required one million signatures from at least seven EU member states (European Media Initiative 2014). Contradictory trends surface even when trust in national media is canvassed. Most respondents in a European Commission-led special Eurobarometer conducted in 2016 believe that their national media provide a diversity of views and opinions. However, only a minority trusts that the information received, including from public service broadcasters, is free from political or commercial

pressure. An overwhelming majority has no idea who the media regulator is in their country, but only a minority believes this body is free and independent of government pressure. Finally, most respondents find social media the least trustworthy, but then most of them – especially the youngest – admit that they follow debates and read articles on social networks and blogs (European Commission 2016).

Another significant challenge is to gauge how EU citizens actually perceive, analyse and interpret media content to make informed decisions. Recent research from Demos (UK) indicates that around a third of young people openly admit that they cannot differentiate truth and lies in an online context, even though social media now represent the largest source of news information for their demographic (Harrison-Evans/Krasodowski-Jones 2017). The Commission recently launched a call for proposals for an EU pilot project called »Media Literacy for All«, whose objective is to »test innovative actions aimed at increasing citizens' ability to think critically about content they receive« via both traditional and social media (European Commission 2017d). However, the European Commission Expert Group on Media Literacy, convened in November 2016 by the Centre for Media Freedom and Pluralism, agreed that there is a dearth of comparable data about how »media savvy« (capable of analysing, interpreting, producing and engaging with media content) EU citizens are (CMPF 2017).

Last but not least, two-thirds of EU countries have either no media literacy policy at all or very few media literacy initiatives either in or outside schools (CMPF 2017).

In 2013, the Commission published the study »Testing and refining criteria to assess media literacy levels in Europe«, which includes a tool that measures media literacy levels across a range of ages, education, income and access levels, as well as geographical locations (EAVI/Danish Technological Institute 2011). Given the lack of data on individuals' capacity to analyse, interpret and engage with media content, the European Commission should draw on the existing tool or update it and fund EU-wide research on people's media literacy skills. The findings of this research should be disseminated across the EU countries and analysed by the Expert Group on Media Literacy set up by the Commission, in order to obtain an effective understanding of the different media literacy levels across the EU population and boost the adoption of effective ad hoc media literacy tools.

The proposal for a revised Audiovisual Media Services Directive (AVMSD), which establishes minimum principles and provisions to harmonise national legislation on all audiovisual media and media regulatory bodies across the EU, should include a responsibility for member states to promote media literacy in schools from a young age. Indeed, national trials have shown the potential for media literacy and critical thinking education to increase the engagement, understanding and abilities of both students and teachers, and to build up resilience against online manipulation, radicalisation and misinformation (Reynolds/Scotts 2016).

Finally, the new AVMSD proposal should also include a responsibility for national regulatory bodies on audiovisual services to adapt and disseminate digital literacy tools produced at European level, such as the

European Digital Competence Framework for Citizens (»DigComp«) and for Educators (»DigCompEduc«) developed by the European Commission together with the EU Joint Research Centre (European Commission, no date; European Commission 2017f). The European Commission itself should consider adapting these existing tools to extend their targets to schoolchildren.

6.3 CONCLUSION

Media pluralism and media freedom complement each other and play a pivotal role in the functioning of healthy democracies, acting as public watchdogs and providing forums for public debate. Media freedom is instrumental in the protection of the right to freedom of expression, which includes both the right to receive and the right to disseminate information without interference by public authorities. At the same time, a free flow of information and ideas requires the presence of a wide range of autonomous and independent media outlets which offer diverse content to diverse types of audience. Therefore, even though the EU Treaties do not explicitly confer a specific competence on the EU to regulate media freedom and pluralism at state level, the EU institutions can and should intervene whenever the threats to media freedom and pluralism jeopardise EU citizens' right to representative democracy at EU level by compromising their right to seek, receive and impart reliable information to make their political choices. For this reason, the EU should continue promoting systematic monitoring of the risks to media pluralism and freedom in EU countries on the basis of the Media Pluralism Monitor and integrate this monitoring tool into a broader monitoring procedure assessing the threats to democracy in EU

member states. Furthermore, the European Commission should lay out proposals for minimum harmonisation rules across the EU in the areas of the internal market that affect media freedom and pluralism, for example, in the areas of transparency of state funding to the media, media ownership, concentration and defamation.

The European Commission should also acknowledge that with the advent of the new digital technologies and the popularity of social media platforms, journalism – intended as the collection and dissemination of news – has become more and more a function shared by a broader range of actors, including not only professional journalists and reporters, but also representatives of civil society organisations, grassroots movements and ordinary citizens. Since this phenomenon has increased the risk of deterioration of quality journalism and facilitated the dissemination of »fake news«, the European Commission should tackle this challenge by funding more investigative digital journalism training projects addressed to the new actors of so-called »citizens' journalism«.

Finally, more must be done by the EU institutions to make sure that EU citizens engage critically with the media and understand the crucial role that free and independent media play in the promotion of their civil, political and socio-economic rights. In order to rise to this challenge, first of all, the European Commission should fund EU-wide research to gauge the actual media literacy levels of the EU population in order to promote effective ad hoc media literacy programmes across the EU member states. Last but not least, the new provisions of the EU Audiovisual Media Services Directive should make EU member states responsible for the promotion of media literacy in schools from a young age. Media literacy and critical thinking education are crucial tools for building up resilience against online manipulation, radicalisation and misinformation.

7

HOLDING EUROPEAN PARTIES ACCOUNTABLE: HOW NATIONAL PARTIES CAN BE INFLUENCED FROM THE EU LEVEL

AT A GLANCE

- The European institutions have no competence to regulate or sanction national parties, but can do so indirectly by sanctioning their European political parties (EuPPs). However, more resources are necessary. The newly created Authority for European political parties and European political foundations should have a dedicated team to control the EuPPs' conduct and to collect evidence in case of breaches of the EU's fundamental values.
- EuPPs can sanction their member parties, up to their suspension or exclusion, but these measures are rarely used because they have little impact, while at the same time incurring costs for the EuPP, as it loses a member party and thus power.
- The power of EuPPs over their member parties is limited, because elections – including European elections – are conducted at the national level. However, EuPP influence on their member parties would grow if they were able to compete for mandates with transnational lists and distribute political power.
- The effect of sanctions could be increased by linking EuPPs more closely to their affiliated political groups in the European Parliament. If suspension from a EuPP meant also suspension from the affiliated political group, EuPP leverage would be considerably higher, as membership of one of the large political groups is essential for access to resources, as well as to important functions and legislative roles.
- EuPPs should formalize the criteria for sanctions and make decision-making more objective and independent from political considerations. The nomination of standing rapporteurs could render decisions less arbitrary and provide necessary first-hand information.

Most research on observance of the European Union's fundamental values, as laid down in Article 2 Treaty on European Union (TEU) – namely, human dignity, freedom, democracy, equality, the rule of law and respect for human rights – focuses on the instruments that EU primary law provides for the EU institutions to sanction and incentivize member states' governments.

Another avenue to explore is in how far the European level can exert influence on national parties in government in order to preserve fundamental EU values. This contribution examines, first, the instruments that the European institutions have at hand vis-à-vis national political parties. Second, it looks at what European political parties (EuPPs) can do to hold their national member parties to account. Recommendations are made to improve the current situation in both respects.

7.1 INFLUENCE OF THE EUROPEAN INSTITUTIONS

7.1.1 REGULATION OF PARTIES AT THE EUROPEAN LEVEL

The European Union has no competence to regulate national parties directly. The national party system is part of each member state's national and constitutional identity, which is protected by Article 4 (2) TEU. Furthermore, according to the Direct Elections Act, member states are responsible for organising European elections in their respective territory and are thus also in control of determining the requirements for participation in the elections. However, the EU regulates political parties at the European level, which consist primarily of national member parties. The EU institutions could thus exert an indirect influence on national parties by sanctioning the EuPPs to which they are affiliated.

EuPPs were first legally recognized at the European level with the entering into force of the Treaty of Nice in 2003 as »important as a factor for integration within the

Union« (Article 191 of the Treaty establishing the European Community (TEC)). The treaty also established a legal basis for the funding and governance of European parties. The Charter of Fundamental Rights of the EU, which was solemnly proclaimed in December 2001 and became legally valid with the entering into force of the Treaty of Lisbon on 1 December 2009, contains a similar provision, Article 12 (2).

Through Regulation (EC) No. 2004 /2003, EuPPs could for the first time benefit from the Union budget. The Regulation was amended in 2007. In 2014, it was repealed and replaced by Regulation (EU, Euratom) No. 1141/2014, which entered into force on 1 January 2017 and created a legal status for EuPPs at the European level. For the purpose of this publication, a European political party shall be defined in accordance with Article 2 (3) of that regulation as a »political alliance that pursues political objectives and is registered with the Authority for European political parties and foundations«.

7.1.2 SANCTIONING MECHANISM

To be eligible for registration as a European party and, in a second step, for funding from the European Union budget, EuPPs have to meet certain formal criteria, but also need to respect the values on which the Union is founded, as expressed in Article 2 TEU (Regulation (EU, Euratom) 2014/1141: Article 3 (c)). To that end, at the request of the European Parliament, the Council or the Commission, the Authority for European political parties and foundations must verify whether a given party or foundation is complying with the European Union's fundamental values. As registration as a EuPP is a requirement for benefitting from the EU budget, de-registration effectively ends financial assistance.

The procedural hurdles for de-registering a EuPP are high, as such a step touches on freedom of association, which is guaranteed by Article 12 of the Charter of Fundamental Rights of the EU. Article 10 (3) of Regulation (EU, Euratom) No. 1141/2014 states that such a step can be taken only in case of a serious breach of the EU's fundamental values. The procedure also contains several safeguards. First, the Authority has to ask the committee of independent eminent persons for an opinion. Second, the European Parliament and the Council, in a co-decision, have the possibility to veto a decision to de-register a EuPP. And third, the party concerned has the possibility to take legal action at the Court of Justice.

To date, no sanctions have been applied to EuPPs for breaches of the EU's fundamental values. In 2016, under the old Regulation 2004/2003, proceedings were launched against the far-right Alliance for Peace and Freedom (APF), which consists of small extreme-right parties, including the German National Party (NPD). At that time, the rules foresaw that the European Parliament shall decide, at the request of a quarter of its members, representing at least three political groups in the European Parliament, whether a EuPP is in breach of the EU's fundamental values. However, the procedure got stuck already in the responsible Committee on Constitutional Affairs (AFCO), because MEPs were unable to collect sufficient concrete proof of APF actions that violate EU values.

7.1.3 NEW DEVELOPMENTS AND OPTIONS TO IMPROVE THE SANCTIONING MECHANISM

The sanctioning mechanism of the old Regulation 2004/2003 was ill-designed, as the APF case proved. The ultimate decision on sanctioning a EuPP on the grounds of violating the EU's fundamental values has been given to the European Parliament, an inherently political institution that has neither the capacity nor the experience to collect and verify evidence against a EuPP. Furthermore, decisions by the European Parliament in this regard could always be criticized as potentially biased, because in the end political opponents would decide on sanctions.

Whether the new system under Regulation (EU, Euratom) No. 1141/2014 will be more practical remains to be seen. Certainly, some major improvements have been made. Most importantly, while the European Parliament retains some role in the sanctioning procedure, the ultimate decision on a de-registration has been transferred to the newly created independent Authority. Nevertheless, as this Authority consists of barely a handful of EU civil servants, and given the numerous tasks it has to handle, the question arises whether it has the capacity to collect evidence against a EuPP potentially in breach of the EU's fundamental values.

The efficiency of the system will now depend more on practical than on legal questions. More specifically, there needs to be a dedicated team of officers that controls the conduct of the EuPPs and their member parties. As the Authority can become active only at the request of the Council, the Commission or the European Parliament, each of these institutions could create a unit to collect data on possible breaches of the EU's fundamental values by EuPPs that would also stand up in the Court of Justice. However, for the same reasons outlined above, it would be more sensible to establish such a unit within the Authority, and not at arm's length of one of the co-legislators or the European Commission, which is in the middle of a transformation from an unpolitical administration to a more political and government-like institution.

Furthermore, it has to be pointed out that EuPPs can be sanctioned only for a serious and systematic breach of the EU's fundamental values. A single rogue national party within a EuPP will probably not be sufficient to meet the criteria. The EU's institutions are thus capable of sanctioning a EuPP only if all or at least a majority of its member parties act against the EU's fundamental value; they cannot sanction individual national parties.

7.2 POWER TRUMPS VALUES? THE POTENTIAL INFLUENCE OF EUROPEAN POLITICAL PARTIES

7.2.1 EUROPEAN POLITICAL PARTIES: NOT QUITE PARTIES, YET

In systems of representative democracy, political parties play an essential role. As transmission belts between the people and the legislative and executive branches of government, parties aggregate and articulate

the interests of a certain part of society and translate them into policy options. They also recruit political leaders and have the task of educating the public by increasing the level of political awareness of ordinary citizens.

Despite some legal and financial upgrading, European political parties (EuPPs) are still not able to exercise the functions of parties and thus are best characterized as umbrella organisations rather than political parties in the traditional sense. EuPPs play an important role in the preparation of intergovernmental meetings. For example, ahead of European Council meetings, the national government representatives of some EuPPs coordinate their positions at leaders' meetings. However, as European elections are still conducted at the national level, with national election laws, national electoral lists and predominantly national campaigns, EuPPs cannot compete for mandates and are thus unable to perform their recruitment function or distribute power to their members.

Since 1998, the European Parliament has made several attempts to amend the Direct Elections Act of 1976 and to introduce a Europe-wide constituency, which would allow EuPPs to set up so-called transnational lists and enable them to compete directly for a portion of the European Parliament's seats. But so far, the member states' governments have not been able to agree on this innovation, and the most recent initiative in this regard, the Leinen-Hübner proposal of 11 November 2015 for a reform of European electoral law, did not obtain the unanimous backing of member states, which is necessary to change the electoral rules under Article 223 (1) Treaty on the functioning of the European Union (TFEU) (European Parliament 2015a).

An important development in the evolution of EuPPs was the »Spitzenkandidaten« initiative ahead of the European elections 2014. For the first time, all major EuPPs nominated lead candidates for the position of President of the European Commission, thus linking the European elections with the selection of the leader of the European executive. After an inter-institutional showdown between the European Council and the European Parliament, the candidate of the most successful EuPP, the EPP's Jean-Claude Juncker, indeed became Commission President. The EuPPs thereby managed to expand their role without the need for legal changes. While this innovation led to a limited transnationalization of electoral campaigns, it cannot substitute for the possibility of competing for parliamentary mandates with transnational lists.

7.2.2 EUROPEAN POLITICAL PARTIES – POWER TRUMPS VALUES?

At least the dedicated pro-European EuPPs, such as the European People's Party (EPP) and the Party of European Socialists (PES), explicitly list the fundamental values of the EU as their founding values, and thus make their observance a requirement for membership. According to Article 3 of its statutes, the EPP will work »to achieve free and pluralistic democracy, for respect for human rights, fundamental freedoms and the rule of law on the basis of a common programme« (European People's Party 2015). Likewise,

Article 3.1 of the PES statutes states that it intends »to pursue international aims in respect of the principles on which the European Union is based, namely principles of freedom, equality, solidarity, democracy, respect of Human Rights and Fundamental Freedoms, and respect for the Rule of Law« (Party of European Socialists 2015). Nevertheless, both parties have members in their ranks who have been criticised for their conduct in national government. Most prominently among them are Fidesz, the party leading the Hungarian government and a member of the EPP, and SMER, the ruling party in Slovakia, a PES member. However, despite continuous efforts, the EuPPs have not been able to apply enough pressure to alter the domestic policy choices of their member parties or trigger a change in their nationalistic rhetoric.

We can assume that the EPP and the PES have some influence over their member parties in government through regular dialogue and informal contacts. But the influence of EuPPs seems to be very limited. Most importantly, in the past, the EuPPs actions have not resulted in major changes in domestic policy choices or a different positioning of national parties, irrespective of the level of escalation. Neither soft influence nor the threat or even imposition of sanctions were able to generate enough pressure. The PES even suspended SMER in 2006, after the latter formed a government coalition with the extreme-right Slovak National Party (SNS), which the PES perceived as a violation of its values and contradicting the decision taken at its Congress in Berlin in 2001 that »all PES parties [...] [shall] refrain from any form of political alliance or co-operation at all levels with any political party which incites or attempts to stir up racial or ethnic prejudices and racial hatred« (PES 2001). In February 2008, the PES Presidency lifted SMER's suspension because »the government policy has proved fully social democratic and SNS Leader Jan Slota together with Robert Fico recently signed a letter underlining both parties respect for the rights of all minorities in Slovakia and for all fundamental values we share« (PES 2008). The PES Congress ratified this decision in December 2009, whereby SMER became a full member of the PES (PES 2009). In fact, no significant change of attitude was discernible on the part of the SNS after the two parties' leaders had signed the letter. The PES, however, lacked an alternative partner in Slovakia, which might be the most decisive reason for the change of mind.

The reasons for the relative powerlessness of EuPPs are to be found in a political cost/benefit calculation. In order to avoid the political costs associated with isolation at the European level, in Brussels and Strasbourg, national leaders tend to present themselves as pro-European, sharing the values of the European Union and their party families and agreeing to do everything necessary to comply with them. However, these statements are always phrased in general terms and in practice they at best lead to minor changes of legislation and policy. The costs of diverging from the – in their eyes – best strategy for remaining in power at home considerably outweigh the potential costs of sanctions by their European party family.

Against this background, EuPPs are in a difficult position. As shown by the suspension of SMER from the PES in 2006, sanctions are unlikely to improve the situation in the

member states or lead to a change of policy. Additionally, a suspension also incurs costs on the EuPP itself, as it loses a member party and thus influence and power. The EuPPs face the decision to lose the little influence and power they have over their member parties, without making a decisive impact. From a cost/benefit perspective, a suspension makes sense only when the damage to the party's credibility due to a rogue member party surpasses the costs of losing a partner through suspension or exclusion.

7.2.3 RECOMMENDATIONS: HOW EUROPEAN POLITICAL PARTIES COULD INCREASE THEIR INFLUENCE ON MEMBER PARTIES

Sanctioning mechanisms will prove more successful when European parties evolve further. A major step would be to allow them to compete for mandates in the European Parliament with their own transnational lists. With the power to nominate candidates for mandates, or to exclude candidates from a member party from the nomination, the leverage of EuPPs would increase significantly, as a suspension would lead to tangible costs.

Under the current framework the costs for national parties questioning the EU's values could be increased by linking EuPPs and their affiliated political groups more closely in the European Parliament. In the EU's institutional framework, political groups existed long before the Nice Treaty and the Charter of Fundamental Rights mentioned transnational political parties as political actors with their own constitutional mandate. Political groups can, but do not have to, affiliate themselves with a EuPP, and vice versa. Both can exist and receive funding from the European Parliament's budget in their own right, under a different set of rules and different budget lines.

Members of European Parliament (MEPs) from a national member party of a EuPP are automatically members of the affiliated political group in the European Parliament (for example, EPP Group 2013: Article 3 (1), Group 2014; Rule 2 (1)). However, if a national member party is suspended from its EuPP, the MEPs of the sanctioned party are not automatically excluded from the political group. Indeed, during the suspension of SMER from the PES from 2006-2008, the SMER MEPs remained in the Progressive Alliance of Socialists and Democrats (S&D), the PES' group in the European

Parliament. If suspension from a EuPP also meant suspension from the affiliated political group, the leverage of EuPPs would be considerably higher, as membership of a large political group is essential for access to resources, as well as to important functions and legislative roles.

EuPPs could also explore amending their statutes and formalizing the process of imposing sanctions, especially the suspension or exclusion of one of their members. Currently, the EPP and the PES do not have clear guidelines on the criteria that have to be met to justify a sanction or the circumstances under which a sanction is inevitable. As regards sanctioning, the decision-making bodies and the distribution of power are the same as for political decision-making. The decision-making bodies are not obliged to justify their conclusions, nor are there any means to challenge their decisions. Clear criteria and an internal court of arbitration with the possibility of legal appeal could render these processes more objective and at the same time counter the criticism that European parties are inconsistent towards national parties in their ranks that violate European fundamental values.

The nomination of standing rapporteurs to monitor the development of a given member party in government is another measure to consider. These persons should not only report to the internal bodies of the EuPP, but also publish their findings. Decisions on sanctions would thus follow a longer period of assessment, be based on first-hand information and thereby be less arbitrary. Through publication additional public pressure could be built up.

For the time being, EuPPs have to resort to softer means of influence, notably within the framework of party summits and the intergovernmental leaders' meetings ahead of European Councils. These meetings, in which the European party families coordinate policy positions, have been increasingly institutionalized and are now important forums also for tackling intra-party dissent (Van Hecke 2013: 71). Nevertheless, as the leaders' meetings do not have any formal decision-making power, their success and influence depend largely on the participation of important members, especially representatives of larger and more powerful member parties. EuPPs should thus do everything in their power to make the gatherings of their party-family's prime ministers, opposition leaders and commissioners as valuable as possible for the participants. Peer-pressure and the power of argument can then lead to results, although these are not quantifiable due to the confidential nature of leaders' meetings.

Abbreviations

APF	Alliance for Peace and Freedom
AVMSD	Audiovisual Media Services Directive
CEF	Connecting Europe Facility
CEPEJ	Commission for the Evaluation of the Efficiency of Justice
CF	Cohesion Fund
CJEU/ECJ	Court of Justice of the European Union/European Court of Justice
CMPF	Centre for Media Pluralism and Media Freedom
CPR	Common Provisions Regulation
DigComp	Digital Competence Framework for Citizens
DigCompEduc	Digital Competence Framework for Educators
EAFRD	European Agricultural Fund for Rural Development
EAVI	European Association for Viewers' Interests
ECJ	European Court of Justice
ECTHR	European Court of Human Rights
EEA	European Economic Area
EED	European Endowment for Democracy
EIDHR	European Instrument for Democracy and Human Rights
EMFF	European Maritime and Fisheries Fund
ENNHRI	European Network of National Human Rights Institutions
EP	European Parliament
EPP	European People's Party
EPRS	European Parliament Research Service
ERDF	European Parliament Research Service
ERGA	European Regulators Group for Audiovisual Media Services
ESF	European Social Fund
ESIF	European Structural and Investment Funds
EuPP	European Political Party
EVI	European Values Instrument
FRA	Fundamental Human Rights Agency of the EU
FREMP	Working Party on Fundamental Rights, Citizens' Rights and Free Movement of Persons
HCLU	Hungarian Civil Liberties Union
HHC	Hungarian Helsinki Committee
HLG	High Level Group on Media Freedom and Pluralism
ISP	Internet Service Provider
LIBE	Civil Liberties, Justice and Home Affairs Committee
MAVISE	Database on TV and On-demand Audiovisual Services and Companies in Europe
MEP	Member of the European Parliament
MFF	Multiannual Financial Framework
MPM	Media Pluralism Monitor
MSI-JOQ	Committee of Experts on Quality Journalism in the Digital Age
NGO	Non-Governmental Organisation
PES	Party of European Socialists
S&D	Progressive Alliance of Socialists and Democrats in the European Parliament
SRCS	Special Representative on Civil Society
TEC	Treaty Establishing the European Community
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union

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MEMBERS OF THE EXPERT GROUP ON SAFE-GUARDING DEMOCRACY IN EU MEMBER STATES

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