CEU Democracy Institute
Rule of Law Clinic

Rule of Law beyond the EU Member States

Assessing the Union's Performance

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Executive Summary

1. Rule of law critical to the European Union

The rule of law is a foundational value of the European Union. It is essential for all Member States and EU institutions to adhere to rule of law standards for the EU to function effectively.

2. Inadequate self-assessment of rule of law requirements among EU Institutions

There is a significant lack, or in some cases a complete absence, of self-assessment or independent review mechanisms at EU institutional level when it comes to upholding EU rule of law requirements. Limited access to courts at the EU level hinders effective review of EU actions, while the lack of transparency and accountability in areas including migration management undermine the rule of law.

3. Politicisation of rule of law decisions

A number of rule of law decisions made by the EU Commission to address backsliding Member States—including delayed infringement actions, inconsistent enforcement and the premature closure of rule of law procedures—suggest political considerations may be influencing the Commission's approach rather than being guided by objective legal standards.

4. Erosion of institutional legitimacy and credibility

When EU institutions responsible for safeguarding the rule of law are seen as prioritising political expediency, or failing to conduct or allow rigorous independent review or self-assessments, their legitimacy and credibility is compromised. This erosion of credibility weakens their role as protectors and promoters of the rule of law, casting doubt on their ability to objectively and effectively enforce rule of law standards across Member States.

5. Negative consequences for all Member States

The repercussions of these shortcomings are twofold. First, in Member States that are backsliding in their rule of law commitments, governments may continue to delay compliance or seek to evade enforcement altogether by claiming 'double standards' and that they are being unfairly targeted. Second, decisions made at the EU institutional level can inadvertently weaken the overall legal framework, leading to a deterioration of rule of law standards even in states that are otherwise committed to upholding them. Thus, both the integrity of the rule of law, and the integrity of the EU's common legal order, is compromised across the board.

6. By holding itself to account, the EU becomes a stronger rule of law actor

By addressing the deficiencies outlined in this report and subjecting itself to annual independent review of its own adherence to the EU's rule of law requirements, the EU can become a stronger rule of law actor capable of defending EU values throughout the EU and its Member States.

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1. Introduction

Since 2020 the European Commission has published its Annual Rule of Law Report. The Commission Report primarily aims to prevent rule of law decline among the European Union (EU) Member States. Since 2022 the report formulates recommendations in four key areas: the justice system, the anti-corruption framework, media pluralism and freedom, and other issues related to checks and balances. The 2024 edition of the annual report was further broadened and includes an assessment of four candidate countries for accession to the EU. However, despite such changes, the state of the rule of law at the EU level remains outside the scope of the EU Annual Rule of Law Report. At the same time, decisions taken (or not taken) by the EU institutions in the rule of law field are critically relevant to the situation in Member States. This publication aims to fill this gap in evaluation and outline the main issues concerning the rule of law in the EU institutions and procedures.

Our report finds that, while the rule of law is embraced and presented as a foundational value of the European Union, self-assessment of rule of law standards at the EU institutional level is severely lacking in a number of areas including *inter alia* mutual recognition in criminal matters and migration management. The Commission and the Council have not produced an annual report, nor supported independent review, in respect of the rule of law situation at EU level similar to the annual reports produced in respect of each Member State notwithstanding regular calls from the European Parliament to do so. Further, decisions made with regard to the rule of law actions against systemic deficiencies in certain Member States are also, to a large extent, heavily politicised which can reduce impact in their effect. This in turn weakens the credibility of EU institutions as rule of law actors. Crucially, it introduces systemic and significant deficiencies in the rule of law at EU level. The consequence of this is to undermine efforts to prevent and reverse the most severe forms of rule of law backsliding in certain Member States, as well as, in some cases, to harm the rule of law in Member States committed to compliance with EU law, including EU rule of law requirements.

Work on the report was initiated by the Rule of Law Clinic at the CEU Democracy Institute in Budapest, supported by a team of experts throughout Europe. The rule of law is a value common to the European Union and the Member States which forms part of the very foundations of the European Union and its legal order. It is possible to assess whether basic rule of law requirements are met in the EU both in law and in fact. This report does not aim to offer an exhaustive assessment of the rule of law situation in all EU institutions and agencies, but a first attempt to frame the main EU achievements and shortcomings in adhering to the EU's own rule of law principles.

While the Commission's reporting is based on a dialogue with the national authorities and in consultation with stakeholders across the EU, this report reflects independent academic expertise and is based on analysis of relevant legal materials, including case-law developments.

This report follows the structure of the original Commission's annual reports. It first begins with an overview of the EU justice system. Secondly, it analyses the major recent developments in the anti-corruption framework at the EU level. Thirdly, it considers the main developments in the field of media freedom and access to information in the EU. Finally, the report discusses major institutional issues linked to checks and balances. The report deals also with the recent developments in the field, including actions to uphold rule of law in Member States, the new Pact on Migration and Asylum, and EU enlargement.

Analysis and improvement of rule of law at EU level is necessary in order to fight against backsliding among the Member States which represents a systemic threat to the EU and the rights and freedoms of its citizens. The state of the rule of law in the EU is often used by political leaders from backsliding governments as a 'whataboutism' type of excuse aimed to reject any attempts to improve the situation at the domestic level and justify systemic non-compliance with EU law, including non-compliance with CJEU orders and judgments. This shadow report aims at *starting* the discussion about the state of the rule of law *at* EU level so as to complement the Commission's monitoring of the rule of law situation *in* the EU. It calls on the EU to ensure that the values of Article 2 TEU and, especially, the rule of law, apply to the fullest extent to the EU institutions in order to guarantee robust liberal democratic constitutionalism, and institutions capable of defending EU values also at the level of the Member States.

2. Key aspects of the rule of law situation in the European Union

2.1 Justice system in the European Union

Development of rule of law case-law of the Court of Justice of the European Union (CJEU) in recent years mainly concentrated on judicial independence of domestic courts. This section of the report first discusses main rule of law issues related to the jurisdiction of the Court of Justice, and the apparent gaps in the system of judicial protection in the EU. Secondly, it analyses the recent developments of the Court of Justice case-law in the field of mutual trust in the context of the rule of law. Finally, the section deals with implementation of CJEU judgments.

The Court of Justice

While perception of judicial independence is considered critical at national level, no surveys on perceived independence of the Court of Justice of the European Union (CJEU) have been conducted so far. Assessing the independence of the CJEU might be somewhat difficult, since the access to the Court and its transparency has been quite limited. Meanwhile 'the discussion about the structural characteristics and shortcomings of EU judicial review forms a crucial part of the broader discussion about the quality of the rule of law at EU level.'[1]

There continues to be very limited access to the Court for non-privileged applicants, especially natural persons. In some cases, this means the ability to challenge the legality of decisions made by the EU institutions dealing with the rule of law cannot be effectively reviewed by the CJEU. In *Medel and others v Council and Commission*[2] case four judicial associations sought annulment of the Council's decision approving the release of the Recovery and Resilience Facility funds for Poland, despite the fact that milestones regarding judicial independence in the country had not been implemented. The General Court found the case inadmissible arguing that judicial associations lack standing in such cases, despite the fact the case concerned judicial independence in EU Member States. The case suggests also that there might be a need to take into account systemic deficiencies (especially in the context of judicial independence) when thinking about access to the court and effective remedies at the EU level.[3]

The scope of the CJEU jurisdiction constitutes a challenge also from the perspective of EU external actions. According to the general rule under Article 24(1) TEU, the CJEU shall not have jurisdiction with respect to Common Foreign and Security Policy. Despite an exception from this general prohibition (Article 275(2) TFEU), the exclusion of CJEU jurisdiction is problematic from the rule of law perspective and consistency of the EU justice system.[4] This is despite efforts within the Court's case-law to overcome this inconsistency.[5]

While the transparency of the Court of Justice has long been considered problematic, recent developments have improved the situation somewhat.[6] Live-streaming of rulings was introduced in 2022. However, access to documents remains limited. There is also almost no possibility to submit *amicus curiae* briefs by third parties in cases pending before the Court of Justice. In this sense the Court of Justice is more closed than the European Court of Human Rights (ECtHR).[7]

1 M. Krajewski, *Relative Authority of Judicial and Extra-Judicial Review: EU Courts, Boards of Appeal, Ombudsman.* (Oxford: Hart Publishing, Bloomsbury Collections 2021) 12.

2 Order of the General Court of 4 June 2024, Joined cases T-530/22 to T-533/22.

3 M. Leson, 'Umkämpfte Meilensteine: Rechtsstaatlichkeitskonditionalität bei NextGenerationEU', *VerfBlog* 2 October 2024, https://verfassungsblog.de/umkampfte-meilensteine/.

4 Ch. Hillion, 'The EU External Action as Mandate to Uphold the Rule of Law Outside and Inside the Union', *Columbia Journal of European Law* 2023, 253.

5 Ibid., 255–257; See also P. Van Elsuwege, 'Judicial review and the Common Foreign and Security Policy: Limits to the gap-filling role of the Court of Justice', *Common Market Law Review* 2021, 1731–1760.

6 Important amendments to the Rules of Procedure of the Court of Justice and of the General Court enter into force on 1 September, Press release No 126/24, Luxembourg, 30 August 2024 https://curia.europa.eu/jcms/upload/docs/application/pdf/2024-08/cp240126en.pdf.

7 J. Krommendijk, K. van der Pas, 'To intervene or not to intervene: intervention before the Court of Justice of the European Union in environmental and migration law', *The International Journal of Human Rights* 2022, 26(8), 1394–1417.

In terms of judicial appointments, a key issue at national level, judges of the Court of Judges are nominated by Member States, with the supportive role of the so-called '255 Committee'. The Committee is constituted of 'seven persons chosen from among former members of the Court of Justice and the General Court, members of national supreme courts and lawyers of recognised competence',[8] and tasked with providing opinion on candidates' suitability. In practice, 'the purpose of the panel is to counterbalance the otherwise essentially political nature of the appointment procedure for members of the Union courts.'[9] In 2020 27% of the opinions were unfavourable and they were always followed by the governments,[10] demonstrating the latter's respect for the Committee's opinions. However, the Committee itself has been criticised for its lack of transparency and accountability.[11]

In terms of the court's composition, the same rule of law standards ought to be achieved by the Court as expected at national level. In this context, the *Sharpston* cases constitute a challenge for the legality of the Court's composition,[12] in the resulting declarations that the acts by the representatives of the governments of the Member States of dismissing Advocate General (AG) Sharpston and appointing AG Rantos were not judicially reviewable.[13] The standard adopted in *Sharpston* case echoes the decision regarding the *EU-Turkey Deal*,[14] in which the Court found that it was not reached by the Council, but by (individual) Member States. It brings the question of rule of law double standards as between Member States and the EU institutions.[15] Questions regarding double standards in understanding judicial independence were also raised after the *Getin Noble Bank* ruling, in which a preliminary reference from a 'fake judge' was accepted, despite a ECtHR decision finding the presence of the person on the bench constituted a violation of a right to fair trial.[16]

A significant ongoing issue is EU accession to the European Convention on Human Rights. Despite a Treaty-based obligation under Article 6(2) TEU, accession continues to be blocked in light of the Court's Opinion 2/13, argued to be an unchecked and broad use of 'autonomy' of EU law. As a result, the EU continues to expect the compliance of its Member States with European Convention on Human Rights (ECHR) norms, but remains outside the system of human rights protection established under the ECHR, with potentially far-reaching negative implications of this status quo[17].

In light of these concerns, it is crucial that the CJEU holds itself to the same standards of judicial independence, transparency, and accountability that it expects from its Member States and which are required by Article 2 TEU and the ECHR. The legitimacy of the Court—and the EU as a whole—depends on maintaining the rule of law and avoiding any perception of double standards in judicial matters.

Mutual trust and judicial cooperation

Mutual trust and mutual recognition under EU law are an expression of judicial cooperation between the Member States. However, the EU and its Member States may sometimes overlook key legal principles, like fair trial rights and the presumption of innocence, to prioritise mutual recognition and prevent criminals from avoiding punishment.

8 Article 255 TFEU.

9 B. Schima, 'Article 255 TFEU', in M. Kellerbauer, M. Klamert, J. Tomkin (eds), *The EU Treaties and the Charter of Fundamental Rights: A Commentary* (2nd ed. Oxford: Oxford University Press, 2024).

10 *Seventh activity report of the panel provided for by Article 255 of the Treaty on the Functioning of the European Union*, Luxembourg 2022, 9.

11 'The Selection of EU Judges and the 255 Committee', *EU Law Live* 23 September 2024 - https://eulawlive.com/op-ed-selecting-eu-judges-the-role-of-the-255-committee-according-to-the-treaty/.

12 D. Kochenov, G. Butler, 'Independence of the Court of Justice of the European Union: Unchecked Member States power after the Sharpston Affair', *European Law Journal* 2021, 262–296.

13 Case T-180/20 *Sharpston v Council*; Case C-684/20 P *Sharpston v Council*.

14 Orders of the General Court in Cases T-192/16, T-193/16 and T-257/16 *NF, NG and NM v European Council*.

15 D. Kochenov, G. Butler, 'Independence of the Court of Justice', 274.

16 B. Grabowska-Moroz, 'Judicial dialogue about judicial independence in times of rule of law backsliding: Getin Noble Bank', *Common Market Law Review* 2023 (60), 797–818; D. Kochenov and P. Bárd, 'Kirchberg Salami Lost in Bosphorus: The Multiplication of Judicial Independence Standards and the Future of the Rule of Law in Europe', *Journal of Common Market Studies* (60), 150–165; L. Pech, D. Kochenov, *Respect for the Rule of Law in the Case-Law of the Court of Justice: A Casebook Overview of the Key Judgments since the* Portuguese Judges *Case* (Stockholm: SIEPS, 2021), 183; L. Pech, 'Dealing With "Fake Judges" Under EU Law: Poland as a Case Study in Light of the Court of Justice's Ruling of 26 March 2020 in *Simpson and HG*' (2020) *RECONNECT Working Paper* No. 8, 1.

17 B. de Witte, Š. Imamovic, 'Opinion 2/13 on Accession to the ECHR: Defending the EU Legal Order against a Foreign Human Rights Court', *European Law Review* 683 (2015); P. Eeckhout, 'Opinion 2/13 on EU Accession to the ECHR and Judicial Dialogue – Autonomy or Autarky?', Fordham International Law Journal 2015, 955 ; D. Kochenov, 'EU Law without the Rule of Law: Is the Veneration of Autonomy Worth It?', *Yearbook of European Law* 2015, 74.

Despite grave rule of law violations in some parts of the EU, neither the political institutions nor the CJEU have displayed willingness to fully address significant breaches of Article 2 TEU within the framework of mutual recognition. As stated in *LM*,[18] and reaffirmed in *Openbaar Ministerie*,[19] a general suspension of mutual recognition is not allowed unless a Member State has undergone the sanctioning arm of an Article 7 TEU procedure and has actually been sanctioned. In so ruling, the CJEU fails to consider the preliminary step enshrined in Article 7(1) TEU and attach consequences to it. Due to the unanimity rule required to establish a serious and persistent breach of Article 2 TEU values under Article 7(2) TEU, which is needed to reach the actual sanctioning in accordance with Article 7(3) TEU, suspension of mutual recognition in general remains a purely theoretical possibility.[20] This approach by the Court can appear to prioritise strict adherence to secondary law over primary law, including EU values, and international legal obligations, as well as vital human rights guarantees established by the national constitutions of the Member States.[21]

In contrast to a general suspension of the Framework Decision on European Arrest Warrant (FD EAW), the CJEU seems to allow a case-by-case suspension. However, the requirements are practically impossible to fulfil. After having determined a value-related overarching problem, the executing court must consider the effects of the generic problem on the individual, i.e. how their fair trial rights and due process guarantees would be jeopardised if surrendered.[22] But however grave the rule of law situation in the issuing state became, the CJEU insisted on the two-prong *LM*-test,[23] meaning it kept the FD EAW operational,[24] with only a very narrow and close to impossible-to-prove exception.[25] In practice, since both a general and a case-by-case suspension, are only theoretically viable, but impossible to be applied in practice, hardly any surrenders have been halted by way of properly applying the *LM*-test.[26]

Insistence on the execution of EAWs to the detriment of Article 2 TEU values might lead to (1) violations of EU law and the primacy of EU law, in case executing courts try to refrain from becoming complicit in potential human rights violations and refuse to execute EAWs on grounds other than those permissible under the *LM*-test,[27] or alternatively it will result in (2) the spread of rule of law violations and human rights abuses in the criminal justice sector, and potentially to clashes with the ECHR.[28]

18 Case C-216/18 PPU, *LM (Deficiencies in the system of justice)*, para 70.

19 Case C-354/20 PPU, *Openbaar Ministerie (Indépendance de l'autorité judiciaire '*émission*) L and P*, para 52.

20 D. Kochenov, 'Article 7 TEU: A Commentary on the Much Talked-about "Dead" Provision' in A. von Bogdandy, P. Bogdanowicz, I. Canor, Ch. Grabenwarter, M. Taborowski, M. Schmidt (eds), Defending Checks and Balances in EU Member States: Taking Stock of Europe's Actions (Springer 2021) 127.

21 P. Bárd, D. Kochenov, 'What Article 7 is Not: The European Arrest Warrant and the *de Facto* Presumption of Guilt – Protecting EU Budget Better than Human Rights?', in A. Łazowski, V. Mitsilegas (eds) *The Arrest Warrant at Twenty*, (Oxford: Hart Publishing, 2024).

22 *LM*, para 61.

23 Case C-354/20 PPU, *Openbaar Ministerie (Indépendance de l'autorité judiciaire '*émission*) L and P*.

24 Case C-480/21, *WO, JL v. Minister for Justice and Equality*; case C-562/21 PPU, *X and Y v Openbaar Ministerie*; case C-158/21 *Puig Gordi and Others*.

25 Beyond the *LM*-test, there is also a very narrow room for humanitarian exceptions, but this applies irrespectively of systemic problems, see Case C-699/21, *EDL*.

26 In fact, experts writing for the STREAM project scrutinising surrenders in six countries found no cases where surrenders have been halted over rule of law backsliding by way of properly applying the *LM*-test. A. Shabbir, 'A Comparative Report of 14 EU Member States' 28–29. As the Dutch expert put it, 'LM highlights the importance to remain in dialogue with the judiciary of the requesting Member State. However, in practice the dialogue between the District Court and the Polish judiciary was 'an uncomfortable, and often laborious, and largely fruitless acquisition'. S.S. Buisman, 'First Periodic Country Report: The Netherlands' (2022): 1–17.

27 District Court of Appeals of Karlsruhe, Ausl 301 AR 15/19 of 17 February 2020. For a summary of national implementation of the judicial tests, see P. Bárd, W. van Ballegooij, 'The effect of CJEU case law concerning the rule of law and mutual trust on national systems', in V. Mitsilegas, A. di Martino, L. Mancano (eds.), *The Court of Justice and European Criminal Law: Leading Cases in a Contextual Analysis* (Hart Publishing 2019) 455; P. Bárd, J. Morijn (2020), 'Domestic courts pushing for a workable test to protect the rule of law in the EU: Decoding the Amsterdam and Karlsruhe Courts' post-LM rulings (Part II)', *VerfBlog*, 19 April 2020 https://verfassungsblog.de/domestic-courts-pushing-for-a-workable-test-to-protect-the-rule-of-law-in-the-eu/.

28 P. Bárd, D. Kochenov, 22-3; G. de Vries, J. Krommendijk, 'Do Luxembourg and Strasbourg Trust Each Other? The CJEU's Engagement with the Jurisprudence of the ECtHR in AFSJ Cases Concerning Mutual Trust since 2017, Innsbruck: 2021; P. Bárd, 'Saving EU Criminal Justice: Proposal for EU-wide supervision of the rule of law and fundamental rights' *CEPS Paper in Liberty and Security in Europe* No. 2018–01, https://www.ceps.eu/download/publication/?id=10549&pdf=PBard_Saving%20Justice.pdf, 5; On the 'two versions of the same principle' see also K. Lenaerts, 'The Principle of Mutual Recognition in the Area of Freedom, Security and Justice', *The Fourth Annual Sir Jeremy Lever Lecture, All Souls College*, University of Oxford, 30 January 2015, https://www.law.ox.ac.uk/sites/default/files/migrated/the_principle_of_mutual_recognition_in_the_area_of_freedom_judge_lenaerts.pdf, 3–4.

The Strasbourg court has historically exercised restraint when cases involved ECHR violations stemming from adherence to EU obligations by way of the *Bosphorus* presumption,[29] asserting that ECHR obligations are not breached when Member States implement EU law, provided specific criteria are fulfilled. However, in instances involving mutual recognition, the ECtHR has begun to scrutinise the protection of fundamental rights more rigorously — something that will happen anyway, once the EU finally accedes to the ECHR.[30] The *Bosphorus* presumption has already been rebutted in one surrender case because of an inadequate assessment of prison conditions in the requesting state,[31] and this finding may in the future spill over to fair trial rights-related cases, too.[32]

Non-compliance with CJEU and ECtHR orders and judgments

In a resolution of 28 February 2024, the European Parliament reiterated its previous criticism of the European Commission's recurrent failure to promptly 'address non-compliance with fundamental rights laws and case-law by Member States'[33] in the face of a growing trend of 'open and unashamed non-compliance of several Member States with EU law in various fields, such as the right to effective judicial protection, anti-corruption laws, asylum, the implementation of sanctions, and human rights law'.[34] The Parliament noted in this context that increasing non-compliance with EU law includes increasing non-compliance with CJEU judgments following a more long standing and 'persistent problem' of non-compliance or incomplete implementation of ECtHR judgments.'[35]

To address this core and systemic rule of law issue, the Parliament has repeatedly called on the Commission since 2021[36] to take two key steps: (1) to 'set up a scoreboard dedicated to monitoring the implementation of each and every CJEU and ECtHR judgment relating to democracy, the rule of law and fundamental rights, and to fully integrate it into the annual rule of law report'[37] and (2) to 'take action regarding failures to implement CJEU rulings under Article 260(2) TFEU and the Rule of Law Conditionality Regulation in cases of non-compliance'.[38]

As regards the first step, the European Commission has only agreed to date to include information on non-compliance with ECtHR leading judgments in its Annual Rule of Law Report since its 2022 Rule of Law Report. The Commission justified this step by (rightly) pointing out that 'the track record of implementing leading judgments of the European Court of Human Rights (ECtHR) is also an important indicator for the functioning of the rule of law in a country' while noting that 'overall around 40% of the leading judgments of the ECtHR relating to EU Member States from the last ten years have not been implemented'.[39] It does not, however, track compliance with CJEU decisions, which appears both an oversight in presenting a full picture of rule of law compliance, but also misses the opportunity to hold itself to account for the enforcement of EU law.

On the second step, prompt response by the Commission to take action regarding the enforcement of CJEU decisions on rule of law issues has been limited, and to a concerning degree in a number of critical cases. There was a 20-month delay in lodging an infringement action against Poland concerning independence of the Constitutional Tribunal after the President of the Commission announced this step.[40] Similarly, notwithstanding a documented pattern of disregard for rule of law issues by Romania's Constitutional Court[41] and its decision of 8 June 2021 that essentially nullified a crucial rule of law CJEU judgment regarding Romania,[42], the Commission has not yet filed an infringement action. In January 2023, an Advocate General of the CJEU expressed

29 ECtHR, *Bosphorus v. Ireland*, no. 45036/98, Judgment of 30 June 2006.
30 ECtHR, *Romeo Castaño v. Belgium*, no. 8351/17, Judgment of 9 July 2019, § 24.
31 ECtHR, *Bivolaru and Moldovan v. France*, nos. 40324/16 and 12623/17, Judgment of 25 March 2021.
32 P. Bárd, *Rule of Law: Sustainability and Mutual Trust in a Transforming Europe* (Eleven 2023) 74–75.
33 European Parliament resolution of 28 February 2024 report on the Commission's 2023 Rule of Law report (2023/2113(INI)), para. 62.
34 Ibid., para. 76.
35 Ibid., para. 79.
36 Resolution of 24 June 2021 on the Commission's 2020 Rule of Law, P9_TA(2021)0313, para. 16.
37 Resolution of 28 February 2024 report on the Commission's 2023 Rule of Law report, para 79.
38 Ibid., para. 62.
39 European Commission, 2022 Rule of Law Report – The rule of law situation in the European Union, COM(2022) 500 final, 13 July 2022, 24.
40 See pending Case C-448/23 (action was brought on 17 July 2023 after the referral to the CJEU was being publicly announced on 15 February 2023). See also Speech by President von der Leyen at the European Parliament Plenary on the rule of law crisis in Poland and the primacy of EU law, Strasbourg, 19 October 2021, Speech/21/5361.
41 See e.g. the role of Romania's Constitutional Court in helping undermine anti-corruption efforts: See ECtHR judgment of 5 May 2020 in the case of *Kövesi v. Romania* (application no. 3594/19).
42 Joined Cases C-83/19, C-127/19 and C-195/19, Cases C-291/19, C-355/19 and C-397/19 *Asociaţia 'Forumul Judecătorilor din România*.

his surprise at the lack of enforcement action considering the Commission's own account of the rule of law deficiencies it provided to the Court and the apparent absence of any national measures addressing the Commission's concerns as outlined in its own CVM reports for Romania.[43] The European Commission formally closed the Cooperation and Verification Mechanism (CVM) for Bulgaria and Romania in September 2023. In their 2024 Special Report, the Court of Auditors identified several milestones and objectives related to the rule of law relevant to CVM benchmarks in the national Recovery and Resilience Plans of Bulgaria and Romania yet to be met, raising questions over the justification in closing the CVM.[44]

In some instances, the Commission has declined to seek enforcement, and instead accepted the Member State's assurances of compliance with a decision of the Court despite evidence to the contrary. For example, the CJEU decided in its preliminary ruling of 23 November 2021 that EU law precludes a national supreme court such as Hungary's Supreme Court from declaring a request for a preliminary ruling submitted by a lower court unlawful and similarly precludes disciplinary proceedings from being brought against a national judge on the ground that he/she has made a reference for a preliminary ruling to the CJEU.[45] The Commission did not use its infringement powers in this context but it did block access to some EU funding in 2022 before unblocking access in December 2023[46] on account *inter alia* that recent legislative amendments allegedly removed 'the possibility for the *Kúria* to review the legality of the decision of a judge to make a preliminary reference' to the CJEU.[47] However, the European Parliament underlined that the Commission is failing to account for the continuing 'persistence of obstacles to preliminary references' amongst many other unresolved systemic rule of law issues.[48] Such decisions can give the impression that enforcement decisions are subject to wider political considerations, rather than fulfilling legal obligations under the Treaties.

2.2 Anti-corruption framework

A Global Corruption Barometer (GCB) report from 2021 assessing perceptions of corruption in the EU identified that in 18 of the 27 Member States, trust in EU institutions is higher than in national governments,[49] while the reverse is true for 7 of them[50] (e.g. trust in EU institutions is 21% lower in the Netherlands).[51] The relatively high reputation of the EU in terms of corruption, however, has been seriously damaged by corruption scandals[52], such as the Uber files[53] and the Qatargate scandal,[54] which have brought the integrity framework applied to EU officials under the spotlight.[55]

43 Opinion of AG Collins delivered on 26 January 2023 in Case C-817/21 *Inspecția Judiciară*.

44 European Court of Auditors, 'Special report 03/2024: The rule of law in the EU – An improved framework to protect the EU's financial interests, but risks remain' https://www.eca.europa.eu/en/publications?ref=SR-2024-03.

45 Case C-564/19 *IS*.

46 European Commission, Commission considers that Hungary's judicial reform addressed deficiencies in judicial independence, but maintains measures on budget conditionality, Press release IP/23/6465, 13 December 2023.

47 European Commission, 'Commission assessment, in accordance with Article 15(4) of Regulation (EU) 2021/1060, of the fulfilment of the horizontal enabling condition '3. Effective application and implementation of the Charter of Fundamental Rights' with regard to the deficiencies in judicial independence in Hungary' C(2023) 9014 final/2, 13 December 2023, 6.

48 European Parliament resolution of 18 January 2024 on the situation in Hungary and frozen EU funds (2024/2512(RSP)).

49 Most outstanding differences in the levels of trust between national governments and the EU are in Romania (33%), Slovenia (31%), Poland (30%), Spain (29%) and Croatia (28%).

50 Denmark, Finland, Sweden, Austria, Germany, Luxembourg and the Netherlands.

51 'Global Corruption Barometer: European Union 2021' (Transparency International 2021) 17 https://images.transparencycdn.org/images/TI_GCB_EU_2021_web_2021-06-14-151758.pdf.

52 However, systemic problems were identified at least since 2006 internal audit 'EU Court Orders MEPs to Publish Report on Expenses' (*The Irish Times, 8* June 2011) https://www.irishtimes.com/news/eu-court-orders-meps-to-publish-report-on-expenses-1.590503.

53 V. Teixeira 'Uber lobbying scandal shows European Commission ethics rules are not up to scratch' (Transparency International EU, 11 July 2022) https://transparency.eu/uber-lobbying-commission-ethics-not-up-to-scratch/.

54 E. Braun, G. Volpicelli and E. Wax, 'The Qatargate Files: Hundreds of leaked documents reveal scale of EU corruption scandal' (POLITICO, 4 December 2023) https://www.politico.eu/article/european-parliament-qatargate-corruption-scandal-leaked-documents-pier-antonio-panzeri-francesco-giorgi-eva-kaili/.

55 Defense of Democracy Initiative (European Commission 2023) https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/13744-Transparency-of-covert-interference-by-third-countries_en; European Commission, 'Proposal for a Directive Of The European Parliament And Of The Council establishing harmonised requirements in the internal market on transparency of interest representation carried out on behalf of third countries and amending Directive (EU) 2019/1937' COM/2023/637 final.

The Commission's Annual Rule of Law Report analyses numerous elements of the anti-corruption framework existing in the EU Member States at the national level, such as anti-corruption strategies, institutional frameworks, integrity in the public sector and preventing conflicts of interests, lobbying, asset and interest disclosure or whistle-blower protection. The picture of the EU-level anti-corruption framework is extremely complicated, since each EU institution is ruled by their own anti-corruption rules, coordinated to some extent by inter-institutional agreements. The effectiveness of the EU anti-corruption framework depends also on the domestic rules on the fight against corruption. 'Both the first (and only) corruption report and the rule of law reports by the Commission focused only on Member States so far, excluding EU institutions and cross-border corruption, although those are the ones which fall between national jurisdictions and need more attention from the EU.'[56]

The EU declares a zero-tolerance policy towards corruption in its own institutions.[57] The EU has relied on soft self-policing and even post-scandal reforms have been piecemeal. The most notable actions include the mandatory transparency register for meetings with lobbyists shared among European Parliament, Council and European Commission;[58] introduction of a 6-month 'cooling-off' period for departing Members of the European Parliament (MEPs); mandatory declaration of assets, additional income and conflicts of interest by MEPs, (the latter two categories defined more broadly); and the regulation of gifts and friendship groups of MEPs with third countries.[59] Besides the problems of enforcement, some of the changes themselves were insufficient. For instance, the cooling-off period of 6 months for MEPs is arguably too short as this is the least active time for the new compositions, while MEPs receive the transitional allowance in accordance with the length of service, as a rule, for longer than 6 months.[60]

Even before the scandals, the EU had strengthened its own investigative and prosecutorial powers through the investigative anti-fraud office (OLAF) and the European Public Prosecutor's Office (EPPO), however, primarily, to protect EU financial interests and react to conduct amounting to crime. Thus, as important as the operation of EPPO (since 2021) is for directly prosecuting corruption, it is restricted to EU financial interests.[61] Notably, the mandate of OLAF established in 1999 to combat fraud, corruption and other illegal activities affecting EU financial interests also extends to cases of serious misconduct committed by EU officials and staff regardless of any impact on EU financial interests. However, it still does not play the more proactive role for less serious cases.

As the Whistleblower Directive[62] does not apply to EU staff, the Staff Regulations[63] include provisions on whistle-blower protection,[64] which are also reflected in internal rules of the European Commission, the Council, the EP and six other EU bodies.[65] These internal rules, at least for the Commission, Council and EP give the option of internal and external reporting, while

56 A. Mungiu-Pippidi, 'The Post-Truth about Corruption in the European Union', *VerfBlog*, 2022/12/20, https://verfassungsblog.de/the-post-truth-about-corruption-in-the-european-union/.

57 Joint Communication to the European Parliament, the Council and the European Economic and Social Committee on the fight against corruption Brussels, 3.5.2023, JOIN(2023), 13.

58 Interinstitutional Agreement between the European Parliament, the Council of the European Union and the European Commission on a mandatory transparency register [2021] OJ L 207/1; 'Implementation of the 14 point Reform plan: Strengthening Integrity, Independence and Accountability' (European Parliament, 25 September 2023) https://www.europarl.europa.eu/news/files/ep-implementation-progress-of-14-points-reform-25-Sept.pdf.

59 'Implementation of the 14-point Reform plan: Strengthening Integrity, Independence and Accountability' (European Parliament, 25 September 2023). 'EP Reinforced Its Anti-Corruption Rules' (EUCRIM, 11 November 2023) https://eucrim.eu/news/ep-reinforced-its-anti-corruption-rules/.

60 M. van Hulten, 'Qatargate reforms: European Parliament fails its first big test' (Transparency International EU 2023) https://transparency.eu/qatargate-reforms-european-parliament-fails-its-first-big-test/.

61 'Mission and Tasks' (European Public Prosecutor's Office) https://www.eppo.europa.eu/en/about/mission-and-tasks. For the argument to extend EPPO powers beyond EU financial interests, see E De Capitani, 'Qatargate: The Tip of the Iceberg?',*VerfBlog*, 10 January 2023) https://verfassungsblog.de/qatargate-the-tip-of-the-iceberg/.

62 Directive (EU) 2019/1937 of the European Parliament and of the Council on the protection of persons who report breaches of Union law [2019] OJ L 305/17.

63 Staff Regulations of Officials of the European Union and the Conditions of Employment of Other Servants of the European Union (Regulation No 31 (EEC), 11 (EAEC), laying down the Staff Regulations of Officials and the Conditions of Employment of Other Servants of the European Economic Community and the European Atomic Energy Community) [1962] OJ P 045/1385.

64 'Protecting whistle-blowers in the EU' (EPRS 2023) 6 https://www.europarl.europa.eu/RegData/etudes/BRIE/2023/747103/EPRS_BRI(2023)747103_EN.pdf.

65 CJEU, European External Action Service, European Committee of the Regions, European Court of Auditors, European Data Protection Supervisor, European Economic and Social Committee.

also protecting confidentiality and prohibiting retaliatory measures.[66]

The EP adopted changes to internal rules in 2023 providing more clarity to standards and procedures of reporting misconduct. However, they still left out the most vulnerable category of MEP assistants (accredited parliamentary assistants).[67]

The enforcement of Staff Regulations, including whistle-blower protection and ethical rules, are subject to organs within the relevant institutions (e.g. the EP President decides upon referral of the Advisory Committee on the Conduct of Members;[68] the CJEU may compulsorily retire the commissioners only upon the application of the Council or the Commission[69]). This means that, for instance, decisions on the failure to declare conflicts of interest or register lobby meetings are made by the same bodies in which the violation originates.[70] Notably, the Commission has announced its plan to establish an inter-institutional ethics body that will set common ethical standards as well as measures to enforce them.[71] However, as expected,[72] the 'watered-down' proposal of an ethics body will not be proactive and will only have an advisory power not sufficiently distanced from the institutions it will be examining.[73] A new ethics body was established in May 2024, however, it has not been equipped with any investigative powers.[74]

Qatargate highlighted numerous shortcomings of the EU ethics and integrity framework including a flawed EU ethics system for MEPs, an absence of post mandate rules for MEPs, the lack of regime governing third-country lobbying, the high fragmentation within and across EU institutions, the soft enforcement of binding standards, based largely on, self-policing.[75] The same factors turn out to be relevant also in the context of conflicts of interests between the EU institutions and domestic actors.[76]

Another issue relevant for anti-corruption strategy at the EU level is the legal framework of the MEPs' parliamentary immunities. It has been regulated in Articles 8 and 9 of the Protocol on the privileges and immunities of the European Union. Each of them has different scope, reach, and different legal frameworks applicable to them.[77] Efforts by the CJEU to find a common ground in the current legal framework to bridge the discrepancies in the substance of immunities enjoyed by different MEPs in different contexts have been unsuccessful. The CJEU most notably relied on the EU's ability to defend immunities of MEPs while they travel, which

66 L Hoffmann-Axthelm, 'The backroom legislator: transparency, integrity and accountability at the Council of the EU' (Transparency International EU 2021), 38-39. A Giménez Bofarull, L Hoffmann-Axthelm, M Manzi, 'Hiding a forest behind the trees: transparency, integrity and accountability at the European Commission (Transparency International EU 2021), 57-61. A Giménez Bofarull, L Hoffmann-Axthelm, M Manzi, V Teixeira, 'One rule for them, one rule tor us: integrity double standards in the European Parliament' (Transparency International EU 2021), 51-56.

67 P. Engelbrecht-Bogdanov 'Watered-down EU ethics body lacks credibility' (Transparency International, 8 June 2023) https://transparency.eu/transparency-international-eu-watered-down-eu-ethics-body-lacks-credibility/.

68 'About Rules for Members (European Parliament: MEPSs: Ethics and Transparency) https://www.europarl.europa.eu/meps/en/about/meps.

69 Article 245 TFEU.

70 R. Kergueno 'Lobby Transparency in the EU' (Transparency International EU 2024) https://transparency.eu/briefing-lobby-transparency-in-the-eu/. 'Lobbying In Europe: Hidden Influence, Privileged Access' (Transparency International 2015) 54.

71 For the institutional setup of the proposed ethics body see 'Ethics Body: Questions & Answers' (*European Commission*, 8 June 2023) https://ec.europa.eu/commission/presscorner/detail/en/qanda_23_3109.

72 A. Alemanno, 'Qatargate: A Missed Opportunity to Reform the Union', *VerfBlog*, 2 Feburary 2023 https://verfassungsblog.de/qatargate-a-missed-opportunity-to-reform-the-union/.

73 P. Engelbrecht-Bogdanov, 'Watered-down EU ethics body lacks credibility' (Transparency International, 8 June 2023) https://transparency.eu/transparency-international-eu-watered-down-eu-ethics-body-lacks-credibility/.

74 O. Costa, The European Parliament and the Qatargate, JCMS 2024, 8

75 A. Alemanno, Qatargate: A Missed Opportunity to Reform the Union, *VerfBlog*, 2023/2/02, https://verfassungsblog.de/qatargate-a-missed-opportunity-to-reform-the-union/; E. De Capitani, Qatargate: The tip of the iceberg?, *VerfBlog*, 2023/1/10, https://verfassungsblog.de/qatargate-the-tip-of-the-iceberg/.

76 A. Roggenbuck, T. Dönsz-Kovács, Soft landing: New high-level EIB 'revolving door' revelations suggest systemic issue persists, Bankwatch Network 1 March 2024 – https://bankwatch.org/blog/soft-landing-new-high-level-eib-revolving-door-revelations-suggest-systemic-issue-persists; B. Smith-Meyer, E. Braun, EU prosecutors launch bombshell corruption probe into former European Investment Bank Chief, Politico 24 June 2024 – https://www.politico.eu/article/eu-top-cop-launches-bombshell-corruption-probe-into-former-european-investment-bank-chief-werner-hoyer/.

77 Article 8 protects from 'any form of inquiry, detention or legal proceedings in respect of opinions expressed or votes cast by them in the performance of their duties' offers immunity, which is absolute and extends beyond the MEPs mandate. It cannot be suspended or lifted and is governed solely by EU law. In contrast, Article 9 immunity is significantly limited in scope compared to Article 8. It does not shape a uniform legal context of MEPs immunity.

allegedly does not depend on national law of their own Member States.[78] The blurriness of the lines separating two types of immunity: the immunity in respect to 'performance of duties' (Article 8 immunity) and all other immunity enjoyed by MEPs during the sessions of the EP (Article 9 immunity)[79] remain the major problem with the immunities. Although Article 8 immunity cannot under any circumstances be lifted, it can be defended by the EP, as the CJEU has confirmed in *Marra*.[80] The current practice of conducting months-long investigations – prohibited in the context of EU civil servants – against MEPs without any request of lifting the immunity further undermines the credibility of the system.

2.3 Media pluralism and media freedom

Media pluralism, which ensures that a diversity of media sources and opinions are widely accessible within a society, as well as media freedom – the ability to report without undue influence or restriction – are both essential to a healthy democracy. Both have been compromised as part of the rule of law backsliding in certain EU Member States such as Hungary and Poland, and more recently, Slovakia.[81] The Commission understands media freedom and pluralism as components of the Article 2 TEU value of the rule of law. Media freedom and pluralism are recognised in the EU Charter of Fundamental Rights (Article 11) and the ECHR (Article 10). During 14 years of the rule of backsliding in Central Europe, the Commission has initiated only one EU law infringement action regarding media freedom. The EU institutions have focused on responding to the rule of law crisis in the media freedom dimension chiefly through policy initiative and new legislation.[82]

European Media Freedom Act

In 2021, the European Union began developing a new regulation aimed at introducing common standards for the media. This initiative was driven by the need to adapt to technological advancements that are transforming the internal market, as well as by concerns over threats to media freedom. The proposal was led by Thierry Breton, the European Commissioner for Internal Market, and Věra Jourová, the Vice-President of the European Commission and Commissioner for Values and Transparency. The European Media Freedom Act (EMFA)[83] was adopted by the European Parliament in March 2024 and has been in force since 7 May 2024. The new regulation will fully apply in all Member States as of 8 August 2025.

The EMFA was carved out within the EU's competencies regarding the internal market (Article 114 TFEU).[84] However, it clearly expresses the ambition to protect the value of media freedom, although it is not defined in the text of the regulation. During the EU legislative process, several EU Member States – Denmark, France, Germany, and Hungary – formally argued that the introduction of this regulation violates the principle of subsidiarity, which means that actions should be taken at the lowest possible level if the objective can be achieved there. Other Member States, such as Czechia, Italy, the Netherlands, and Poland, pointed out the need to examine this issue. However, the required votes from one-third of EU countries were not gathered for the European Commission to initiate a procedure to assess whether the law meets the subsidiarity requirement. The Legal Service of the European Commission, however, assessed that the European

78 S. Hardt, 'Fault Lines of the European Parliamentary Mandate: The Immunity of Oriol Junqueras Vies', 16 EUConst (2020) 170.

79 The meaning of 'sessions' has been interpreted by the CJEU expansively, to cover the whole duration of the legislature: Case 101/63 *Wagner v Fohrmann and Others*. See also Case 149/85 *Wybot v. Faure*.

80 Judgment of the Court (Grand Chamber) of 21 October 2008, *Alfonso Luigi Marra v. Eduardo De Gregorio* (C-200/07) *and Antonio Clemente* (C-201/07), para. 37: '[Rule 6a] of the Rules of Procedure sets down a procedure for defence of immunity and privileges which can be triggered by the Member of the European Parliament. That procedure also concerns immunity for opinions expressed and votes cast in the exercise of parliamentary duties'.

81 See 2024 Rule of Law Report on Slovakia, 29.

82 E. Brogi, D. Borges, R. Carlini, I. Nenadic, K. Bleyer-Simon, J.E. Kremer, S. Verza, *The European Media Freedom Act: media freedom, freedom of expression and pluralism*. Policy Department for Citizens' Rights and Constitutional Affairs 2023.

83 Regulation (EU) 2024/1083 of the European Parliament and of the Council of 11 April 2024 establishing a common framework for media services in the internal market and amending Directive 2010/13/EU (European Media Freedom Act) Text with EEA relevance.

84 See, for example, V. Kraetzig, Freedom Governed by Brussels, *VerfBlog*, 12 June 2023 https://verfassungs-blog.de/freedom-governed-by-brussels/.

Media Freedom Act has the proper legal basis.[85] In July 2024 media reported that Hungary brought an action of annulment to the EU Court of Justice against EMFA, arguing that the legal basis for the regulation was incorrect.

The EMFA introduces new duties and obligations on various actors in the media sphere, notably on the Member States, but also on media owners (for example, transparent of ownership and guaranteeing editorial freedom) and very large online platforms (for example, not taking down content produced by independent media)[86]. Regarding the requirements for Member States, the EMFA emphasises certain obligations that already exist in EU law. For example, it includes the imperative to safeguard the functional independence of media regulators, as specified in Article 7 of the EMFA and Article 30 of the Audiovisual Media Services Directive. The EMFA would be the first EU law to regulate some important issues to media freedom comprehensively.[87] The new obligations of Member States include: a requirement to appoint and dismiss heads of supervisory boards and management of public service media under transparent, open and non-discriminatory procedure and criteria, as defined in advance in national law (Article 5 EMFA); an obligation to provide public service media with adequate and stable financial resources (Article 5 EMFA); and the so-called media pluralism test, an assessment of the impact of media market concentration on media pluralism and editorial independence (Article 22 EMFA). Member States are required to introduce substantive and procedural rules that ensure such an assessment. Moreover, they are required to refer to The Commission's Annual Rule of Law Report concerning media pluralism and media freedom in this assessment[88]; transparent and non-discriminatory public spending on media, including through advertising and purchasing services from media (Article 24); additionally, on 11 March 2024, the Council adopted a new regulation on the transparency and targeting of political advertising.[89]

Certain issues raised in the EMFA are reflected in the recommendations in the most recent annual Rule of Law Report by the European Commission, such as: introducing mechanisms to enhance the functional independence of the media regulator taking into account European standards on the independence of media regulators (Hungary); enhancing the independent governance and editorial independence of public service media taking into account the European standards on public service media (Slovakia, Hungary, Cyprus, Malta, the Netherlands, Poland, Romania, Slovakia); ensuring that rules or mechanisms are in place to provide funding for public service media that is appropriate for the realisation of its public service remit while guaranteeing its independence (Czechia, Ireland, Italy, Slovenia); improving transparency in the allocation of state advertising (Bulgaria, Croatia, Cyprus, Austria); introducing reforms relating to transparency of information on media ownership (Czechia, France); improving legislative framework for the protection of professional secrecy and journalistic sources (Italy); introducing legislative and non-legislative safeguards to improve the protection of journalists (Slovenia, Slovakia); and ensuring that fair, transparent and non-discriminatory procedures are adhered to for the granting of operating licences to media outlets (Poland).

While still early, it can be foreseen that monitoring will be needed to ensure compliance with the Act, as well as prompt enforcement through infringement proceedings against Member States in the event that they fail to fulfil their obligations under EU law.

Strategic lawsuits against public participation

Strategic lawsuits against public participation (SLAPPs), i.e. abusive and unfounded or exaggerated lawsuits targeting mainly journalists, activists and academics and their organisations[90]

85 M. Cole, C. Ettelforf, Research for CULT Committee-European Media Freedom Act-Background Analysis, Policy Department for Structural and Cohesion Policies Directorate-General for Internal Policies PE 733.129 – April 2023 2023, 19, https://www.europarl.europa.eu/RegData/etudes/STUD/2023/733129/IPOL_STU(2023)733129_EN.pdf.

86 See, for example, M.Z. van Drunen, *et al.*, What can a media privilege look like? Unpacking three versions in the EMFA. *Journal of Media Law*, (2023)15(2), 152-167.

87 See A. Koltay, *Media Freedom and the Law: The Regulation of a Common European Idea*, Routledge 2024, 72.

88 See M. Sznajder, 'Biting More Than It Can Chew: On the The EMFA's Media Pluralism Test', *VerfBlog* 16 July 2024 https://verfassungsblog.de/biting-more-than-it-can-chew/.

89 Proposal for a Regulation of the European Parliament and of the Council on the transparency and targeting of political advertising COM/2021/731 final.

90 See Recital 6 of Directive (EU) 2024/1069 of the European Parliament and of the Council of 11 April 2024 on protecting persons who engage in public participation from manifestly unfounded claims or abusive court proceedings ('Strategic lawsuits against public participation') (hereinafter: SLAPP Directive): journalists, whistle-blowers and human rights defenders, as well as civil society organisations, NGOs, trade unions, artists, researchers and academics.

have become a prevalent problem in the EU.[91] SLAPPs are not necessarily aimed at winning the case, but at silencing critics of state institutions, agents or private businesses. The broader impact of SLAPPs is the erosion of democratic discourse and informed public debate on issues including human rights, the environment, health, corruption, or disinformation.[92] By limiting democratic discourse and abuse of the legal system, SLAPPs threaten the core values of the European Union.[93]

Recognising this threat, EU co-legislators adopted Directive 2024/1069 (SLAPP Directive), which came into force in May 2024.[94] Member States must adjust their laws, regulations and administrative provisions in line with the Directive by 7 May 2026. According to the new law, SLAPP victims can request the court to dismiss a claim at an early stage, they may seek financial remedies from the claimant, and they may ask the court for other remedies. The Directive addresses cross-border SLAPP suits, meaning cases having cross-border implications unless both parties are domiciled in the same Member State as the court seised.[95] In case of SLAPPs originating from third countries, EU Member States are encouraged to refuse recognition and enforcement in case the judgment is seen as manifestly unfounded or abusive in the EU Member State. SLAPP victims can receive stronger protection through the implementation of two key safeguards: early dismissal of unfounded cases and the ability for the defendant to request that the claimant cover the estimated costs of the proceedings, including the defendant's legal representation and any damages. If the defendant seeks an early dismissal, the burden of proof shifts to the claimant to demonstrate that the case has merit to proceed. Additionally, the court may impose further penalties on claimants. Member States must also ensure that third parties, with the defendant's consent, are permitted to support the defendant or provide relevant information during the proceedings, in accordance with national law. To further support SLAPP victims, Member States are required to consolidate information on procedural safeguards and remedies in a single accessible location. Additionally, Member States must publish all final judgments in SLAPP cases and gather specific data on these cases.

While the Directive is a positive step in addressing the threat of SLAPPS within the EU, issues such as the scope of the law make the effectiveness of the SLAPP Directive in practice dependent on the Member States. This can present a challenge where state institutions have initiated the suits. The independence of national courts is of vital importance in the fight against SLAPPs, as many anti-SLAPP measures are allocated with the judiciary. Identifying SLAPP suits, and when appropriate, halting them at an early stage will not work in case the claimant is a state agent and the government managed to capture the judiciary. Therefore, *ceterum censeo*, the independence of Member States' courts should be enforced by EU institutions, with a special regard to infringement and rule of law conditionality procedures.[96]

Access to information in the EU and the inclusiveness, quality and transparency of law-making and the legislative processes

The Lisbon Treaty confirms the principle of openness when it states that '(EU) decisions are taken as openly as possible and as closely as possible to the citizens'.[97] 'Legislative transparency' is now clearly stated by Article 15(2) TFEU. This provision could pave the way for a more formalised framework for legislative 'trilogues',

91 Coalition Against SLAPPs in Europe (CASE), Shutting Out Criticism: How SLAPPs Threaten European Democracy: A Report by CASE, 2022, https://www.the-case.eu/wp-content/uploads/2023/04/CASEreportSLAPPsEurope.pdf, 18.

92 United Nations Human Rights Office of the High Commissioner, The impact of SLAPPs on human rights & how to respond, 2024, https://antislapplaws.com/casedocs/UN_SLAPP_2404.pdf, J. Bayer, P. Bárd, L. Vosyliute, N. Chun Luk, *Strategic Lawsuits Against Public Participation (SLAPP) in the European Union. A comparative study*, EU-CITZEN: Academic Network on European Citizenship Rights, https://commission.europa.eu/system/files/2022-04/slapp_comparative_study_0.pdf, 6-7.

93 P. Bárd, J. Bayer, N. Chun Luk, L. Vosyliutė, Ad-Hoc Request: SLAPP in the EU context, EU-CITZEN, 2020, https://commission.europa.eu/system/files/2020-07/ad-hoc-literature-review-analysis-key-elements-slapp_en.pdf.

94 This is not the only SLAPP-related development in the EU, there is also an important case pending in front of the CJEU. So far see the Opinion of AG Szpunar delivered on 8 February 2024 in the Case C-633/22 *Real Madrid Club de Fútbol, AE v. EE, Société* Éditrice *du Monde SA*. For an analysis of the controversy see P. Milewska, Z. Nowicka, 'The Ball is in the Game: Opportunities for the Protection of Freedom of Expression at the EU Level arising from Real Madrid vs Le Monde Case', *VerfBlog* 24 April 2024, https://verfassungsblog.de/the-ball-is-in-the-game/.

95 See Recital 17 and Article 5 SLAPP Directive.

96 J. Bayer, P. Bárd, L. Vosyliute, Ngo Chun Luk, Strategic Lawsuits Against Public Participation (SLAPP) in the European Union. A comparative study, EU-CITZEN: Academic Network on European Citizenship Rights, https://commission.europa.eu/system/files/2022-04/slapp_comparative_study_0.pdf, 71-78.

97 Article 1 TEU.

for common legislative impact assessments, and for technical legal assessments. Since the Lisbon Treaty, legislative transparency has become a self-standing constitutional obligation of the co-legislator. However legislative transparency faces numerous problems resulting from secondary law and practice based on it. The main difficulty deals with the exceptions set in Regulation 1049/2001[98], especially referring to the 'protection of the decision making process'. The paradoxical outcome would be that the co-legislator may invoke confidentiality to protect a legislative negotiation that the Treaty considers should be public.

These legal inconsistencies have been detected by the European Parliament when voting on the revision of Regulation 1049/2001 in December 2011.[99] At the time the EP Plenary also framed a new regime for legislative transparency for classified documents and for the implementation of the principle of good administration by EU institutions, agencies and bodies. Unfortunately, such an ambitious revision, which is still formally pending, was not endorsed by the European Commission nor by the EU Council so that the EU and its citizens are still confronted with a secondary law (Regulation 1049/2001) and a wide practice of the EU institutions, agencies and bodies not complying with the new constitutional framework.

Clear signs in this direction are the Commission initiatives on security information (INFOSEC Draft Regulation) and the creation of 'sensitive non-classified information' (SNC). This notion is grounded on Article 17 of the Staff Regulations obligation not to disclose, without authorisation, information to which EU officials have been exposed in the course of their work, unless that information has already been made public or is accessible to the public. Business information can, *inter alia*, be considered as SNC information if it falls within the scope of the obligation of professional secrecy under Article 339 TFEU or within the 'commercial interest' exception under the first indent of Article 4(2) of Regulation 1049/2001. The Council of the European Union has taken into account the obligation of transparency of its meetings as required by Article 16(8) TEU in its internal Rules of procedures.[100] It also covers the obligation linked with access to documents.[101]

However these transparency provisions are still an exception to the general regime of confidentiality and professional secrecy rule[102] and, as with every exception, are interpreted in a strict way.

According to the Council Internal Guidelines,[103] the obligations of legislative transparency covers only the Council meetings at the ministerial level and, even if the Council is a single legal entity, covers only in a very limited way all the preparatory phase which is done at working parties and COREPER level. This approach has a huge impact on legislative transparency because ministerial debates cover only a minimal part of the legislative negotiations, as most of the Council decisions are still taken without debate and very often by a Council formation that has nothing to do with the content of the decision to be taken. But, even when a public debate takes place, it is warmly suggested by the Council Internal Guidelines to limit the Ministers' interventions at a strict minimum. Since 2015 the Council has reorganised its 130 working parties by transforming them into 'virtual communities', which are *de facto* also virtual 'sandboxes'[104] where working (WK) documents covering legislative preparatory works (also at 'trilogue level') are shared between the Community members. Several thousands of legislative WK documents are created each year but, in violation of Article 11 and 12 of Regulation 1049/2001, they are not even accessible through the Council Register of documents.[105] Not allowing (timely) access to these documents during the crucial debates that lead to a Council position is akin to forbidding

98 Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents.

99 See Legislative Procedure 2008/0090(COD).

100 Council Decision of 1 December 2009 adopting the Council's Rules of Procedure, Articles 7-9.

101 Annex II of the same ROP.

102 According to Article 5(1) of the Council Rules of Procedures, unless deliberating or voting on legislative acts, Council meetings must not be public, and Article 6(1) CRP stipulates that 'Without prejudice to Articles 7, 8 and 9 and to provisions on public access to documents, the deliberations of the Council shall be covered by the obligation of professional secrecy.

103 See Comments on the Council's Rules of Procedure - https://www.consilium.europa.eu/media/63469/20213371_pdf_qc0221838enn_002.pdf.

104 See the Council public document 7385/16 of 2 May 2016, 'Delegates Portal: a new Community Approach to document distribution'. The reorganisation of the internal production/diffusion of Council internal documents has been endorsed by the Coreper in public document 6704/13 CIS 5 work on COCOON (Council Collaboration Online). The system has been generalised to all Working Parties in 2015. See https://data.consilium.europa.eu/doc/document/ST-7385-2016-INIT/en/pdf.

105 Meijers Committee, 'Working Documents' in the Council of the EU cause a worrying increase in secrecy in the legislative process, CM2107 June 2021 https://www.commissie-meijers.nl/wp-content/uploads/2021/09/2107_en.pdf.

citizens (not to speak of the European and national parliaments) to see and access the political arena that would allow them to watch, understand and possibly participate in the legislative process (until a key part of that legislative process is finalised).

In 2022, the European Commission submitted a legislative proposal dealing with information security in the institutions, bodies, offices and agencies of the Union (so called 'INFOSEC' Proposal).[106] If adopted as it stands, it may even pave the way for the transformation of the 'EU Bubble' into a sort of (administrative) fortress and substitute the principle of 'transparency by design' with the principle of 'confidentiality by design'. In principle, the objective as announced in the title of the proposal is legitimate: granting a comparable level of protection in all the EU institutions, agencies and bodies, for information and documents, which, according to the law, should be protected. To do so a wide inter-institutional coordination group is proposed, as well as a network of security officials in all the EU entities and a securitised informatic network (TEMPEST) is foreseen. A concern is that, in parallel with the definition of the physical security of EU information, this proposal on one side redefines the conditions of treatment, access and sharing of all kinds of information/documents treated by the EU institutions, agencies and bodies by so overlapping and modifying Regulation 1049/2001 following a different logic. If the principle of Regulation 1049/2001 is to frame the right to know of EU citizens by granting that everything is public unless a specific exception is applicable, the logic of the new Commission proposal is that almost all internal documents should be protected and shared only with people with a recognised 'need to know' unless the document is marked as 'public'.

With the new legal regime, the Commission, by endorsing and widening at the legislative level the current Council internal security rules, is proposing to go back to the pre-Maastricht era when it was up to the EU institutions to decide whether or not to give access to their internal documents. But since the Amsterdam Treaty (Article 255 ECT) and, even more, since the Lisbon Treaty, this practice is no longer compatible within an EU that is bound by the rule of law.

The core of the proposed INFOSEC Regulation is the creation and management of EU classified information (EUCI). By doing so, it substantially amends Article 9 of Regulation 1049/2001, which deals with so-called 'sensitive documents'. It does not regulate how the information should be classified and declassified in the interests of the EU, as opposed to the interests of the originator (whether that be a member State, EU institution, agency or body). Article 9 of Regulation 1049/2001 recognises the so-called 'originator privilege' only in the domain of 'sensitive' documents and information, and it is an exception to the general philosophy of Regulation 1049/2001 according to which the EU institutions may only be bound by law and not by the will of an 'author', even if it were an EU Member State. What the INFOSEC proposal does is transform the exception of the 'originator principle' in a rule against the provision of Regulation 1049/2001. It does not foresee judicial oversight of classified information. It does not solve the problem of the sharing of 'sensitive information' between entities that have a legitimate 'need to know'. It threatens the EP oversight role of EU security agreements with third countries and international organisations on the exchange of classified information.

The EP has been, since its first direct election, the most supportive institution of the transparency of the EU decision making process both in the interest of the EU citizens and its own constitutional role. For decades it has challenged the Council and Commission reluctance when sharing the relevant information on what was happening on the ground inside or outside the EU. The Court of Justice has recognised in several cases that the EP's right to relevant information is explicitly recognised by the Treaty notably for international agreements (Article 218 (10) TFEU). Instead of pushing the Council towards an open 'parliamentary' approach to legislation, the EP has followed the Council 'diplomatic' approach notably in the crucial phase of inter-institutional negotiations ('trilogues') even when, as is normally the case, these negotiations take place in the first parliamentary 'reading'. Although the CJEU considers the documents shared within the trilogues meetings as 'legislative' , the European Parliament does not yet publish these documents as it does with other legislative documents such as the Commission proposal, its amendments, and positions. It has started publishing them in its Register of Documents since March 2023 but only after specific requests for access by EU citizens and after a consistent delay so that the information becomes available when the agreements have been reached. This practice does not fit with Article 15(2) TFEU nor with the CJEU jurisprudence according to which '[i]n' a system based on the principle of democratic legitimacy, co-legislators must be answerable for their actions to the public and if citizens are to be able to exercise their democratic rights they must

106 Procedure 2022/0084/COD.

be in a position to follow in detail the decision-making process within the institutions taking part in the legislative procedures and to have access to all relevant information.'[107]

2.4 Other institutional issues linked to checks and balances

The Fundamental Rights Agency and EU Ombudsman

The EU rule of law crisis often involves complicated legal disputes on constitutional issues. The Fundamental Rights Agency was not however involved in any of those major cases of rule of law backsliding in the EU, nor in providing its expertise in related actions, for example the Article 7 procedure. The potential role of the FRA has not been used in the Rule of law framework procedure against Poland either (2016-2017), despite the fact the Commission provided for such an opportunity in its 2014 communication. It is likely due to the fact that such situations and actions remain outside the scope of the FRA mandate.[108] It seems that there were no attempts by the European Commission to involve FRA in solving the rule of law crisis in the EU Member States. Instead the Commission prefers to rely on the Venice Commission's Opinions.

Another institutional check at the EU level is the EU Ombudsman tasked with holding the EU's institutions and agencies to account, and promoting good administration. By dealing with individual complaints aims to solve issues which might never reach the CJEU in fields such as access to documents,[109] transparency[110] or human rights protection in the context of migration.[111]

Enabling framework of civil society

The European Commission underlined on numerous occasions that civil society organisations (CSOs) and human rights defenders' are essential to bring life to and protect the values and rights enshrined in the Treaties and Charter.[112] The Commission's 2020 strategy to strengthen the application of the Charter of Fundamental Rights stated that empowering civil society organisations, rights defenders and justice practitioners is one of the actions taken in order to strengthen the application of the Charter.[113] Furthermore, the Commission stated in a 2022 report on civic space that the recognition of the key role of the civic space 'is reflected in the functioning of the EU and in its policies'.[114]

Rule of law related procedures in the EU offer a rather limited access of CSO to EU institutions deciding on rule of law issues (such as the Article 7 TEU procedure). The consultations with stakeholders conducted by the European Commission while preparing the Annual Rule of Law Report are the positive exception here. The procedure in the Council 'offers neither a process nor opportunities for consulting with the public in its legislative and

107 Case T-163/21 *De Capitani v Council*.

108 L. Pech, J. Grogan, 'Upholding the rule of law in the EU. What role for FRA?' in R. Byrne, H. Entzinger (eds.), *Human Rights Law and Evidence-Based Policy. The Impact of the EU Fundamental Rights Agency*, Routledge 2019, 219-236.

109 Review of the Ombudsman's work in the area of public access to documents for the years 2021 to 2023, 25 April 2024 – https://www.ombudsman.europa.eu/en/document/en/185485; How the European Parliament, the Council of the EU and the European Commission deal with requests for public access to legislative documents, Case OI/4/2023/MIK https://www.ombudsman.europa.eu/en/case/en/64321.

110 Strategic Initiative on improving the European Parliament's Ethics and Transparency Framework (SI/1/2023/MIK) – https://www.ombudsman.europa.eu/en/doc/correspondence/en/178878.

111 Human rights impact assessment in the context of the EU-Turkey Agreement – https://www.ombudsman.europa.eu/en/decision/en/75160; Human rights impact by the European Commission before providing support to African countries to develop surveillance capabilities – https://www.ombudsman.europa.eu/de/decision/en/163491; How the European Border and Coast Guard Agency (Frontex) complies with its fundamental rights obligations and ensures accountability in relation to its enhanced responsibilities – https://www.ombudsman.europa.eu/en/decision/en/151369.

112 2023 Rule of law report. The rule of law situation in the European Union, Brussels 5 July 2023, COM(2023) 800 final, 26. See Article 11 (1) and (2) TEU and Article 15(1) TFEU.

113 European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. Strategy to strengthen the application of the Charter of Fundamental Rights in the EU, Brussels, 2.12.2020, COM(2020) 711 final, 2

114 European Commission, Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee and the Committee of the Regions. A thriving civic space for upholding fundamental rights in the EU. 2022 Annual Report on the Application of the EU Charter of Fundamental Rights, Brussels 6 December 2022, COM(2022) 716 final, 29.

non-legislative activities'.[115] As a result, the premature closing of the Article 7(1) TEU procedure against Poland did not involve consultations with any domestic stakeholders (except the government). Civil society's participation in the rule of law procedures should be strengthened legally and practically.

Meanwhile it is commonly known that a safe civic space has been shrinking in several EU Member States,[116] which may even further limit the CSOs' involvement in the EU rule of law related procedures. One of the obstacles are 'foreign-agents-type of legislation' introduced by several EU Member States. In December 2023 the European Commission published a proposal for a Directive on Transparency of Interest Representation on behalf of Third Countries,[117] which applies similar tools as already existing domestic regulations. This time however, Member States will be obliged to introduce them when transposing the proposed directive.[118] The Commission's proposal was criticised by numerous civil society organisations[119] who are afraid that the new directive will involve stigmatisation and can 'pose potential dangers in the hands of autocratic, xenophobic, or otherwise vindictive leaders'.[120] Furthermore, 'the directive stems from the false assumption that nonprofits whose public-interest activities are funded from abroad are duty-bound to advocate for the country that pays them'.[121] Proposing such a directive might be perceived as another example of EU double standards, due to the fact that similar legislation in EU states and third states were (correctly) criticised. It was suggested that introducing transparency obligations covering all (foreign and internal) interest representatives would allow a much better solution.[122] The debate surrounding the draft directive is closely related to Qatargate, however 'instead of seizing the opportunity to address its own system post-Qatargate, the EU opted to propose a Directive, indicating Member States as potential areas of concern'.[123]

Frontex and EU accountability

The EU Border and Coast Guard agency (Frontex) was established in 2004. Since the inception of its operations, serious or persistent violations of fundamental rights or international protection obligations related to its activities have been documented and reported.[124] Violations under EU law have been reported since Frontex started operating in the Aegean Sea region (ASR) in 2006.[125] In 2020, Greece suspended and criminalised the right to asylum on land,[126] and introduced novel

115 M. Pardavi, B. Knoll-Tudor, 'Europe Needs a Civil Society Strategy', *VerfBlog* 29 June 2022 https://verfassungsblog.de/europe-needs-a-civil-society-strategy/.

116 Protecting civil society – Update 2023, FRA 2023 – https://fra.europa.eu/en/publication/2023/civic-space-2023-update.

117 COM/2023/637 final - https://commission.europa.eu/document/9cc58fb0-8b39-467c-8e66-38fd-5f9b4992_en.

118 T. Petrovic, EU's 'Foreign Agent Law' Is Misguided, Balkan Insight 8 May 2024 – https://balkaninsight.com/2024/05/08/eus-foreign-agent-law-is-misguided/.

119 EU Foreign Interference Law: Is Civil Society at Risk? Why we are against an EU FARA law – https://civilsocietyeurope.eu/wp-content/uploads/2023/07/230-Civil-Society-Organisations-Statement-on-EU-Foreign-Interference-Law-7-2.pdf.

120 E. Korkea-aho, 'This Is Not a Foreign Agents Law': The Commission's New Directive on Transparency of Third Country Lobbying, *VerfBlog* 19 December 2023, https://verfassungsblog.de/this-is-not-a-foreign-agents-law/.

121 T. Petrovic, EU's 'Foreign Agent Law' Is Misguided, Balkan Insight 8 May 2024 – https://balkaninsight.com/2024/05/08/eus-foreign-agent-law-is-misguided/.

122 M. Jones, 'Planned EU foreign influence law will not criminalise or discriminate, Brussels says', *Euronews* 12 December 2023 – https://www.euronews.com/my-europe/2023/12/12/planned-eu-foreign-influence-law-will-not-criminalise-or-discriminate-brussels-says.

123 E. Korkea-aho, 'This Is Not a Foreign Agents Law': The Commission's New Directive on Transparency of Third Country Lobbying.

124 See, e.g., I. Kalpouzos, I. Mann, 'Banal Crimes against Humanity: The Case of Asylum Seekers in Greece' *Melbourne Journal of International Law* 2015.

125 Frontex, '*Beyond the Frontiers, Frontex: The First Five Years*' (Warsaw 2010), https://www.frontex.europa.eu/assets/Publications/General/Beyond_the_Frontiers.pdf, at 37 and 84. See, for example: Amnesty International, 'FRONTIER EUROPE: Human Rights abuses on Greece's border with Turkey', July 2013, https://www.amnesty.org/en/documents/eur25/008/2013/el/; Human Rights Watch, 'Greece: Attacks on Boats Risk Migrant Lives', 22 October 2015 https://www.hrw.org/news/2015/10/22/greece-attacks-boats-risk-migrant-lives; M. Stevis-Gridneff, S. Kerr, K. Bracken, N. Kirac,'Greece Says It Doesn't Ditch Migrants at Sea. It Was Caught in the Act', New York Times May 2023, https://www.nytimes.com/2023/05/19/world/europe/greece-migrants-abandoned.html.

126 Human Rights Watch, 'Greece Restarts Suspended Asylum Procedure', 5 June 2020, https://www.hrw.org/news/2020/06/05/greece-restarts-suspended-asylum-procedure#:~:text=Greece's%20month%2Dlong%20suspension%20of,19%2C%20but%20is%20now%20operating.

'preventive measures' at sea.[127] Frontex's Director acknowledged these 'prevention of departure' practices, and admitted Frontex *'do not know how to qualify them legally'*,[128] but launched operation 'Rapid Border Intervention (RBI) Aegean' to support them,[129] in arguable breach of EU law.[130]

In 2019 a case filed to the International Criminal Court (ICC) accused Frontex agents and EU officials of crimes against humanity in connection with its policies in the Central Mediterranean and Libya.[131]

The case focused on three policies: the systemic and wilful omission to rescue asylees in distress at sea, notably under Joint Operation Triton,[132] which caused the death of about 25,000 civilians in the past decade;[133] the campaign to oust from the Mediterranean NGOs who, following JO Triton's withdrawal of Search and Rescue (SAR) services, were rendering assistance to asylees in distress;[134] and the reconstruction and recruitment of Libyan militias and mercenaries who were tasked with doing what is since 2012 considered unlawful under EU, European and international law:[135] to capture and forcibly transfer survivors to Libyan facilities where, as per the ICC Chief Prosecutor, they are subjected to countless crimes against humanity (CAH).[136] From 2016 to date, more than 120,000

127 During a meeting of the European Parliament's Committee on Civil Liberties, Justice and Home Affairs (LIBE) in July 2020, the Greek Minister of Migration and Asylum confirmed this policy change: '*...a series of decisions have been taken...focusing on the early detection of migrants prior to their entry to the EU waters, to prevent an unauthorised border* crossing' (European Parliament, 'LIBE Committee meeting', 6 July 2020, 17:03:18–17:04:00), and Greek MP Georgios Koumoutsakos confirmed that, as of March 2020, '*...nothing is the same in the overall management of the migration pressure*' (Ibid., 17:08:30–17:08:58).

128 European Parliament, 'Committee on Civil Liberties, Justice and Home Affairs', 1 December 2020, 14:08:15–14:10:40.

129 Frontex, 'Rapid border intervention requested by Greece on March 2020', (29 September 2022), available online at: https://prd.frontex.europa.eu/document/rapid-border-intervention-requested-by-greece-on-march-2020/.

130 Article 46(5) of the Regulation (EU) 2019/1896 of the European Parliament and of the Council of 13 November 2019 on the European Border and Coast Guard and repealing Regulations (EU) No 1052/2013 and (EU) 2016/1624; Fundamental Rights Officer, 'RAPID BORDER INTERVENTION AEGEAN 2020 FRO Observations' (Warsaw, 4 March 2020), ('...the FRO is deeply concerned about the intended suspension for the period of one month the applications for provision of asylum requests...as well as return without registration of the irregular migrants... [which] risks to compromise the Agency ability to comply with Article 80(1) of the EBCG Regulation 2019/1896 according to which the Agency shall guarantee the protection of fundamental rights... There is a high risk that unlawful procedures may negatively affect persons in need of international protection and other vulnerable groups'): https://fragdenstaat.de/dokumente/9690-fro-observations-to-draft-oplan-rapid-border-intervention-aegean-2020/.

131 O. Shatz, J. Branco, 'Communication to the Office of the Prosecutor of the International Criminal Court Pursuant to the Article 15 of the Rome Statute: EU Migration Policies in the Central Mediterranean and Libya' (2014-2019) (June 3, 2019) https://www.statewatch.org/media/documents/news/2019/jun/eu-icc-case-EU-Migration-Policies.pdf.

132 See, e.g., Ch. Heller, L. Pezzani, *Death by Rescue: The Lethal Effects of the EU's Policies of Non-Assistance at Sea* (London: Forensic Oceanography, 18 April 2016), 6.

133 According to the most conservative figures, between 2014 and 2022, more than 50,000 people have lost their lives during 'migratory movements'. More than half of these deaths, 29,126, occurred on routes to and within Europe. 86% of these deaths, 25,104 people, occurred in the Mediterranean Sea. The deadliest migration route is the Central Mediterranean, with 20,122 deaths. In comparison, during the same period, 6,905 'migrants' died in North American, Central American, South American and the Caribbean routes. See J. Black, Z. Sigman, *50,000 Lives Lost During Migration: Analysis of Missing Migrants Project Data 2014-2022* (Berlin: IOM GMDAC, 2022), https://missingmigrants.iom.int/sites/g/files/tmzbdl601/files/publication/file/2022%2050k%20deaths.pdf. K. Dearden et al., 'Calculating 'Death Rates' in the Context of Migration Journeys: Focus on the Central Mediterranean,' *GMDAC Briefing Series: Towards safer migration in Africa: Migration and Data in Northern and Western Africa* (2020), https://publications.iom.int/system/files/pdf/mortality-rates.pdf.

134 'Fundamental rights considerations: NGO ships involved in search and rescue in the Mediterranean and criminal investigations: Tables and figures,' European Union Agency for Fundamental Rights, updated Oct. 1, 2018, table 2, https://fra.europa.eu/sites/default/files/fra_uploads/fra-2018-ngos-sar-med-iterranean_en.pdf. Compare with 'June 2022 Update – Search and Rescue (SAR) operations in the Mediterranean and fundamental rights,' European Union Agency for Fundamental Rights, updated June 20, 2022, https://fra.europa.eu/en/publication/2022/june-2022-update-ngo-ships-sar-activities.

135 Judgment of ECtHR of 23 February 2012, *Hirsi Jamaa and Others v. Italy*, App. No. 27765/09

136 Office of the Prosecutor, 'Statement of ICC Prosecutor to the UNSC on the Situation in Libya,' statement, 9 May 2017 ('serious and widespread crimes allegedly committed against migrants attempting to transit through Libya...I am deeply alarmed by reports that thousands of vulnerable migrants, including women and children, are being held in detention centers across Libya in often inhumane conditions. Crimes, including killings, rapes and torture, are alleged to be commonplace... I am similarly dismayed by credible accounts that Libya has become a marketplace for the trafficking of human beings...The situation is both dire and unacceptable... my Office is carefully examining... opening an investigation into migrant-related crimes in Libya... We must act...'), https://www.icc-cpi.int/news/statement-icc-prosecutor-unsc-situation-libya.

survivors were shipped to these camps.[137] In 2023 the UN Human Rights Council partially confirmed the allegations made in the ICC case, finding that EU agents are complicit in CAH against 'migrants' in the Central Mediterranean and Libya.[138]

Case-law concerning the organisation evidences issues with regard to the accountability of Frontex, as well as the further and severe rule of law concerns related to access to judicial review and effective remedies. The CJEU is the sole tribunal with competence to conduct judicial oversight over Frontex's policies, to provide judicial protection and remedy to individuals subject to Frontex policies, and to hold the agency to account.[139]

In 2021, the first human rights case against Frontex was filed to the CJEU.[140] The case, which concerned EU policy in the Aegean Sea, argued that Frontex's Executive Director had failed to act by not terminating operations despite serious or persistent violations of fundamental rights or international protection obligations by the Hellenic Coast Guard that are related to these operations.[141] The CJEU procedurally rejected the case, but its ruling expanded the procedural access of victims to the Court. Bridging an accountability gap in the EU's 'complete system of legal remedies', the Court paved the way for victims to seek annulment of policies that breach their fundamental rights beyond the 2-month limitation period that EU law prescribes. In 2022 a second case was filed against Frontex seeking the annulment of Frontex's operations in the Aegean Sea.[142] The case relied on the EU's Anti-Fraud Office (OLAF) report, whose undisputed body of evidence corroborated all the factual and legal allegations raised in the first CJEU case.[143] Based on OLAF's findings, proceedings have also been instituted against the EU Commission seeking the immediate dismissal of Frontex's Executive Director,[144] who resigned whilst these proceedings were pending. Two other legal actions that were filed against Frontex are claims related to damages its victims have already incurred.[145] Both these EU cases have been rejected by the General Court for procedural reasons, and are now pending appeal before the ECJ.[146]

Absence of checks and balances in relation to the use of EU money

The investment of EU funds into external migration management beyond EU borders,[147] which do not guarantee human rights protections, raises severe concerns for the accountability of its decision-making and practices. The paradigmatic example is the European Union Emergency Trust Fund (EUTF) for Africa which was created in 2015

137 Ch. Oberti, 'Mediterranean Sea: Migrant boat departures from eastern Libya on the rise,' *InfoMigrants*, 30 November 2022, https://www.infomigrants.net/en/post/45041/mediterranean-sea-migrant-boat-departures-from-eastern-libya-on-the-rise; M. Emad, 'German Doctor Accuses Libyan Coast Guard of Threatening Her,' *Libya Review*, 13 November 2022, https://libyareview.com/29056/german-doctor-accuses-libyan-coast-guard-of-threatening-her/; In 2020 and 2021, for example, the Libyan Coast Guard (LYCG) intercepted almost 12,000 and 32,425 'migrants', respectively. See United Nations Support Mission in Libya (UNSMIL), 2021. Report of the Secretary-General, 19 January 2021. UN Doc S/2021/62, 10; According to UN International Organization for Migration in Libya, in 2022 the LYCG intercepted 24,684 'migrants' and in the first three months of 2023 it intercepted 4,245 'migrants' - https://x.com/IOM_Libya/status/1642835740131311617.

138 U.N. Doc. A/HRC/48/83, including Annexes I and II; UN Human Rights Council Rep. of the Independent Fact-Finding Mission on Libya on Its Forty-Eighth Session, U.N. Doc. A/HRC/52/83, (3 March 2023); See also 'Independent Fact-Finding Mission on Libya – Press Conference,' United Nations, 27 March 2023, 54:06 (explicitly qualifying the involvement of European nationals as aiding and abetting CAH), https://www.youtube.com/watch?v=Iv--tlulk-A.

139 See Articles 263, 265 and 340 TFEU. See also O. Shatz, I. Cohen, S. Easy, 'Who Guards the Guards? The legal responsibility of Frontex in the Aegean Sea under EU law', Heinrich Böll Foundation 2023, https://gr.boell.org/en/2023/12/08/who-guards-guards.

140 See Order of the General Court of 7 April 2022, *SS and ST v. Frontex*, Case T-282/21. See also See, e.g., M. Fink, 'Why it is so Hard to Hold Frontex Accountable: On Blame-Shifting and an Outdated Remedies System' (26 November 2020), EJIL!, https://www.ejiltalk.org/why-it-is-so-hard-to-hold-frontex-accountable-on-blame-shifting-and-an-outdated-remedies-system/.

141 Within the meaning of Article 46(4) of Frontex Regulation and in connection with multiple serious breaches of the EU Charter of Fundamental Rights.

142 Case T-600/22 *ST v. Frontex*.

143 A leaked version has been published by FragDenStaat, see https://fragdenstaat.de/dokumente/233972-olaf-final-report-on-frontex/.

144 N. Nielsen, 'EU commissioner risks court action over Frontex', EUObserver, 24 March 2022, https://euobserver.com/world/154567.

145 Case T-600/21, *WS and Others v Frontex*; Case T-136/22, *Alaa Hamoudi v. Frontex*

146 C-679/23 P, *WS and Others v. Frontex*; C-136/24 P, *Hamoudi v. Frontex*.

147 I. Urbina, *The Secretive Prisons that Keep Migrants out of Europe*, New Yorker (28 November 2021), https://www.newyorker.com/magazine/2021/12/06/the-secretive-libyan-prisons-that-keep-migrants-out-of-europe.

through a constitutive agreement[148] concluded between the Commission, which adopted a prior decision on it,[149] and donor states – EU Member States, the United Kingdom, Norway and Switzerland. Major beneficiaries of this fund, including the Libyan Coast Guard[150] and the General Directorate for Combating Illegal Migration[151] in Libya, have been implicated in serious human rights violations as documented by journalists,[152] NGO's[153] and the European Ombudsman.[154] As the EUTF for Africa is an 'EU Development Fund', it is outside of the EU budget and therefore not automatically subject to European Parliament scrutiny.[155] Trust funds for emergency or post-emergency actions have their own flexible governance rules, management modes and conditions.[156] Rule of law concerns regarding the fund include the lack of transparency and accountability in spending.[157] The initial strategic guidance was framed so broadly that it attracted strong criticism from the European Court of Auditors.[158] Although there were slight improvements following the Auditors' report, especially in terms of communication and visibility, the core idea of spending money in full obscurity remains.[159]

The EUTF for Africa came to an end at the end of December 2021 although projects will continue to run (and money for it disbursed) until June 2025.[160] The Fund has been transposed into the EU Budget under the Neighbourhood, Development and International Cooperation–Global Europe

148 See also Constitutive Agreement Establishing the European Emergency Trust Fund for Stability and Addressing the Root Causes of Irregular Migration and Displaced Persons in Africa, arts. 4-6, 12 November 2015; The Director General for International Cooperation and Development signed the agreement. See also, European Union Emergency Trust Fund for stability and addressing root causes of irregular migration and displaced persons in Africa, *Board Meeting Minutes* (12 November 2015), https://ec.europa.eu/trustfundforafrica/sites/default/files/minutes_1st_eutf_for_africa_board_meeting_0.pdf, at 3.

149 Commission Decision on the establishment of a European Union Emergency Trust Fund for stability and addressing root causes of irregular migration and displaced persons in Africa, Brussels, 20.10.2015 C(2015) 7293 final (20 October 2015).

150 The maritime authorities are the General Administration for Coastal Security (GACS) and the Libyan Coast Guard and Port Security (LCGPS).

151 DW, Refugee mistreatment in Libyan trafficking camps (29 January 2017), https://www.dw.com/en/libyan-trafficking-camps-are-hell-for-refugees-diplomats-say/a-37318459.

152 Urbina, *op. cit.*; *Migrants being sold as slaves*, CNN (13 November 2017), http://edition.cnn.com/videos/world/2017/11/13/libya-migrant-slave-auction-lon-orig-md-ejk.cnn.

153 *Italy-Libya agreement: Five years of EU-sponsored abuse in Libya and Central Mediterranean*, Médecins sans Frontières (MSF) (2 February 2022), https://www.msf.org/italy-libya-agreement-five-years-eu-sponsored-abuse-libya-and-central-mediterranean; *An emergency for whom? The EU Emergency Trust Fund for Africa – migratory routes and development aid in Africa*, Oxfam (15 November 2017), https://www-cdn.oxfam.org/s3fs-public/file_attachments/bp-emergency-for-whom-eutf-africa-migration-151117-en_1.pdf.

154 European Ombudsman, Decision on how the European Commission assessed the human rights impact before providing support to African countries to develop surveillance capabilities (case 1904/2021/MHZ).

155 Article 42 of Council Regulation 2015/323, Financial regulation applicable to the 11th European Development Fund, 2015 O.J. (L 58) 17 (repealed by Council Regulation 2018/1877, Financial regulation applicable to the 11th European Development Fund, 2018 O.J. (L 307) 1 and replaced by its Article 35). Until the NDICI Regulation (see below), the Development Fund was not regulated by the budgetary common rules and procedures for the implementation of the Union's instruments for financing external action.

156 Article 187 of Parliament and Council Regulation 2012/966, Financial rules applicable to the general budget of the Union, 2012 O.J. (L 298) 1 (repealed by Parliament and Council Regulation 2018/1046, Financial rules applicable to the general budget of the Union, 2018 O.J. (L 193) 1) and replaced by its Article 234).

157 For instance, the procedure of elaboration of project proposals and attribution is absolutely non-transparent, as in the case of Tunisia where neither the preliminary projects drafts nor the projects' logical frameworks (consisting of detailed objectives and indicators) are available publicly. Neither the amendments are shared publicly and in general description of activities remain unspecified: F. Raach et al., Country report Tunisia, Brussels, *CEPS* 19 (2022), at 45, https://www.asileproject.eu/.

158 European Court of Auditors, EU readmission cooperation with third countries: relevant actions yielded limited results, Special Report n°17, at 13 (2021).

159 Ibid.

160 European Commission, Southern Neighbourhood, https://neighbourhood-enlargement.ec.europa.eu/european-neighbourhood-policy/southern-neighbourhood_en.

Instrument (NDICI).[161] This instrument merges former EU external financing instruments (12 in total), including the Development Fund, and covers development cooperation with third-countries.[162] Ten percent of the NDICI is devoted to supporting management and governance of migration.[163] There continues to be a lack of transparency plaguing the NDICI Regulation's application, which affects the monitoring and democratic scrutiny of the NDICI migration-related projects by the European Parliament. As Estela Casajuana and Giorgia Jana Pintus explain, 'this opacity raises concerns about the accountability of the decision and makes it even more difficult to gauge how the allocated funds will be distributed and utilized'.[164] Finally, like for the EUTF for Africa, there is little to no consideration for the human rights aspect of the projects and activities funded under the NDICI, with the absence of any *ex-ante* and *ex-post* monitoring and assessment of this aspect of its funding, while the respect of human rights constitutes a *sine qua non* condition for the release of the funds under Articles 3, 8 and 29 of the NDICI Regulation.[165]

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161 Regulation (EU) 2021/947 of the European Parliament and of the Council of 9 June 2021 establishing the Neighbourhood, Development and International Cooperation Instrument – Global Europe, amending and repealing Decision No 466/2014/EU and repealing Regulation (EU) 2017/1601 and Council Regulation (EC, Euratom) No 480/2009, 2021 O.J. (L 209) 1 (hereafter: 'NDICI Regulation').

162 Except for pre-accession beneficiaries and the overseas countries. *See* NDICI Regulation, Recitals 28, 50, 51, 64, 69, Article 3(a), 2(c)(iv), d(i), Article 8(10), Article 10(c), Article 11(d)(v), Article 18(f). *See* also Annex II(3) and Annex III (4)(A)(5), Annex V(f).

163 Recital 51, Preamble of the NDICI Regulation.

164 E. Casajuana, G.J. Pintus, 'Beyond borders, beyond boundaries. A Critical Analysis of EU Financial Support for Border Control in Tunisia and Libya', Research commissioned by the Greens/EFA in the European Parliament 14 (2023), https://extranet.greens-efa.eu/public/media/file/1/8607zzzzzz at 47.

165 Eg. Ibid. at 43. Commission, Action Document to support countries in the Southern Neighbourhood for the management of migration flows for 2023 (Annual Action Plan), https://shorturl.at/rLRcu. Along the same lines, see European Commission, Action Document for Support to Cross-Border Cooperation and Integrated Border Management in North Africa (2022), https://shorturl.at/J9IIT and European Commission, Action Document for EU Support to Border Management Institutions in Libya and Tunisia (2021), https://shorturl.at/5inOf.

3. Developments

3.1 EU actions to uphold the rule of law within Member States

As guardian of the Treaties tasked with upholding the rule of law within the Union, the Commission has several preventive and corrective measures available for its use as part of the EU's 'Rule of Law toolbox'. These include the European Rule of Law Mechanism incorporating the annual Rule of Law Report, as well as infringement actions and the Article 7 TEU mechanism. The last several years have also witnessed the introduction of further tools to uphold rule of law standards, including the Rule of Law Conditionality Regulation which came into force in January 2021. However, an emerging issue is the apparent politicisation of their use resulting in threats to and violations of the rule of law being left unaddressed.

Since 2021, the Annual Rule of Law Report includes recommendations on how countries can improve standards. While the Commission's report has become a benchmark for the EU institutions' work on rule of law issues in the EU and in specific Member States and the inclusion of country-specific recommendations is welcome, evidence that the report has had a tangible impact on the autocratisation in the EU is heavily disputed. The latest 2024 report headlines that 68% of recommendations have been 'fully or partially' followed by Member States, an improvement on 65% in 2023. However, the Court of Auditors has highlighted several shortcomings in relation to how the Commission has assessed full implementation, significant or some progress, noting that in the case of Hungary, a 2023 recommendation had been assessed as 'fully implemented' on the mere basis that a new law had been adopted with no regard as to whether the law had been implemented in practice.[166] Subsequently, another study has concluded that only 19% of recommendations were significantly progressed or fully implemented, while in the case of 50% of recommendations, Member States did the bare minimum such as announcing or initiating measures. As there are no consequences tied with failing to follow a recommendation, there is little incentive for Member States not otherwise committed to rule of law improvement. Hungary and Slovakia made little or no progress on recommendations in 2024.

Infringement actions to protect the rule of law have also been underutilised by the Commission, acting with an insufficient sense of urgency in certain critical cases. The European Parliament has called on the Commission 'to step up the number of new infringement procedures and to push forward existing infringement procedures with more audacity and urgency'.[167] Notwithstanding the repeated claims that it has taken unprecedented action to uphold the rule of law, the von der Leyen Commission has taken two infringement actions against Poland[168] out of a total of five infringement actions related to the rule of law launched since the beginning of Poland's rule of law crisis.[169] The rule of law has been particularly vulnerable to the Commission's unwillingness to fulfil its Treaty function, as the general number of actions brought by the Commission to the Court is in significant decline over the last years.[170]

In May 2024, the Commision withdrew the Article 7(1) TEU reasoned proposal it adopted in December 2017 against Poland.[171] The abrupt and opaque manner in which the Commission has done so raises once again the most serious questions in relation to the Commission's objectivity and due respect for its procedural obligations. The Commission considered that there is no longer a clear risk of a serious breach of the rule of law in Poland without publishing either the Polish government's rule of law action plan or the 'information note' it shared with the Council. This seems to suggest that according to the Commission, it has unlimited discretion to decide whether to close a pending Article 7(1) procedure

166 European Court of Auditors, The Commission's rule of law reporting, Review 02/2024, 39. See also Liberties, 'European Commission's Rule of Law Report 2024: Gap Analysis', 14 October 2024: https://www.liberties.eu/en/stories/rule-of-law-2024-gap-analysis/45166

167 Resolution of 28 February 2024 report on the Commission's 2023 Rule of Law report, ibid., para. 78.

168 Case C-204/21 regarding Poland's muzzle law and pending Case C-448/23 regarding Poland's Constitutional Court.

169 For further analysis and references, see L. Pech, The European Court of Justice's jurisdiction over national judiciary-related measures, PE 747.368, April 2023.

170 R.D. Kelemen, T. Pavone, 'Where Have the Guardians Gone? Law Enforcement and the Politics of Supranational Forebearance in the European Union', *World Politics* 2023 (74)4, 779.

171 'Commission intends to close Article 7(1) TEU procedure for Poland', IP/24/2461, 6 May 2024.

on the basis of an undisclosed assessment without any public reasoning after several hearings having been organised by the Council. The Commission's decision risks 'a perception of favouritism' and politicised assessment in addition to providing a precedent whereby Article 7(1) scrutiny may be ended on the basis of an 'action plan' of no legal value and a few 'concrete steps' to implement the action plan.

In terms of the Rule of Law Conditionality Mechanism and the power to withhold funds, the Commission indicated that the power to withhold funds 'has been proven effective' in respect of both Hungary and Poland. However, the positive assessment of Hungarian judicial reforms by the Commission has been challenged. In March 2024, the Parliament took the rare step of suing the Commission, having previously sued it for failing to act in October 2021.[172] In support of its annulment application before the CJEU, the Parliament has *inter alia* claimed that the Commission's assessment 'merely lists the amendments that were adopted to Hungarian legislation and rules but provides no substantive explanations that would allow the reader to understand the reasons underlying the positive assessment of the fulfilment of the horizontal enabling condition'.[173] The Court of Auditors has warned that 'although decisions not to block or to release EU funds should be based on technical and legal analysis, the EU auditors emphasise that political considerations may ultimately play a major role.'[174] The Commission refused to disclose documents related to exchanges between it and Hungary on judicial independence, which is now subject to an investigation by the European Ombudsman.[175]

The legislative changes that Poland adopted in June 2022 were found to be insufficient to meet rule of law benchmarks. However, following the election of the new government in December 2023, the Commission unlocked previously suspended funding in February 2024. The Commission's assessment that the country had then met its 'rule of law milestones' was found deficient and in part potentially unlawful by several members of the von der Leyen Commission. The decision also led the first set of annulment actions brought by several associations of European judges against the Commission for disregarding the rule of law case-law of the CJEU for reasons of political expediency.[176]

The Court of Auditors found that, while the decision to adopt measures under the Conditionality Regulation in respect of Hungary was duly justified, for countries other than Hungary, 'the auditors could not always verify the reasons for using one tool rather than another' which means that 'the European Commission cannot transparently demonstrate that the EU's financial interests are properly protected across all Member States.'[177] For example, notwithstanding requests the Commission received from the EPPO, it has not used the Regulation in respect of Slovakia. The overall impression is one of uncertainty as to when political considerations may prevail over legal ones when it comes to the activation of the Rule of Law Conditionality Regulation, even in situations where the conditions for its use have been manifestly met.

The Commission closed the Cooperation and Verification Mechanism with regard to Bulgaria and Romania in September 2023. However, the Court of Auditors disagreed with the Commission's positive assessment of the rule of law situation in both states. The Court of Auditors noted in February 2024 that there has been no further reporting under the CVM since 2019 for Bulgaria 'despite the Commission itself acknowledging that Bulgaria must continue its reforms' and the Commission also acknowledging that 'further reforms are necessary' as regards Romania. The Court of Auditors furthermore remarked that the Commission's own country reports highlight a 'number of issues relevant to the CVM benchmarks, which would require further action by both Member States.'[178] There has been circumstantial evidence prior to the closure of the CVM of political considerations – in particular partisan loyalty considerations – playing once again an undue role in the assessment of the rule of law situations in both Bulgaria and Romania. The politicisation of

172 Action for failure to act brought on 29 October 2021 and withdrawn in May 2021, Case C-65/21 *European Parliament v. European Commission.*

173 Action brought on 25 March 2024, Case C-225/24 *Parliament v. Commission* C/2024/3063..

174 European Court of Auditors, 'EU's finances not yet immune to rule-of-law breaches', press release, 21 February 2024: https://www.eca.europa.eu/en/news/NEWS-SR-2024-03.

175 Case 849/2024/PPV, case opened on 17 May 2024.

176 Joined cases T-530/22 to T-533/22, *Medel and others v. Council and Commission. Appeal pending - Case C-555/24 P, Medel and Others v. Council.*

177 European Court of Auditors, 'EU's finances not yet immune to rule-of-law breaches', press release, 21 February 2024: https://www.eca.europa.eu/en/news/NEWS-SR-2024-03.

178 European Court of Auditors, The rule of law in the EU – An improved framework to protect the EU's financial interests, but risks remain, special report 03/2024, para. 57.

the Commission's formal rule of law assessments seems to be an increasingly shared diagnosis.

A former transport minister claimed in March 2024 that the Commission's technical experts were being overruled politically with the Commission 'releasing post-Covid recovery funds to Romania despite Bucharest's failure to implement required reforms'.[179] There is also evidence of undue political considerations affecting the Commission's rule of law assessments of Bulgaria. The ultimate impression is one of the increasing and undue politicisation of the EU's rule of law toolbox which both weakens its impact and undermines it as a means by which the rule of law situation in the EU can be improved.

3.2 The EU's New Pact on Migration and Asylum

In April 2024, after years of negotiations, the EU adopted a new Pact on Migration and Asylum.[180] The Common European Asylum System (CEAS) has been chronically affected by an asymmetric distribution of responsibilities among various Member States, which resulted in documented and systematic violations of the human rights of migrants and refugees.[181]

This new legal and policy framework seeks to 'close gaps between the various realities faced by different Member States and promote mutual trust by delivering results through effective implementation'.[182] However, instead of revolutionising the EU approach to migration, the Pact seems oriented toward perpetuating a legally problematic logic of exclusion and externalisation. It normalises emergency legislation and grants Member States considerable discretion to derogate from basic rights and asylum guarantees in certain cases.

Beyond the Eurodac Regulation[183] – which turns the existing database into a comprehensive asylum and migration database – the Pact consists of five main regulations that build on the current CEAS. The Screening Regulation includes rules that should allow for a health and vulnerability assessment and the fast identification of the applicable procedure – e.g. asylum or return procedure – when a person enters the EU without fulfilling the entry conditions.[184] The Asylum Procedures Regulation (APR) expands the use of border and accelerated procedures, and establishes some mandatory rules.[185] These should allow for a swift assessment of asylum applications, also based on the already contested concept of 'safe third country' and the newly introduced notion of 'effective protection'.[186] Together with the Return Border Procedure Regulation it also establishes a mandatory border procedure for both the asylum and return process at the external border.[187] Taken together, these regulations contribute to the 'generalization of special procedures and the introduction of vague and disputable notions, leaving a considerable margin of discretion to Member States', thus increasing the risk of *refoulement* in violation of

179 S. Wheaton, 'Romanian centrist lawmakers won't back von der Leyen', Politico, 12 March 2024: https://www.politico.eu/article/romanian-union-party-ursula-von-der-leyen-eu-centrist-lawmakers/.

180 Commission, Pact on Migration and Asylum, 21 May 2024, https://home-affairs.ec.europa.eu/policies/migration-and-asylum/pact-migration-and-asylum_en.

181 E. Tsourdi, C. Costello, '"Systemic Violations" in EU Asylum Law: Cover or Catalyst?' *German Law Journal* 2023, 982.

182 Commission, Pact on Migration and Asylum, 21 May 2024.

183 Regulation (EU) 2024/1358 of the European Parliament and of the Council of 14 May 2024 on the establishment of 'Eurodac' for the comparison of biometric data in order to effectively apply Regulations (EU) 2024/1351 and (EU) 2024/1350 of the European Parliament and of the Council and Council Directive 2001/55/EC and to identify illegally staying third-country nationals and stateless persons and on requests for the comparison with Eurodac data by Member States' law enforcement authorities and Europol for law enforcement purposes, amending Regulations (EU) 2018/1240 and (EU) 2019/818 of the European Parliament and of the Council and repealing Regulation (EU) No 603/2013 of the European Parliament and of the Council.

184 Regulation (EU) 2024/1352 of the European Parliament and of the Council of 14 May 2024 amending Regulations (EU) 2019/816 and (EU) 2019/818 for the purpose of introducing the screening of third-country nationals at the external borders.

185 Regulation (EU) 2024/1348 of the European Parliament and of the Council of 14 May 2024 establishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU.

186 Ibid., Articles 57-59. J. Vedsted-Hansen, 'Harmonisation of Types of Asylum Procedures: New Regulation, Old Dilemmas – EU Immigration and Asylum Law and Policy' (Odysseus Blog, 17 May 2024) https://eumigrationlawblog.eu/harmonisation-of-types-of-asylum-procedures-new-regulation-old-dilemmas/.

187 Regulation (EU) 2024/1349 of the European Parliament and of the Council of 14 May 2024 establishing a return. border procedure, and amending Regulation (EU) 2021/1148.

international law.[188] In addition, the Regulation on Asylum and Migration Management (RAMM) introduces some (mostly cosmetic) amendments to the current Dublin system for establishing national responsibilities for examining applications for international protection.[189] Moreover, it establishes a mandatory but flexible solidarity mechanism to share the burden of applications between Member States.[190] UNHCR noted in 2020 that such a mechanism requires coherent application and compliance. Therefore, it is indispensable to have an independent monitoring framework coupled with immediate sanctions for non-compliance.[191] Finally, the Crisis and Instrumentalisation Regulation will establish a framework allowing Member States to derogate from ordinary EU asylum law in 'crisis situations'.[192] This regulation ossifies the ongoing 'crisification' of migration governance,[193] with risks not only for the harmonisation of applicable rules and their consistent implementation but also for the fundamental rights of people on the move.[194] In addition, four other instruments, respectively on reception conditions, qualification, resettlement, and the asylum agency date back to 2016 and were only adopted in 2024 due to the 'package approach' followed for the Pact.[195]

In line with previous EU policies,[196] the Pact places considerable emphasis on strengthening external border controls and returning individuals who do not qualify for asylum. To this end, screening, border asylum processing, and return procedures are meant to create 'faster, seamless migration processes' at the EU's borders.[197] Yet, the practical implementation of these policies raises significant concerns about their impact on human rights and the rule of law. During the screening and border procedure, people are not allowed to legally enter the territory of Member States, even if they are physically within it.[198] Despite its long history[199] this *fictio iuris* with severe implications on the rights of migrants and refugees has no ground in international law.[200]

The inability or unwillingness of Member States to comply with their EU law obligations has been plaguing the CEAS for years, resulting in systemic violations of fundamental rights at the EU borders. Addressing this implementation gap is vital if the EU is to be guided by its fundamental values as enshrined in Article 2 TEU. However, the EU's ability to monitor and enforce compliance is often limited by political considerations and Member States' concerns. The Commission hesitates to initiate infringement proceedings, even in the face of blatant violations of the Schengen *acquis* and the CEAS, of which fundamental rights are part and parcel.[201] Instead, the Commission has focused on more politically palatable policy objectives, such as strengthening the controls of external borders and extending them through informal deals with third countries. The main objective of this cooperation

188 V. Chetail, M. Ferolla Vallandro do Valle, 'The Asylum Procedure Regulation and the Erosion of Refugee's Rights – EU Immigration and Asylum Law and Policy' (Odysseus Blog, 23 May 2024) https://eumigrationlawblog.eu/the-asylum-procedure-regulation-and-the-erosion-of-refugees-rights/.

189 A.H. Neidhardt, 'Navigating the New Pact on Migration and Asylum in the Shadow of Non-Europe', European Policy Centre 2023.

190 S. Peers, 'EU Law Analysis: The New EU Asylum Laws, Part 6: The New Dublin Rules on Responsibility for Asylum-Seekers' (EU Law Analysis, 27 April 2024) https://eulawanalysis.blogspot.com/2024/04/the-new-eu-asylum-laws-part-6-new.html. Regulation (EU) 2024/1351 of the European Parliament and of the Council of 14 May 2024 on asylum and migration management, amending Regulations (EU) 2021/1147 and (EU) 2021/1060 and repealing Regulation (EU) No 604/2013.

191 EU Pact on Migration and Asylum – Practical considerations for fair and fast border procedures and solidarity in the European Union – https://www.refworld.org/policy/polrec/unhcr/2020/en/123361.

192 Regulation (EU) 2024/1359 of the European Parliament and of the Council of 14 May 2024 addressing situations of crisis and force majeure in the field of migration and asylum and amending Regulation (EU) 2021/1147.

193 V. Moreno-Lax, 'The "Crisification" of Migration Law: Insights from the EU External Border' Stella Burch Elias, Kevin Cope and Jill Goldenziel (eds), The Oxford Handbook of Comparative Immigration Law (Oxford University Press, forthcoming).

194 ECRE, Comments Paper: Regulation on Addressing Situations of Crisis and Force Majeure in the Field of Migration and Asylum | European Council on Refugees and Exiles' (May 2024) https://ecre.org/comments-paper-regulation-on-addressing-situations-of-crisis-and-force-majeure-in-the-field-of-migration-and-asylum/.

195 P. De Bruycker, 'Genealogy of and Futurology on the Pact on Migration and Asylum – EU Immigration and Asylum Law and Policy' (Odysseus Blog, 6 May 2024) https://eumigrationlawblog.eu/genealogy-of-and-futurology-on-the-pact-on-migration-and-asylum/.

196 M. Moraru, 'The New Design of the EU's Return System under the Pact on Asylum and Migration – EU Immigration and Asylum Law and Policy' (Odysseus Blog, 14 January 2021) https://eumigrationlawblog.eu/the-new-design-of-the-eus-return-system-under-the-pact-on-asylum-and-migration/.

197 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on a new Pact on Migration and Asylum [2020] COM/2020/609 final.

198 Article 3, Screening Regulation; Article 43(3) APR.

199 Germany, Residency Act, 1997.

200 ECtHR, *Amuur v. France*, 1996.

201 J.J.Rijpma, 'Watching the Guards: Ensuring Compliance with Fundamental Rights at the External Borders', European Law Journal 2024.

is to prevent arrivals thanks to delegated 'exit controls', bypassing not only democratic scrutiny and EU legal obligations, but also circumventing the prohibition of *refoulement*, the right to leave, and to seek asylum.[202]

In view of the serious legal challenges that the Pact may involve for the rights of migrants and refugees, not least the potential clash between Member States' international and EU law obligations, independent review is essential. However, there seems to be a general presumption of compliance with the rule of law and fundamental rights by the EU.[203] Moreover, the notion of the autonomy of EU law as developed by the CJEU and its resort to a legalistic approach risks undermining and even running against fundamental rights protection.[204] The rule of law functions as a limitation of the (legislative) power through law.[205] Yet this function has not been fully employed by the CJEU in the domain of (migrant) fundamental rights.[206] The impossibility of bringing any claim against an EU institution before the ECtHR exacerbates this situation.

3.3 Soft law in Migration and Asylum Policy

Since the migration crisis in 2015–2016, the use of soft law instruments has proliferated in the field of externalisation of migration management.[207] Soft law agreements or arrangements consist of 'law-like promises or statements that fall short of hard law'[208] and bypass the traditional binding international agreements endowed. Soft 'partnerships' in contemporary migration policy mobilise considerable resources to keep migrants out of the Union and return them to countries of departure.[209] Some of these arrangements strictly concern readmission,[210]while others, such as the multi-purpose partnerships, or 'compacts', are broader and encompass the purported objectives of tackling the root causes of irregular migration as well as preventing and fighting such migration, migrant smuggling and trafficking in human beings.[211] Soft arrangements with third countries are not channelled through the Article 218 TFEU framework.[212]

On the one hand, procedurally, with regard to the principles of conferral and institutional balance, many of these agreements are negotiated and signed by the Commission. However, it does always appear that the Commission was authorised by the

202 V. Moreno-Lax, 'The Informalisation of the External Dimension of EU Asylum Policy: The Hard Implications of Soft Law', in *Research Handbook on EU Migration and Asylum Law* (Edward Elgar Publishing 2022); J. Santos Vara, 'Soft International Agreements on Migration Cooperation with Third Countries: A Challenge to Democratic and Judicial Controls in the EU', in *Constitutionalising the External Dimensions of EU Migration Policies in Times of Crisis* (Edward Elgar 2019).

203 T. Kostadinides, 'The rule of law was the constitutional foundation of the general principles of EU law', in K. Ziegler, P. Neuvonen, V. Moreno-Lax, *Research Handbook on General Principles in EU law: Constructing Legal Orders in Europa* (Edward Elgar, 2022).

204 D. Kochenov, Dialogical Rule of Law in the Hands of the Court of Justice: Analysis and Critique' *CEU Democracy Institute Working Papers* No. 11, 26 April 2023.

205 D. Kochenov, 'The Missing EU Rule of Law?' in C. Closa, D. Kochenov (eds), *Reinforcing Rule of Law Oversight in the European Union* (Cambridge University Press 2016).

206 S. Ganty, D. Kochenov, 'EU Lawlessness Law: Europe's Passport Apartheid From Indifference to Torture and Killing' 30(1) *Columbia Journal of European Law* 2024.

207 P. García Andrade, EU External Competences in the Field of Migration: How to Act Externally When Thinking Internally, *Common Market Law Review* 2018, 157, 192; T. Strik, R. Robbesom, Compliance or Complicity? An Analysis of the EU-Tunisia Deal in the Context of the Externalisation of Migration Control, *Netherlands Int'l L. Rev.* 2024, 199, 202.

208 A. T. Guzman & Timothy L. Meyer, International Soft Law, *J. Legal Analysis* 2010, 171, 174.

209 C. Castillejo, The EU Migration Partnership Framework: time for a rethink?, *German Institute of Development and Sustainability (IDOS), Working Paper* 2017, No. 28.

210 Among others, Afghanistan (Joint Way Forward), Guinea (Good Practices), Bangladesh (Standard Operating Procedures), Ethiopia (Admission Procedure), the Gambia (Good Practices), Ivory Coast (Good Practices) and Mali (Standard Operating Procedures).

211 European Parliament resolution of 19 May 2021 on human rights protection and the EU external migration policy, (2020/2116(INI)), I. Including with: Ghana (2016); Nigeria (2015; 2020); Niger (2016, non-published); India (2016; 2023); Turkey (2016). See also recently the deal concluded with Tunisia (2023), Egypt (2024) and Mauritania (2024).

212 *See also* Article 216 TFEU. A. Dashwood, 'EU Acts and Member State Acts in the Negotiation, Conclusion, and Implementation of International Agreements', in M. Cremona, C. Kilpatrick (eds.) *EU Legal Acts: Challenges and Transformations*, Oxford Univ. Press 2018.

Council to negotiate and/or sign such deals, as in the case of the infamous EU-Tunisia deal.[213] The Treaty as interpreted by the ECJ, makes clear that in the absence of such an approval the Commission does not enjoy the power to sign a non-binding agreement resulting from negotiations conducted with a third country,[214] or, *a fortiori*, to engage in such negotiations in the first place.[215]

The failure of the Commission to 'consult the European Parliament also goes against the institutional balance enshrined in the EU Treaties, since its power of political control and consultation recognised in Article 14 TEU requires [...] its intervention in the procedure of adoption of international soft agreements'.[216]

Turkey has received almost EUR 6 billion from the EU and the Member States since the signature of the infamous EU-Turkey Statement in 2016,[217] while constant human rights violations against asylum seekers in Turkey have been reported. Some of these grave human rights violations are acknowledged by the EU Commission itself.[218] The Turkey deal perfects the departure from the basic idea of the rule of law through the leading role played by the Court of Justice: by finding that this deal had nothing to do with EU law, the ECJ has played a fundamental role in moving such deals outside the boundaries of any accountability.[219]

The recent Memorandum of Understanding (MoU) on a strategic and global partnership signed between the European Union and Tunisia on 16 July 2023 is no different. Tunisia is well-known for its authoritarian drift since 2021.[220] The underlying motive of the EU-Tunisia deal is straightforward: halting irregular migration through and from Tunisia in exchange for financial support and cooperation in other policy areas.[221] Part of the money has already been given by the Commission, which disbursed the first EUR 127 million already in September 2023. EUR 67 million – more than half of the original amount – is earmarked as an operational assistance package on migration. The money will be spent to equip the Tunisian Coast Guard, identified by the UN as known perpetrators of serious human rights violations against migrants, among others.[222] There was no prior assessment of the human rights consequences of the deal and no guidelines, safeguards and no monitoring mechanisms to ensure that European money does not support, directly or indirectly, mass crimes and human rights violations – like what is happening in Libya.[223]

213 European Commission, The European Union and Tunisia: political agreement on a comprehensive partnership package, Statement (Jul. 16, 2023), https://ec.europa.eu/commission/presscorner/detail/en/statement_23_3881.

214 Case C-660/13 *Swiss MoU*, 38, 39 and 43.

215 P. García Andrade, 'The Distribution of Powers Between EU Institutions for Conducting External Affairs through Non-Binding Instruments', *European Papers* 2016, p. 115; A. Ott, 'Informalization of EU Bilateral Instruments: Categorization, Contestation, and Challenges', *Yearbook of European Law* 2020, 569, 588.

216 P. García Andrade, *The Memorandum of Understanding between the EU and Tunisia*; *See* P.García Andrade, 'The role of the European Parliament in the adoption of non-legally binding agreements with third countries', in J. Santos Vara, S. Rodríguez Sánchez-Tabernero (eds.), *The Democratisation of EU International Relations Through EU Law*, Routledge 2018. See also: *Council of the European Union, Follow up to Judgment in Case C-660/13 – Arrangements between Secretaries General on non-binding instrument,* 15367/17 (Dec. 4, 2017), https://data.consilium.europa.eu/doc/document/ST-15367-2017-INIT/en/pdf.

217 Council, *Statement of the EU Heads of State or Government, 07/03/2016* (8 March 2016), https://www.consilium.europa.eu/en/press/press-releases/2016/03/08/eu-turkey-meeting-statement/; European Council, *EU-Turkey statement* (18 March 2016), https://www.consilium.europa.eu/en/press/press-releases/2016/03/18/eu-turkey-statement/.

218 I. Van Liempt et al., 'Evidence-Based Assessment of Migration Deals the Case of the EU-Turkey Statement. Final Report', December 2017 , https://migratiedeals.sites.uu.nl/wp-content/uploads/sites/273/2017/12/20171221-Final-Report-WOTRO.pdf. See M. Jill Alpes, et al., 'Post-deportation risks under the EU-Turkey statement: what happens after readmission to Turkey?', Migration Policy Center Policybrief 2017/30 (2017), https://cadmus.eui.eu/handle/1814/49005; Human Rights Watch, 'Turkey Forcibly Returning Syrians to Danger' (Oct. 24, 2019), https://www.hrw.org/news/2019/10/24/turkey-syrians-being-deported-danger.

219 *See* Case T-192/16, *NF v. Council*, 22 as well as Joined Cases C-208/17 P to C-210/17 P *NF and Others v European Council*.

220 European Commission, The European Union and Tunisia: political agreement on a comprehensive partnership package.

221 The so-called 'more for more' approach 'implying an element of conditionality or incentives.

222 U.N., *Joint Communication from Special Procedures, AL OTH 98/2023, 17 August 2023,* 2 (17 August 2023) https://spcommreports.ohchr.org/TMResultsBase/DownLoadPublicCommunicationFile?gId=28292.

223 U.N. Human Rights Committee, Report of the Independent Fact-Finding Mission on Libya (Mar. 27, 2023), https://www.ohchr.org/en/hr-bodies/hrc/libya/index.

Informalisation makes human rights violations difficult if not impossible to avoid and challenge, because of the lack of transparency in the absence of imperative publication requirements applicable to such soft law, absence of information during the negotiations, coupled with vacant political control by the European Parliament[224] and the absence of any *ex-ante* checks by the Court to ensure that the agreement in question is in compliance with EU law, including the rule of law and human rights imperatives.

Such deals usually do not comprise independent monitoring mechanisms and suspension clauses to be triggered by human rights violations,[225] nor effective legal remedies to obtain redress or reparation for victims of such deals. In general, the involvement of courts in the enforcement process of soft law is limited[226] and soft law agreements make it very difficult if not impossible for individuals to enforce and claim their fundamental rights before domestic and European courts.[227]

Soft law agreements concluded with low-income third countries in the context of externalisation of migration management, although 'not binding', in fact boast far-reaching legal effects, while being questionable both procedurally and in substance.

3.4 EU enlargement

While the political question of enlargement is most often, if not exclusively, answered by geostrategic concerns, accession is grounded in the legal process enshrined in Article 49 TFEU. Criteria for membership is prescribed by the Copenhagen criteria, first among them having stable institutions guaranteeing the rule of law as well as democracy, human rights and respect for and protection of minorities. Having such institutions is critical for the functioning of the EU, particularly as there is often difficult recourse to improve failing rule of law standards once a country has become an EU Member State. Aiding reform to achieve 'irreversible progress on democracy and rule of law ahead of accession', an addition to the Commission's 2024 Rule of Law Report was to include country chapters on four enlargement countries (Albania, Montenegro, North Macedonia, Serbia), though recommendations are not offered for these states.

However, despite underlining the importance of achieving rule of law standards within the relevant country seeking EU accession, an ongoing concern is the politicisation of the process is undermining the rule of law efforts and the EU's own rule of law standards. The accelerated progression of Moldova and Ukraine in particular, prompted by Russia's war of aggression on Ukraine rather than by any significant improvement in commitments to democracy or rule of law, raises concerns that politics – rather than achieving markers for accession under the Copenhagen criteria – are solely governing decision-making with regard to the accession process. This is echoed in the European Council's decision to grant candidate status to Bosnia and Herzegovina in December 2022, followed by opening accession negotiations in November 2023, which appeared to be driven by the fear of destabilisation in the light of the war in Ukraine.

A common theme among all candidate countries and accession states, is a lack of predictability of the enlargement process owing largely to inconsistent assessment and progression in the light of the established Copenhagen criteria. Progress reports and recommendations of the European Commission are not always an indicator for the future progress of candidate countries towards membership.[228] Instead, both the progress and the accession of states lie primarily and increasingly 'within the discretion of the Union and its Member States [and is] thus somewhat removed from the legal sphere'.[229] This is solidified by the requirement of unanimity in the Council. The degree to which accession countries have met relevant benchmarks in the opinion of the European Commission can be less important than the consensus of Member States in the Council. Paired with a long and uncertain process, this can undermine both the transformative effect of the

224 Article 218(6) and (10) TFEU; Case C-658/11 *Parliament v. Council*. *See* A. Dashwood, 'EU Acts and Member State Acts in the Negotiation", p. 221–226.

225 T. Strik, R. Robbesom, 'Compliance or Complicity? An Analysis of the EU-Tunisia Deal in the Context of the Externalisation of Migration Control', *Netherlands International Law Review* 2024, at 213.

226 O. Stefan, 'Soft Law and the Enforcement of EU Law' in A. Jakab, D. Kochenov (eds.), *The Enforcement of EU Law and Values: Ensuring Member States' Compliance*, Oxford Univ. Press 2017, 200, 203.

227 G. Andrade, 'EU External Competences in the Field of Migration', 192.

228 E. Basheska, 'EU Enlargement in Disregard of the Law: A Way Forward Following the Unsuccessful Dispute Settlement Between Croatia and Slovenia and the Name Change of Macedonia' *Hague Journal on the Rule of Law* 2022 (14), 221–256.

229 D. Kochenov, *EU Enlargement and the Failure of Conditionality: Pre-Accession Conditionality in the Fields of Democracy and the Rule of Law* (Kluwer Law International, Alphen aan den Rijn 2008) 15.

pre-accession process on improving rule of law within accession states, but also negatively reflects the EU's commitment to its own values.[230]

3.5 The legal framework for emergencies

As evidenced above, the crisification of EU policy making is well documented. However, unlike the majority of EU Member States that have legislative provisions for emergency situations, the EU Treaties do not provide a general legal basis for responding to emergencies. However, the Treaties do provide for competence to react to specific categories of emergencies. Article 122 TFEU provides that 'the Council, on a proposal from the Commission, may decide, in a spirit of solidarity between Member States, upon the measures appropriate to the economic situation, in particular if severe difficulties arise in the supply of certain products, notably in the area of energy.' Article 122(2) TFEU empowers the Council, on Commission proposal, to provide financial assistance under circumstances where a Member State 'is in difficulties or is seriously threatened with severe difficulties caused by natural disasters or exceptional occurrences beyond its control'.

Concerns have been raised with regard to the 'surge' in the use of Article 122 TFEU,[231] particularly where the ordinary legislative procedure could have been used.[232] In particular, the use of the provision for far-reaching and long-term programmes with significant financial consequences for Member States, but without due consultation of Parliament, and through decision-making by qualified majority, even when the Treaties would otherwise require unanimity in ordinary circumstances. The central point of concern for the rule of law has been the increasing reliance on the provisions in Article 122 TFEU for purposes other than their proper use in an emergency-type situation. For example, the use of Article 122 to suspend state aid rules and enact significantly consequential policies including issuing common EU debt and temporary EU taxes on energy sector profits.[233]

230 E. Basheska, 'EU Enlargement in Disregard of the Law'.

231 M. Chamon, 'The use of Article 122 TFEU: Institutional implications and impact on democratic accountability' Study for the European Parliament, September 2023.

232 See e.g. comments of President of the European Parliament Metsola at the European Council meeting of 15 December 2022.

233 Council Regulation (EU) 2022/1854 of 6 October 2022 on an emergency intervention to address high energy prices; and Council Regulation (EU) 2022/1369 of 5 August 2022 on coordinated demand-reduction measures for gas. See e.g. P. Leino-Sandberg, M. Ruffert, 'Next Generation EU and its constitutional ramifications: A critical assessment', *Common Market Law Review* 2022 (59), 433-472; P. Dermine, 'Article 122 TFEU and the Future of the Union's Emergency Powers', *EU Law Live,* 23/01/2024, https://eulawlive.com/op-ed-article-122-tfeu-and-the-future-of-the-unions-emergency-powers-by-paul-dermine/.

4. Conclusions

The rule of law is a foundational value of the European Union. It is essential for all Member States and EU institutions to adhere to rule of law standards for the EU to function effectively. Despite its importance, there is a significant lack, or in some cases a complete absence of independent or effective self-assessment mechanisms when it comes to upholding rule of law by the EU institutions themselves. While this, our first report, does not provide a comprehensive evaluation of the rule of law across all EU institutions and agencies, it serves as an initial effort to highlight some achievements and the key shortcomings in meeting these standards.

In terms of the EU's system of justice, limited access to courts at the EU level for private parties may hinder effective oversight of EU actions. CJEU case-law regarding mutual recognition in criminal matters poses risks to the rule of law by deprioritising fair trial rights and the presumption of innocence. Although mechanisms like a transparency register and whistleblower protections exist, reforms at the EU level have been fragmented within a complex system. Ongoing challenges, such as weak or even non-enforcement, inconsistent regulations, and inadequate parliamentary immunity protections, undermine the effectiveness of the EU's anti-corruption strategy. Likewise, reforms aimed at promoting media pluralism and freedom demonstrate the EU's commitment to safeguard media integrity and transparency; however, their success relies on robust monitoring and prompt enforcement, which is untested.

On actions to ensure the rule of law is upheld, a concerning picture emerges. The Commission's overall enforcement record against Member States on rule of law issues is lacking given the widespread erosion of rule of law across the EU. A number of rule of law decisions made by the EU Commission — including delayed infringement actions, inconsistent or even non-enforcement and the premature closure of rule of law procedures— suggests reasons of political expediency are influencing the way the Commission but also the Council are dealing with problematic rule of law developments within Member States. Relatedly, the Commission's assessments on when to release funds to Hungary and Poland, as well as the closure of the Cooperation and Verification Mechanism (CVM), are seen as politically motivated and lacking legal rigour, with evidence suggesting that it has ignored systemic issues related to judicial independence.

In migration management are some of the most serious concerns. The legality of actions, and particularly soft law arrangements within the area, is questionable. Barriers accessing the courts, the lack of oversight and transparency of Frontex operations as well as the use of EU funding beyond EU borders, creates an area which appears unaccountable to the law. Within EU borders, while the new Migration and Asylum Pact seeks to enhance mutual trust among Member States, it risks continuing a trend of exclusion and externalisation of EU policy without the protection of fundamental rights. Enforcement too remains politically fraught, with the Commission hesitant to act against manifest and systemic violations.

Only by addressing these deficiencies, and implementing robust self-assessment or better, independent oversight mechanisms, the EU can reinforce its position as a credible advocate for the rule of law which is capable of defending EU values throughout the EU and its Member States.

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