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# Can EU funds promote the rule of law in Europe?

By Jasna Šelih with Ian Bond and Carl Dolan

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- ★ The EU is a values-based organisation, but it has struggled to respond effectively when member-states violate its values, including the rule of law. The rise of populist parties that reject European values suggests that the problem may grow. The EU needs to defend its values more effectively.
- ★ The rule of law is the backbone of democracy. It is essential to the functioning the EU, which depends on shared confidence in individual legal systems; and essential to the Union's aim of embedding liberal democracy in Europe.
- ★ Countries where the rule of law is weak are unlikely to be able to use EU funds effectively. In the absence of the rule of law, corruption can flourish; that damages the public finances as well as investor confidence.
- ★ The EU has been trying to force new member-states to pay more attention to EU values and the rule of law since the post-Cold War enlargement process began in the 1990s. But the instrument chosen, requiring a political decision to suspend a member-state's voting rights, has proved impossible to use in practice.
- ★ The Commission can in some cases start infringement proceedings, when in the process of violating EU values a member-state has breached a specific EU law. But it is possible to honour the letter of the law while breaching its spirit and ignoring the EU's values.
- ★ The Commission has also created a 'Framework to strengthen the rule of law', but the Commission can only make non-binding recommendations to improve the situation in a member-state.
- ★ The EU's biggest levers are financial. European structural and investment funds are designed to reduce economic and social inequality in the EU; they amount to more than €450 billion for the period from 2014 to 2020. Over the years, various economic conditions have been attached to them, designed in particular to stop countries running excessive deficits while receiving EU funding for investments.
- ★ A number of member-states and some European commissioners want to see respect for the rule of law included as a condition for EU funding. The EU already links compliance with EU values, and especially rule of law, to progress towards EU membership for candidate countries; the task is to make rule of law conditionality as effective in changing the behaviour of existing member-states as it is in the case of candidates.
- ★ The Commission could do many things without treaty changes, either by taking a broader interpretation of existing EU laws, or by proposing new conditionalities when the rules governing structural and investment funds are revised ahead of the next budget cycle.
- ★ Any mechanism devised to improve compliance with EU values and the rule of law must in principle be applicable to all member-states, not just poorer and newer ones.

- ★ As a first step, the EU needs regular assessments of the operation of the rule of law in all member-states. The EU Fundamental Rights Agency already collects relevant data; with an enlarged mandate, it could report on individual member-states. Information could also be drawn from the Council of Europe and civil society organisations.
- ★ On the basis of the assessments, the Commission could judge whether there was a rule of law problem in a member-state, and if so, how serious. For less serious breaches of the rule of law, a member-state would have to draw up a plan to meet its obligations.
- ★ For more serious breaches, the Commission could suspend disbursement of funds, and step up monitoring and verification. In doing so, it would have to ensure that poorer regions and vulnerable groups did not suffer disproportionate harm from measures designed to hit governments that ignore EU values and the rule of law. Funding could be directed away from governments and go directly to enterprises, or be disbursed by civil society organisations.
- ★ Countries that perform particularly well could be rewarded with extra funds, on the model of the current 'performance reserve' for structural and investment funds.
- ★ Informal discussions on the next budget cycle are already starting, so this is a good moment to discuss strengthened rule of law conditionality and any new legislation needed to underpin it.
- ★ Nothing will change unless member-states have the political will for it. But the lesson of the accession process is that the EU can improve the quality of democracy and the rule of law by working with stakeholders in member-states where there are problems.
- ★ It cannot be right that the EU is forced by its own rules to subsidise member-states that flout EU values, and in doing so damage their own economic prospects. The rule of law is the best long-term guarantee of economic convergence between EU member-states.

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**The EU is a values-based organisation. The Treaty on European Union (TEU) lists the values on which it is founded as: “respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities.”**

In recent years, however, the EU has struggled to respond when member-states have not lived up to these values. Poland's coalition government, led by the Law and Justice party (PiS), and Hungary's Fidesz government have both undermined the independence of the judiciary and the public media. But the problems are unlikely to remain limited to two countries. Populist movements, primarily on the extreme right, have flourished in many European countries. Many of these parties espouse values which are at odds with those of the European Union.

It has become clear that the EU's existing mechanisms for dealing with breaches of EU values are flawed. Some rely on a government breaching a specific EU law (while the rule of law can be considerably undermined without a government having to violate the letter of any EU rule). Some rely on other member-states agreeing unanimously

that they should take drastic action against one of their partners (and it is almost impossible to achieve such a degree of consensus). The EU needs to protect its values more effectively, and to ensure that member-states abide by them.

This policy brief considers whether there are more effective tools available. In particular, it looks at whether the disbursement of EU funds to member-states could be tied to their compliance with EU values. Could the EU's structural and investment funds – expected to be worth more than €450 billion between 2014 and 2020 – be withheld in order to sanction breaches of EU values, particularly the rule of law; and if so, how could that leverage best be used to achieve better compliance with European values?



## What is the rule of law, and why does it matter to the EU?

The European Commission calls the rule of law “the backbone of any modern constitutional democracy”.<sup>1</sup> But what does it mean by the term? In the words of Viviane Reding, former Commissioner for Justice, “the rule of law means a system in which no one – no government, no public official, no dominant company – is above the law; it means equality before the law”.<sup>2</sup> This definition has been subsequently embedded in the EU’s ‘Framework to strengthen the rule of law’, which says that the rule of law ensures “that all public powers act within the constraints set out by law, in accordance with the values of democracy and fundamental rights, and under the control of independent and impartial courts”.

*“It is unlikely that countries where the rule of law is weak will be able to spend EU funds effectively.”*

The legitimacy of the Union depends on member-states and their governments agreeing to follow European rules. They voluntarily take on these obligations when they join the EU, accepting that they will be bound by EU law after their accession. The Commission and the European Court of Justice (ECJ) are the guardians of the treaties, ensuring that the member-states and the institutions abide by their commitments. The EU uses the case law of the ECJ and of the European Court of Human Rights, and guidance from the Council of Europe (in particular the work of its Venice Commission on democracy through law), to give the concept of rule of law a more precise meaning in the European context.

The rule of law is of primary importance to EU member-states both functionally and philosophically: functionally, in the sense that it is essential to the effective functioning of the European Union, because the mutual trust between its member-states rests on having confidence in the decisions of each other’s legal systems; and philosophically because the EU’s aim from its founding has been to embed liberal democracy in Europe.

It seems a curious omission that the EU regards the rule of law as the foundation of European values and principles, yet does not insist on observance of the rule

of law as a condition for receiving EU funds. It is unlikely that countries where the rule of law is weak will be able to spend EU funds effectively, or leverage them to attract investment and boost economic growth. Factors such as a stable and predictable legal system and assurance of competitive procurement processes provide the necessary security for investors. Research by the World Bank has shown that factors such as perceived constraints on businesses, barriers to investment, and policy uncertainty influence countries’ investment climates and competitiveness.<sup>3</sup>

EU funds have more impact, and thereby contribute more to long-term economic development, where the rule of law is safeguarded. Where it is not, the funds may be lost to corruption and mismanagement; and the investment climate and consequently economic growth may be worsened in the long run because investors lack confidence in the country’s regulatory framework. Poorly governed places are also less likely to absorb all of the allocated funds, so that the funds have a much weaker impact than expected.<sup>4</sup>

Absence of the rule of law undermines the principle of mutual trust that exists between different member-state legal systems. Citizens and investors working in different EU member states should be confident that they will face the same legal treatment everywhere in the EU, and that they will have resort to independent and impartial courts which make judgements that are accepted across the EU. In cases where judicial independence and other checks and balances are undermined, the EU single market is also undermined because investors can no longer be confident that their rights will be adequately protected in all EU member-states.

The European Commission has likewise acknowledged that an effective justice system, characterised by high quality, independence and efficiency, serves as the foundation for investor confidence and is consequently essential for a business-friendly environment. In addition, an effective and independent justice system is the necessary basis for the protection of individual rights and the enforcement of EU law itself. The absence of the rule of law contributes to corruption, which negatively affects public finances as well as investor confidence.<sup>5</sup>

1: European Commission, ‘Communication from the Commission to the European Parliament and the Council: A new EU Framework to strengthen the Rule of Law’, March 19<sup>th</sup> 2014.

2: Viviane Reding, European Commission, ‘The EU and the Rule of Law – What next?’, Centre for European Policy Studies, September 4<sup>th</sup> 2013.

3: International Finance Corporation, ‘The Investment Climate’, Inter-Agency Task Force on Financing for Development, July 2016.

4: Valentina Pop, ‘Poorest regions get least out of EU funding’, EU Observer, April 19<sup>th</sup> 2013.

5: European Commission, ‘European Semester Thematic Factsheet: Effective Justice Systems’, 2016.

## The evolving defence mechanism for the rule of law

As the EU enlarged after the Cold War, applicant countries from Central Europe had to meet the ‘Copenhagen criteria’ for accession. The Copenhagen criteria were adopted in 1993 both as guidance for applicant states, and as reassurance for existing member-states that unstable applicants would not be admitted. They include both economic and political criteria: for an applicant, meeting them may involve improving the judicial system; reinforcing institutional and administrative capacity; and undertaking reforms to be able to operate within the single market.<sup>6</sup> One criterion is “stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities”. The Commission thoroughly scrutinises compliance with EU values, including the rule of law, in the pre-accession period.

*“When member-states shy away from using Article 7, it is no longer a credible and effective deterrent.”*

But even with the Copenhagen criteria in place, in the 1990s some Western European member-states feared that once Central European countries with little or no history of democratic government or the rule of law got into the EU, they could revert back to old habits while the EU would no longer have any leverage against them.<sup>7</sup> As a result, the 1999 Amsterdam Treaty created a mechanism to sanction member-states by suspending some of their rights as members if the Council (acting by qualified majority) determined that there was a “serious and persistent breach” of EU principles. The mechanism subsequently evolved to become Article 7 of the current version of the Treaty on European Union (TEU).

Article 7 consists of a preventive and a sanctioning mechanism. The preventive measure requires the support of four-fifths of the Council and the consent of the Parliament. Its main function is to simply establish that the risk of a systematic breach exists in a member-state and to invite the state to put its side of the case. The preventive arm is intended to serve as an ‘early warning’ mechanism. The sanctioning mechanism on the other hand provides for the Council to decide unanimously (with the exception of the state concerned) that a “serious and persistent breach” of EU values exists; the Council can then decide by a qualified majority to

suspend some of the member-state’s rights, including its voting rights in the Council.

It is important to note that the EU member-states and the Commission designed Article 7 to respond to violations of EU principles that were systemic in nature. The article is not intended to punish a single abuse of political power or a breach of EU principles, that is to say isolated problems which could still be corrected by the legal and political systems in member-states autonomously. The article’s purpose is to address issues such as capture of the state’s institutions by one political party, or moves to destroy the system of checks and balances characteristic of a liberal democratic state. In the event of such a systematic breach of European values, EU involvement is legitimate and necessary since the national institutions can no longer uphold European law and values independently.<sup>8</sup>

However, Article 7 has shown itself to be ineffective when it comes to triggering sanctions, because it requires unanimous agreement (minus the state concerned) on whether a serious and persistent breach of EU values exists. Many European politicians also consider the punishment set out in the article to be too drastic, analogous to expelling the state from the Union. Article 7 has consequently become known as the ‘nuclear option’ and has never been used. But when member-states shy away from using Article 7, it is no longer credible and therefore cannot serve as an effective deterrent.<sup>9</sup>

The Commission has the option of launching infringement proceedings based on Article 258 of the Treaty on the Functioning of the European Union (TFEU), which deals with failure to carry out treaty obligations. There are two problems with infringement proceedings, however. First, they can only be launched when a member-state is accused of violating a specific EU law, not for non-compliance with EU values in general.<sup>10</sup> Second, the transgressing member-state may be able to correct a specific infringement without tackling the systemic governance problems underlying it.

A case in point is Hungary, which in 2012 instituted a mandatory retirement age of 62 for judges. This forced hundreds of judges to retire and gave the ruling Fidesz party led by Prime Minister Viktor Orbán the opportunity to fill these positions with its supporters.<sup>11</sup> Hungary’s Constitutional Court ruled this unconstitutional, as it posed a threat to the independence of the judiciary, but

6: Heather Grabbe, ‘The EU’s Transformative Power: Europeanization Through Conditionality in Central and Eastern Europe’, London, 2006.  
7: Wojciech Sadurski, ‘Adding a Bite to a Bark? A Story of Article 7, the EU Enlargement, and Jörg Haider’, University of Sydney Law School Legal Studies Research Paper, January 2010.  
8: Carlos Closa, Dmitry Kochenov and J.H.H. Weiler, ‘Reinforcing Rule of Law Oversight in the European Union’, European University Institute Working Paper, RSCAS 2014/25, Robert Schuman Centre for Advanced Studies, March 2014.

9: Maria Fletcher, ‘Article 7 sanctions: a legal expert explains the EU’s ‘nuclear option’’, The Conversation, July 28<sup>th</sup> 2017; Ginger Harvey and Emmet Livingston, ‘What is Article 7?’, Politico, January 13<sup>th</sup> 2016.  
10: Agata Gostyńska-Jakubowska and Ian Bond, ‘Hungary and the West: We need to talk about Viktor’, CER insight, November 26<sup>th</sup> 2014.  
11: Kim Lane Scheppele, ‘How to Evade the Constitution: The Hungarian Constitutional Court’s Decision on Judicial Retirement Age, Part I’, Verfassungsblog, August 9<sup>th</sup> 2012.

the government did nothing to respond to the ruling. The Commission then took Hungary to the ECJ, arguing that it violated EU rules on age discrimination, and won.<sup>12</sup> Hungary ultimately complied with the ECJ judgement and instituted a new retirement age of 65 for all judges, reinstating and compensating those who had been forced out. But a loophole in the amended law prohibited the reinstatement of judges in leadership positions that had already been filled by new judges.

The Hungarian case showed that infringement proceedings are ill-suited for addressing systemic rule of law issues. Fidesz's attack on the independence of the judiciary was only part of a wider effort to marginalise critical voices and institutions that could obstruct Orbán's efforts to entrench Fidesz's dominance of Hungarian politics. Regardless of the Commission's victory at the ECJ, the underlying problems, such as widespread corruption and lack of media independence, remained, and Orbán continued his attack on constitutional checks and balances.<sup>13</sup>

*“The Commission's recommendations are not legally binding, and there are no hard incentives to comply.”*

Though Hungary became the poster-child for breaches of EU values and the rule of law, it was not the only offender. In 2012, the Romanian government of Victor Ponta replaced the ombudsman and the speakers of both houses of the Parliament with its allies, tried to subordinate the public broadcaster to the government, and limited the jurisdiction of the Constitutional Court.<sup>14</sup>

Nor were the problems limited to the 'new' member-states. A group of EU member-states applied limited and ultimately ineffective sanctions against Austria in 2000 when the xenophobic, right-wing Austrian Freedom Party (FPÖ) – seen by many as authoritarian and tainted by association with Austria's Nazi past – became part of its coalition government. And the Commission threatened to launch infringement proceedings against France in 2010 for expelling almost 1,000 members of the Roma population to Bulgaria and Romania and thereby violating EU rules on non-discrimination (even though the Commission did not carry out its threat in the end).<sup>15</sup>

These two events also prompted discussions of triggering Article 7, but as a result of political alliances in the Council and the article's perceived severity, this proved impossible

12: European Commission, 'Court of Justice rules Hungarian forced early retirement of judges incompatible with EU law', November 6<sup>th</sup> 2012. Nikolaj Nielsen, 'Hungarian judicial reform has 'loopholes'', EU Observer, January 29<sup>th</sup> 2013.

13: Agnes Batory, 'Defying the Commission: Creative Compliance and Respect for the Rule of Law in the EU', Public Administration, 2016.

14: Zselyke Csaky, 'Romania: Is the Crisis Over?', Freedom At Issue Blog, Freedom House, November 28<sup>th</sup> 2012.

15: BBC, 'Q&A: France Roma expulsions', October 19<sup>th</sup> 2010.

to agree upon. It became clear that the EU needed other ways of dealing with emerging threats to the rule of law that did not immediately involve Article 7 and raise the political stakes. This led the Commission to establish a 'Framework to strengthen the Rule of Law' in 2014. This is a mechanism for addressing threats to the rule of law which are of a "systemic nature" and as such cannot be effectively addressed by national legal and constitutional checks and balances.

The framework consists of three steps; firstly, the Commission conducts an assessment of the situation in the member-state. Secondly, it issues a recommendation based on that assessment. Finally, the Commission monitors how the member-state is following up on its recommendation.<sup>16</sup> The framework has the merit of allowing for a more graded response to rule of law threats, engaging governments in a dialogue. The Commission's 'name and shame' approach can also be considered to have some deterrent effect. But the Commission's recommendations are not legally binding and there are no hard incentives for errant member-states to comply.

These limitations were all too evident the first time the framework was used, in the case of Poland, in January 2016. Despite the Commission's unprecedented actions, the situation in Poland worsened: infringement proceedings were launched against the country in 2017 in response to measures introduced by the ruling Law and Justice (PiS) party. These measures threatened the independence of the judiciary by making it easier for the government to fire judges (including members of the Constitutional Tribunal) and set different retirement ages for female and male judges.<sup>17</sup> The deterrent effect of the 'rule of law framework' has clearly been negligible in this case, and the Polish government has engaged in dialogue with the Commission only to defend its position rigidly. The success of the procedure depends on the willingness of the government to cooperate with the Commission by following its recommendations. The slow pace of the procedure also tells against it. A government hell-bent on taking control of the judiciary and other institutions can do a lot of damage in the time it takes to move from one stage of the process to the next.

The Council also established its own 'rule of law dialogue', after its legal service declared the Commission's rule of law framework to be illegal, but this approach also lacks strong incentives for compliance with EU principles. Member-states evaluate their own compliance, allowing them to paint a rosy picture of the situation.<sup>18</sup>

16: European Commission, DG Justice, 'Effective Justice: Rule of law'. European Commission, European Judicial Network in civil and commercial matters: Glossary.

17: European Commission, 'European Commission launches infringement against Poland over measures affecting the judiciary', July 29<sup>th</sup> 2017.

18: Peter Oliver and Justine Stefanelli, 'Strengthening the Rule of Law in the EU: The Council's Inaction', JCMS: Journal of Common Market Studies, September 2016; Council of the European Union, 'Presidency non-paper for the Council (General Affairs) on May 24<sup>th</sup> 2016 – Rule of law dialogue', May 13<sup>th</sup> 2016.

If it is crucial to uphold EU values, notably the rule of law, and if both the Council's and the Commission's current instruments for doing so are inadequate, what else can the EU do? One area which member-states and

EU institutions are already looking at is whether the EU can exert its leverage through other mechanisms such as cohesion policy in order to encourage greater respect for the rule of law.

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## EU cohesion policy: What is it for and how does it work?

The EU's cohesion or regional policy is designed to reduce economic and social inequality across the Union. Although all regions are eligible to bid for funds, most funding goes to less developed regions (with a gross national income (GNI) per capita less than 75 per cent of the EU average) and 'transition' regions (with a GNI per capita between 75 and 90 per cent of the EU average). European structural and investment funds are the EU's main instrument for overcoming inequality.

There are five different funds, including:

- ★ the European Regional Development Fund, which focuses on correcting regional imbalances within the EU through investments in areas such as sustainable jobs, infrastructure and small and medium enterprises;
- ★ the Cohesion Fund, which supports transport and environment projects in countries where the per capita income is less than 90 per cent of the EU average;
- ★ the European Social Fund, which invests in employment-related and human capital projects;
- ★ the European Agricultural Fund for Rural Development, supporting the EU's rural areas;
- ★ the European Maritime and Fisheries Fund, which

supports sustainable fishing practices and aims to diversify the economies of the EU's coastal communities.

The total budget for these funds amounts to around €454 billion for the period from 2014 to 2020.<sup>19</sup> These investments are aimed at achieving several EU policy goals laid out in the 'Europe 2020 strategy', the EU's agenda for increasing growth and employment in the current decade. The investments contribute towards the strategy's five goals in the areas of employment, research and development, climate change and energy sustainability, education, and fighting poverty and social exclusion.

The structural and investment funds are regulated by a single piece of EU legislation, the 'Common Provisions Regulation'.<sup>20</sup> The regulation has a number of objectives, one of which – related to rule of law issues – is improving the institutional capacity of public authorities and promoting efficient public administration. Member-states set out their investment priorities and how they would be implemented. The Commission then negotiates 'partnership agreements' with the member-states. This enables it to make suggestions and highlight shortcomings in the national plans. So while each member-state chooses its own investment priorities informed by its own needs, the final programme is a joint creation by the Commission and the member-state, and should reflect the views of both.

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## Conditionalities and enforcement mechanisms in EU structural and investment funds

The mechanisms regulating the EU structural and investment funds have evolved over the years. In the previous budget period, between 2007 and 2013, the European Commission interrupted payments related to structural funds when there were financial irregularities, such as lack of control over disbursement, or because countries were managing their national budget poorly. According to interviews with Commission officials, freezing EU funds usually prompted governments to reform, at least in their economic policies. On the basis of this experience, the EU gradually introduced more and more economic governance conditionalities into structural funds. In 2007, the EU linked cohesion funds to fiscal policy, so that the Council could freeze cohesion

funds for countries which surpassed the excessive deficit limit under the Stability and Growth Pact. In 2012, for example, the Commission withheld half of the funds allocated to Hungary because its public deficit exceeded the limit set by the EU.<sup>21</sup> The suspension was lifted three months later, in June 2012, after the Council concluded that Hungary had effectively corrected its excessive government deficit in line with EU recommendations.

In this and previous budget periods, the EU's Court of Auditors and the Commission found that many investments either did not take place or were delayed. Several regions were unable to spend the funds allocated to them due to poor administrative capacity and national

19: European Commission, European Structural and Investment Funds: Cohesion Data.

20: EUR-Lex, Regulation (EU) No 1303/2013 of the European Parliament and of the Council, December 17<sup>th</sup> 2013.

21: Council of the European Union, 'Hungary: €495.2 million in cohesion fund commitments suspended', March 13<sup>th</sup> 2012. Council of the European Union, 'Hungary: Council lifts cohesion funds suspension', June 22<sup>nd</sup> 2012.



government changes and reforms. These were often the territories which needed funding the most, such as regions in Italy, the Czech Republic, Romania and Bulgaria.<sup>22</sup> In some cases, the Court of Auditors or the Commission also uncovered poor management of funds. This led the Commission to recognise that certain pre-conditions need to be in place for the funds to be disbursed effectively.

To make EU spending more effective and avoid underspending or delays, the Commission proposed that the regulation for the current 'multiannual financial framework' (MFF) budget period, between 2014 and 2020, should include so-called 'ex-ante conditionalities'.

*“Certain member-states have proposed tying structural funds to the rule of law and democratic principles.”*

These are preconditions, linked to a country's investment priorities, that have to be fulfilled before a member-state can receive EU structural and investment funds, or (in the current MFF period) by the end of 2016 at the latest.<sup>23</sup> The funds earmarked for a member-state can be suspended at the point of the interim review mid-way through the MFF period if the member-state still does not fulfil the agreed conditions.<sup>24</sup>

The Commission decides whether member-states' plans fulfil these conditions, and monitors compliance when the plans are being rolled out. Member-states report on what measures they took to comply with conditions at the start of the budget period, and on subsequent progress. At the beginning of the current budget period, initial payments were not suspended or frozen for any country. Since we are barely halfway through the budget period, it remains to be seen whether the EU's new *ex-ante* conditions will fulfil their aims. A few positive examples have been reported by the Commission, but their implementation and success varies depending on the member-state and region. One shortcoming of the current design of *ex-ante* conditionalities already apparent is that they rest heavily on self-monitoring by the member-states, rather than rigorous assessments by an independent evaluator or the Commission. After the initial conditions are met, there is also no follow up or

monitoring of progress and continued compliance.<sup>25</sup>

Another innovation of this budget period has been *ex-post* macroeconomic conditionality: if a member-state suffers from macroeconomic imbalances during the budget cycle, the Commission can either ask it to re-programme its plan for structural and investment funds, or suspend the funding.<sup>26</sup> By using *ex-ante* and *ex-post* conditionalities, the Commission and the member-states (which for the most part support the innovative use of conditionality) have shown that they are willing to use structural and investment funds to push for reform in beneficiary states. They have also shown that the reforms they seek do not have to be directly linked to the government's investment priorities; they can be broader economic reforms, or steps to improve the investment climate.

As concerns about respect for EU values and the weakness of existing mechanisms for ensuring it have grown, certain member-states have proposed tying structural funds to the rule of law and democratic principles, much in the way they are now tied to macroeconomic and other policies. The idea of withholding funds in cases where EU values were breached was first floated in 2013 by the foreign ministers of Denmark, Finland, Germany and the Netherlands.<sup>27</sup> The German government set out its views again in an official position paper on future EU budget rules in June 2017, in which it argued that the increased use of *ex-ante* conditionality has resulted in positive policy reforms and more efficient use of EU funding and suggested the possibility of linking cohesion funds to "compliance with the basic principles underpinning the rule of law".<sup>28</sup>

There is some support for such an approach in the Commission, though it is not unanimous (Commission President Jean-Claude Juncker is opposed – see below). Budget Commissioner Günther Oettinger argued that conditionality applied to EU funds could be "changed or reinforced" to address threats to EU values such as the rule of law.<sup>29</sup> Justice Commissioner Věra Jourová suggested conditioning EU funds upon respect for fundamental rights and the rule of law in the next budget period, noting that "everyone who chooses to live in Europe must accept [the EU's] basic values".<sup>30</sup> The possibility of linking the disbursement of structural funds

22: Library of the European Parliament, 'The (low) absorption of EU Structural Funds', October 1<sup>st</sup> 2013.

23: European Commission Staff Working Document, 'The Value Added of Ex-ante Conditionalities in the European Structural and Investment Funds', March 3<sup>rd</sup> 2017.

24: European Commission, 'Internal Guidance on Ex-Ante Conditionalities for the European structural and investment funds: Part I', August 29<sup>th</sup> 2014.

25: Interviews with EU officials, 2017.

26: Robin Huguenot-Noël and Alison Hunter with Fabian Zuleeg, 'Can the EU structural funds reconcile growth, solidarity and stability objectives?', European Policy Centre Issue Paper No. 83, October 2017. European Parliament Briefing, 'How the EU budget is spent: The European Structural and Investment Funds', July 2015.

27: Rijksoverheid, 'Letter to the European Commission on the rule of law mechanism', March 6<sup>th</sup> 2013.

28: Federal Government of Germany, 'Joint statement by the German government and the German Länder on EU Cohesion Policy beyond 2020', June 20<sup>th</sup> 2017.

29: Eric Maurice, 'Commission hints at political conditions for EU funds', EU Observer, May 30<sup>th</sup> 2017.

30: Markus Becker, 'EU Commissioner Pushes for Hard Line on Poland', Spiegel, March 7<sup>th</sup> 2017.



to success in upholding the rule of law is touched on in passing as an option in the European Commission's

reflection paper on the future of EU finances published in June 2017.

## Conditionality in the EU accession process: Successes and failures

Some member-states may well respond negatively to Jourová's comments on acceptance of European values: the implication that states might not respect the rule of law is politically sensitive. But the EU has already effectively applied this carrot and stick approach to improvements in the rule of law as part of the accession process for new member-states. Several lessons can be learnt from the successes and failures of the EU's evolving approach to enlargement.

*“Compliance with EU values, notably the rule of law, cannot be taken for granted after accession.”*

According to Article 49 of the Treaty on European Union, “any European State which respects the values referred to in Article 2 and is committed to promoting them may apply to become a member of the Union”. States which want to join the EU have to comply with the conditions set in the Copenhagen criteria and agree to respect the principles enshrined in the EU Treaties.

Conditions for EU membership had an impact on institutional and policy reforms in accession states in the past because the incentive of potential EU membership has been a powerful tool of policy reform. This was true in former dictatorships like Portugal and Spain; and it was particularly true in Central Europe. As former Commission adviser Heather Grabbe wrote, “the ‘return to Europe’ was a national project in which officials and politicians ended up sharing much of the EU’s reform agenda”<sup>31</sup> All the countries that joined the EU in 2004 implemented major reforms before accession. A few, notably the Baltic States, have made sustainable improvements in the areas of the rule of law and governance. Estonia, for instance, overhauled the former communist power structures and stamped out systemic corruption, embarking upon what has been termed a “virtuous cycle of good governance”<sup>32</sup> However, in other cases, these reforms were not as effective or long lasting.<sup>33</sup>

Bulgaria, Croatia, Hungary and Romania all illustrate the risks that reforms are not always as well entrenched as they seem. In these countries, there has been clear backsliding in certain policy areas, notably the rule of law, corruption and economic governance. With the benefit of hindsight, several countries appeared to meet the criteria for accession to the EU when they joined, but the changes they had made were often merely cosmetic, focusing more on the quantity rather than quality of the laws passed. Croatia passed three laws per day on average in the period between 2008 and 2010, but has since been criticised for its failure to protect the rule of law and for systemic corruption.<sup>34</sup> The Roman historian Tacitus wrote that “the most corrupt state has the most laws”; two millennia later, that still seems to be true. Compliance with EU values, notably the rule of law, cannot be taken for granted after accession when the main ‘carrot’, the incentive of membership, is gone.

There is no doubt that the Commission has learnt from its mistakes and now takes a stricter view of adherence to the rule of law. The applicant state's compliance with EU values is closely monitored during the pre-accession process, through mechanisms such as country evaluations and peer review assessments. In relation to current applicant countries, rule of law monitoring is extremely in-depth: the Commission even reviews the evidence in court cases involving issues such as high-level corruption. Policy reforms, such as setting up national anti-corruption agencies and accepting public procurement laws, are complemented by training of public officials and other educational activities conducted by the Commission and national or local civil society groups. During the accession process, the Commission now gives precedence to the negotiation ‘chapter’ dealing with the rule of law (Chapter 23, dealing with the Judiciary and Fundamental Rights). This means that it freezes negotiations on the other chapters until the applicant state takes measures to address any shortcomings in relation to rule of law, judiciary and fundamental rights.<sup>35</sup> There are important lessons to be learnt from this: the Commission should prioritise the rule of law in its dealings with existing member-states as well.

31: Heather Grabbe, ‘Enlargement policy towards Central and Eastern Europe: what EU-policy-makers learned’ in Haakon Ikononou, Aurélie Andry and Rebecca Byberg (eds), ‘European enlargement across rounds and beyond borders’, London, 2017.

32: Alina Mungiu-Pippidi, ‘The Quest for Good Governance: How Societies Develop Control of Corruption’, Cambridge, 2015.

33: Nikolaj Nielsen, ‘Romania and Bulgaria continue to flout rule of law’, July 18<sup>th</sup> 2012; Laurent Pech and Kim Lane Scheppele, ‘Illiberalism Within: Rule of Law Backsliding in the EU’, SSRN Paper, August 2017.

34: Jean-Sylvestre Mongrenier, ‘Croatia’s accession and the rule of law’, Euractiv, July 1<sup>st</sup> 2013; European Commission, ‘2017 European Semester: Country Report – Croatia’, February 22<sup>nd</sup> 2017.

35: European Commission, European Neighbourhood Policy and Enlargement Negotiations, Chapters of the acquis/negotiating chapters, 2016; Interviews with EU officials, 2017. European Parliament Research Service Briefing, ‘The Western Balkans and the EU: Enlargement and challenges’, September 2016.

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## Options for reinforced rule of law mechanisms

To deal with the limitations of existing instruments and incentives to address threats to the rule of law in member-states, a wide range of new legal and political mechanisms have been proposed. Some of these ideas may require a change to the treaties (including lower thresholds for triggering Article 7 mechanisms, judicial review by the ECJ and extending the powers of the Fundamental Rights Agency).<sup>36</sup> Others could be implemented more simply, by updating EU legislation.

*“There is scope for the Commission to take firmer action to ensure that member-states comply with EU values.”*

Legal scholars have suggested that the rule of law standards developed for the accession process (the Copenhagen criteria) could also be used after accession to monitor continued compliance with Article 2 TEU by member-states, thus extending them to all member-states, not just new members. The argument is that the ECJ could gradually implement these standards through case law, as it did with the general principles of EU law. This is in line with the spirit of EU treaties, which urge the member-states and the Union to promote EU values.<sup>37</sup> In a similar vein, some argue for the establishment of a Copenhagen Commission – an independent body which would monitor all member-states’ compliance with the Copenhagen criteria and serve as a ‘democracy watchdog’.<sup>38</sup>

Article 337 TFEU provides for the Commission to be able to “collect any information and carry out any checks required for the performance of the tasks entrusted

to it”, subject to a simple majority in the Council. Thus, there is scope in the treaties for the Commission to take firmer action to ensure that member-states comply with the Article 2 values, as long as the Commission has the political will to act and has the political support of the member-states.

Over the years, the European Parliament has likewise made several proposals for new enforcement mechanisms for EU values. It has adopted various resolutions calling on member-states to comply with EU values, and has argued for stronger monitoring of compliance. The most recent proposal, by the Parliament’s Civil Liberties Committee in October 2016, made recommendations to the Commission on the establishment of an EU mechanism on democracy, the rule of law and fundamental rights, and called on the Commission to make a proposal to that effect by September 2017. In its response, the Commission acknowledged the need to protect the EU’s rule of law principles, but argued that existing instruments should be used first in order to avoid duplication.<sup>39</sup>

The ultimate option for strengthening EU’s mechanisms that would require treaty change would be to remove the requirement for unanimity to trigger the sanctioning mechanism of Article 7. If this were replaced with a requirement for a qualified majority for the preventive phase and a four-fifths majority for the sanctioning phase, the threat of suspending voting rights would become more credible. If wider treaty change comes back onto the EU agenda, as French President Emmanuel Macron suggested in his ‘Initiative for Europe’ speech on September 26<sup>th</sup> 2017, then reform of Article 7 should not be forgotten.

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## Recommendations for workable rule of law mechanisms

While treaty change may offer the best chance of fundamental reform of the EU’s approach to the rule of law, no member-state is likely to propose reopening the treaties for this alone; and at present there is little enthusiasm for launching a wider redrafting exercise. Treaty change will be at best a very long-term solution. But the rule of law situation in a number of member-states is more pressing. The EU should therefore look for tools that are consistent with existing legal bases. Any instrument should also be applicable in principle to all member-states (not just newer or poorer ones), and should have sanctions attached that are strong enough to deter non-compliance.

Apart from moral pressure, the EU’s main practical leverage on member-states is financial. The entire EU budget should be linked to European values, amongst them rule of law, since they are the foundation of the Union. In the first instance, this points to an approach that links the disbursement of all EU structural and investment funds – the largest element of the EU budget – to an objective assessment of the state of the rule of law in each member-state.

Suspending EU structural and investment funds (not just Cohesion Funds, in order to avoid discriminating against poorer countries) for member-states which violate EU

36: European Parliament Research Service, ‘Understanding the EU Rule of Law mechanisms’, January 2016.

37: Christophe Hillion, ‘Overseeing the rule of law in the European Union: Legal mandate and means’, Swedish Institute for European Policy Studies, January 2016.

38: Jan-Werner Müller, ‘Should the EU Protect Democracy and the Rule of Law Inside Member States?’, Princeton University, 2015.

39: European Parliament Legislative Observatory, ‘European Commission response to text adopted in plenary – SP (2017)16’, February 17<sup>th</sup> 2017.

rule of law provisions could be a potent mechanism in situations where other instruments have failed. In the case of Poland, for example, the Commission has concluded that after the PiS government's reforms of the system for appointing judges, Poland lacks an independent judicial system able to uphold EU law.<sup>40</sup> The country now faces infringement proceedings; yet it continues to receive almost a fifth of EU cohesion funds (€86 billion over the 2014-2020 budget period).<sup>41</sup>

*“Existing member-states should meet the same standards of respect for the rule of law as applicant countries.”*

As a first step, the EU should establish a regular rule of law assessment mechanism for all member-states. The EU's Fundamental Rights Agency would be well-suited to carrying out the assessment, because it already collects and analyses data on respect for rights in the EU. This would require a formal extension to its mandate since it is currently not allowed to report on individual member-states.<sup>42</sup> Each member-state would be assessed before the start of each budget cycle. The assessments would cover the operation of the rule of law, and the risk of corruption.

In addition, each member-state would be subject to annual monitoring. The Commission should identify indicators based on the latest interpretation of the Copenhagen criteria for countries that want to join the EU, so that existing member-states would have to meet the same standards of respect for the rule of law as applicants for membership. The indicators might also include information from the EU Justice Scoreboard (a Commission assessment of the quality, independence

and efficiency of justice systems in all member-states), reports by the Fundamental Rights Agency and reports by the Council of Europe's Venice Commission. Indicators for media freedom, corruption, and civil society participation could also come from non-governmental sources. The European Parliament helpfully compiled a set of such indicators in its resolution on democracy, the rule of law and fundamental rights.<sup>43</sup> The rule of law is difficult to monitor and measure, so the Commission would need timely and detailed information to make the right decisions. New methods of monitoring, perhaps a combination of quantitative indicators and qualitative assessments, would be needed in order to capture the complexities of the situation in different member-states.

The European Commission or the Fundamental Rights Agency, or both together, would prepare and publish the periodic threat assessments and the annual monitoring exercises. They could solicit input from a range of sources, and make the reports public. An independent body, composed of academics from different member-states, EU and national officials, civil society organisations and other experts could validate the work.

Monitoring of conditionalities as a whole (not just in relation to rule of law) could be improved by replacing the current system in which member-states report on their own performance with a more comprehensive monitoring model that includes a greater number of stakeholders. To encourage continual monitoring, interim and *ex-post* conditionalities or benchmarks should be introduced in addition to *ex-ante* conditionalities. Civil society in each member-state could help the Commission to monitor compliance with both *ex-ante* and *ex-post* conditionalities, for example by filling out Commission questionnaires. This could follow the methodology of the Fundamental Rights Agency, which uses a similar system to assess discrimination against Roma groups.

## Options for action, and how to implement them

If the periodic assessment raised no concerns about compliance with the rule of law, then there would be no need for the Commission to do anything (though it might reward particularly good performers – see below). If concerns were raised, however, then the Commission would have a number of options (apart from triggering the rule of law dialogue in line with existing procedures) depending on the seriousness of the problems identified.

### Option I: Additional conditionalities and enhanced monitoring

If the periodic assessment raised some concerns, but not major ones, then the Commission could recommend

that *ex-ante*, interim and *ex-post* conditionalities relating to compliance with the rule of law be included in the Partnership Agreement with the country concerned. Conditions might be applied in particular to any project which could be threatened by poor rule of law standards. This would mean that some of the funds for the country in question would not be disbursed until the country drew up a plan demonstrating how it would meet its EU rule of law obligations.

The Commission could impose such conditionalities now, without treaty change or even new EU legislation. Recipients of structural and investment funds already have to meet a number of conditions and pursue

40: Israel Butler, 'To Halt Poland's PiS, Go for the Euros', Liberties EU, August 2<sup>nd</sup> 2017.

41: European Commission, 'European Structural and Investment Funds: Country factsheet – Poland', May 19<sup>th</sup> 2016.

42: Charles Grant and others, 'Relaunching the EU', CER report, November 2017.

43: European Parliament resolution, 'EU mechanism on democracy, the rule of law and fundamental rights', October 25<sup>th</sup> 2016.



specific policy objectives. One of these objectives is “enhancing institutional capacity of public authorities and stakeholders and efficient public administration”. The Commission could make clear that it regarded respect for the rule of law as a pre-condition for efficient public administration, and that it would treat the absence of the rule of law (measured, for example, by a lack of judicial independence or media freedom) as a sign that the objective was not being met.

The Commission could go further, and make rule of law conditionality more explicit in the next budget period (2021-2027). It could amend the regulation for structural and investment funds (that is, the Common Provisions Regulation, or whatever replaces it) to give priority to compliance with EU values by including respect for the rule of law as one of the general conditionalities. The Commission would have to include a reference to the link between structural and investment funds and respect for the rule of law in the new Multiannual Financial Framework Regulation.

*“There is an implicit link between an effective and impartial justice system and successful investment outcomes.”*

The Council will have to adopt the MFF regulation unanimously, so an amendment of this sort would be difficult to achieve, but the Commission has got agreement to link structural funds to other policy areas before. In the 2007-2013 budget period, provisions that allowed the Commission to suspend cohesion funds (only) for member-states which violated the rules of EU’s Stability and Growth Pact were introduced. In the current budget period, the Commission extended macroeconomic conditionality to all European structural and investment funds.

The rules on disbursing funds in the next MFF period could include provisions for an independent judiciary and other checks and balances as *ex-ante* conditionalities. The Commission could also establish a set of interim and *ex-post* conditions in order to ensure that compliance is maintained throughout the budget period. In addition, the Commission could oblige member-states to sign up to the European Public Prosecutor’s Office (EPPO) as a pre-condition of receiving funds. The EPPO will start operating in 2020 or 2021, and will be able to investigate and prosecute crimes against EU’s financial interests, in order to ensure EU-wide judicial standards and the accountability of governments. So far 20 member-states have agreed to be subject to the EPPO.

The Commission could justify new *ex-ante* conditionalities on the basis that a member-state

that did not meet the pre-conditions would find it harder to use EU funds for effective investment and economic growth: a successful market economy demands an independent judiciary that protects property rights, and an independent media that makes the government more accountable for its actions and exposes cronyism and corruption. European structural and investment funds are already allocated to improving the justice system in some countries, showing that the EU has accepted that there is at least an implicit link between an effective and impartial justice system and successful investment outcomes.

Informal discussions on the next budget period are underway, ahead of official negotiations on the Commission’s legislative proposal for the MFF (likely to be presented next year). It is possible that EU structural and investment funds will be disbursed through separate financial instruments, such as loans rather than grants. That would allow private sector bodies and enterprises to receive funds directly rather than via a member-state government. The recommendations outlined here would still be applicable, however.

#### Option II: Suspension of funds

If the periodic assessment raised major concerns and pointed to systemic breaches of EU’s rule of law standards, the Commission could recommend that disbursement of some or all funds be immediately suspended, especially if projects were likely to fail as a result of major breaches of the rule of law. The Commission already has the power to freeze funds for candidate countries if there are serious rule of law problems (though it rarely uses it); this power would apply in future to existing member-states. Suspension would be combined with enhanced monitoring of the rule of law in the member-state concerned, analogous to the cooperation and verification mechanism applied to Bulgaria and Romania post-accession and to the current rule of law framework. The Commission should seek Council endorsement for its recommendations, ideally by qualified majority rather than unanimity, in order to show member-states’ political support for action, and to increase the legitimacy of sanctions.

The Commission could freeze funds going to a member-state until it implemented adequate policy reforms in line with the recommendations agreed by the Council and the Commission. The freeze could be complete in case of serious rule of law problems, or partial in cases of limited breaches. In the latter case, the funding streams suspended would be those most affected by poor rule of law standards, such as big infrastructure projects where lack of rule of law might lead to inadequate contract enforcement.

The imposition of new conditions for receiving EU funds, making suspension of disbursement more

likely, might cement the economic disparities between member-states, however. If net recipients of cohesion funds were the main losers and net contributors the main beneficiaries from penalties imposed for violating EU values, poorer states might simply resent richer ones, rather than responding to the stimulus by reforming. Net contributors may resent paying money to countries that do not respect EU values; but net recipients may equally resent being penalised financially for actions that net contributors could carry out with impunity. Commission President Jean-Claude Juncker recently echoed this argument, expressing concerns about tying the rule of law to structural funds, which he claimed could be “poison for the continent”<sup>44</sup>

*“Any future conditionality should be applicable to all member-states, since all must respect the rule of law.”*

To mitigate this risk, any future conditionality would in principle have to be applicable to all member-states, since all are obliged to respect the rule of law. Though poorer countries get more from EU structural and investment funds, all EU member-states receive some transfers. Because the financial incentives for net contributors to the EU budget to comply with EU values are weaker, different incentives would have to be found. These could be linked, for example, to the imposition of periodic monitoring and consequent reputational damage.

Even if suspending payment of funds does not have a major effect on the overall economic development of a member-state, it may inadvertently harm specific groups of citizens in the target country, particularly those already living in regions significantly poorer than the EU average. This situation would create a moral dilemma for the Commission in deciding how to incentivise the government to improve, without inadvertently punishing the citizens. On a political level, citizen resentment could lead to heightened levels of euroscepticism and increase support for governments even when they violate rule of law standards. But if the Commission communicated the reasons and justification for potential suspension to the citizens carefully, such sanctions could also lead to increased popular pressure for positive democratic reforms.

In cases of extreme breaches of European values, the Commission could reinforce the message that sanctions were aimed at the government, not the people, by channelling some or all EU funding not through the national government but through other

agencies. Funds could be administered by either a separate European Commission body (in the case of larger projects, which might otherwise be more prone to corruption), or a body of national experts and administrators from other member-states, supervised by the Commission. Funds or other loan instruments could also be allocated to municipal governments or other local-level beneficiaries, such as citizen groups.

For smaller-scale projects, one or more NGOs could take on the management of funds, ideally in a partnership of organisations from the sanctioned member-state and from other countries. This is for instance how the European Economic Area (EEA) and Norway grants are administered by the Norwegian government. The EEA grants are the EEA members’ contributions to the post-2004 accession states, and are allocated to governments and civil society. The Norwegian government signs an inter-governmental agreement with the national government on the objectives that the funds should serve. On the basis of these national priorities, the Norwegian foreign ministry appoints local NGOs and other public organisations, such as national and local authorities and research institutions, to be “programme operators” which develop and manage the programmes, and disburse the grants in accordance with agreed criteria.<sup>45</sup> These operational administrative bodies are independent from the government in certain cases. In the past, this has been contentious for governments such as Poland and Hungary which wanted to have greater control over the choice of grant beneficiaries.<sup>46</sup>

Withholding some funds might have perverse effects if this resulted in reduced spending on improved public administration. Since a key benefit of structural and investment funds is that they build the capacity of national public administrations, any sanctions would have to be complemented by direct funding of training for public officials, taking into account the lessons from accession. Channelling the funds in this way would not only ensure that projects with a demonstrable public benefit went ahead, but it would also reduce the opportunities for incumbent political parties to direct the income stream to friends and supporters in ways that contradict the rule of law and fuel corruption.

Of course, much can happen over the course of a seven-year budget period. A problem would arise if sanctions were delayed, so that they fell not on the government that the EU was seeking to deter, but on its successor. Terms of government are typically four or five years, shorter than the seven year MFF period. One of the purposes of the routine annual monitoring would be to detect evidence of serious backsliding; that would then trigger a comprehensive

44: Florian Eder, ‘Juncker: German plan to link funds and rules would be “poison”’, Politico, June 1<sup>st</sup> 2017.

45: EEA Grants: About the EEA and Norway Grants, 2013.

46: Aleksandra Eriksson, ‘Hungary and Poland risk losing €1 billion in Norway aid row’, EU Observer, May 3<sup>rd</sup> 2017; Aleksandra Eriksson, ‘Norway defends NGOs in Hungary and Poland’, May 8<sup>th</sup> 2017.

assessment. On the basis of that, the Commission could decide to deploy one of the options above. Politically, the knowledge that the Commission had these instruments would reinforce the importance of EU principles, and serve as a deterrent to governments or parties in power that violate them. Since the Union is ultimately a community of states, it is vital that the member-states explicitly back the Commission's powers in this regard.

### Option III: Reward mechanisms

Apart from sanctioning poor performers, the Commission could disburse 'reward funds' to countries which performed well. The groundwork for this has been established with the 'performance reserve' in this programming period – an additional sum which programmes obtain when they reach certain indicators at the end of the period – but a separate allocation

could also be made for specific 'EU values reward funds' which would go to member-states, civil society or community organisations, or local authorities that performed well on the *ex-post* evaluation and promoted EU values including the rule of law.

The performance reserve would need to be adapted, so that financial and non-financial incentives could be on offer for exemplary compliance with EU values, as well as for meeting specific programme targets. The reward funds could provide further support for policy reforms such as training for judges and public officials, visiting fellowships at the EU institutions and the access to expert advice. Whatever the balance between positive and negative incentives, however, the focus in every case should be on upholding EU values, with solutions reflecting the objective assessment of conditions in each member-state.

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## Conclusion

The Commission faces a number of challenges in strengthening existing rule of law mechanisms or creating new ones, though none of them is insuperable. First and foremost, a number of member-states do not show the political will to establish stronger mechanisms to protect the rule of law. Some may be motivated by the fact that they themselves do not wish to face in-depth scrutiny of what they deem to be sovereign affairs, especially if that leads to punishment. The lesson of accession was that the EU succeeded in improving the quality of democracy and the rule of law not (primarily) by sanctioning governments, but by working with other stakeholders in shaping the 'day-to-day functioning of politics' in the offending member-states. The accession process therefore had a transformative effect when it caused a cultural change in how the public administration worked. Consequently, the freezing of parts of the funds should be complemented with softer means such as dialogue with the government under the current rule of law framework.

*“Each state has chosen to accept the discipline of belonging to the Union, and to abide by EU values.”*

Any new mechanism should ensure that the 'semblance of change', such as amended national laws, is matched by change in practice, embedded in societal expectations. There is little value in cosmetic changes designed only to avoid sanctions and ensure that funds continue to flow.

Equally, any new measures that are introduced should not unduly stretch the Commission's or national authorities' capacities to design and implement projects, so that needed funds do not flow at all. Commission officials

have privately highlighted the fact that the existing *ex-ante* conditionalities applied to European structural and investment funds have already increased the administrative burden on national managing authorities and the Commission itself. While the recommendations we make here involve establishing fairly sophisticated and complex systems for monitoring the rule of law, this is compatible with more streamlined mechanisms for disbursing and monitoring the spending of structural and investment funds. Many of the more intrusive and administratively complex elements canvassed here would only be implemented in a case where there has been a serious breach of the rule of law, and that in itself would be an incentive for member-states to avoid finding themselves in this position.

Europe is not the only place where democracy (in the limited sense of rule by the majority) is sometimes in tension with the rule of law (which sets limits to what the majority can do). But for the member-states of the European Union, EU law adds an extra constraint on what governments – even those enjoying strong popular support – can do. Each state has chosen, by its own democratic process, to accept the discipline of belonging to the Union, and to abide by EU values.

Perhaps inevitably, at times governments come to power and want to do things beyond the limits that the EU lays down. But the EU cannot function as an area of peace, prosperity and civil rights unless its member-states respect the rule of law. It protects weak states against strong ones, and ordinary citizens against over-reaching governments. Therefore, including the rule of law in the treaties was not only right but also necessary.

For political leaders who belong to the European 'club', making judgements about the internal situations in



other member-states may be uncomfortable. Sometimes it may be easier for governments to capitalise on their silence, as a political favour that can be called in later; or to turn a blind eye to what a political ally is doing rather than risk a split in the political family that might benefit another grouping (the European People's Party has been noticeably less critical of Hungary's Fidesz – a member of their group – than of Poland's PiS – a member of a different group). But a rules-based institution cannot tolerate serious breaches of its rules for very long without suffering serious damage. Loyalty to a party grouping can never justify turning a blind eye to violations of the rule of law in a member-state.

Membership of the EU has always been the great prize for most European countries, and the big lever for reform in candidate countries. By and large, the leverage has worked: most of the countries that have joined the EU as part of their transition from undemocratic to democratic forms of government have successfully embedded respect for the rule of law in their everyday political and economic life. But there are warning signs that in some cases reforms may be reversible.

One way of looking at the EU's role in Europe is as a peace project implemented by economic means: in the aftermath of World War Two, the founding fathers sought to create economic interdependence and economic, political and social ties that would make a repeat of Europe's ruinous wars impossible. If part of the Union's current role is to create a law-governed space in Europe, then it is logical to look again at the economic levers that the EU can use.

Threatening sanctions in the form of reduced structural and investment funding from the EU for countries that are turning their back on European values would be a blunt economic instrument. But it should be possible for the EU to devise rules on the use of funds that make safeguarding the rule of law a priority. Protecting the rule of law is already becoming a central concern in its governance agenda, and it could also become an explicit condition for receiving at least some EU funds. It cannot be right that the EU is forced by its own rules to subsidise member-states even when their governments flout EU values. In the long run, the inequalities between member-states are more likely to be narrowed if investments, whether by the EU or the private sector, are governed by the rule of law rather than the will of the rulers.

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