

# Rule of Law in the EU Legal Order

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## A. Introduction

The rule of law is one of the founding principles of the European Union (EU)/ European Economic Community (EEC) and a legally binding constitutional principle.<sup>1</sup> Its development has been supported by the Court of Justice of the European Union (CJEU) in its jurisprudence via a comparative approach of the constitutional traditions of all Member States. The rule of law as 'a concept of overwhelming importance'<sup>2</sup> has to be followed by every Member State which desires to be a member of the Union.<sup>3</sup> The duty of the Union and the institutions of the Union to promote the fundamental values of the Union has been stated in Articles (Art(s).) 3(1) and 13(1) Treaty on European Union (TEU) respectively. The rule of law is further considered as a prin-

1 Communication from the Commission to the European Parliament and the Council, A new EU Framework to strengthen the Rule of Law, COM (2014) 158 final, Annex. 1 to 2, p. 1.

2 Kochenov, ELR 2009/2(1), p. 5, 6.

3 Hillion, EPA 2016/1, p. 1.

ciple that guides both internal and external actions of the EU.<sup>4</sup> The European Commission (EC or Commission) has stated that compliance with the rule of law is essential for protection of all fundamental values as provided in Art. 2, TEU as well as rights and obligations arising from treaties and international agreements.<sup>5</sup>

Art. 2 TEU lays down that “*The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities*”; this view is further carried forward by Art. 21(1) TEU which states that the rule of law is a core feature promoting the ‘creation, development and the enlargement’ of the EU. It is an elementary part of the EU’s constitutional framework. The notion of proportionality, legal clarity and effective protection by courts, which are categorised as ‘General Principles of Community Law’, are all based on the rule of law.<sup>6</sup> From these ‘General Principles’ the secondary principles legitimate expectations, need to provide a reason for legal measures and the right to be heard are derived.<sup>7</sup>

Even though there is no universally agreed meaning<sup>8</sup> for the rule of law and a number of international organisations have presented their own checklists and instruments to measure the prevalence of the rule of law with their own individual criterion *inter alia* the UN Rule of Law Indicators,<sup>9</sup> the World Justice Project,<sup>10</sup> and the Venice Commission Rule of Law Checklist,<sup>11</sup> it is opined that ‘*at the core of the Rule of Law is the idea that any exercise of power should be subject to the law: the Rule of Law, not men.*’<sup>12</sup> An insight into the understanding of the EC on the scope of the rule of law can be found in a definition in its recent proposal for a regulation where it stated that: “*‘the rule of law’ refers to the Union value enshrined in Article 2 of the Treaty on European Union which includes the principles of legality, implying a transparent, accountable, democratic and pluralistic process for enacting laws; legal certainty; prohibition of arbitrariness of the executive powers; effective judicial protection by inde-*

4 Timmermans, the First Vice-President of the European Commission, Keynote speech at Conference on the Rule of Law, Tilburg University, 31 August 2015, available at: [https://ec.europa.eu/commission/commissioners/2014-2019/timmermans/announcements/european-union-and-rule-law-keynote-speech-conference-rule-law-tilburg-university-31-august-2015\\_en](https://ec.europa.eu/commission/commissioners/2014-2019/timmermans/announcements/european-union-and-rule-law-keynote-speech-conference-rule-law-tilburg-university-31-august-2015_en) (03/03/2017).

5 Communication from the Commission to the European Parliament and the Council, A new EU Framework to strengthen the Rule of Law, COM(2014) 158 final, p. 4.

6 CJEU, case C-101/08, Opinion of the Advocate General Trstenjak, *Audiolux SA e.a. v. Groupe Bruxelles Lambert SA (GBL) and Others and Bertelsmann AG and Others*, ECLI:EU:C:2009:410, para. 71.

7 Ibid.

8 Street, p. 12.

9 Department of Peacekeeping Operations, United Nations, p. 4.

10 World Justice Project, p. 10.

11 Rule of Law Checklist, Adopted by the Venice Commission at its 106th Plenary Session Venice, 11-12 March 2016, Doc No. CDL-AD (2016)007, Council of Europe.

12 Kochenov, ELR 2009/2(1), p. 5, 9.

pendent courts, including of fundamental rights; separation of powers and equality before the law.”<sup>13</sup>

These definitions and interpretations present a relatively clear picture of the scope of the subject although it is an ever-developing field of law. The Commission<sup>14</sup> as well as the CJEU, have expressed that the rule of law is a constitutional principle and has both formal and substantive components. It has also emphasised that there is a general interest in ensuring the rule of law in all Member States as there is a close linkage among all Member States in terms of automatic enforcement of certain types of judgments and warrants.<sup>15</sup> This contribution will aim at giving an overview of the cornerstones of the EU rule of law approach as well as the elements to enforce this key constitutional element.

## B. The Rule of Law as a Key Element of EU Legal Order

As already mentioned above, the principle of the “rule of law” is considered a part of the legal framework of every EU Member State. Many national constitutions have it embedded as a principle to be followed by the units, which constitute it. An example of such a provision is seen in the German Constitution in Art. 28(1), which puts a responsibility on the constituting states to conform to the principle of the rule of law. Furthermore, the *Rechtsstaatsprinzip* is part of the *Staatsstrukturprinzipien* in Art. 20 of the German Constitution, which cannot be modified (“*Ewigkeitsgarantie*”, see Art. 79 par. 3 German Constitution).<sup>16</sup> Among the other EU members, the Constitution of Spain states the rule of law as the governing principle ‘which advocates freedom, justice, equality and political pluralism as highest values of its legal system.’<sup>17</sup> A third variation is seen in the Croatian Constitution which follows the same line and also includes the ‘rule of law’ as one of the highest values of the Constitutional order.<sup>18</sup>

On the EU level, Art. 49 TEU links membership of the Union to the observance of the common values of the Union for two primary reasons.<sup>19</sup> Firstly, contravention of the values would ‘endanger the legitimacy of EU decision making as a whole’ and secondly non-compliance with the rule of law principles may affect the functioning of the Union itself as it is based on mutual trust and interdependence among the

13 European Commission, Proposal for a Regulation of the European Parliament and of the Council on the protection of the Union's budget in case of generalised deficiencies as regards the rule of law in the Member States, COM(2018) 324 final, 02/05/2018, p. 8.

14 Communication from the Commission to the European Parliament and the Council, A new EU Framework to strengthen the Rule of Law, COM (2014) 158 final/2, p. 4.

15 Ibid.

16 A detailed explanation on the rule of law framework can be found in Schmidt-*Aßmann*, in: Isensee/Kirchhof (eds.), p. 541–612.

17 Section 1.1, Constitution of Spain, 1978; *Pech*, Rule of Law as a Guiding Principle of the European Union’s External Action, p. 10.

18 Art. 3, Constitution of Croatia.

19 *Kochenov*, ELR 2009/2(1), p. 5, 6.

members. Non-observance of the rule of law can invite enforcement actions from the Commission.

The EU Commission has highlighted that each Member State has the responsibility to respect rule of law as a common value,<sup>20</sup> it has also stated that Member States have challenged the principle of rule of law in the Union through their activities such as attacks on independence of constitutional courts, corruption, abuse of office and threats to independent media.<sup>21</sup> To deal with the situation, the Commission has published a recent communication titled ‘Strengthening the rule of law within the Union-A blueprint for action’, which seeks to lay down the path to an effective common response to rule of law problems.<sup>22</sup>

The EU has thus continued to promote the rule of law as a fundamental requirement for every State which seeks to join the Union; notably the European Council at the Copenhagen Summit of 1993 even went to the extent of including it as a requirement for new applications for joining the Union.<sup>23</sup> The Amsterdam Treaty of 1997 introduced a new provision, which stated that ‘the Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States.’<sup>24</sup> This meant that these principles were explicitly elevated to the level of foundational principles for the Union for the first time and were stated as defining principles that form a core part of the ‘purpose and character’ of the entire EU ‘politico-legal system’.<sup>25</sup> The Amsterdam and later the Nice Treaty also introduced provisions for penalties to be imposed in case the states did not comply with the “provisions” of Rule of Law.

The Lisbon Treaty modified the principles first introduced in the Amsterdam Treaty and included them in Art. 2 of the TEU. The Lisbon Treaty in a significant modification however placed the rule of law as a ‘value’, as part of the constitutional framework the EU possesses.<sup>26</sup> The change of words however is not a permanent change in terminology and in the preamble and Art. 21(1) of the TEU, the rule of law is again referred to as a principle. The rule of law is referred to in Clause 1 of Art. 21 TEU as one of the guiding principles of the external action of the Union which has also inspired the ‘creation, development and enlargement’ of the Union.<sup>27</sup> The next reference is found in Sub clause (b) of Clause 2 of the same Art. 21 TEU wherein the ‘rule of law’ is one of the ‘fields’ which the Union will work to consolidate and support

20 Communication from the Commission to the European Parliament and the Council, COM(2019) 343 final, p.4

21 Communication from the Commission to the European Parliament and the Council, COM(2019) 343 final, p.1 ff.

22 Communication from the Commission to the European Parliament and the Council, COM(2019) 343 final,

23 Conclusions of the Presidency, European Council in Copenhagen, Doc No. SN 180/1/93 REV 1, Copenhagen, 21-22 June 1993, p. 13.

24 Ex Art. 6(1) TEU.

25 *Pech*, Rule of Law as a Guiding Principle of the European Union’s External Action, p. 9.

26 CJEU, *Opinion 1/17*, ECLI:EU:C:2019:341, para. 110 ; See also, Art. 2 TEU.

27 OJ C 326 of 26/10/2012, p. 28.

in its international relations.<sup>28</sup> Lastly, the principle of the rule of law is mentioned in the first preambulatory paragraph of the Charter of Fundamental Rights of the European Union (CFREU) where it is referred to as one of the principles on which the Union is based on. All of these provisions will have a significant influence on the future of Europe and international investment law.

### C. The Rule of Law in the recent Jurisprudence of the CJEU

The CJEU has played an active role in promoting the ‘Rule of law’ as a fundamental value of the Union and it stated that: “*it must first be emphasized in this regard that the European Economic Community is a community based on the rule of law, in as much as neither its member states nor its institutions can avoid a review of the question whether the measures adopted by them are in conformity with the basic constitutional charter, the treaty.*”<sup>29</sup>

The exact meaning and scope of the “rule of law” was however not clear from the formula prescribed by the CJEU and it is suggested that this lack of an exact meaning is behind the consensus among the Member States on the need for maintaining the rule of law in the Union.<sup>30</sup> The European principle of the “rule of law” is thus a compilation of national definitions and understanding of the “rule of law” based on the constitutional law of the Member States which has been further augmented in a “European sense” by the EU institutions and then “Europeanised” by the CJEU.<sup>31</sup>

The importance of the principle of the rule of law has been stressed by the CJEU and the General Court (previously, Court of First Instance) as a ‘guarantor of the rule of law within the EU’<sup>32</sup> in a number of important decisions in different areas in recent years. In the development of the rule of law as a basic EU constitutional element, the CJEU for the first time referred to the Union as a “Community based on the rule of law” in the *Les Verts* case<sup>33</sup> while the *Granaria* Case of 1979<sup>34</sup> was the first case referring to the principle of the “rule of law within the Community”. The CJEU’s understanding of the rule of law is legalistic as well as procedural and is related *inter*

28 OJ C 326 of 26/10/2012, p. 29.

29 CJEU, case C-294/83, “*Les Verts*” *v. European Parliament*, ECLI:EU:C:1986:166, para. 23.

30 *Pech*, The Rule of Law as a Constitutional Principle of the European Union, p. 4.

31 *Ibid.*, p. 6.

32 CJEU, case C-216/18, *PPU Minister for Justice and Equality v. LM*, ECLI:EU:C:2018:586, para. 50; *Lenaerts*, SMU L. Rev. 2014/67, pp. 707, 715.

33 CJEU, case C-294/83, *Parti écologiste “Les Verts” v. European Parliament*, ECLI:EU:C:1986:166, para. 23; *Pech*, The Rule of Law as a Constitutional Principle of the European Union, p. 10.

34 CJEU, case C-101/78, *Granaria*, ECLI:EU:C:1979:38, para. 5: “Thus it follows from the legislative and judicial system established by the Treaty that, although respect for the principle of the rule of law within the Community context entails for persons amenable to Community law the right to challenge the validity of regulations by legal action, that principle also imposes upon all persons subject to Community law the obligation to acknowledge that regulations are fully effective so long as they have not been declared to be invalid by a competent court.”.

alia to the principles of legality, judicial protection and judicial review.<sup>35</sup> In recent years, it has had to decide on a number of disputes from the Member States relating to safeguarding the rule of law in the Union.<sup>36</sup> For example in the *Safe Harbour* case the Court used the opportunity to reiterate that the ‘European Union is a union based on the rule of law in which all acts of its institutions are subject to review of their compatibility with, in particular, the Treaties, general principles of law and fundamental rights.’<sup>37</sup> In the recent *LM* case, it highlighted the importance of the rule of law as a core principle of the EU legal order by determining that serious steps such as automatic refusal to execute an European arrest warrant from a Member State could be undertaken if it is determined that there is a serious and persistent breach of the principle of the rule of law in that Member State.<sup>38</sup>

#### D. Elements of the Rule of Law Principle in EU Law

Respect for the rule of law is a prerequisite for the protection of all fundamental values listed in the Treaties, including democracy and fundamental rights. A few key elements, which define this principle are (non exhaustively):

*Access to Justice and Judicial Independence:* Justice has been considered as a very important feature of the Union which is mentioned in both the core treaties of the Union (i.e. the TEU and the Treaty on the Functioning of the European Union (TFEU)). Art. 2 TEU states that justice is one of the values common to the societies in the Member States.<sup>39</sup> Art. 19(1) TEU also requires effective judicial protection through independent courts. Continuing with this objective, Art. 67 (4) of the TFEU places responsibility on the Union to ‘facilitate access to justice’.<sup>40</sup> The CFREU as per Art. 47 also guarantees a “fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law” highlighting the importance of access to justice in EU law.<sup>41</sup> The Council of Europe (CoE) has gone ahead and described access to justice as one of the fundamental principles ‘of a democratic state based on human rights and the rule of law.’<sup>42</sup> This is not surprising considering the fact that the European Convention for the Protection of Human Rights and Fun-

35 CJEU, case C-216/18, *PPU Minister for Justice and Equality v. LM*, ECLI:EU:C:2018:586, para. 51; *Pech*, The Rule of Law as a Constitutional Principle of the European Union, p. 15.

36 On this see also, von *Danwitz*, FILJ 2014/5, p. 1311 ff.

37 CJEU, case C-362/14, *Schrems v. Data Protection Commissioner*, ECLI:EU:C:2015:650, para. 60.

38 CJEU, case C-216/18 *PPU Minister for Justice and Equality v. LM*, ECLI:EU:C:2018:586, para. 72. Other leading cases on the subject of rule of law are: CFI, joined cases T-228/99 and T-233/99, *Westdeutsche Landesbank Girozentrale v. Commission*, ECLI:EU:T:2003:57, para. 167; CJEU, joined cases C-46/93 and C-48/93, *Brasserie du Pêcheur SA v. Federal Republic of Germany and Queen v. The Queen and Secretary of State for Transport*, ECLI:EU:C:1996:79, para. 51.

39 OJ C 326 of 26/10/2012, p. 17.

40 *Ibid.*, p. 73.

41 *Ibid.*, p. 405; See also, CJEU, *Opinion 1/17*, ECLI:EU:C:2019:341, paras 189 ff.

42 Council of Europe, available at: <https://www.coe.int/en/web/cdcj/activities/judicial-independence-impartiality/conference-sofia2016> (05/06/2019).

damental Freedoms (ECHR), one of the key documents of the CoE has stated under Art. 6 ECHR that ‘everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.’<sup>43</sup> The CJEU has also passed a number of important decisions through which it has tried to ensure that the right to be heard can be ensured for the citizens of the Union.<sup>44</sup> Important decisions from the Court call for affordable court fees,<sup>45</sup> the entitlement to effective protection by the courts<sup>46</sup> and being granted the option to challenge measures under a Directive and in absence of such options, empowering the national court to draw necessary conclusions by displaying the legislative act.<sup>47</sup>

*Transparency:* The principle of Transparency is found to be included in a variety of contexts in the treaties of the Union.<sup>48</sup> In Art. 11 (3) of the TEU, it has been associated with ensuring an open consultation with the parties as a means of ensuring legitimacy for the actions of the Union.<sup>49</sup> Art. 15 (3) TFEU goes a step further and places responsibility on the Union bodies and institutions to ensure transparency in their proceedings. It also introduces the concept of special provisions for ensuring the accessibility of documents in the rules of procedure of the institutions.<sup>50</sup> Transparency has also been stated to be essential to the rule of law and democracy together.<sup>51</sup> Transparency is also mentioned in the Laeken Declaration on the future of the European Union wherein it was stated that the Union needs to be more transparent and it was recognised as one of the qualities desired in the institutions.<sup>52</sup> The value of transparency has been recognised more strongly in the acts of the Union due to the widely perceived ‘democratic deficit’ in the functioning of the Union and transparency is one of the core values linked with taking the Union closer to the people.<sup>53</sup>

*Legal Certainty and legitimate interests:* The principle of legal certainty is considered as one of the noteworthy ‘principles’ of the rule of law in the European

43 European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5.

44 CJEU, case 32/62, *Maurice Alvis v. Council of the European Economic Community*, ECLI:EU:C:1963:15.

45 CJEU, case C-530/11, *European Commission v. the United Kingdom of Great Britain and Northern Ireland*, ECLI:EU:C:2014:67; See also, CJEU, *Opinion 1/17*, ECLI:EU:C:2019:341, paras 205 ff.

46 CFI, case T-192/99, *Dunnett and Others v. EIB*, ECLI:EU:T:2001:72.

47 CJEU, joined cases C-128/09 to C-131/09, C-134/09 and C-135/09, *Antoine Boxus and Willy Roua and Ors*, ECLI:EU:C:2011:667.

48 On this, for a reference to the principle of transparency in relation to public authorities, See, CJEU, case C-458/03, *Parking Brixen GmbH v. Gemeinde Brixen, Stadtwerke Brixen AG*, ECLI:EU:C:2005:605, para. 72.

49 OJ C 326 of 26/10/2012, p. 21.

50 *Ibid.*, p. 23.

51 *Bard/Carrera/Guild*, p. 52.

52 Laeken Declaration on the future of the European Union, Para II, Heading More democracy, transparency and efficiency in the European Union.

53 *Karageorgou*, p. 3.

Union<sup>54</sup> and is also found in the Venice Commission Checklist on the rule of law.<sup>55</sup> The principles of legal certainty and legitimate expectations, although they are frequently discussed together, are two separate principles and relate to two different areas of the Rule of Law.<sup>56</sup>

The principle of legal certainty has been a core part of the rule of law since the beginning of the jurisprudence of the CJEU in 1961.<sup>57</sup> The Commission has stated that legal certainty requires that 'rules are clear and predictable and cannot be retrospectively changed.'<sup>58</sup> This interpretation has originated in a decision of the CJEU, wherein the court stated that ".....*the principles of legal certainty and the protection of legitimate expectation, by virtue of which the effect of community legislation must be clear and predictable for those who are subject to it...*".<sup>59</sup> The background behind legal certainty is that the people who are addressed by a law must know how to conduct themselves to 'protect themselves from the arbitrary use of state power.'<sup>60</sup>

*Proportionality:* The principle of proportionality is deeply entrenched in the fundamental treaties of the Union and has been generally associated with the issue of competences.<sup>61</sup> Art. 5(1) of the TEU states that the use of Union competences will be governed 'by the principles of subsidiarity and proportionality'.<sup>62</sup> The meaning of the term is further clarified later in Art. 5(4) TEU wherein it is stated that proportionality means that the form of Union actions could not exceed the objectives laid out in the treaties.<sup>63</sup> The importance of the principle can be seen from the fact that a special protocol, Protocol No. 2 'On the application of the principles of Subsidiarity and Proportionality' was attached to the Lisbon Treaty.<sup>64</sup> Art. 2 of the protocol reiterates the responsibility of the institutions for the principle of proportionality as laid down in Art. 5 TEU. The Venice Commission has also included proportionality as one of the principles included under the concept of the rule of law as interpreted by the CJEU.<sup>65</sup>

54 Communication from the Commission to the European Parliament and the Council, A new EU Framework to strengthen the Rule of Law, COM (2014) 158 final, Annex. 1, p. 4; See also, *Bungenberg*, in: *Heselhaus/Nowak* (eds.), pp. 945 ff.

55 Rule of Law Checklist, Adopted by the Venice Commission at its 106th Plenary Session Venice, 11-12 March 2016, Doc No. CDL-AD (2016)007, Council of Europe, para.18.

56 *Communication from the Commission to the European Parliament and the Council*, A new EU Framework to strengthen the Rule of Law, COM(2014) 158 final, Annex 1, p. 1.

57 CJEU, case 42/59 and 49/59, *SNUPAT v. High Authority*, ECLI:EU:C:1961:5.

58 *Communication from the Commission to the European Parliament and the Council*, A new EU Framework to strengthen the Rule of Law, COM(2014) 158 final, Annex 1, p. 1.

59 CJEU, joined cases 212 to 217/80, *Amministrazione delle finanze dello Stato v. Salumi*, ECLI:EU:C:1981:270, para. 10.

60 *Abmetaj*, IJRD 2014/1(2), pp. 20, 21.

61 Opinion of the Advocate General Trstenjak, CJEU, case C-101/08, *Audiolux SA e.a v. Groupe Bruxelles Lambert SA (GBL) and Others and Bertelsmann AG and Others*, ECLI:EU:C:2009:410, para. 71.

62 OJ C 326 of 26/10/2012, p. 18.

63 *Ibid.*

64 *Ibid.*, p. 206.

65 Rule of Law Checklist, Adopted by the Venice Commission at its 106th Plenary Session Venice, 11-12 March 2016, Doc No. CDL-AD (2016)007, Council of Europe, para. 41.

The test for proportionality in the EU was mainly developed in the *Fedesa* case.<sup>66</sup> The test has five main elements:

- a) *an appropriate measure*
- b) *in pursuit of a legitimate objective*
- c) *necessary to achieve the objectives legitimately pursued*
- d) *least onerous measure to be chosen*
- e) *disadvantages must not be disproportionate to the aims pursued.*

In terms of EU Law, the proportionality test is used to evaluate government actions and legislations and can be used both at the Member State and at the Union level.<sup>67</sup> Further, the use of the proportionality principle is based on a strong legislative presumption for sovereignty.<sup>68</sup>

*Fundamental Rights:* The Commission has stated that ‘an independent and effective judicial review, including respect for fundamental rights’ is one of the principles related to the rule of law stemming from the Constitutions of the Member States.<sup>69</sup> The Commission has closely linked the rule of law and fundamental rights and has stated that democracy and respect for fundamental rights are not possible without respect for the rule of law.<sup>70</sup> Fundamental rights depend on being ‘justiciable’, which can only be ensured if the judiciary and constitutional courts can perform their duties.<sup>71</sup> The protection of fundamental rights is a core related issue of the rule of law discussion primarily owing to the recognition of the ‘rule of law’ as a value of the Union and maintenance of the value would also require respect for fundamental rights. Advocate General Cruz Villalón stated that “...*the idea of a Union based on the rule of law, hereinafter the value of the rule of law, requires not only respect for fundamental rights and that the institutions be subject to judicial review of the compatibility of their acts with the constitutional charter, the Treaties...*”<sup>72</sup> The interpretation from the Court and Advocate Generals signifies that rule of law is the wider umbrella under which Fundamental rights have been sought to be protected.<sup>73</sup> Thus, Fundamental Rights and the rule of law are often mentioned in the same breath in EU Law.

<sup>66</sup> CJEU, case C-331/48, *The Queen v. Minister of Agriculture, Fisheries and Food and Secretary of State for Health, ex parte: Fedesa et al.*, ECLI:EU:C:1990:391, para. 13.

<sup>67</sup> Sauter, p.1.

<sup>68</sup> Ibid., p. 4.

<sup>69</sup> Communication from the Commission to the European Parliament and the Council, A new EU Framework to strengthen the Rule of Law, COM (2014) 158 final, Annex 1, p. 2.

<sup>70</sup> Ibid., p. 4.

<sup>71</sup> Ibid.

<sup>72</sup> Opinion of the Advocate General Cruz Villalón, CJEU, case C-336/09, *Republic of Poland v. European Commission*, ECLI:EU:C:2011:860, para. 30. Similar opinions were reiterated in the opinion of the Advocate General in case C-47/08, *Commission v. Belgium*, ECLI:EU:C:2010:513, para. 129.

<sup>73</sup> EGC, case T-340/14, *Klyuyev v. Council*, ECLI:EU:T:2016:496, para. 74; Opinion of the Advocate General Kokott, CJEU, case C-296/08, *PPU*, ECLI:EU:C:2008:455, para. 38; Opinion of Advocate General Villalón, CJEU, case C-336/09, *Poland v. Commission*, ECLI:EU:C:2011:860, para. 30.

## E. Mechanisms of Implementing the Rule of Law in Europe via EU Law

### I. Key Options for reinforcement of rule of law oversight

The EC has been described as the ‘guardian of the treaties’<sup>74</sup> and has been entrusted with the responsibility of protecting the values of the Union.<sup>75</sup> Although, the EC has expressed that “*the different constitutions and judicial systems of the EU Member States are, in principle, well designed and equipped to protect citizens against any threat to the rule of law*”,<sup>76</sup> a several member states have displayed a lack of respect for the rule of law principle.<sup>77</sup> In light of this situation, the Commission has reiterated the strategic importance of the principle stating it as “*a constitutional principle with both formal and substantive components*.<sup>78</sup>”

To tackle this situation, the Commission has looked at alternatives available to it and has preferred to use infringement procedures under Art. 258 TFEU.<sup>79</sup> The Commission has already used this mechanism in a few different cases.<sup>80</sup> However, it was felt by some scholars that the mechanisms available with the Commission were not enough and a new mechanism was required.<sup>81</sup> In practice, the Commission has primarily used the following ways of dealing with a rule of law challenge in the Union:

#### a) Soft approach

The Council has admitted that in the past it has used the ‘soft power’ of political persuasion.<sup>82</sup> This approach, which used negotiations and discussion to come to a solution, can generally be seen as the precursor to the new Commission Framework, which we discuss later. As of now, the Commission has generally used the new framework for dealing with any situations of infringement of the rule of law.

74 European Parliament resolution of 13 April 2016 on the situation in Poland, 2015/3031(RSP), para M.

75 Art. 17 TEU, OJ C 326 of 26/10/2012, p. 19.

76 Communication from the Commission to the European Parliament and the Council, A new EU Framework to strengthen the Rule of Law, COM (2014) 158 final/2, p. 2.

77 Kochenov/Pech, ECLR 2015/3, pp. 514 ff.

78 Communication from the Commission to the European Parliament and the Council, A new EU Framework to strengthen the Rule of Law, COM (2014) 158 final/2, p. 4.

79 Communication from the Commission to the European Parliament and the Council, A new EU Framework to strengthen the Rule of Law, COM (2014) 158 final/2, p. 3.

80 CJEU, case C-286/12, *Commission v. Hungary*, ECLI:EU:C:2012:687 (on equal treatment as regards the compulsory retirement of judges and public prosecutors); CJEU, case C-518/07, *Commission v. Germany*, ECLI:EU:C:2010:125 (on state scrutiny for data monitoring agencies) and CJEU, case C-614/10, *Commission v. Austria*, ECLI:EU:C:2012:631 (on independence of data protection authorities).

81 Goldston, available at: <https://euobserver.com/opinion/123526> (25/03/2017).

82 Communication from the Commission to the European Parliament and the Council, A new EU Framework to strengthen the Rule of Law, COM(2014) 158 final, p. 2.

*b) Infringement proceedings under Article 258 TFEU*

The law as provided under Art. 258 TFEU permits the Commission to commence infringement proceedings against states who have ‘failed to fulfil an obligation under the Treaties.’<sup>83</sup> As per the procedure prescribed in the article, there are three steps for proceedings:

In the first step, the Commission has to provide the State with an ‘opportunity to submit its observations’ and it sends a formal notice to the Member State in this stage. In the second step, the Commission will submit a reasoned opinion to the State and prescribe a time period for compliance with the opinion. In case, the State fails to comply with the suggestions, the Commission may bring the matter before the CJEU in the third step. The Commission has used the infringement procedure to obtain an order of the CJEU to successfully to halt the implementation of a new Polish Law on its Supreme Court, which sought to lower the retirement age for its judges.<sup>84</sup> The CJEU later issued a final judgment determining that the action of Poland to lower the retirement age of judges of the Supreme Court was not in compliance with its obligations under Art. 19(1) TEU.<sup>85</sup> Other important cases based on this procedure include two cases of *Commission v Hungary*,<sup>86</sup> and a single *Commission v Austria*<sup>87</sup> Case.

*c) The Commission’s Framework called ‘A new EU Framework to strengthen the Rule of Law’<sup>88</sup>*

As mentioned before, the Commission designed ‘a new EU Framework to strengthen the Rule of Law’<sup>89</sup> to deal with challenges to the rule of law in the Union. According to the Commission, the new framework would be used to prevent the escalation of an emerging systemic threat to a level when the Commission may need to use its powers under Art. 7 TEU.<sup>90</sup>

According to the Commission, the trigger point for the new framework will be situations where the Member States are creating situations through their measures or tolerating situations which may ‘systematically and adversely’ affect the proper functioning of the institutions and mechanisms which have been established at the national

<sup>83</sup> OJ C 326 of 26/10/2012, p. 160.

<sup>84</sup> CJEU, case C-619/18 R, *European Commission v. Poland*, Order-Interim relief, ECLI:EU:C:2018:1021.

<sup>85</sup> CJEU, case C-619/18, *European Commission v. Poland*, ECLI:EU:C:2019:531.

<sup>86</sup> CJEU, case C-286/12, *Commission v. Hungary*, ECLI:EU:C:2012:687; CJEU, case C-288/12, *Commission v. Hungary*, ECLI:EU:C:2014:237.

<sup>87</sup> CJEU, case C-614/10, *Commission v. Austria*, ECLI:EU:C:2012:631.

<sup>88</sup> Communication from the Commission to the European Parliament and the Council, A new EU Framework to strengthen the Rule of Law, COM(2014) 158 final, p. 1.

<sup>89</sup> Communication from the Commission to the European Parliament and the Council, A new EU Framework to strengthen the Rule of Law, COM (2014) 158 final/2, p. 1.

<sup>90</sup> *Crabit/Bel*, in: Schroeder (ed.), p. 202.

level of the Member States to ensure the rule of law.<sup>91</sup> It is a system designed to be an ‘early warning tool’ ready to deal with any possible concerns relating to the rule of law in a Member State through a structured dialogue prior to the emergence of a serious threat.<sup>92</sup>

The Framework establishes a three-stage procedure. The first stage of Commission’s assessment involves the collection of information from all relevant sources and bodies, including the CoE and the European Agency of Fundamental Rights.<sup>93</sup> The Commission examines the information to determine if there are ‘clear indications of a systemic threat to the rule of law’.<sup>94</sup> If it still sees a threat to the rule of law, the Commission sends a ‘rule of law’ opinion to the Member State with a possibility to respond and starts a dialogue with the Member State. The Commission expects co-operation from the Member State owing to the ‘duty of sincere cooperation’ provided in Art. 4(3) TEU.<sup>95</sup> Information on the launch of the process is made public, but the content of the communication is kept confidential.

In case the matter is not resolved in the first stage, the Commission moves to the second stage and issues a ‘rule of law recommendation’ to the Member state. The Commission indicates the ‘reasons for its concerns’ and in some situations also suggests ways for the Member State to resolve it. It also recommends that the Member State resolves the problem within the specified time period and inform the Commission about its steps.<sup>96</sup> The recommendation and its core content are made public by the Commission.

In the third and last stage of the framework, the Commission monitors the follow-up of the Member State and the steps taken by the member stage in resolving the situation. If the procedure is not successful, the Commission has retained Art. 7 TEU as a last resort.<sup>97</sup> In the entire procedure, the Parliament and the Council are informed about the progress at every step.

It is not surprising that in view of their importance, the rule of law along with the other ‘values’ mentioned in Art. 2 of the TEU have been sought to be protected through the stringent procedure mentioned in Art. 7 TEU, which can be activated, on the opinion of the Member States, the European Parliament or the Commission.

91 Communication from the Commission to the European Parliament and the Council, A new EU Framework to strengthen the Rule of Law, COM (2014) 158 final/2, p. 6.

92 Kochenov/Pech, ECLR 2015/3, pp. 521 ff.

93 Communication from the Commission to the European Parliament and the Council, A new EU Framework to strengthen the Rule of Law, COM (2014) 158 final/2, p. 7.

94 Ibid.

95 Communication from the Commission to the European Parliament and the Council, A new EU Framework to strengthen the Rule of Law, COM(2014) 158 final, p. 8; Communication from the Commission to the European Parliament and the Council, COM(2019) 343 final, p.4

96 Ibid.

97 European Commission, available at: [https://ec.europa.eu/info/policies/justice-and-fundamental-rights/effective-justice/rule-law/rule-law-framework\\_en](https://ec.europa.eu/info/policies/justice-and-fundamental-rights/effective-justice/rule-law/rule-law-framework_en) (04/06/2019).

However, the Commission has called it a ‘nuclear option’<sup>98</sup> keeping in view the strong consequences of the action.

The new framework would have come into use when the European Parliament (EP) passed a resolution on 10 June 2015 on the situation in Hungary and urged upon “*the Commission to activate the first stage of the EU framework.*”<sup>99</sup> However, the only instance when the framework has been used to date is when the second grave situation emerged in 2016 in view of the crisis in Poland and the EP again called upon the Commission to engage in ‘structured’ dialogue in Poland<sup>100</sup> in view of the emerging rule of law situation in the country. On 13 January 2016, the Commission decided to start a structured dialogue with the country,<sup>101</sup> immediately around the time when concerns started emerging about the situation in the country.<sup>102</sup> The process of the dialogue did not provide successful results, and the Commission issued four recommendations and one opinion to Poland to remedy the situation.<sup>103</sup> The failure of Poland to resolve the concerns of the Commission<sup>104</sup> resulted in it triggering the Art. 7(1) TEU procedure, which is described in detail below.

#### *d) Art. 7 TEU Procedures*

The final alternative for the Commission in case the framework fails is to resort to one of the procedures listed in Art. 7 TEU against the Member State. Nevertheless, the severe nature of sanctions under this provision has made the Commission wary of using it except under extreme situations.<sup>105</sup> Procedures under Art. 7 TEU are divided into two groups: Preventive measures under Art. 7 (1) TEU and the Sanctions mechanism under Art. 7(2-3) TEU. While the preventive measures are aimed at ‘determining a clear risk of a serious breach of the values in Art. 2 TEU, the sanctions mechanism works for ‘determination of the existence of a serious and persistent breach of values

98 Communication from the Commission to the European Parliament and the Council, A new EU Framework to strengthen the Rule of Law, COM (2014) 158 final/2, p. 2.

99 European Parliament Resolution of 10 June 2015 on the situation in Hungary, 2015/2700(RSP), para. 11.

100 European Parliament Resolution of 13 April 2016 on the situation in Poland, 2015/3031(RSP), para. 7.

101 *Ibid.*, para. L.

102 Recital 13, Commission Recommendation (EU) 2016/1374 of 27 July 2016, OJ L 217 of 12/08/2016, p. 53.

103 *Ibid.*, p. 53; Commission Recommendation (EU) 2017/146 of 21 December 2016, OJ L 22 of 27/01/2017, p. 65; Commission Recommendation (EU) 2017/1520 of 26 July 2017, OJ L 228 of 02/09/2017, p. 19; Commission Recommendation (EU) 2018/103 of 20 December 2017, OJ L 17 of 23/01/2018, p. 50. Commission Opinion of 1 June 2016 (The full text of the Opinion is available through an unofficial source at <http://eulawanalysis.blogspot.com/2016/08/commission-opinion-of-1-june-2016.html> (04/06/2019)).

104 Communication from the Commission to the European Parliament, the European Council and the Council, Further strengthening the Rule of Law within the Union State of play and possible next steps, COM(2019) 163 final, 03/04/2019, p. 3.

105 Communication from the Commission to the European Parliament and the Council, A new EU Framework to strengthen the Rule of Law, COM (2014) 158 final/2, p. 7.

in Art. 2 TEU.<sup>106</sup> Art. 7 procedures do not prevent the initiation of infringement proceedings under Art. 258 TFEU.<sup>107</sup>

The mechanism under Art. 7(1) TEU can be commenced through a reasoned proposal to the Council by 1/3<sup>rd</sup> of the Member States, the Commission or by a 2/3<sup>rd</sup> majority of the European Parliament.<sup>108</sup> The Council then hears the Member State regarding its position. Based on the submission and the hearing, the Council, prior to making its determination, seeks the consent of the European Parliament, which has to provide its consent with a 2/3<sup>rd</sup> majority of votes of its component members.<sup>109</sup> After receipt of the consent, the Council may by a 4/5<sup>th</sup> majority of Member States (except the state under scrutiny) make a final determination *that there is a clear risk of a serious breach by a Member State of the values referred in Art. 2 TEU*.<sup>110</sup> The Council may then issue recommendations to remedy the situation.<sup>111</sup> This procedure is primarily aimed at convincing the Member State to remedy the situation before a possible breach occurs.<sup>112</sup>

In practice, the procedure under Art. 7(1) TEU has been invoked twice to date, first by the EC in December 2017 in a case against Poland<sup>113</sup> and secondly, by the European Parliament on 12 September 2018 in connection with the situation in Hungary arising *inter alia* from measures against the independence of the judiciary, functioning of the constitutional and electoral system, corruption and conflicts of interest, measures against academic freedom and treatment, and for rights of persons belonging to minority communities.<sup>114</sup>

The procedure under Art. 7(2) TEU is slightly different, and the procedure can be commenced through a proposal to the Council, by 1/3<sup>rd</sup> of the Member States, or the Commission. Observations are then sought from the country under scrutiny and similar to the procedure under Art. 7(1) TEU, the consent of the European Parliament has to be obtained by the Council with a 2/3<sup>rd</sup> majority of votes of its component members.<sup>115</sup> The Council may then determine through Unanimity (except the country under scrutiny) *the existence of a serious and persistent breach by a Member State of*

106 European Commission, The EU's Rule of Law toolbox, Factsheet, April 2019, available at: [https://ec.europa.eu/info/sites/info/files/rule\\_of\\_law\\_factsheet\\_1.pdf](https://ec.europa.eu/info/sites/info/files/rule_of_law_factsheet_1.pdf) (16/05/2019).

107 Kochenov, EUI Working Papers, 2017/10, p. 7.

108 Art. 7(1) TEU; See also, European Commission, Proposal for a Council decision on the determination of a clear risk of a serious breach by the Republic of Poland of the rule of law, COM(2017) 835 final, 20/12/2017, para. 171.

109 European Commission, The EU's Rule of Law toolbox, Factsheet, April 2019, available at: [https://ec.europa.eu/info/sites/info/files/rule\\_of\\_law\\_factsheet\\_1.pdf](https://ec.europa.eu/info/sites/info/files/rule_of_law_factsheet_1.pdf) (16/05/2019).

110 Art. 7(1) TEU.

111 European Commission, The EU's Rule of Law toolbox, Factsheet, April 2019, available at: [https://ec.europa.eu/info/sites/info/files/rule\\_of\\_law\\_factsheet\\_1.pdf](https://ec.europa.eu/info/sites/info/files/rule_of_law_factsheet_1.pdf) (16/05/2019).

112 Kochenov, EUI Working Papers, 2017/10, p. 7.

113 Proposal for a Council decision on the determination of a clear risk of a serious breach by the Republic of Poland of the rule of law, COM(2017) 835 final, 20/12/2017.

114 European Parliament resolution of 12 September 2018 on a proposal calling on the Council to determine, pursuant to Article 7(1) of the Treaty on European Union, the existence of a clear risk of a serious breach by Hungary of the values on which the Union is founded, 2017/2131(INL).

115 Art. 7(2) TEU and Art. 354 TFEU.

*the values referred in Art. 2 TEU.*<sup>116</sup> Under exceptional situations, once a determination under Art. 7(2) TEU has been made, the Council acting under a qualified majority may suspend certain rights of the Member State in question including voting rights under Art. 7(3) TEU.<sup>117</sup> However, it has been clarified that the membership of the EU for the Member State which has been acted against is not in question, only its voting rights may be curtailed.<sup>118</sup> This procedure has not come to be used to date.

The Art. 7 TEU procedures have been marked for discussion by the Commission with regards to participation from external organisations such as the CoE, the need for clear procedural rules and if the European Parliament needs to be provided with a greater role in procedures which has been initiated by it.<sup>119</sup>

#### e) Other mechanisms

The EC also has a set of other tools that provide an early warning and play a preventive role against the rule of law concerns. They include the European Semester, the EU Justice scoreboard, the Cooperation and Verification mechanism (for Bulgaria and Romania), the Structural Reform Support Service and EU funds to strengthen public administration and judiciary and fight corruption.<sup>120</sup> The Commission has also sought to safeguard the EU budget from any rule of law issues in a Member State by allowing the EU to regulate access to funding from the EU for the Member State.<sup>121</sup>

## II. Recent developments for protection of rule of law in the Union

The European Parliament has supported the debate on the need for adequate mechanisms for the protection of the rule of law. It called in resolutions in 2016 and 2018 for the “*the establishment of a comprehensive Union mechanism for democracy, the rule of law and fundamental rights.*”<sup>122</sup> This call was supported by the CoE through its Parliamentary Assembly resolution of April 2019 further considering that the existing instruments used by the EC and the Council ‘have limited scope’.<sup>123</sup>

<sup>116</sup> Art. 7(2) TEU.

<sup>117</sup> Art. 7(3) TEU; Kochenov, EUI Working Papers, 2017/10, p. 11.

<sup>118</sup> Kochenov, EUI Working Papers, 2017/10, p. 11.

<sup>119</sup> Communication from the Commission to the European Parliament and the Council, COM(2019) 343 final, p.14

<sup>120</sup> Communication from the Commission to the European Parliament, the European Council and the Council, Further strengthening the Rule of Law within the Union State of play and possible next steps, COM(2019) 163 final, 03/04/2019, pp. 3, 4 f.

<sup>121</sup> European Commission, Proposal for a Regulation of the European Parliament and of the Council on the protection of the Union's budget in case of generalised deficiencies as regards the rule of law in the Member States, COM(2018) 324 final, 02/05/2018, p. 8.

<sup>122</sup> Art. 1, European Parliament resolution of 25 October 2016 with recommendations to the Commission on the establishment of an EU mechanism on democracy, the rule of law and fundamental rights, 2015/2254(INL); Art. 2, European Parliament resolution of 14 November 2018 on the need for a comprehensive EU mechanism for the protection of democracy, the rule of law and fundamental rights, 2018/2886(RSP).

<sup>123</sup> Resolution 2273 (2019), 9 April 2019, Parliamentary Assembly of CoE, para. 2.

The EC has recognised the concerns and has recently taken a small but firm step to strengthen the enforcement mechanisms through its Communication: *Further strengthening the Rule of Law within the Union State of play and possible next steps*.<sup>124</sup> The enforcement of the rule of law rests on three pillars: Promotion of the rule of law, Prevention of rule of law problems and an Effective response when problems are identified.<sup>125</sup> As a part of its recent Communication, *Strengthening the rule within the Union: A blueprint for action*, the Commission has formed detailed strategies under all the three pillars. On the first pillar of promotion of rule of law, the Commission plans to involve the Civil society, media, academia and Member States' education systems to promote a public debate on rule of law in the society and deepen the dialogue with civil society and independent media and support their work.<sup>126</sup> It will also promote transparency and access to information for the public regarding the rule of law and also support the European networks such as the networks of Presidents of the Supreme Courts and European Training Network for Judges.<sup>127</sup> The Commission also seeks to support national parliaments, the CoE and other international institutions such as the OSCE in promoting the rule of law values.

As a part of the second pillar on prevention of rule of law problems, the Commission seeks to establish a *Rule of Law Review Cycle*, which will monitor the different components of rule of law, including process for enacting laws, an independent judiciary, issues of corruption in the Member States and the effective enforcement of EU law.<sup>128</sup> The process will involve Member States and relevant bodies such as the OECD and OSCE. The Commission has also proposed establishment of 'national contact points' by Member States for discussion and exchange of information on rule of law issues.<sup>129</sup> It also proposes to publish an annual rule of law report that will shed light on the rule of law situation in the Member States.

On the third pillar of response, the Commission plans to make full use of its power as the 'guardian of the treaties; and ensure that Member States also receive support for 'swift de-escalation or exit perspective form the formal rule of law process' as soon as it has taken steps to resolve its violations of the rule of law.<sup>130</sup> The Commission further

124 Communication from the Commission to the European Parliament, the European Council and the Council, Further strengthening the Rule of Law within the Union State of play and possible next steps, COM(2019) 163 final, 03/04/2019.

125 Communication from the Commission to the European Parliament, the European Council and the Council, Further strengthening the Rule of Law within the Union State of play and possible next steps, COM(2019) 163 final, 03/04/2019, pp. 3, 10.

126 Communication from the Commission to the European Parliament and the Council, COM(2019) 343 final, p. 6.

127 Communication from the Commission to the European Parliament and the Council, COM(2019) 343 final, p. 6.

128 Communication from the Commission to the European Parliament and the Council, COM(2019) 343 final, p. 9.

129 Communication from the Commission to the European Parliament and the Council, COM(2019) 343 final, p. 13.

130 Communication from the Commission to the European Parliament and the Council, COM(2019) 343 final, pp. 15 ff.

aims to bring rule of law problems to the CJEU and seek expedited proceedings or interim measures if required.<sup>131</sup>

## F. Rule of Law in EU External Action

The EU has tried to promote its fundamental values across the globe; ‘fundamental rights and democratisation objectives have been progressively integrated into all aspects of the EU’s external policies and actions.’<sup>132</sup> The Council of the European Union (‘Council’) has designed a new “Strategic Framework on Human Rights and Democracy” (Strategic Framework) which provides the guidelines on how EU’s external engagement will be guided in the coming years with an aim to ‘promote human rights and democracy throughout the world’.<sup>133</sup> Significantly, the EU highlights in the first paragraph of its Strategic Framework that: *“the European Union is founded on a shared determination to promote peace and stability and to build a world founded on respect for human rights, democracy and the rule of law. These principles underpin all aspects of the internal and external policies of the European Union.”*<sup>134</sup> It has also committed to ‘step up its efforts’ to promote the rule of law in its external action.<sup>135</sup>

All international agreements concluded by the EU (including investment agreements) have to serve as a tool to promote European values – listed in Art. 21 TEU – in third countries; the general principles and objectives of the EU’s external action are made mandatory in the field of the common commercial policy as well.<sup>136</sup> The EU has committed itself to the core values of democracy, human rights as well as the rule of law as guiding ‘principles’ in Art. 21(1) TEU<sup>137</sup> and as ‘objectives’ of the Union’s external action in Art. 21(2)(b) TEU.<sup>138</sup> According to Art. 21(2) (h) TEU, the EU is

131 Communication from the Commission to the European Parliament and the Council, COM(2019) 343 final, p. 14.

132 *Pech*, Rule of Law as a Guiding Principle of the European Union’s External Action, p. 13.

133 Annex I, Council of The European Union, Outcome of Proceedings, Doc No. 11855/12, Brussels, dated 25 June 2012, p. 2.

134 Annex II, Council of The European Union, Outcome of Proceedings, Doc No. 11855/12, Brussels, dated 25 June 2012, p. 3.

135 *Ibid.*, p. 5.

136 See on this also *Vedder*, in: Bungenberg/Herrmann (eds.), p. 115. For examples of agreements with explicit mention of rule of law as a principle, see, Preambulatory para. 3, EPA between European Community and CARIFORUM States, OJ L 289/I of 30/10/2008, p. 3; Preambulatory para. 8, EPA between European Community and Pacific States, OJ L 272 of 16/10/2009, p. 2; Preambulatory para 5, CETA, OJ L 11 of 14/01/2017, p. 23.

137 Article 21(1) TEU (‘The Union’s action on the international scene shall be guided by the principles which have inspired its own creation, development and enlargement, and which it seeks to advance in the wider world: democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, and respect for the principles of the United Nations Charter and international law.’), OJ C 326 of 26/10/2012, p. 28.

138 Article 21(2)(b)TEU (‘The Union shall define and pursue common policies and actions, and shall work for a high degree of cooperation in all fields of international relations, in order to: [...] consolidate and support democracy, the rule of law, human rights and the principles of international law.’), OJ C 326 of 26/10/2012, p. 29.

obliged to ‘promote an international system based on (...) good global governance’ as one of the most ambitious of the objectives, and thereby covering the fight against corruption and organised crime; in this regard good global governance includes the export of the Union’s own fundamental values -such as also the rule of law.<sup>139</sup>

Keeping in view these provisions, the EU is obliged to align its Common Commercial Policy (CCP) with the range of general objectives set forth in Art. 21 TEU; Art. 21 TEU states a constitutional self-commitment of the EU<sup>140</sup> to pursue within the CCP the implementation of the general external policy objectives<sup>141</sup> as also being legally binding<sup>142</sup> and justiciable. The CCP can thus be seen as an instrument or tool to promote Art. 21 TEU values. Nevertheless, it includes especially for the Commission, a wide margin of discretion for applying it.

The EU uses a number of instruments to promote the values as stated in its Fundamental treaties and the Strategic Framework. These instruments have been categorised into two distinct groups:<sup>143</sup>

- a) Soft instruments: The documents regularly published by the EU institutions, including conclusions, resolutions, public declarations have been categorised as soft law principles. The EU also uses Human rights dialogues as a potent tool for promotion of rule of law as a fundamental value of the Union. The Union claims success from the use of human rights dialogues for the promotion of the rule of law.<sup>144</sup>
- b) Legally binding trade, technical and financial instruments: They refer to three types of instruments, which have been used as a part of trade and investment negotiations with countries. The first among the latter group, the unilateral trade instruments, are highlighted by the facility of Generalised system of preferences (GSP) which is provided in detail in Regulation 732/2008.<sup>145</sup> The GSP enables developing countries to access the EU markets without any need for reciprocal treatment.<sup>146</sup> The EU has commenced a special incentive for some of the developing countries through a mechanism called GSP+, which provides more preferences on fulfilment of conditions like ratification of international conventions on human rights and labour rights and compliance with Environmental protection and good governance norms.<sup>147</sup> It must be noted here that the ‘rule of law’ is not mentioned as an explicit principle that has been promoted through this mechanism. The second important instrument in this second group are the technical and financial assistance instruments. The European Instrument for Democracy and Human Rights (EIDHR) is

139 *Vedder*, in: Bungenberg/Herrmann (eds.), p. 127.

140 *Kaufmann-Bühler*, Art. 21 TFEU, para. 6, in: Grabitz/Hilf/Nettesheim (eds.); *Vedder*, in: Hermann/Krenzler/Streinz (eds.), pp. 43, 46.

141 *Vedder*, in: Bungenberg/Herrmann (eds.), p. 127.

142 *Krajewski*, in: Biondi/Eeckhout/Ripley (eds.), pp. 292, 296 f.; *Hahn*, Art. 207 TFEU, paras 4 f., in: Callies/Ruffert (eds.), pp. 2013 ff. On this see also, *Holterhus*, in: Holterhus (ed.), pp. 82 ff.

143 *Pech*, Rule of Law as a Guiding Principle of the European Union’s External Action, p. 14.  
144 *Ibid.*, p. 15.

145 OJ L 211 of 06/08/2008, p. 1.

146 *Pech*, Rule of Law as a Guiding Principle of the European Union’s External Action, p. 16.

147 OJ L 303 of 31/10/2012, p. 5. On this see also, *Holterhus*, in: Holterhus (ed.), p. 98.

commonly the most discussed among these instruments.<sup>148</sup> The EIDHR is supported by other instruments, including the European Neighbourhood and Partnership Instrument (ENPI)<sup>149</sup> and the Development Co-operation Instrument (DCI).<sup>150</sup> There are also special instruments to support countries who desire to accede to the Union like the Instrument for Pre-Accession Assistance (IPA).<sup>151</sup> The last group among these instruments is probably the most important as they are most commonly used for promotion of trade relations and have occupied centre stage in recent years. The recent trade agreements with EU and Columbia/ Peru<sup>152</sup> and Canada (CETA)<sup>153</sup> have explicitly upheld the ‘rule of law’ as one of the core principle that the parties agree to adhere to. This is also seen in case of the Economic Partnership and Cooperation agreements like the one signed with Mexico,<sup>154</sup> which explicitly sets out the ‘rule of law’ as one of the principle which the parties agree to adhere to. The EU ‘Trade for All’ communication also mentions that the Commission will use FTA’s to monitor domestic reforms in relation to rule of law and promote good governance.<sup>155</sup>

## G. Relevance of the EU Rule of Law in International Investment Law

It is suggested that to ensure the rule of law and protect European investments abroad, adequate emphasis should be laid on the inclusion of Investor-state Dispute Settlement (ISDS) provisions in EU investment agreements. This has the potential to contribute to the rule of law as an EU value that has to be taken into account in all external policy actions of the Union.<sup>156</sup> However, if the Union wants to include rule of law components into investment agreements with third states, the success of such efforts depends upon the political capability of the Union to induce the other parties to the agreements to accept such provisions. With a global economic weight equal to nearly half of global foreign direct investment (FDI) outflows, the EU’s potential in investment negotiations is more than evident.<sup>157</sup>

148 More information on EIDHR can be found on its website: [https://ec.europa.eu/europeaid/how/finance/eidhr\\_en.htm\\_en](https://ec.europa.eu/europeaid/how/finance/eidhr_en.htm_en) (16/05/2019).

149 Regulation (EC) No. 1638/2006 of the European Parliament and of the Council of 24 October 2006 laying down general provisions establishing a European Neighbourhood and Partnership Instrument, OJ L 310 of 09/11/2006, p. 1.

150 Regulation (EC) No. 1905/2006 of the European Parliament and of the Council of 18 December 2006 establishing a financing instrument for development cooperation, OJ L 378 of 27/12/2006, p. 41.

151 Council Regulation (EC) No. 1085/2006 of 17 July 2006 establishing an Instrument for Pre-Accession Assistance (IPA), OJ L 210 of 31/07/2006, p. 82.

152 Article 1, OJ L 354 of 21/12/2012, p. 5.

153 Preambulatory para. 5, CETA, OJ L 11 of 14/01/2017, p. 23.

154 OJ L 276 of 28/10/2000, p. 45.

155 European Commission Communication No. COM(2015) 497 final of 14 October 2015, Trade for All. Towards a more responsible trade and investment policy, p. 20.

156 See Article 21 TEU, OJ L 326 of 26/10/2012, p. 28.

157 European Commission, available at: <http://ec.europa.eu/trade/policy/accessing-markets/investment/> (27/03/2017).

From a European perspective, the inclusion of ISDS in EU investment agreements will serve the immediate purpose to protect EU nationals investing abroad. ISDS will be a crucial tool to remedy deficiencies in the legal system of host states.<sup>158</sup> In addition to the immediate political goal of increasing the level of protection of European investors abroad, the inclusion of ISDS is likely to serve an important long-term goal in line with the EU's value system: it is likely to have a positive spill-over effect on the legal system of host states, exercising a push towards rule of law disciplines and thus developing improved administrative practices to comply with IIA obligations that also benefit national citizens and residents.<sup>159</sup>

Significantly, a new proposed Multilateral Investment Court (MIC), which the EU is promoting,<sup>160</sup> as well as chapters on investment protection in free trade agreements concluded by the EU will have to fulfil *inter alia* all conditions set up by the rule of law principle as being one of the leading constitutional principles of EU law.<sup>161</sup> In its recent *Opinion 1/17*, the CJEU has laid down that dispute settlement mechanisms in future trade and investment agreements concluded by the EU will need to comply with the 'constitutional framework' unique to it.<sup>162</sup> Any international agreement concluded by the EU will have to comply with the founding values of the EU, which includes the rule of law.<sup>163</sup>

The CJEU has also discussed the right under Art. 47 CFREU to an independent and impartial tribunal and 'effective access to justice' and determined that any ISDS mechanism formed as a result of an international agreement by the EU will have to comply with these requirements.<sup>164</sup> The Court explicitly mentioned 'strict application of rule of law' as one of the key elements of the right to access to an independent tribunal.<sup>165</sup> These observations by the Court are crucial since they will shape the Commission's policies in negotiating future trade and investment agreements and in the formation of a MIC.<sup>166</sup>

## H. Conclusion/Outlook

The protection of the rule of law in the EU has emerged as one of the new challenges for the Commission as well as the CJEU in view of the recent developments in certain

158 See *Griebel*, pp. 24 f.

159 *Echandi*, in: Alvarez/Sauvant et al. (eds.), p. 13; *Sattorova*, Conference Paper No. 11/2014, 10<sup>th</sup> Anniversary Conference, Vienna, 4-6 September 2014, p. 4.

160 Submission from the European Union and its Member States, UNCITRAL Working Group III, 24 January 2019, UN Doc. A/CN.9/WG.III/WP.159/Add.1; Council of the European Union, Negotiating directives for a Convention establishing a multilateral court for the settlement of investment disputes, 20 March 2018, Doc. 12981/17.

161 *Bungenberg/Reinisch*, p. 26; CJEU, *Opinion 1/17*, ECLI:EU:C:2019:341, para. 203.

162 CJEU, *Opinion 1/17*, ECLI:EU:C:2019:341, para. 110.

163 *Ibid.*, para. 110.

164 *Ibid.*, paras 189 ff.

165 *Ibid.*, paras 203 ff.

166 On this, see also, <https://www.ejiltalk.org/ceta-opinion-setting-conditions-for-the-future-of-isds/> (05/06/2019).

Member States. As one of the core values listed in Art. 2 TEU, the EU has the responsibility of protecting it, both in the Union and its external actions. The EU has been ably assisted by the CoE and its bodies, including the Venice Commission in protection of the rule of law in the Union.

The EC has tried to continuously innovate while performing its duty of protection of the rule of law in the Union and has brought about a new framework to strengthen the rule of law in the Union aiming to tackle such violations at the beginning and without having to resort to strong tactics. Irrespective of these changes, the EC faces new challenges every day, particularly in view of continuing non-cooperation by the Member States.

The EC has also worked to promote the principle of the rule of law through agreements signed with third countries (*inter alia* trade agreements) and by promoting schemes which incentivise compliance with good governance principles. The Commission has also sought to promote the principle of rule of law in international investment law by including ISDS mechanisms in its investment agreements, which as per the CJEU have to comply with Art. 47 CFREU. In all, the trade and investment agreement negotiations undertaken by the EU in the future are expected to include rule of law as a core value to be promoted.

Understandably, all these steps ensure that the EU complies with its commitment to the protection of the rule of law through unified action by the EU institutions and the Member States.

## BIBLIOGRAPHY

AHMETAJ, HYSNI, *Legal Certainty and Legitimate Expectation in EU Law*, Interdisciplinary Journal of Research and Development, 2014, Vol. 1, No. 2, pp. 20-25

BARD, PETRA; CARRERA, SERGIO; GUILD, ELSPETH; KOCHENOV, DIMITRY, *An EU mechanism on Democracy, the Rule of Law and Fundamental Rights*, Brussels, 2016

BUNGENBERG, MARC, *Vertrauensschutz*, in: Heselhaus, F.S.M.; Nowak, Carsten (eds.), *Handbuch der Europäischen Grundrechte*, München, 2006, pp. 945 – 967

BUNGENBERG, MARC; REINISCH, AUGUST, *From Bilateral Arbitral Tribunals and Investment Courts to a Multilateral Investment Court*, Heidelberg, 2018

BUNGENBERG, MARC; TITI, CATHERINE, *CETA Opinion – Setting Conditions for the Future of ISDS* (05/06/2019), available at: <https://www.ejiltalk.org/ceta-opinion-setting-conditions-for-the-future-of-isds/> (05/06/2019)

CRABIT, EMMANUEL; BEL, NICOLLAS, *The EU Rule of Law Framework*, in: Schroeder, Werner (ed.), *Strengthening the Rule of Law in Europe: From a Common Concept to Mechanisms of Implementation*, Portland, Oregon, 2016, pp. 197 – 206

COUNCIL OF EUROPE, *European Committee on Legal Co-operation (CDCJ)*, available at: <https://www.coe.int/en/web/cdcj/activities/judicial-independence-impartiality/conference-sofia2016> (05/06/2019)

DEPARTMENT OF PEACEKEEPING OPERATIONS, *United Nations, The United Nations Rule of Law Indicators*, Geneva, 2011.

ECHANDI, ROBERTO, 'What Do Developing Countries Expect from the International Investment Regime?' in: Alvarez, Jose E.; Sauvant, Karl P. (eds.), *The Evolving International Investment Regime: Expectations, Realities, Options*, New York, 2011, pp. 3 – 21

EUROPEAN COMMISSION, *Investment*, available at: <http://ec.europa.eu/trade/policy/accessing-markets/investment/> (09/04/2019)

EUROPEAN COMMISSION, *Rule of Law Framework*, available at: [https://ec.europa.eu/info/policies/justice-and-fundamental-rights/effective-justice/rule-law/rule-law-framework\\_en](https://ec.europa.eu/info/policies/justice-and-fundamental-rights/effective-justice/rule-law/rule-law-framework_en) (04/06/2019)

EUROPEAN COMMISSION, *The EU's Rule of Law toolbox, Factsheet*, April 2019, available at: [https://ec.europa.eu/info/sites/info/files/rule\\_of\\_law\\_factsheet\\_1.pdf](https://ec.europa.eu/info/sites/info/files/rule_of_law_factsheet_1.pdf) (16/05/2019)

GOLDSTON, VERONIKA SZENTE, *Rule of law: EU 'mechanism' needs upgrade*, available at: <https://euobserver.com/opinion/123526> (04/06/2019)

GRIEBEL, JORN, *Internationales Investitionsrecht*, Munich, 2008

HAHN, MICHAEL, *Art. 207 TFEU, para. 4f.*, in: Callies, Christian; Ruffert, Matthias (eds.), *EUV/AEUV – Das Verfassungsrecht der Europäischen Union mit Europäischer Grundrechtecharta. Kommentar 4<sup>th</sup> edition*, Munich, 2011

HILLION, CRISTOPHE, *Overseeing the rule of law in the European Union*, European Policy Analysis, 2016, vol. 1, pp. 1-16

HOLTERHUS, TILL PATRICK, *The Legal Dimensions of Rule of Law Promotion in EU Foreign Policy- EU Treaty Imperatives and Rule of Law Conditionality in the Foreign Trade and Development Nexus*, in: Holterhus, Till Patrick, (ed.), *The Law Behind Rule of Law Transfers*, 1<sup>st</sup> edition, Baden-Baden, 2019, pp. 73-111

KARAGEORGOU, VASILIKI, *Transparency principle as an evolving principle of EU law: Regulative contours and implications*, available at: <https://www.right2info.org/resources/publications/eu-karageorgou-vasiliki-transparency-principle-as-an-evolving-principle-of-eu-law/view> (05/06/2019)

KAUFMANN-BÜHLER, WERNER, *Art. 21 TEU, para. 6*, in: Grabitz, Eberhard; Hilf, Meinhard; Nettesheim, Martin (eds.), *Das Recht der Europäischen Union: EUV/AEUV*, 46th suppl. 2011 ('Selbstbindung')

KOCHENOV, DIMITRY, *Busting the myths nuclear: A commentary on Article 7 TEU*, EUI Working Papers, 2017, vol. 10, pp. 1-13

KOCHENOV, DIMITRY; PECH, LAURENT, *Monitoring and Enforcement of the Rule of Law in the EU: Rhetoric and Reality*, European Constitutional Law Review, 2015, Vol. 11, Issue 3, pp. 512 – 540

KOCHENOV, DIMITRY, *The EU Rule of Law: Cutting Paths Through Confusion*, Erasmus Law Review, 2009, Vol. 2, Issue 1, pp. 5 – 24

KRAJEWSKI, MARKUS, *The Reform of the Common Commercial Policy*, in: Biondi, Andrea; Eeckhout, Piet; Ripley, Stefanie (eds.), EU-Law After Lisbon, New York, 2012, pp. 292 – 311

LENAERTS, KOEN, *The Kadi Saga and the Rule of Law within the EU*, SMU Law Review, 2014, vol. 67, pp. 707 – 715

PECH, LAURENT, *Rule of Law as a Guiding Principle of The European Union's External Action*, The Hague, 2012

PECH, LAURENT, *The Rule of Law as a Constitutional Principle of the European Union*, New York, 2009

SATTOROVA, MAVLUDA, *International Investment Treaties and the Promise of Good Governance: Norm and Institutional Design, Internalisation, and Domestic Rule-Making*, ESIL Conference Paper Series, 2014, vol. 4, no. 11, 10<sup>th</sup> Anniversary Conference, Vienna, 4-6 September 2014, pp. 1-16

SAUTER, WOLF, *Proportionality in EU Law: A Balancing Act?* Tilburg University, TILEC Discussion Paper, DP 2013-003, 2013

STREET, AMY, *Judicial Review and the Rule of Law*, London, 2013

SCHMIDT-ABMANN, EBERHARD, *Der Rechtstaat*, in: Isensee, Josef; Kirchhof, Paul (eds.), Handbuch des Staatsrechts, Heidelberg, 2004, pp. 541 – 612

TIMMERMANS, FRANS, *Keynote speech at Conference on the Rule of Law*, Tilburg University, 31 August 2015, available at: [https://ec.europa.eu/commission/commissioners/2014-2019/timmermans/announcements/european-union-and-rule-law-keynote-speech-conference-rule-law-tilburg-university-31-august-2015\\_en](https://ec.europa.eu/commission/commissioners/2014-2019/timmermans/announcements/european-union-and-rule-law-keynote-speech-conference-rule-law-tilburg-university-31-august-2015_en) (03/03/2017)

VON DANWITZ, THOMAS, *The Rule of Law in the Recent Jurisprudence of the ECJ*, Fordham International Law Journal, 2014, vol. 37, issue 5, pp. 1312 – 1347

VEDDER, CHRISTOPH, *Ziele der Gemeinsamen Handelspolitik und Ziele des auswärtigen Handelns*, in: Herrmann, Christoph/ Krenzler/ Horst G./ Streinz, Rudolf (eds.), *Die Außenwirtschaftspolitik der Europäischen Union nach dem Verfassungsvertrag*, Baden-Baden, 2006, pp. 43-62

VEDDER, CHRISTOPH, *Linkage of the Common Commercial Policy to the General Objectives for the Union's External Action*, in: Bungenberg, Marc; Herrmann, Christoph (eds.), European Yearbook of International Economic Law, Special Issue: Common Commercial Policy after Lisbon, Heidelberg, 2013, pp. 115-144

