

# PROPOSALS FOR NEW TOOLS TO PROTECT EU VALUES: AN OVERVIEW

## EXECUTIVE SUMMARY

The current debate on strengthening the EU's mechanisms to protect the rule of law and other key values in EU member states has triggered a flurry of proposals aimed at adding new instruments and empowering existing institutions or establishing new ones. This paper presents an overview of these proposals. In absence of agreement on the overall policy objectives of a possible reform, it is difficult to conclude that any one solution is clearly preferable to others.

Useful policy objectives would include:

- a) **a comprehensive, long-term solution:** an EU mechanism that would only be aimed at the rule of law in member states would only be a piecemeal solution; the EU values expressed in Article 2 EU Treaty include other equally central concerns, including human rights and democracy;
- b) **simplicity and accountability:** ensuring that the procedure is clear and understandable and that one institution has the responsibility and the necessary authority for achieving the task of protecting article 2 values;
- c) **prevention:** regular fact-finding and analysis should create a basis for early interventions to prevent significant violations of article 2 values;
- d) **due process:** any enforcement measure against a member state should be subject to due process, including an effective remedy to the Court of Justice of the European Union;

# 1. INTRODUCTION

A wide array of policy proposals have been made for the EU to better protect the rule of law and other core values, as expressed in article 2 EU Treaty. These are presented in Section 3. In absence of a debate on policy objectives, it is difficult to ascertain which may be the best solution. If, for example, the assumption is that any systemic, political crisis in a member state is always a rule of law problem, it makes sense to prioritise a tool that looks at rule of law issues. Or, if one believes that challenges to article 2 values in member states will remain rare and exceptional, one may be inclined to propose a lighter solution. Section 2 suggests policy objectives that a new mechanism should fulfill.

This Briefing Paper serves as input to the *Assises de la Justice* conference (Brussels, 21-22 November 2013) of the European Commission and as a contribution to the Commission's future initiatives on this issue. It expands on Democracy Reporting International's Briefing Paper 39: *In Need of New Tools: Protecting Democracy in EU Member States*<sup>1</sup>.

## 2. POLICY OBJECTIVES

### SIMPLICITY AND ACCOUNTABILITY

One aspect of the public lack of engagement in European affairs is the complexity of the *sui generis* institutional framework of the EU. For too many citizens it is not clear who is responsible for what policy issue. A crisis in the democracy of a member state and possible future EU responses, such as cutting EU funding, are so sensitive that any new mechanism should be simple and provide clear accountability. Ideally, one single institution should be in charge of dealing with all aspects of fact-finding, gtg and enforcement, and be clearly accountable for the way it carries out its mandate. It would need to have authority to match its responsibility. Distributing the tasks of fact-finding, analysis and enforcement across a complex range of actors who speak with different voices on different aspects would be counterproductive.

This body should be impartial and independent. In many aspects the European Commission would be the most obvious choice, but its increasing 'politicisation' could weaken its claim to impartiality. If the Commission starts resembling more of a government based on a partisan majority in the European Parliament, it will be less perceived as an impartial guardian of the treaty.

### A COMPREHENSIVE, LONG-TERM SOLUTION

With 28 EU member states and more to join, as well as on-going economic troubles, a crisis of article 2 values in a member state will be more likely to happen than in the past. Any new mechanism should be built for the long-term and should cover all article 2 issues: human rights, democracy and rule of law are intertwined concepts; one crisis may have more to do with

democratic values, another with human rights. All these values should be covered, rather than making the rule of law a sort of super-value that deserves more attention than the others.

### PREVENTION

To avoid involvement of the EU only once a crisis of article 2 values has reached massive proportions, the EU should engage early on by monitoring critical developments as a basis for interaction with the member state concerned.

The justice scoreboard appears to be a too limited tool, even for monitoring what is anyway only one aspect of article 2, namely the rule of law. The justice scoreboard deals with aspects of the judicial system which are important for the confidence of business, but overall does not assess entirely the rule of law in light of article 2 values, nor is relevant in evaluating democracy and protection of human rights. The sources it uses are based on quantitative data, but do not include a qualitative examination of key factors such as *de jure* and *de facto* independence of the judiciary in line with international law obligations and soft law standards<sup>2</sup>. Furthermore, the scoreboard focuses more on civil law matters, while penal, administrative and constitutional justice deserve special scrutiny from an article 2 perspective. It offers little information on the crucial question of how the judiciary is positioned in an overall system of separation and balance of powers<sup>3</sup>. The situation in Hungary, which the Council of Europe's Venice Commission described as a threat to democracy, was not reflected in the last scoreboard results, because by its design it does not deal with all the issues that undermine the rule of law in Hungary.<sup>4</sup>

### DUE PROCESS

Any new tool or mechanism should itself respect principles of rule of law, democracy and protection of human rights. This entails that the right to due process be respected. Most importantly, member states concerned must have the right to an effective remedy against enforcement decisions by an EU body. The European Court of Justice would be the obvious institution to rule on remedies.

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<sup>1</sup> Available at [www.democracy-reporting.org/files/dri-bp-39\\_in\\_need\\_of\\_new\\_tools\\_-\\_protecting\\_democracy\\_in\\_eu\\_member\\_states.pdf](http://www.democracy-reporting.org/files/dri-bp-39_in_need_of_new_tools_-_protecting_democracy_in_eu_member_states.pdf).

<sup>2</sup> For these, see Democracy Reporting International and New York University, Briefing Paper No.41, *International Standards for the Independence of the Judiciary*, September 2013, [http://www.democracy-reporting.org/files/dri-bp-41\\_en\\_international\\_standards\\_for\\_the\\_independence\\_of\\_the\\_judiciary\\_2013-09.pdf](http://www.democracy-reporting.org/files/dri-bp-41_en_international_standards_for_the_independence_of_the_judiciary_2013-09.pdf).

<sup>3</sup> See Israel Butler, Policy Brief: "*How to monitor the Rule of Law, Democracy and Fundamental Rights in the EU*," Open Society European Policy Institute - Open Society Foundations, August 2013, available at <http://www.opensocietyfoundations.org/sites/default/files/how-monitor-rule-law-democracy-and-fundamental-rights-eu.pdf>.

<sup>4</sup> Nikolaj Nielsen, "*Hungary in surprise ranking on EU justice scoreboard*," 27 March 2013, available at <http://euobserver.com/justice/119597>.

### 3. OVERVIEW OF PROPOSALS

Below is an overview of various proposals, including the institution proposed for the task, the task the institution would be charged with, and the pros and cons of each proposal. Three different tasks are considered. It is important to distinguish between the various components of the response, namely, fact-finding, assessment and enforcement. Monitoring takes place during the two first steps.

Institution	Role	Pro/Con
Commission	Fact-finding Assessment Enforcement	<ul style="list-style-type: none"> <li>+ The Commission already assumes the role of 'Guardian of the Treaties'.</li> <li>+ The Commission fulfils the task of fact-finding, assessment and enforcement in other policy areas such as competition law. It is already monitoring article 2 values in relation to candidate countries.</li> <li>- The Commission may not be entirely independent, given the role of member states in appointing commissioners and the <i>de facto</i> influence in particular of big member states.</li> <li>- The Commission has become more political/partisan by the Lisbon treaty</li> </ul>
Council	Fact-finding Assessment Enforcement	<ul style="list-style-type: none"> <li>+ The Council already has a role in article 7 EU Treaty.</li> <li>- Representing the Member States, the Council is not likely to take action against one Member State, even more so because of the high thresholds for votes under article 7.</li> </ul>
European Parliament	Fact-finding Assessment Enforcement <sup>5</sup>	<ul style="list-style-type: none"> <li>+ The EP represents the interests of the citizens in the procedure and has more electoral legitimacy than other bodies.</li> <li>- The EP votes by partisan majorities and is therefore not considered to be impartial.<sup>6</sup></li> </ul>
Court of Justice of the European Union	Assessment <sup>7</sup> Enforcement <sup>8</sup>	<ul style="list-style-type: none"> <li>+ Impartial</li> <li>+ Independent</li> <li>+ It would improve the uniformity and efficacy of EU law in areas related to the founding values.</li> <li>- The CJEU may be a more obvious body to serve appeals against enforcement decisions thereby guaranteeing due process.</li> <li>- The CJEU could not carry out monitoring functions and could not contribute to prevention</li> </ul>
National courts <sup>9</sup>	Assessment Enforcement	<ul style="list-style-type: none"> <li>+ Impartial</li> <li>+ Independent</li> <li>+ A better enforcement of the General Principles expressing the founding values of the EU would diminish the risks of infringement of the values of the EU.</li> <li>- May not be impartial and independent if the values are already seriously undermined</li> </ul>

<sup>5</sup> Cesare Spinelli, *Protecting the Fundamentals – Article 7 of the Treaty on the European Union and beyond*, 25 September, 2012, FEPS Jurist Network: proposal to use articles 258-260 TFEU to ensure the values.

<sup>6</sup> Jan-Werner Müller, *Safeguarding democracy inside the EU - Brussels and the future of liberal order*, 2012-2013, Paper series, No. 3, Transatlantic Academy, available at [http://www.transatlanticacademy.org/sites/default/files/publications/Muller\\_SafeguardingDemocracy\\_Feb13\\_web.pdf](http://www.transatlanticacademy.org/sites/default/files/publications/Muller_SafeguardingDemocracy_Feb13_web.pdf); HRDN (Human Rights Democracy Network), *Strengthening the EU's response to Human Rights abuses inside its own borders*, August 2013, available at <http://www.hrw.org/news/2013/08/05/strengthening-european-union-s-response-human-rights-abuses-inside-its-own-borders>.

<sup>7</sup> *Ibid.*

<sup>8</sup> *Ibid.*; Israel Butler, *Supra* No. 2.

<sup>9</sup> András Jakab presents different possible options on how to extend the scope of the charter, see: András Jakab, *Supremacy of the EU charter in National Courts in Purely Domestic Cases*, 27 March 2013, available at

<http://www.verfassungsblog.de/en/hungary-taking-action-andras-jakab/#unuafbc6ij>; See also: Eleanor Spaventa, "Seeing the wood despite the trees? On the scope of union citizenship and its constitutional effects," *Common Market Law Review* 45: 13-45, 2008, *Kluwer Law International*, Netherlands; Xavier Groussot, Laurent Pech and Gunnar Thor Petursson, "The scope of application of EU Fundamental Rights on Member States' action: In search of certainty in EU adjudication", Eric stein working paper no 1/2011, *Czech society for European and comparative law*, Prague, Czech Republic, The Eric Stein Working papers, <http://www.ericsteinpapers.eu>; Mattias Derlén and Johan Lindholm, "Three ideas: the scope of EU law - Protecting against discrimination", In honor of Pär Hallström, Mattias Derlén and Johan Lindholm eds, Justus, Uppsala 2012, pp.77-100; Francis Snyder, "The Effectiveness of European Community Law: Institutions, Processes, Tools and Techniques", *The Modern Law Review*, Volume 56, No. 1, January 1993; Opinion of Advocate General Sharpston delivered on 30 September 2010 (C-34/09) Gerardo Ruiz Zambrano v Office national de l'emploi (ONEM).

Institution	Role	Pro/Con
FRA (Fundamental Rights Agency)	Fact-finding <sup>10</sup> Assessment <sup>11</sup>	+ Impartial + Independent + Legitimacy through expertise - The mandate of the FRA would need to be extended
Council of Europe – Venice Commission	Fact-finding Assessment	+ Impartial + Independent + Legitimacy through expertise - Institution outside of the context of the EU
‘Copenhagen Commission’ <sup>12</sup>	Fact-finding Assessment	+ Impartial + Independent + Composed of high-level experts providing legitimacy - Need to create a new body <sup>13</sup> - Multiplication of actors risks lack of clarity and accountability
Network of independent fundamental rights experts	Fact-finding <sup>14</sup> Assessment <sup>15</sup>	+ Impartial + Independent + The mandate of the network used to report on how national government were implementing international obligations in the area of fundamental rights. In this sense its mandate is more appropriate than that of the FRA, in aiming at monitoring the application and respect of the founding values of the EU in the Member States. + Composed of experts - Doesn’t work anymore since the creation of the FRA. The mandate would need to be renewed. - Multiplication of actors risks lack of clarity and accountability
EU citizens through popular initiatives <sup>16</sup>	Fact-finding	+ Legitimacy - It might be difficult for citizens in a state where the values are not respected to launch an initiative
NGOs	Fact-finding Assessment	+ Expertise and credibility - Lack of legal authority

<sup>10</sup> *Supra* No. 4; European Parliament Report on the situation of Fundamental Rights: standards and practices in Hungary, pursuant to the European Parliament Resolution of 16 february 2012, Committee On Civil Liberties, Justice And Home Affairs, 2012/2130(ini), 24.6.2013 available at <http://www.europarl.europa.eu/sides/getDoc.do?type=REPORT&reference=A7-2013-0229&format=PDF&language=EN>; See also Viviane Reding’s speech, “*The EU and the Rule of Law – What next?*”, European Commission, SPEECH/13/677, 04/09/2013, [http://europa.eu/rapid/press-release\\_SPEECH-13-677\\_en.htm](http://europa.eu/rapid/press-release_SPEECH-13-677_en.htm).

<sup>11</sup> European Parliament Report, *Supra* No. 10.

<sup>12</sup> Jan-Werner Müller, *Supra* No. 5; See also: Floris de Witte, *Supra* No. 6; European Parliament Report *Supra* No. 10.

<sup>13</sup> Jan Komárek, “*The European Union is more than a Constraint on Populist Democracy*”, 25 March 2013, available at [www.verfassungsblog.de/en/the-eu-is-more-than-a-constraint-on-populist-democracy/#.umelwna5mzm](http://www.verfassungsblog.de/en/the-eu-is-more-than-a-constraint-on-populist-democracy/#.umelwna5mzm): “*familiar unsuccessful EU strategy of creating a new institution rather than addressing the real problem*”.

<sup>14</sup> Israel Butler, “*How the EU can safeguard its ‘Fundamental Values’: two ideas*,” Open Society European Policy Institute - Open Society Foundations, July 2013, available at <http://www.opensocietyfoundations.org/briefing-papers/how-eu-can-safeguard-its-fundamental-values-two-ideas>. The author supports the renewal of the mandate of the EU network of independent fundamental rights experts, which was created in September 2002 by the Commission upon the EP’s recommendation with a view to monitor the human rights situation in the Member States as well as in the EU, and whose mandate expired in September 2006.

<sup>15</sup> Israel Butler, *Supra* No. 2.

<sup>16</sup> Marco Dani, Opening the enforcement of EU Fundamental Values to European Citizens, 7 April 2013, available at [www.verfassungsblog.de/de/ungarn-was-tun-marco-dani/#.umagyaz8sos](http://www.verfassungsblog.de/de/ungarn-was-tun-marco-dani/#.umagyaz8sos); Nicolaidis Kalypto & Rachel Kleinfeld, 2012, “*Rethinking Europe’s ‘Rule of Law’ and Enlargement Agenda: the Fundamental dilemma*”, *sigma papers*, No. 49, OECD Publishing, available at <http://dx.doi.org/10.1787/5k4c42jmn5zp-en>.