

Out With the Old, in With the New: Reform Initiatives for Functioning Rule of Law in the EU

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This brief delves into the critical juncture facing the European Union as it grapples with challenges to the rule of law amidst shifting geopolitical dynamics and discussions on future enlargement. Recent proposals from the Franco-German expert group and the European Parliament aim to bolster enforcement mechanisms and streamline decision-making processes to address the rule of law breaches effectively. However, achieving a consensus on these reforms presents significant challenges amidst divergent Member State perspectives. Despite the hurdles, reform initiatives present opportunities to fortify the EU's commitment to the rule of law, necessitating sustained discussions and diplomatic efforts.

NAVIGATING A CRITICAL JUNCTURE

The rule of law, along with the other fundamental values enshrined in Article 2 TEU, is widely recognised as the cornerstone of the European Union's (EU) collective identity.¹ But the fact that there are instances of violations of the rule of law and concerning trends in certain Member States—most notably Hungary and Poland,² but in old member states, too—makes it increasingly clear that a functioning rule of law cannot be taken for granted. This has underscored the necessity of strengthening the mechanisms that safeguard the fundamental values that bind the Union in recent years.

As the global geopolitical landscape has changed, discussions regarding the shaping of the Union's future course have become increasingly important. The prospect of more countries seeking membership has led to a reassessment of the Union's internal structure and a thorough review of the EU's deepening processes. The need to safeguard the EU's fundamental values is at the forefront of these discussions, with the rule of law emerging as a central theme. In answer to observed challenges, the French Minister of State for Europe, Laurence Boone, and her German counterpart, Anna Lührmann, Minister of State for Europe and Climate, tasked a group of experts in January 2023 with opening reflection among the Member States as to institutional reforms ahead of future enlargements. At the General Affairs Council meeting in Brussels on 19 September 2023, the group presented an outline for how the EU should function going forward, including suggestions aimed at strengthening the EU in preparation for the admission of new Member States.³

¹ European Commission, 'Strengthening the Rule of Law within the Union - A Blueprint for Action', EUR-lex, 17 July 2019, <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=COM%3A2019%3A343%3AFIN>.

² 'Poland and Hungary Still Lagging, Says Annual EU Rule-of-Law Report', EUobserver, 5 July 2023, <https://euobserver.com/rule-of-law/157235>.

³ Franco-German Working Group on EU Institutional Reform, 'Sailing on High Seas: Reforming and Enlarging the EU for the 21st Century', 18 September 2023, <https://www.auswaertiges-amt.de/blob/2617206/4d0e0010ffcd8c0079e21329bbb3332/230919-rfaa-deu-fra-bericht-data.pdf>.

The credibility of the EU is intricately linked to its ability to maintain and enforce its values and principles among its Member States.⁴ Naturally, this also impacts the accession process—if the EU falters in upholding rule of law standards among its Member States, its credibility wavers in the eyes of aspiring member countries.⁵ The transformative power of the EU, which hinges on the promise of shared values, is jeopardised. Given this context, the recommendations put forth by the Franco–German expert group emerge as a timely method to bolster the Union’s dedication to upholding the rule of law.

This brief provides an overview of the existing arsenal of tools the EU employs to uphold the rule of law, scrutinising its strengths and limitations. Subsequently, the brief explores emerging reform initiatives, including insights from the Franco–German expert group and recent parliamentary proposals, and evaluates responses to these potential changes. Finally, the conclusion reflects on the challenges ahead, the diverse perspectives among Member States, and the imperative to navigate a delicate balance between reinforcing the commitment to the rule of law and accommodating varied interests within the Union.

THE EU’S RULE OF LAW TOOLKIT: EXISTING TOOLS AND EMERGING REFORM INITIATIVES

1. AN OVERVIEW OF EXISTING TOOLS AND MECHANISMS

The European Union has established an extensive toolbox for the rule of law. Based on their functions and objectives, the tools can be systematically categorised into three groups: tools for early prevention and promotion, enforcement mechanisms, and financial and technical assistance.

1.1. Tools for prevention and promotion

The European Rule of Law Mechanism, implemented through peer-to-peer reviews, concerns **annual dialogues** aiming to foster and safeguard the rule of law among EU Member States. Since 2020, this mechanism has followed a tailored structured approach, which involves broad discussions encompassing general rule-of-law developments in the EU and country-specific discussions addressing key developments in five Member States per semester. The dialogues utilise the **European Commission’s annual report on the rule of law**, focusing on justice systems, anti-corruption frameworks, media pluralism and freedom, and institutional issues linked to checks and balances. This structured approach aims to enhance the preventive and constructive nature of the tool, facilitating an open exchange of comments and best practices while upholding principles of objectivity, non-discrimination, and equal treatment.⁶

The European Semester is another crucial element for promoting the rule of law. As part of the EU’s economic governance, the Council annually adopts country-specific recommendations, coordinating economic, fiscal, employment, and social policy. These recommendations may include measures related to the justice system’s independence, efficiency, and quality, reflecting the interconnectedness of the rule of law with broader economic considerations.⁷

The EU Justice Scoreboard, integral to the European Semester, provides an annual overview of indicators of justice systems’ efficiency, quality, and independence. This monitoring tool is meant to improve national justice systems’ effectiveness by offering objective, reliable, and comparable data.⁸

4 Christian Calliess, ‘Restoring Credibility and Trust by Enforcing the Rule of a Law’, European Policy Centre, April 2019, https://www.epc.eu/content/PDF/2019/Challenge_Europe_Restoring_credibility_and_trust_by_enforcing_the_rule_of_a_law_.pdf.

5 Franco-German Working Group on EU Institutional Reform.

6 ‘Rule of Law’, European Council, 28 November 2023, <https://www.consilium.europa.eu/en/policies/rule-of-law/>.

7 ‘Rule of Law’.

8 ‘EU Justice Scoreboard’, European Commission, n.d., https://commission.europa.eu/strategy-and-policy/policies/justice-and-fundamental-rights/upholding-rule-law/eu-justice-scoreboard_en.

Established upon the accession of Romania and Bulgaria in 2007, the **Cooperation and Verification Mechanism** (CVM) aimed to address shortcomings in judicial reform, the fight against corruption, and, in Bulgaria's case, the fight against organised crime. The Commission regularly verified progress against specific benchmarks included in this tailored monitoring tool. In September 2023, the Commission formally closed the CVM for Bulgaria and Romania, as all benchmarks had been satisfactorily met. Monitoring of these two countries continues through the other EU rule of law tools.⁹

In 2014, the European Commission introduced the **Rule of Law Framework** to proactively assess potential threats to the rule of law within Member States, aiming to address issues before invoking the procedures of Article 7 TEU. The framework's objective is to engage in a dialogue with the respective EU countries to prevent the escalation of rule of law concerns.¹⁰

1.2. Enforcement mechanisms

Article 7 TEU constitutes a crucial component of the EU's response to breaches of foundational values among its Member States. Enacted through the Amsterdam Treaty and refined by the Nice Treaty, Article 7 features both preventive and sanctioning parts. In the preventive part (Article 7(1) TEU), the Council may issue a public warning upon a reasoned proposal by one-third of the Member States, the European Parliament, or the Commission. This aims to address a clear risk of a serious breach, fostering collaborative dialogue and recommendations. The sanctioning part comes into play when a serious and persistent breach is unanimously identified by the Council, once initiated by one-third of the Member States or the Commission and approved by a two-thirds majority in the Parliament (Article 7(2) TEU). After a unanimous decision to activate Article 7(3) TEU, the Council decides on sanctions by a qualified majority, including the potential suspension of EU voting rights. Within the Article 7(1) procedure, the Council conducts regular hearings on countries repeatedly breaching the rule of law.¹¹ However, the unanimous vote required to activate Article 7(3) renders this procedure unproductive, as countries in breach of the rule of law may form coalitions to veto the decision.¹²

The Commission may also initiate **infringement procedures** to address instances where a member country fails to implement EU law. This process begins with the Commission identifying possible infringements, either through its own investigations or in response to complaints. The formal procedure includes a formal notice and a reasoned opinion requesting compliance with EU law. The concerned Member State must notify the Commission of the measures taken within a specific period, typically two months. If the country still does not comply, the Commission may refer the matter to the **European Court of Justice** (ECJ). The national authorities must act to abide by the Court's ruling if it determines that the country has violated EU law. Following a Court ruling, if non-compliance persists, the Commission can refer the country back to the court for additional action, which might incur financial penalties.¹³ The court can also provide preliminary rulings for interpreting EU law and treaties, contributing to the enforcement of the rule of law principles.¹⁴

Since January 2021, the Union budget has been bolstered with an additional safeguard known as **the rule of law conditionality regulation**, activated when breaches of the rule of law endanger EU financial interests. This mechanism enables the EU to implement measures such as payment suspensions or financial corrections to protect the budget if rule of law violations in a Member State directly impact or seriously risk impacting the responsible financial management of the EU budget. It supplements

9 Thomas Wahl, 'Commission Formally Closes Cooperation and Verification Mechanism for Bulgaria and Romania', Eurim, 2 October 2023, <https://eurim.eu/news/commission-formally-closes-cooperation-and-verification-mechanism-for-bulgaria-and-romania/>.

10 'Rule of Law Framework', European Commission, n.d., https://commission.europa.eu/strategy-and-policy/policies/justice-and-fundamental-rights/upholding-rule-law/rule-law/rule-law-framework_en.

11 'Rule of Law'.

12 Marko Kmezić and Florian Bieber, 'Protecting the Rule of Law in EU Member States and Candidate Countries', SIEPS, October 2020, 9, https://www.sieps.se/globalassets/publikationer/2020/2020_12epa.pdf.

13 'Infringement Procedure', European Commission, n.d., https://commission.europa.eu/law/application-eu-law/implementing-eu-law/infringement-procedure_en.

14 'Rule of Law'.

existing budget protection tools like audits and investigations by the European Anti-Fraud Office (OLAF), stepping in when those measures are insufficient. The Commission proposes measures to the Council, with the Council making the final decision.¹⁵ Thus far, this mechanism has been utilised once, in the case of Hungary, in December 2022.¹⁶

1.3 Financial and technical assistance

The Commission's **Justice Programme**, currently extending from 2021 to 2027, aims to support judicial cooperation in civil and criminal matters, enhance access to justice, and promote the rule of law across the EU. It fosters a European area of justice based on principles like judicial independence, mutual recognition, and mutual trust. Key objectives include increasing the capacity of national legal practitioners, promoting cooperation between competent authorities, raising awareness among policymakers, and improving judicial training to ensure a common legal culture and effective implementation of EU legal instruments. Additionally, the programme aims to facilitate access to justice for all, support victims' rights, and ensure procedural rights for suspects and accused persons in criminal proceedings. It also maintains and expands the e-Justice portal, offering citizens and businesses access to essential legal documents and databases to facilitate cross-border legal proceedings, access to legal practitioners, and information on various legal matters.¹⁷ Furthermore, the Commission's **Directorate-General for Structural Reform Support** provides technical support for structural reforms, including institution-building, judicial system reform, anti-corruption efforts, and anti-money laundering strategies, tailored to Member States' specific reform priorities upon request.¹⁸

2. EMERGING INITIATIVES FOR RULE OF LAW REFORMS

The Franco-German expert group report criticises existing European instruments for having demonstrated limitations in preventing backsliding in certain Member States, creating a 'Copenhagen dilemma' where conditions imposed on candidate countries cannot be effectively applied post-accession. The report also acknowledges the impact of **budgetary conditionality** and ECJ rulings as effective tools in defending the rule of law. However, it proposes significant reforms to enhance the EU's ability to protect the rule of law. For budgetary conditionality, the report recommends broadening the scope to sanction breaches of the rule of law and European values beyond the direct link to the EU budget. The report also proposes extending the scope of budgetary conditionality to behaviours detrimental to sound financial management, such as the fight against money laundering. To refine the **Article 7 TEU procedure**, the report suggests modifying Article 7(2) TEU to replace unanimity minus one with a majority of four-fifths at the European Council. It advocates for automatic responses and time limits, along with the inclusion of automatic sanctions after specified periods of inaction by the Council. **The ECJ** would serve as the final arbiter in case of disputes.¹⁹

The push for reforms, however, does not stem strictly from the geopolitical circumstances and the Franco-German report. In 2017, a Parliament resolution advocated EU reform, considering both the existing Treaty potential²⁰ and the prospect of Treaty change.²¹ Subsequent debates in 2018 and 2019, alongside

15 'Rule of Law Conditionality Regulation', European Commission, n.d., https://commission.europa.eu/strategy-and-policy/eu-budget/protection-eu-budget/rule-law-conditionality-regulation_en.

16 'Rule of Law Conditionality Mechanism: Council Decides to Suspend €6.3 Billion given Only Partial Remedial Action by Hungary', European Council, 12 December 2022, <https://www.consilium.europa.eu/en/press/press-releases/2022/12/12/rule-of-law-conditionality-mechanism/>.

17 'Funding & Tenders', European Commission, n.d., <https://ec.europa.eu/info/funding-tenders/opportunities/portal/screen/programmes/just2027>.

18 Kmezić and Bieber, 'Protecting the Rule of Law in EU Member States and Candidate Countries'.

19 Franco-German Working Group on EU Institutional Reform, 'Sailing on High Seas: Reforming and Enlarging the EU for the 21st Century'.

20 'Improving the Functioning of the European Union Building on the Potential of the Lisbon Treaty', European Parliament, 16 February 2017, https://www.europarl.europa.eu/doceo/document/TA-8-2017-0049_EN.html.

21 'Possible Evolutions of and Adjustments to the Current Institutional Set-up of the European Union', European Parliament, 16 February 2017, https://www.europarl.europa.eu/doceo/document/TA-8-2017-0048_EN.html.

the Conference on the Future of Europe,²² resulted in many proposals for EU reform. The Parliament further called for a convention on EU reform in May²³ and June 2022,²⁴ with support from Ursula von der Leyen in September 2022. On 5 October 2023, the European Parliament Committee on Constitutional Affairs adopted a report detailing proposals to amend the Treaties, emphasising that this would be an effort to enhance the Union's capacity to act, strengthen its democratic legitimacy, and bolster accountability.²⁵ Notably, in relation to the **rule of law procedure (Article 7 TEU)**, the proposals advocate for significant changes. These include enabling the Council to act by Qualified Majority Voting (QMV) to establish the existence of a risk of a serious breach of EU values by a Member State. The Council should then decide within six months, also by QMV, to submit an application to the ECJ for a serious and persistent breach. Importantly, Parliament would have the authority to make such a referral to the Council. If the ECJ confirms the existence of a breach, the Council could determine appropriate sanctions, such as the suspension of commitments and payments from the EU's budget or the right to hold the Council Presidency.²⁶

2.1 Responses to the new reform initiatives

In her annual State of the Union speech to MEPs in September, the European Commission President Ursula von der Leyen expressed support for those advocating EU reforms, including the possibility of a European convention and treaty changes, if necessary. However, despite this call for reform, there seems to be limited enthusiasm among national governments to reopen the treaties.²⁷ The initiation of a political convention relies on the leaders of the EU Member States deciding whether to open a new convention on EU treaty reform following the formal demand from the European Parliament. Despite this, treaty reform was not a focal point at the December European Council Summit, which was predominantly centred around enlargement and economic aid for Ukraine.²⁸

Amidst the reform discussions, Jacek Saryusz-Wolski, an MEP from the Polish conservative PiS party, criticised the proposals as an attempt to “hijack Europe” and create a “dystopian superstate” that undermines member countries. Concerns about where the proposals come from have also been raised. For example, László Trócsányi of the Hungarian conservative Fidesz highlighted that four of the five co-rapporteurs of the Parliament's report are German, suggesting that the new proposals might increase institutional powers at the expense of smaller countries only.²⁹ In early December, the Polish foreign minister announced that Poland would forge ahead with efforts to build a coalition of countries against planned changes to EU treaties. He anticipated discussions on these changes among the bloc's leaders in the coming spring.³⁰

The reaction from these particular two countries comes as no surprise, given the criticism and scrutiny they have faced due to concerns about democratic backsliding, erosion of judicial independence, and infringements on media freedom and civil liberties. Both countries have also emphasised national sover-

22 'Conference on the Future of Europe', European Commission, n.d., https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/new-push-european-democracy/conference-future-europe_en.

23 'Treaty Review Necessary to Implement Conference Proposals, Parliament Declares', European Parliament, 4 May 2022, <https://www.europarl.europa.eu/news/en/press-room/20220429IPR28227/treaty-review-necessary-to-implement-conference-proposals-parliament-declares>.

24 'The Call for a Convention for the Revision of the Treaties', European Parliament, 9 June 2022, https://www.europarl.europa.eu/doceo/document/TA-9-2022-0244_EN.html.

25 'REPORT on Proposals of the European Parliament for the Amendment of the Treaties', European Parliament, 7 November 2023, https://www.europarl.europa.eu/doceo/document/A-9-2023-0337_EN.html.

26 'Parliament's Proposals to Amend the Treaties', European Parliament, 2 November 2023, [https://www.europarl.europa.eu/RegData/etudes/ATAG/2023/754593/EPRS_ATA\(2023\)754593_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/ATAG/2023/754593/EPRS_ATA(2023)754593_EN.pdf).

27 'MEPs Aim to Politicise EU Institutions, Scrap Vetoes in Planned Treaty Overhaul', Euractiv, 26 October 2023, sec. EU Institutions, <https://www.euractiv.com/section/eu-institutions/news/meps-aim-to-politicise-eu-institutions-scrap-vetoes-in-planned-treaty-overhaul/>.

28 'The Brief – The Treaty Change Window Slams Shut', Euractiv, 19 December 2023, sec. EU Reforms, <https://www.euractiv.com/section/eu-reforms/opinion/the-brief-the-treaty-change-window-slams-shut/>.

29 'EU Parliament To Vote on “Dystopian Superstate” Proposal', The European Conservative, 22 November 2023, <https://europeanconservative.com/articles/news/eu-parliament-to-vote-on-dystopian-superstate-proposal/>.

30 'Poland to Continue Drive against EU Treaty Changes', Polskie Radio, 7 December 2023, <https://polskieradio.pl/395/7784/artykul/3295716,poland-to-continue-drive-against-eu-treaty-changes-fm>.

eighty, often framing EU interventions as unwarranted interference in domestic affairs.³¹ The objections to treaty reforms and initiatives to strengthen the rule of law are thus a reflection of broader tensions within the EU regarding the balance between national sovereignty and supranational integration, as well as concerns about democratic governance and institutional power dynamics.

CONCLUSION

The reform initiatives, particularly the Franco–German report and the Parliament’s proposals signify a recognition of the need for more robust mechanisms to protect the rule of law within the EU. The proposed changes create a clearer path to enforcing rule of law standards, with measures such as automatic sanctions, time limits, and enhanced transparency. The regulatory changes aim to streamline the decision-making process and provide a more effective response to serious and persistent breaches. However, there are huge challenges ahead in achieving a necessary consensus on meaningful rule of law reforms within the EU. The divergent views among individual Member States, as well as concerns raised by prominent politicians, underscore the complexities of navigating institutional changes and the need for careful diplomacy to ensure an effective approach. The EU thus faces a burdensome task of striking a delicate balance between reinforcing its commitment to the rule of law and addressing the diverse perspectives and interests within the Union.

Despite the apparent waning interest from leaders, efforts should persist in pushing for continued discussions on EU reform. The Franco–German expert group’s proposals, alongside those from the European Parliament, present an opportunity for the EU to strengthen its commitment to the rule of law. This necessitates sustained attention, diplomatic efforts, and a commitment to finding common ground.

Policy Recommendations:

- Encourage continued discussions on EU internal reform with inclusive participation from Member States and stakeholders to ensure that momentum is maintained and progress is made.
- Intensify diplomatic efforts to bridge gaps and foster consensus among Member States on proposed reforms.
- Ensure continuous dialogue and cooperation between EU institutions, Member States, and civil society organisations to address concerns and adapt reforms as needed.
- Amend decision-making procedures to overcome deadlock and ensure timely action on rule of law matters.
- Expand budgetary conditionality to encompass a broader range of rule of law breaches, providing stronger incentives for compliance.

31 Heather Grabbe and Stefan Lehne, ‘Defending EU Values in Poland and Hungary’, Carnegie Europe, 4 September 2017, <https://carnegieeurope.eu/2017/09/04/defending-eu-values-in-poland-and-hungary-pub-72988>.

