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Establishment of a European Union mechanism on democracy, the rule of law and fundamental rights

Report¹

Committee on Rules of Procedure, Immunities and Institutional Affairs

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Summary

The 2016 European Parliament resolution on establishing within the European Union a comprehensive, binding and permanent mechanism to monitor the situation of democracy, the rule of law and human rights in the 28 member States was a triggering point for the Parliamentary Assembly to launch a new process of reflection on how to achieve greater complementarity between the two organisations.

Even though the Council of Europe's position as "a benchmark for human rights, the rule of law and democracy in Europe" is not called into question, practical arrangements at all levels and lasting efforts are required to ensure synergy of action and to avoid fragmentation of the understanding of fundamental values and their implementation on the European continent.

The report proposes concrete measures to enhance the dialogue with the national parliaments, under conditions favouring an open debate on the recommendations emanating from both organisations concerning the respect by the member States of standards relating to human rights, the rule of law and democracy, and to bring European decision-makers and representatives of national parliaments closer together.

1. Reference to committee: [Doc. 14317](#), Reference 4308 of 30 June 2017.



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A. Draft resolution²

1. In October 2016, the European Parliament adopted a resolution proposing that the European Union establish a comprehensive, binding and permanent mechanism to monitor the situation of democracy, the rule of law and human rights in the 28 member States and to ensure compliance with the fundamental values of the European Union enshrined in Article 2 of the Treaty on European Union and the implementation of the European Treaties in the member States.

2. The Parliamentary Assembly recognises that such an initiative is legitimate and consistent from the European Union perspective, the European Parliament itself noting that the existing instruments implemented by both the European Commission and the European Council have limited scope.

3. The Assembly considers that the initiative of the European Parliament, which is still under discussion, needs serious reflection in that the proposed mechanism makes specific reference to the Council of Europe framework and aims to create synergies between the two organisations. The proposed mechanism would, on account of its substance and scope, have a clear impact on the Council of Europe, its standard-setting *acquis* and the implementing mechanisms of its conventions: this mechanism refers to the Council of Europe *acquis* and includes in its “legal basis” several Council of Europe conventions – in particular the European Convention on Human Rights (ETS No. 5) and the European Social Charter (revised) (ETS No. 163) – to which the European Union is not a Party; certain Council of Europe bodies will be called upon to collaborate with the European Union under this mechanism – the European Commission for Democracy through Law (Venice Commission), the Group of States against Corruption (GRECO), the Commissioner for Human Rights of the Council of Europe, the Congress of Local and Regional Authorities of the Council of Europe and the European Commission for the Efficiency of Justice (CEPEJ).

4. The Assembly recalls that the Council of Europe and the European Union rely on strong standards in the field of human rights, the rule of law and democracy to achieve their respective institutional goals. Since the 2007 Memorandum of Understanding, the Council of Europe and the European Union have developed a strategic partnership based on these common values, which make synergy and convergence of actions indispensable. Today, both organisations have a shared responsibility for upholding the effectiveness of their respective legal frameworks, ensuring that any overlapping of competences does not create conflict, and that this set of shared core values and principles is not interpreted independently either by the European Union or the Council of Europe, in order to avoid fragmentation of understanding about what the fundamental values are and their implementation on the European continent.

5. On many occasions in recent years, the Assembly has taken a position on how to achieve complementarity of action between the two organisations, in particular in [Resolution 1427 \(2005\)](#) and [Recommendation 1696 \(2005\)](#) “Plans to set up a Fundamental Rights Agency of the European Union”, [Recommendation 1744 \(2006\)](#) “Follow-up to the Third Summit: the Council of Europe and the Fundamental Rights Agency of the European Union”, [Resolution 1756 \(2010\)](#) and [Recommendation 1935 \(2010\)](#) on the need to avoid duplication of the work of the Council of Europe by the European Union Agency for Fundamental Rights, [Resolution 1836 \(2011\)](#) and [Recommendation 1982 \(2011\)](#) on the impact of the Lisbon Treaty on the Council of Europe, [Recommendation 2027 \(2013\)](#) “European Union and Council of Europe human rights agendas: synergies not duplication”, [Resolution 2029 \(2015\)](#) and [Recommendation 2060 \(2015\)](#) on the implementation of the Memorandum of Understanding between the Council of Europe and the European Union and [Resolution 2041 \(2015\)](#) and [Recommendation 2065 \(2015\)](#) on European institutions and human rights in Europe.

6. The Assembly strongly reaffirms that under the 2007 Memorandum of Understanding, “the European Union regards the Council of Europe as the Europe-wide reference source for human rights” and “the Council of Europe will remain the benchmark for human rights, the rule of law and democracy in Europe”. It welcomes the fact that many Council of Europe conventions as well as Committee of Ministers' recommendations contain standards considered today as *acquis communautaires*, without the operational logic of the Organisation being called into question. The Memorandum of Understanding also invited the European Union institutions to cite the relevant Council of Europe norms “as a reference in European Union documents” and to take the decisions and conclusions of the Council of Europe bodies into account “where relevant”.

7. The Council of Europe has a large number of bodies empowered to collect data from member States, evaluate member States' compliance with general obligations and specific or contractual commitments, or formulate observations and recommendations on democratic governance, the rule of law and human rights for the attention of member States. The Assembly notes that the Council of Europe acts as a partner of the

2. Draft resolution adopted unanimously by the committee on 18 March 2019.

European Union, providing the basis for the European Union decision-making process in respect of countries which are also member States of the Council of Europe. The Council of Europe's input in current European Union rule of law initiatives, especially with the Venice Commission opinions, has already proven substantial.

8. The Assembly recognises that the co-operation established between the Council of Europe and the European Union institutions and agencies, in particular the Fundamental Rights Agency, has been positive and has strengthened the European framework for the promotion of fundamental rights and the mutual trust on which co-operation between European States is based.

9. In response to increased concerns within the European Union over the democratic deficit in relation to several of its member States, various European Union rule of law monitoring and enforcement mechanisms have been established, involving different European Union institutions and based on different paradigms, differing in their nature and their coercive effects.

10. In reaction to previous initiatives of the European Union to set up mechanisms for monitoring respect for the rule of law or human rights, the Assembly has often expressed reservations and highlighted the risks of creating double mechanisms, double standards, fragmentation or inconsistency of applicable standards and "forum shopping", as well as the risk of wasting limited budgetary resources where such a mechanism already existed within the framework of the Council of Europe. It therefore considers it essential to maintain the primacy of the Council of Europe in the assessment of the respect by European Union member States, as well as non-European Union member States, of the common fundamental values.

11. The Assembly also recalls that the current enforcement and monitoring procedures aimed at upholding the values of human rights, the rule of law and democracy, set up by the Council of Europe or the European Union, rely on co-operation with national authorities and institutions. The Assembly therefore expresses concern that, if taken from the perspective of national authorities, the multiple recommendations produced by the various European bodies may result in institutional fatigue and compromise the ability to develop a sound public policy.

12. The Assembly considers that a sound political commitment has been expressed by the Council of Europe and the European Union to making more effective use of existing standards and procedures in order to create an enabling environment for the effective realisation of human rights and the freedoms of citizens. The Assembly believes, however, that a number of practical arrangements could usefully reinforce the above political commitments, clarify and optimise their respective roles and missions and, at the same time, remove or minimise the risk in the long term of double standards and duplication of mechanisms or action undertaken.

13. Therefore, the Assembly invites the European Union, in the framework of its existing procedures and its initiatives to ensure compliance with the values guaranteed in Article 2 of the Treaty on European Union, to:

13.1. support the effective implementation of benchmarks at European level, using the Council of Europe's "rule of law standards", including the case law of the European Court of Human Rights, relevant recommendations of the Committee of Ministers, standards and opinions of the Venice Commission (including the "Rule of Law Checklist") and opinions and/or conclusions of the relevant Council of Europe advisory or monitoring bodies;

13.2. use the available reports, opinions or recommendations of the Council of Europe's advisory or monitoring bodies, not only citing them as references in the documents produced by the European Union bodies, but taking into account the final conclusions of these bodies in the assessment by the institutions of the European Union to determine whether rule of law issues arise, as well as to guide proposals for any action to be taken;

13.3. when assessing whether the rule of law deficiency has been remedied or has ceased to exist, liaise with the relevant Council of Europe bodies which issued the opinion or the recommendation to ensure consistency of views and conclusions. The initiative for political action in the event of alleged non-compliance with the European Union legal framework would remain with the European Union, with the Council of Europe offering legal and technical assessment in compliance with its monitoring or advisory bodies' competences;

13.4. provide for safeguards in any mechanism of the European Union, to ensure that the assessment or action of the European Union will not affect existing procedures arising from Council of Europe advisory or monitoring mechanisms, along similar lines to Article 53 of the Charter of Fundamental Rights of the European Union.

14. The Assembly welcomes the increased participation of the European Union in the work of a number of Council of Europe bodies, which contributes to strengthening consistency in the respective organisations' approaches in the fields addressed and in relation to the countries concerned. This sound co-operation must continue without necessarily leading to formal institutional arrangements. However, in a number of cases, establishing a formal basis would not only help to reinforce the concept of shared values in the field of human rights, the rule of law and democracy, but would also avoid the risk of fragmentation and dividing lines in the application of standards in Europe.

15. Therefore, with a view to developing the European Union's participation in the Council of Europe's monitoring bodies, the Assembly calls on the European Union to:

15.1. resume the negotiation process of accession to the European Convention on Human Rights in order to ensure the convergence of human rights standards all over Europe;

15.2. accede to the Criminal Law Convention on Corruption (ETS No. 173) and speed up the negotiations on its participation in GRECO, with a view to contributing to more co-ordinated anti-graft policies in Europe.

16. In addition, the Resolution of the European Parliament on a European Union mechanism for democracy, rule of law and fundamental rights gives national parliaments an important role in the envisaged mechanism and calls for a reinforced interparliamentary dialogue between the European Parliament and national parliaments. Like the European Parliament, the Assembly is convinced that national parliaments are, upstream, well-positioned to identify shortcomings and frame indicators to measure compliance with the shared values. However, it also considers that, downstream, the lack of information in national parliaments on recommendations made by the various European institutions in the context of rule of law compliance mechanisms is detrimental to the consolidation of the system of protection of human rights and the rule of law in Europe.

17. The Assembly considers that, as a pan-European forum for interparliamentary dialogue whose adopted texts provide guidance to national governments and parliaments on the standards to be promoted in Europe, it could be the privileged place for regular interaction between the European Union institutions and the national parliamentary delegations which sit in the Assembly. Thus, it stands ready to hold an annual parliamentary debate on the rule of law, which would provide a timely opportunity to bring European decision-makers and monitoring bodies closer to national parliaments.

18. Therefore, the Assembly decides to invite the European Union to co-operate on establishing an annual parliamentary debate on the rule of law, using the Parliamentary Assembly platform to:

18.1. better inform national parliaments about the conclusions and recommendations of the various reports on member States' compliance with the standards of human rights, the rule of law and democracy produced by the Council of Europe and the European Union, and by doing so to contribute to converting recommendations, advice and conclusions into national compliance policies;

18.2. enable national parliaments to inform the European institutions about their priority issues;

18.3. help to create a common feeling that a country's situation is not unique and that the same problems are shared by others.

19. The Assembly calls on the European Parliament to reinforce their mutual co-operation in order to further strengthen the parliamentary dimension of rule of law-related matters.

20. Finally, the development of European Union rule of law mechanisms, ongoing initiatives and their implications for the Council of Europe deserve further analysis and reflection at the level of the Assembly itself with regard to the potential impact on its own mode of operation in terms of compatibility with its own procedure for monitoring the obligations and commitments entered into by the member States.

B. Draft recommendation³

1. The Parliamentary Assembly, referring to its Resolution ... (2019) on the establishment of a European Union mechanism on democracy, the rule of law and fundamental rights, welcomes the fruitful co-operation between the European Union and the Council of Europe aimed at ensuring greater respect of the shared values of human rights, democracy and the rule of law.

2. It recalls that the Memorandum of Understanding concluded in 2007 between the two organisations establishes common priorities for institutional co-operation, based on enhanced partnership and complementarity and meant to be achieved by using common strategies. In addition, the Memorandum contains a firm commitment by both organisations to “establish common standards” for promoting a Europe without dividing lines.

3. The Assembly notes that the areas of co-operation outlined by the Memorandum of Understanding have been progressively grouped under the pillars of political dialogue, joint activities and legal co-operation. As regards the legal co-operation on rule of law-related matters, the Assembly notes that a number of co-operation arrangements have been made by the European Commission and various Council of Europe expert bodies to intensify the exchange and sharing of information, knowledge and experience, thereby preserving the consistency of rule of law standards and complementarity of action.

4. However, the Assembly considers that given the political and institutional context in which the European Union rule of law initiatives are being drawn up or implemented, rule of law-related matters require, in addition to legal co-operation at a technical level, intensified political action by the Committee of Ministers.

5. Several European Union initiatives and mechanisms to ensure that European Union member States comply with rule of law standards have emerged in recent years. They involve different institutions, are based on different paradigms and differ in their nature and coercive effects. Article 7 of the Treaty on European Union was recently triggered by the European Commission in respect of Poland and by the European Parliament with regard to Hungary. The assessments provided by various Council of Europe expert bodies, on the basis of standards common to both organisations, were extensively used to back both proposals.

6. The Assembly notes that the Lisbon Treaty has modified the basis of the political dialogue between the two organisations, since the European Union's relations with the Council of Europe have since been under the competence of the High Representative of the Union for Foreign Affairs and Security Policy. In so far as it is not directly involved in the drawing up and implementation of European Union rule of law-related initiatives, the Assembly regrets that, with the end of the quadripartite meetings, the voice of the Council of Europe, represented by the chairmanship of the Committee of Ministers and the Secretary General of the Organisation, no longer makes itself heard directly on these issues at the highest political and institutional level by the Presidency of the European Union and the Presidency of the European Commission.

7. Given the current context and notwithstanding the sound basis of the existing legal co-operation, the Assembly is concerned that, in the long run, the variety of the rule of law-related initiatives involving different European Union institutions may jeopardise both the Memorandum of Understanding's declared objective of ensuring the coherence of the standard-setting system, and the complementarity and efficiency of mechanisms in upholding the shared values of human rights, democracy and the rule of law which exist at the level of both institutions with regard to States which are members of both the Council of Europe and the European Union.

8. The Assembly reaffirms the terms of its [Recommendation 2060 \(2015\)](#) on the implementation of the Memorandum of Understanding between the Council of Europe and the European Union, in which it stressed that “the ultimate goal of the partnership between the two organisations, based on each other's *acquis* and comparative advantages, is to pursue further the building of a common space for human rights protection and to ensure coherence of standards and the monitoring of their implementation in Europe” and, “[w]ith a view to ensuring in-depth legal co-operation, enhancing complementarity and coherence of legal standards and providing a unique framework for human rights, democracy and the rule of law in Europe ... [asked the Committee of Ministers to] ensure active co-operation with the European Union in the implementation of the new framework to strengthen the rule of law in European Union member States; [and] continue developing appropriate synergies between Council of Europe monitoring mechanisms and bodies and any new evaluation mechanisms to be set up by the European Union”.

3. Draft recommendation adopted unanimously by the committee on 18 March 2019.

9. As the Assembly considers it essential to maintain the primacy of the Council of Europe in the assessment of the European Union member States' compliance with common fundamental values, it recommends that the Committee of Ministers:

9.1. take stock, on a regular basis, of the current state of various European Union rule of law initiatives and assess them in the context of the Memorandum of Understanding and its objectives to maintain common standards and complementarity;

9.2. establish a specific co-ordination body to report to the Committee of Ministers on a regular basis on the above issue;

9.3. create, bearing in mind the respective organisations' competences, a more integrated approach regarding political decision-making, which would directly involve dialogue with the European Union institution concerned every time an assessment of a Council of Europe/European Union member State is carried out as to whether a risk of a serious breach of the common rule of law standards exists or whether the deficiency has been remedied or has ceased to exist;

9.4. promote safeguards along similar lines to Article 53 of the Charter of Fundamental Rights, according to which any European Union rule of law mechanism shall ensure that the assessment or action of the European Union will not affect existing procedures arising from Council of Europe advisory or monitoring mechanisms.

C. Explanatory memorandum by Ms Petra De Sutter, rapporteur

1. Introduction

1. On 25 October 2016, the European Parliament adopted a resolution⁴ proposing that the European Union establish a comprehensive, binding, long-term and permanent mechanism to monitor the situation of democracy, the rule of law and fundamental rights (hereafter “DRF”) in the 28 member States and to ensure compliance with the fundamental values of the European Union and implementation of the European treaties. This binding mechanism would provide for the definition, monitoring and enforcement of the values and principles enshrined in Article 2 of the Treaty on European Union (TEU) in the member States and within the European Union’s institutions.

2. While such initiative is legitimate and consistent from an European Union perspective, it raises questions as to its scope and content, in particular regarding the Council of Europe’s framework, to which the proposed mechanism expressly refers. The Committee on Rules of Procedure, Immunities and Institutional Affairs is tasked with analysing at this stage, before the mechanism is set in motion, the issues at stake and assessing the impact the new EU mechanism recommended by the European Parliament might have. The committee should in particular consider any possible duplication and contradiction between this new mechanism and the Council of Europe existing mechanisms, including the Parliamentary Assembly’s monitoring mechanisms.⁵

2. The current EU framework for the monitoring and enforcement of EU values and principles

2.1. Treaty provisions

3. The current EU framework for the monitoring and enforcement by member States of EU values and principles is mainly based on Article 2⁶ and Article 7 TEU, the latter providing for a detailed mechanism in this regard.

4. Article 7 TEU⁷ is composed of two parts: a preventive mechanism and a sanctioning mechanism. The preventive mechanism of Article 7(1) TEU can be activated by the Council of the European Union (hereafter “the Council”) only in case of a “clear risk of a serious breach” of the values recognised by Article 2 TEU, and the sanctioning mechanism of Article 7(2) TEU only in case of a “serious and persistent breach” of the values

4. P8_TA(2016)0409, EU mechanism for democracy, rule of law and fundamental rights. See also the report presented by the Committee on Civil Liberties, Justice and Home Affairs (Rapporteur: Sophia in ‘t Veld, ALDE) (A8_0283/2016), www.europarl.europa.eu/sides/getDoc.do?pubRef=-%2f%2fEP%2f%2fNONSGML%2bREPORT%2bA8-2016-0283%2b0%2bDOC%2bPDF%2bV0%2f%2fEN; as well as the European Added Value Assessment prepared by the European Parliament Research Service (EPRS) (PE 579.328), [www.europarl.europa.eu/RegData/etudes/IDAN/2016/579328/EPRS_IDA\(2016\)579328\(ANN2\)_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/IDAN/2016/579328/EPRS_IDA(2016)579328(ANN2)_EN.pdf); and [www.europarl.europa.eu/RegData/etudes/IDAN/2016/579328/EPRS_IDA\(2016\)579328_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/IDAN/2016/579328/EPRS_IDA(2016)579328_EN.pdf)

5. The rapporteur carried out a fact-finding visit to the European Union institutions in Brussels on 27 November 2017; she also met with the rapporteur of the European Parliament, Ms In ‘t Veld, on 20 December 2017. On 15 January 2019, the committee held a hearing with the participation of Mr Christos Giakoumopoulos, Director General of the Human Rights and Rule of Law, Council of Europe; Mr Emmanuel Crabit, Director, Directorate C – Fundamental rights and rule of law, Directorate General for Justice and Consumers, European Commission; Mr Ralph Kaessner, Head of Unit Horizontal Matters, Justice and Home Affairs, Council of the European Union, and Mr Jonas Grimheden, Senior Policy Manager, Institutional Cooperation, European Union Agency for Fundamental Rights. The rapporteur expresses her warmest thanks to these experts for their availability.

6. Article 2 TEU defines the values of the European Union as “human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail”.

7. Article 7 TEU: “1. On a reasoned proposal by one third of the Member States, by the European Parliament or by the European Commission, the Council, acting by a majority of four fifths of its members after obtaining the consent of the European Parliament, may determine that there is a clear risk of a serious breach by a Member State of the values referred to in Article 2. Before making such a determination, the Council shall hear the Member State in question and may address recommendations to it, acting in accordance with the same procedure.

The Council shall regularly verify that the grounds on which such a determination was made continue to apply.

2. The European Council, acting by unanimity on a proposal by one third of the Member States or by the Commission and after obtaining the consent of the European Parliament, may determine the existence of a serious and persistent breach by a Member State of the values referred to in Article 2, after inviting the Member State in question to submit its observations.

by a member State. The preventive mechanism allows the Council to give the EU State concerned a warning before a “serious breach” has actually materialised. According to the sanctioning mechanism, the Council may decide to suspend certain rights conferred by the Treaties to the member State concerned, including voting rights in the Council.⁸

5. It should be noted that at its origin the sanctioning mechanism was potentially directed at candidate States from central and eastern Europe, it being presumed that multiple breaches may occur in non-consolidated democracies which would undermine the stability of the European Union. However, the introduction of Article 7 also coincided with the rise of populist and nationalist parties in “old” member States in the late 90s and early 2000s which resulted in the general agreement that certain actions would be incompatible with EU values whether they were undertaken by “old” or “new” member States.⁹

6. Article 7 TEU sets up the (only) legally binding mechanism which allows relevant EU institutions to act in situations where there is “a clear risk of a serious breach” or a “serious and persistent breach” by a member State of the values referred to in Article 2 TEU. Article 7 TEU foresees a heavy procedure in the Council and is said to be extremely difficult, if not impossible, to launch, because of the high threshold required for its activation and implementation: it is commonly referred to as the “nuclear option” since it ultimately may lead to the suspension of some rights, including voting rights of a member States in the Council.

7. There are therefore shortcomings and gaps in the existing EU legal and policy framework between the rights and values laid down in the Treaties and the mechanisms to ensure member States’ actual compliance with them.¹⁰ This is due to the weakness of the existing EU legal and policy framework relating to the scope of EU competence to enforce the rights and values enshrined in the Treaties; the division of responsibilities between EU institutions and also between EU institutions and the member States; and the lack of an effective enforcement mechanism. In fact, apart from the procedure of Article 7 TEU, compliance with the values enshrined in Article 2 TEU is ensured during the accession process. Article 49(1) TEU sets the accession criteria (“Copenhagen criteria”), which any applicant State must undertake to respect. As the framework currently stands, compliance with values is monitored on the accession of a new member State, but not regularly afterwards: candidate countries are closely scrutinised, but not the EU members themselves. While the European Union is clear on conditions to enter the European Union, on respect for democracy, human rights and the rule of law, it is rather ill-equipped to address shortcomings in its own member States. This is known as the “Copenhagen dilemma”. This is why the European Commission and the Council have developed their own mechanisms, to be implemented as pre-Article 7 mechanisms.

2.2. The European Commission’s rule of law framework

8. In 2014, both the European Commission and the Council set up two new mechanisms in order to address rule of law-related issues: the Commission adopted a new rule of law framework and the Council committed itself to organising an annual rule of law dialogue between member States.

9. The European Commission¹¹ adopted its “Rule of Law Framework” on 11 March 2014.¹² It organises a structured dialogue between the Commission and a member State, through successive steps, in cases where there is a “systemic threat to the Rule of Law” and where such a situation falls outside the scope of EU law

3. Where a determination under paragraph 2 has been made, the Council, acting by a qualified majority, may decide to suspend certain of the rights deriving from the application of the Treaties to the Member State in question, including the voting rights of the representative of the government of that Member State in the Council. In doing so, the Council shall take into account the possible consequences of such a suspension on the rights and obligations of natural and legal persons.

The obligations of the Member State in question under the Treaties shall in any case continue to be binding on that State. ...”

8. For instance, on 12 September 2018, the European Parliament passed a resolution “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”. During the General Affairs Council meeting on 18 September 2018, the Council formally received the European Parliament’s request to open the Article 7(1) procedure. On 16 October 2018, the Council asked the Commission to provide an overview of the infringement proceedings taken against Hungary, and requested that the Hungarian authorities provide a written statement on the issues raised in the EP resolution, prior to the next General Affairs Council meeting on 12 November 2018.

9. Sadurski, Wojciech. “Adding Bite to a Bark: The Story of Article 7, EU Enlargement, and Jörg Haider.” *Colum. J. Eur. L.* 16 (2009): 385.

10. An EU mechanism on Democracy, Rule of Law and Fundamental Rights, European Added Value Assessment accompanying the legislative initiative report (EPRS-IDA(2016)579328_EN), pp. 11-17.

and can therefore not be addressed through infringement procedures to the Court of Justice of the European Union (the CJEU examines the compatibility of measures taken at national level by the member States to apply or comply with EU law). This process has three stages:

- a “Commission assessment” (the European Commission collects and examines all the relevant information and assesses whether there are clear indications of a systemic threat to the rule of law);
- a “Commission recommendation” if the matter has not been satisfactorily resolved, where the European Commission recommends that the member State solves the problems identified within a fixed time-limit, and informs the Commission of the steps taken to that effect;
- a “Follow-up to the Commission Recommendation”, where the European Commission monitors the follow-up given by the member State to the recommendation.

10. The entire process is based on a continuous dialogue between the European Commission and the member State concerned. If there is no satisfactory follow-up within the time-limit set, the procedure set out in Article 7 TEU can be triggered by a reasoned proposal by one third of the member States, by the European Parliament or by the Commission.

11. The European Commission has declared that the Framework, the aim of which was to resolve threats to the rule of law, also aimed to contribute to reaching the global objectives of the Council of Europe, whose indicators the Commission could use to assess the risk of systemic threats.

12. The European Commission launched for the first time this “Rule of Law Framework” against Poland on 13 January 2016. In December 2017, the Commission issued a reasoned proposal for a decision by the European Council on the determination of a clear risk of a serious breach of the rule of law. On 1 March 2018, the European Parliament voted in favour of a resolution backing the Commission’s proposal and calling on the Council to determine whether Poland was at risk of a serious breach of EU values. The issue is now being discussed by the General Affairs Council.

2.3. The European Council’s rule of law dialogue

13. The European Council adopted its “rule of law dialogue” on 16 December 2014; it sets up an opportunity for an annual discussion at political level on rule of law matters. As a discussion, it leads neither to specific recommendations nor to policy decisions or any kind of Council conclusions. It takes place at ministerial level in the General Affairs Council. The first dialogue was organised on 17 November 2015 under the Luxembourg Presidency, the [second](#) dialogue, on 24 May 2016, under the Dutch Presidency, and the third one, on 17 October 2017 under the Estonian Presidency (on the topic “Media Pluralism and the Rule of Law in the digital age”). The evaluation of the experience, carried out by the Slovak Presidency, in the Council (General Affairs) on 15 November 2016, confirmed that the member States wished to continue and strengthen the dialogue. On 12 November 2018, a “dialogue” on “trust in public institutions” was held under the Austrian Presidency.

2.4. Other mechanisms

14. Different mechanisms and non-binding or soft law tools exist at EU level to promote, protect and safeguard the EU values laid down in Article 2 TEU.

15. The Agency for Fundamental Rights of the European Union (FRA) is mandated to provide EU institutions and member States, when they implement EU law, with assistance and expertise relating to fundamental rights. The main task of the Agency is to collect and disseminate objective, reliable and comparable data on the situation of fundamental rights in all EU member States within the scope of EU law. The FRA is also tasked with raising awareness about fundamental rights. However, the Agency does not have the competence to examine individual complaints or to exercise regulatory decision-making powers.¹³

11. The European Commission, as guardian of the Treaties, has the duty to monitor and assess the correct implementation of EU law and the respect of the principles and objectives enshrined in the Treaties by the member States and by all the EU institutions and bodies.

12. Communication from the European Commission to the European Parliament and the Council, “A new EU Framework to strengthen the Rule of Law”, COM/2014/0158 final, 19 March 2014.

13. <https://fra.europa.eu/en/publication/2014/introducing-fra-eu-agency-fundamental-rights>.

16. The EU Justice Scoreboard, a tool by the European Commission, which was first released in 2013, gives a comparative annual overview of the quality, independence and efficiency of justice systems in the European Union. It aims at assisting member States to improve the effectiveness of their justice systems.¹⁴ The Scoreboard mostly uses data and methodology of the Council of Europe's European Commission for the Efficiency of Justice (CEPEJ) with which the European Commission has concluded a contract to produce a specific annual study.

17. The Media Pluralism Monitor (MPM) is designed to identify and assess risks for media pluralism and media freedom in member States. It is based on a set of 20 indicators covering legal, economic and socio-political areas. The MPM is based on a European Commission-funded Independent Study on Indicators for Media Pluralism in the Member States published in 2009. It is performed by the Centre for Media Pluralism and Media Freedom, a research and training centre co-financed by the European Union.¹⁵

18. In 2011 the European Commission adopted the Communication on Fighting Corruption in the EU establishing the European Union Anti-Corruption Report to monitor and assess member States' efforts in this area with a view to stronger political commitment to address corruption effectively. This report provides an analysis of corruption within the European Union's member States and of the steps taken to prevent and fight it.¹⁶ It makes use of data gathered by the Group of States against Corruption (GRECO).

19. In the framework of the Multiannual Financial Framework, the European Commission set a proposal for a "Rule of Law Conditionality" with a view to protecting the EU budget from financial risks linked to generalised deficiencies as regards the rule of law in the member States. Under the proposals, the European Union could suspend, reduce or restrict access to EU funding in a manner proportionate to the nature, gravity and scope of the deficiencies.

20. Finally, some issues are referred by the European Commission to the Court of Justice under the infringement procedure. For instance, under the infringement procedure launched by the Commission against Poland for breaches of EU law related to measures affecting the judiciary, the CJEU has granted interim measures forcing the Polish authorities to suspend the application of the law and ordering the Polish authorities to issue monthly reports to the Commission on all measures that have been taken to comply with the order. Similar procedures have been launched against Hungary over the laws on non-governmental organisations, asylum and education.

3. Presentation of the mechanism recommended by the European Parliament

21. The European Parliament supported the future setting-up of a more appropriate mechanism to enforce and monitor the Treaty obligations regarding democracy, the rule of law and fundamental rights in the member States and also in the European institutions, based on the acknowledgment that the existing instruments and mechanisms implemented by both the European Commission and the Council have a limited scope.

22. The legal basis for the envisaged EU mechanism is an interinstitutional agreement concluded on the basis of Article 295 of the Treaty on the Functioning of the European Union (TFEU), i.e. an "EU Pact for Democracy, Rule of Law and Fundamental Rights in the EU" ("EU Pact on DRF"). This EU Pact for DRF in the form of an interinstitutional agreement will lay down "arrangements facilitating the co-operation between the Union institutions and the member States in the framework of Article 7 TEU". It aims at developing a comprehensive and coherent mechanism, which would help to bridge the gap between the rights and the values enshrined in the Treaties and the actual compliance with those rights and values, while integrating, aligning and complementing existing mechanisms.

23. The Pact as defined in Article 1 of the draft agreement proposed by the European Parliament would provide for the definition, elaboration, monitoring and enforcement of the core values and founding principles of the Union, namely democracy, the rule of law and fundamental rights.

24. The mechanism is based on the following principles:

- it is a permanent mechanism created to monitor member States permanently;
- it should apply equally to all member States, which should be assessed on exactly the same objective rules and standards;

14. http://ec.europa.eu/justice/effective-justice/scoreboard/index_en.htm.

15. <https://ec.europa.eu/digital-single-market/en/media-pluralism-monitor-mpm>.

16. https://ec.europa.eu/home-affairs/sites/homeaffairs/files/e-library/documents/policies/organized-crime-and-human-trafficking/corruption/docs/acr_2014_en.pdf.

- it should build on existing instruments (it would incorporate existing EU instruments and mechanisms), so that there will be neither duplication nor creation of any new instrument;
- it sets clear and non-political criteria for assessing EU member States' records in the area of democracy, the rule of law and fundamental rights;
- it should be evidence-based.

25. More specifically, the mechanism shall consist of a DRF annual report with country-specific reports and recommendations. It would be drawn up and adopted by the European Commission with the assistance of a Panel of Experts, on the basis of a quantitative and qualitative review of the data and information available. It would be transmitted to other EU institutions and national parliaments. It would be composed of general observations and country-specific reports and recommendations. It should base its findings on existing sources and existing tools for assessment, reporting and monitoring of member States' activities, such as member States contributions, EU institutions and agencies, civil society, the Council of Europe – in particular the Venice Commission, GRECO, the Congress of Local and Regional Authorities of the Council of Europe, and CEPEJ – but also other international organisations such as, the United Nations, the Organization for Security and Co-operation in Europe (OSCE) and the Organisation for Economic Co-operation and Development (OECD). The report would be elaborated with a specific focus on 19 aspects (Article 7 of the draft agreement).

26. The Panel of Experts will be composed of 28 (27 with the United Kingdom's exit from the European Union) independent experts appointed by the member States' parliaments, and 10 experts appointed by the European Parliament and chosen from a list of experts nominated by the Federation of All European Academies (ALLEA), the European Network of National Human Rights Institutions (ENNHRI), the Council of Europe (including the Venice Commission, GRECO, CEPEJ, the Council of Europe Human Rights Commissioner), and the Council of Law and Bar Societies Europe (CCBE), the United Nations, the OSCE and the OECD.

27. The results of the European DRF Report and country-specific recommendations shall be addressed through an inter-parliamentary debate and a debate in the Council of the European Union:

- an annual inter-parliamentary debate should be organised by the European Parliament on the basis of the DRF European Report, which will lead to the adoption of a resolution; this inter-parliamentary debate would also be part of a multi-annual structured dialogue between the European Parliament, national parliaments, the Council, the European Commission, and it shall also involve civil society, the FRA and the Council of Europe;
- the Council of the European Union should hold an annual debate on the basis of the report, building upon its rule of law dialogue; it shall adopt conclusions inviting national parliaments to provide a response to the report and proposals or reforms;
- on this basis, the European Commission may decide to launch a “systemic infringement” action under Article 2 TEU or Article 258 TFEU (possibly with several cases “bundled” together to underline the systematic character of the non-compliance); depending on the findings of the reports, there are four possible scenarios, according to the gravity of the non-compliance;¹⁷
- after consulting the European Parliament and the Council, the European Commission may decide to submit a proposal for an evaluation of the implementation of member States of Union policies in the area of freedom, security and justice under Article 70 TFEU.¹⁸

17. There are four possible scenarios: the member State complies with the aspects listed in Article 7 of the draft agreement, then no further action is necessary; if the member State falls short on one or more of the aspects listed in Article 7, the European Commission shall start a dialogue with that Member State without delay, taking into account the country-specific recommendations (following the mechanism of the Rule of Law Framework set in place by the European Commission). Third scenario, if the member State is found in clear risk of a serious breach of the values referred to in Article 2 TEU and that there are sufficient grounds for invoking Article 7(1) TEU, the European Parliament, the Council and the Commission, should each discuss the matter without delay and take a reasoned decision, which should be made public. And the fourth scenario dictates that if a Member State is found to be in serious and persistent breach (increasing or remaining unchanged over a period of two year) of the values referred to in the article 2 TEU, and that there are sufficient grounds for invoking Article 7(2), the European Parliament, the Council and the Commission should each discuss the matter without delay and each institution should take a reasoned decision which should be made public.

18. Article 70 provides a peer review mechanism in the area of freedom security on justice, “the Council may, on a proposal from the Commission, adopt measures laying down the arrangements whereby Member States, in collaboration with the Commission, conduct objective and impartial evaluation of the implementation of the Union policies ...”

28. A policy cycle for democracy, the rule of law and fundamental rights (DRF Policy Cycle) within the Union institutions will enable them to assess their own work (i.e. application of EU law *inter alia*) with regard to the compliance of the European Commission, Council and European Parliament to DRF. However, it is interesting to note that no clear consequences are laid down in the mechanism following a lack of respect for DRF of an EU institution.

29. Lastly, the key role of the independent “Panel of Experts” in the envisaged mechanism should be mentioned: the decision to trigger the “Rule of Law Framework” by the European Commission and the decision to discuss activating Article 7 both lie with the independent panel assessment. Therefore, the Panel should offer guarantees of independence in the assessment leading to the report.

30. The European Parliament proposal for an inter-institutional agreement and the EU Pact on DRF is currently under discussion. Many question the Commission and the Council’s readiness to enter into such an agreement, as well as chances for any positive follow-up to the proposal.¹⁹ While it supports the all-inclusive approach adopted by the Parliament and welcomes the idea of an inter-parliamentary dialogue, the Commission has serious doubts about the need, the feasibility and added value of the mechanism suggested in the European Parliament’s Resolution. The central role attributed to an independent expert panel also raises serious questions of legality, institutional legitimacy and accountability. Moreover, there are practical and political concerns which may render it difficult to find common ground between all the institutions concerned.²⁰

31. Since the adoption of the report, no action has been taken by the Commission and the Council due to a lack of agreement on the measure, in particular due to doubts as to the legality and need for such a measure.

4. How the Council of Europe involvement in the DRF mechanism is contemplated by the European Union

32. As mentioned above, there is ample reference to the Council of Europe in the proposed mechanism. The Council of Europe’s main achievements (European Convention on Human Rights (ETS No. 5), the Court’s case law, conventions, recommendations, Human Rights Commissioner, the Congress of Local and Regional Authorities, GRECO, CEPEJ and Venice Commission) are cited in the European Parliament’s resolution and in the annexed proposal. The resolution also called for the Commission to come up with a new agreement on EU accession to the European Convention on Human Right by June 2017.

33. As the situation stands at present, the European Union already co-operates with several Council of Europe institutions. The European Union has a special status in the Venice Commission. The work of CEPEJ is already incorporated in the Justice Scoreboard of the European Commission. While there is close co-operation between GRECO and various EU institutions (for example the European Commission and the European Parliament) on country-specific situations, the European Union has still not joined GRECO, despite many invitations to do so, and does not participate as such in GRECO meetings.

34. There is no doubt that such a mechanism, if it were to be created, would, on account of its substance and scope, have a clear impact on the Council of Europe, its standard-setting *acquis* and the implementing mechanisms of its conventions. In point of fact:

- this mechanism refers to the Council of Europe *acquis* and includes in its “legal basis” several Council of Europe conventions – in particular the European Convention on Human Rights and the European Social Charter (revised) (ETS No. 163) – to which the European Union is not a Party;
- certain Council of Europe bodies will be called upon to collaborate with the European Union under this mechanism – the Venice Commission, GRECO, the Commissioner for Human Rights, the Congress of Local and Regional Authorities and CEPEJ. The “reporting” done by the Council of Europe, in particular

19. An inter-parliamentary committee meeting with members of national parliaments, chaired by the EP rapporteur, Ms In ’t Veld, was held in Brussels on 22 June 2017 on the mechanism. The representative of the Commission recalled the support of the Commission regarding the general objective of the mechanism, and the idea of further defining the values of the Union, but also its concerns regarding the notions of peer review and annual reports, or the duplication of existing documents. www.europarl.europa.eu/cmsdata/122081/1127861EN_June%2021.pdf.

20. Follow-up to the European Parliament resolution with recommendations to the Commission on the establishment of an EU mechanism on democracy, the rule of law and fundamental rights, adopted by the Commission on 17 January 2017.

the Venice Commission, GRECO, the Congress of Local and Regional Authorities of the Council of Europe and CEPEJ, as well as the case law of the European Court of Human Rights, would be incorporated in the annual DRF report (Articles 2 and 6 of the draft agreement).

35. Moreover, the Council of Europe (the Venice Commission, GRECO and the Commissioner for Human Rights) would be entitled to nominate candidates for the Panel of Experts to be designated by the European Parliament (Article 8.1 of the draft agreement). Finally, the Council of Europe would be part of the annual inter-parliamentary debate (Article 10 of the draft agreement).

36. Therefore, the resolution on the DRF mechanism gives the Council of Europe an important place and tends to create synergies between the two organisations, beyond the input the Council of Europe already provides, though the latter is not always sufficiently acknowledged.²¹

37. Two studies commissioned by the European Commission in the context of the European Added Value Assessment report (hereinafter “the EAVA studies”)²² after the adoption of the resolution by the European Parliament pointed out some difficulties related to Council of Europe involvement in the DRF mechanism. If the EAVA conclusion²³ still calls for “the right synergies” with other international organisations to be found in order to reduce operational costs²⁴, it also emphasises the difficulty of using standards, sources, data, data-handling methods by other institutions without the performance of prior methodological exercise, aimed at making this data comparable.²⁵

38. The studies’ primary concern is that the Council of Europe advisory and monitoring bodies do not produce data in the way an EU assessment would require. The European Parliament resolution suggests putting in place a DRF Scoreboard which would enable a global comparative picture of compliance in all EU member States, like the EU Justice Scoreboard, based on data and the methodology of CEPEJ.

39. For their part, the monitoring procedures of the Council of Europe are country-specific and are compliant with different procedures and evaluation criteria established for and by each body. Therefore, some avenues are explored in chapter 7 below which, if both organisations agree to move further, could be further developed through feasibility studies.

5. Global overview of Council of Europe data collection, evaluation and monitoring procedures

40. In reflecting on the issue of arrangements of Council of Europe participation in various EU rule of law related mechanisms, account should be taken of the *raison d’être* of the Council of Europe, its structure, the existing mechanisms and the procedures in use in its various bodies.

5.1. General observations

41. The values of democracy, the rule of law and the rights of citizens occupy a place in the institutional framework of, respectively, the Council of Europe and the European Union that is not similar. In the case of the Council of Europe, those values have been central to its operational logic since the Organisation was created. Moreover, the commitment to “accept the principles of the rule of law and of the enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms” (Article 3 of the Statute (ETS No. 1)) constitutes a firm treaty commitment which member States accept upon becoming a member of the Council of Europe.

21. The Council of Europe could act in two capacities in its relation to the European Union. On the one hand, it is a distinct international organisation which produces its own assessment based on its benchmarks and mandate. On the other hand, the Council of Europe could also act as a partner of the European Union. In the second hypothesis, its role is to provide the basis for the EU decision-making in respect of countries which are also Council of Europe member States.

22. Annex I and Annex II to the European Added Value Assessment report: [www.europarl.europa.eu/RegData/etudes/IDAN/2016/579328/EPRS_IDA\(2016\)579328\(ANN1\)_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/IDAN/2016/579328/EPRS_IDA(2016)579328(ANN1)_EN.pdf); [www.europarl.europa.eu/RegData/etudes/IDAN/2016/579328/EPRS_IDA\(2016\)579328\(ANN2\)_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/IDAN/2016/579328/EPRS_IDA(2016)579328(ANN2)_EN.pdf).

23. [www.europarl.europa.eu/RegData/etudes/IDAN/2016/579328/EPRS_IDA\(2016\)579328_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/IDAN/2016/579328/EPRS_IDA(2016)579328_EN.pdf).

24. The DRF operational costs were calculated using the model of the Venice Commission whose annual operational budget is estimated at 4 million euros, to which an average yearly salary of 90 000 euros for each of the 38 Panel experts should be added.

25. For instance, the EAVA conclusion also mentions that in the absence of such tools and comparable formats, the European Fundamental Rights Information System, which is now being set up with the goal of bringing together existing data by international actors in relation to EU member States, would be of little or no effect.

42. In the case of the European Union, it was not until the adoption of the Maastricht Treaty in 1992 that human rights, the rule of law and democracy were officially added to the Union's agenda.²⁶ Even if the institutional narrative changed, making, retroactively, democracy, the rule of law and fundamental rights the founding principles of the European Union, Article 2 TEU does not constitute an expression of intent but rather a declarative statement.²⁷ Even today, the question of compliance with human rights and rule of law standards is rather addressed by the European Union from the viewpoint of sound economic integration.

43. Enlargement had an impact on the functioning of both organisations, which responded to it by adopting slightly different approaches. The European Union set the Copenhagen criteria required from countries willing to join the European Union to comply with values prior to accession. It was understood that compliance with human rights standards by "old" member States would continue to be done by the Council of Europe and the European Court of Human Rights. For its part, the Council of Europe invited candidate States to join the Organisation upon the condition that they would enter into a number of commitments, the fulfilment of which would be monitored post-accession.

44. Also, the institutional and organisational rationale of the two organisations differs – a classic international organisation of intergovernmental co-operation for the Council of Europe; a supranational integration organisation for the European Union – which has also had an impact on how the reporting procedures have been organised and coercive measures for non-compliance have been set up.

45. The Statute of the Council of Europe provides for compelling sanctions for non-compliance with the Organisation's principles and values in the form of suspension of a member State's right of representation or, as the ultimate sanction, expulsion from the Organisation.²⁸ At the level of the European Union, the option of expulsion was ruled out as from 1995 during negotiations on the mechanism of Article 7 TEU, for fear that it would push a member State to leave the European Union. However, if Article 7 TEU does not foresee any "ultimate" sanction, the provisions of EU treaties invest the European Commission with an arsenal of tools enabling it to exercise coercive action against member States. Therefore, if dialogue fails, the Commission has institutional tools to transform tensions between national interests of member States and the European Union into a judicial action.

5.2. Reporting activities of the Council of Europe

46. The Council of Europe has an important number of bodies empowered to collect data from member States, evaluate member States' compliance with general and specific commitments or formulate observations and recommendations related to democratic governance, the rule of law and human rights for the attention of member States. Only a few of them were mentioned in the European Parliament resolution on the DFR mechanism or described in the EAVA studies, which is far from reflecting the large diversity of procedures in the framework of the Council of Europe.

– Diversity of reporting bodies

47. Several of these reporting bodies have been established as part of the follow-up to Council of Europe conventions (for example the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (ETS No. 126) or the Framework Convention for the Protection of National Minorities (ETS No. 157)), which are international treaties. In the case where EU member States joined them prior to their accession to the European Union, commitments arising from these treaties shall not normally be affected by the EU treaties (Article 351 TFEU). Nor are these commitments incompatible with the EU legal order in which case a State would have terminated its participation in a convention (Article 351(2) TFEU). Therefore, there is a strong presumption that the outcomes of the reporting mechanisms arising from Council of Europe conventions could be taken as input to DRF without the issue of possible conflict between conventional standards and the EU legal order being raised.

26. For many years the Council of Europe and in particular the European Court of Human Rights were regarded as sufficient providers as regards the protection of human rights in Europe. At an early stage, the initial rationale of the European Union, as an international organisation, was subordinated to its goal of economic integration. At a later stage, when the European Union started expanding its competences, the Council of Europe was still being seen as an appropriate mechanism for human right protection, in particular in "old" EU member States, given the unique system of protection it had established on the European continent the coherence of which would have been undone if the European Union had acquired more competences in the field of human rights. Williams, Andrew J., *EU human rights policies: a study in irony*. Oxford University Press, 2004.

27. *Ibid.*

28. Article 8 of the Statute. The specific procedure provided by the Parliamentary Assembly for non-compliance with the obligations and commitments entered into by the member States should also be mentioned.

48. In addition, the Council of Europe carries out other activities to monitor the Organisation's standards within the framework of its statutory powers, more specifically implemented by the subordinated bodies set up by the Committee of Ministers in a given thematic field (Article 17 of the Statute).²⁹ The steering committees, the number of which varies according to the Council of Europe's priorities, collect data from the member States on the basis of which they regularly report to the Committee of Ministers and suggest possible measures to be taken.

49. The Committee of Ministers may also establish committees in charge of more specialised tasks and acting according to well-established procedures, such as CEPEJ and ECRI (both of which are referred to in the EAVA studies).³⁰

50. Finally, there is another specific form of co-operation within the Council of Europe – partial agreements – that allows only interested member States to promote regular dialogue on a specific issue. The Venice Commission and GRECO are enlarged agreements (membership encompasses all but extends beyond Council of Europe member States). However, notwithstanding its quasi-conventional nature a partial or enlarged agreement is not an international treaty.³¹ That said, any State becoming a Party to the Criminal and/or Civil Law Convention on Corruption (ETS Nos. 173 and 174) is automatically a member of GRECO.

51. These Council of Europe bodies also use international treaties as a baseline,³² which make their benchmarks presumably compatible with the EU legal order and, therefore, usable within the context of DRF.

– Geographical coverage

52. Some bodies (i.e. steering committees) are composed of representatives of all 47 member States of the Council of Europe. Others, in particular bodies created by partial agreements or conventional committees, are either limited to a number of Council of Europe member States (i.e. only Parties to a convention) or, on the contrary, extend their fully-fledged membership to non-European States. The United States participate on an equal footing in GRECO plenary meetings where GRECO recommendations are discussed and adopted. The Venice Commission includes members from Algeria, Kyrgyzstan, Mexico, South Korea and the United States to mention just a few non-European States. Experts from non-Council of Europe member States participate on an equal footing in the work of the Venice Commission.

– Reporting procedures

53. Schematically, Council of Europe reporting mechanisms are divided into three stages: gathering of data, analytical analysis leading to recommendations and monitoring of compliance with the recommendations.

54. Some bodies, usually steering committees, may set up compendiums of the latest legislative developments or administrative practices, as well as toolboxes with best practices concerning implementation of the Council of Europe standards in a given thematic field. The more specialised a body is, the more diversified and sophisticated the ways of collecting data would be and the more data processing procedures would be developed.

55. GRECO, which is a specialised anti-corruption body, puts in place evaluation rounds each of which focuses on thematic issues (i.e. funding of political parties). Information about the current state of the legislation and States' practices is collected on-site through official sources as well as other stakeholders. ECRI works on both recommendations to a given country and general recommendations to all member States.

29. [Resolution CM/Res\(2011\)24](#). For instance, the Steering Committee for Social Cohesion, Human Dignity and Equality (CDDECS), referred to in the EAVA study, or the Steering Committee for Human Rights (CDDH), the [Steering Committee on Media and Information Society](#) (CDMS), the European Committee on Crime Problems (CDPC) and the European Committee on Legal Co-operation (CDCJ).

30. For instance, the ECRI monitors situations in member States and formulates guidelines in the field of combating racism, racial discrimination, xenophobia, antisemitism and intolerance, while the CEPEJ evaluates the performance of member States' judicial systems based on data provided and verified by the States themselves.

31. www.coe.int/en/web/conventions/about-partial-agreements.

32. For instance, the Steering Committee for Social Cohesion, Human Dignity and Equality referred to in the EAVA study applies standards set up by the European Charter for Regional or Minority Languages (ETS No. 148), the Framework Convention for the Protection of National Minorities (ETS No. 157), the European Social Charter (revised), the Convention on Action against Trafficking in Human Beings (CETS No. 197), the Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse (CETS No. 201), and the Convention on Preventing and Combating Violence against Women and Domestic Violence (CETS No. 210).

56. The mandate of the Commissioner for Human Rights, whose office was created as a general preventive mechanism to proactively address human rights concerns before violation occurs, is not limited to specific human rights areas. However, s/he usually limits a country on-the-spot monitoring to a specific topic or a group of topics. The Commissioner keeps track of all observations, recommendations or case law related to a given country. So does the Monitoring Committee of the Parliamentary Assembly which relies, in its recommendations, on both on-the-spot visits but, to a great extent, on observations made by other Council of Europe specialised bodies (including on opinions which it may itself request from the Venice Commission).

57. Such close interaction that reporting mechanisms have with national stakeholders makes it possible to go beyond the simple collection of “row” data, and thus allows the development, in a second phase, of more detailed recommendations. The recommendations addressed to the member States are aimed at improving member States' compliance with respect for the standards promoted by the Council of Europe. Each year, a synthesis of the observations made by the various monitoring mechanisms on the state of democracy, the rule of law and human rights in the member States is made in a report by the Secretary General of the Council of Europe.

58. The third stage is about the follow-up to observations and recommendations which represented the outcomes of the two previous stages. The way the follow-up procedures are organised is also closely related to the mandate of each body and its operational rationale. For instance, the mandate of the Venice Commission does not entail examining the compliance of an opinion it has delivered (although it provides public information on follow-up to its opinions).

59. However, a number of reporting and monitoring mechanisms provide that compliance with recommendations is assessed through a compliance procedure (GRECO) or a regular follow-up dialogue (the Advisory Committee of the Framework Convention). In some cases, a relevant body may adopt a public statement in the case where a State non-compliance with commitment is flagrant (GRECO, European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT)) or have its recommendations endorsed by the Committee of Ministers. A number of reporting bodies could carry out ad hoc evaluations.

60. As mentioned above, these mechanisms and procedures arise from convention or agreements member States have voluntarily entered into and committed themselves to complying to in good faith. However, the Statute of the Council of Europe does not enable these bodies to take action, which would lead to a position of subordination between a Council of Europe body and a member State, the Committee of Ministers being the statutory decision-making body.

6. Cross-fertilisation or fragmentation?

61. The relations between the Council of Europe and the European Union rest on the principles of co-operation and synergy. As a consequence, any modification proposed to their respective framework should be assessed in the light of these principles. Paragraph 12 of the Memorandum of Understanding between the Council of Europe and the European Union (2007) points to the need to take into account the comparative advantages, the respective competences and expertise of the two organisations, avoiding duplication and fostering synergy, to search for added value and to make better use of existing resources.

62. Past Assembly reports concerning previous initiatives of the European Union to set up mechanisms for monitoring respect for the rule of law or human rights highlighted the risks of creating double standards and “forum shopping” as well as the risk of wasting limited budgetary resources when such mechanism already exists within the framework of the Council of Europe at multiple levels.³³ The cases where the European Union, once it had acquired authority to legislate in a given field, was asking its member States to abstain from participation in the Council of Europe conventions have also been addressed.³⁴

33. The concern about the need to avoid duplication was raised in several Assembly reports: report on “European institutions and human rights in Europe” (rapporteur: Mr Michael McNamara, Ireland, SOC), [Doc. 13714](#), [Resolution 2041 \(2015\)](#) and [Recommendation 2065 \(2015\)](#); report on “European Union and Council of Europe human rights agendas: synergies not duplication!” (rapporteur: Mr Michael McNamara, Ireland, SOC), [Doc. 13321](#) and [Recommendation 2027 \(2013\)](#); report on “The impact of the Lisbon Treaty on the Council of Europe” (rapporteur: Ms Kerstin Lundgren, Sweden, ALDE), [Doc. 12713](#), [Resolution 1836 \(2011\)](#) and [Recommendation 1982 \(2011\)](#); report on “The need to avoid duplication of the work of the Council of Europe by the European Union Agency for Fundamental Rights” (rapporteur: Mr Boriss Cilevičs, Latvia, SOC), [Doc. 12272](#), [Resolution 1756 \(2010\)](#) and [Recommendation 1935 \(2010\)](#).

34. Report on “Defending the *acquis* of the Council of Europe: preserving 65 years of successful intergovernmental co-operation” (rapporteur: Mr Tiny Kox, Netherlands, UEL), [Doc. 13322](#), [Recommendation 2114 \(2017\)](#).

63. However, despite a declarative attitude of openness to international law, the European Union, when it comes to concrete action, often remains cloistered in its own system by putting forward the argument of the autonomy of EU law. A glance at EU case law over recent years reveals that this is an upward trend. For instance, conditions for direct effect of international treaties and customary law on EU law have been tightened and the possibility to derogate from EU law for pre-accession agreements has been reduced.³⁵

64. If this trend continues, it would increase the potential for conflicts between member States' commitments with regard to the founding principles of the Council of Europe and the European Union. For instance, work on codifying existing international standards relating to the conditions in which migrants are held in administrative detention by the Council of Europe's European Committee on Legal Co-operation has come to a halt while the committee seeks guidance from the Committee of Ministers on how it should proceed in relation to the proposed interpretation by the European Commission of certain core concepts related to detention, an interpretation which the committee considers would imply omitting key existing standards from the codifying instrument. Consequently, values common to the whole European continent, such as democracy, the rule of law and fundamental rights, are at risk of being interpreted in an autonomous manner by the European Union and the Council of Europe, respectively, thereby setting up a dividing line inside the European continent.

65. In the past, the European Union co-operated with the Council of Europe in assessing EU candidate countries' compliances with principles of democracy, the rule of law and fundamental rights. For instance, at the end of the 90s, concerned about the consequences of the violent conflict in the Balkans, the European Union used the Council of Europe texts, in particular the Framework Convention for the Protection of National Minorities, as a benchmark for candidate States. Later, the "Agenda 2000" action plan, whose objective was to develop the Union's policies beyond the turn of the century, created thematic fields of enquiry in respect of candidate States – democracy and the rule of law; human rights and respect for minorities – whose baseline and methodology foresaw the possibility of making use of assessment by other international organisations including the Council of Europe.

66. More recent examples of institutional commitment by the European Union to increased collaboration and synergy between the two organisations exist. The European Commission agrees that case law of the European Court of Human Rights, as well as documents drawn up by the Council of Europe, define the core meaning of the rule of law as a common value of the European Union in accordance with Article 2 TEU.³⁶ The Commission committed itself to seeking advice from the Council of Europe and/or its Venice Commission on an expert assessment, and to aligning its analysis with them (for example GRECO) in all cases where the matter is also under their consideration and analysis.

67. Therefore, it is important to ensure that, should the elaboration of a DRF mechanism or any other EU initiative to monitor compliance with the rule of law continue, the dynamic of a deeper involvement of the Council of Europe in assessment of the EU member States' compliance with founding values, screening by the European Commission and emphasised in the resolution of the European Parliament, would not be reversed. Against this background, whether or not the DRF mechanism sees the light of day, a joint analytical reflection would be desirable, if not indispensable, to avoid fragmentation of understanding about what the core values of the European continent are.

68. Brexit talks have also generated discussions on a number of thorny issues, including whether and how human rights and the rule of law standards are going to be impacted by the European Union Withdrawal Act. The White Paper on a Great Repeal Bill published by the British Government in March 2017 clearly stated that, even though human rights *acquis* resulting from the application of EU law were going to be preserved, the Charter of Fundamental Rights was going to be removed from the United Kingdom law and national courts would not be bound by new rulings of the Luxembourg Court. However, the Human Rights Act 1998, protecting core civil and political rights, similar to those set out in the European Convention on Human Rights, will continue to apply after Brexit.

69. For the moment, it is difficult to predict how standards in the field of human rights are going to evolve after Brexit enters into force. The draft agreement on the withdrawal of the United Kingdom from the European Union contains an article requiring the non-regression of existing labour and social common standards set by the European Union and the United Kingdom. However, it is still not clear how the common grounds are to be set and maintained if the EU law would not apply anymore. Therefore, concerns about weakening standards still exist. Other voices claim that those concerns are largely overstated and the fact that the supremacy and

35. Ziegler Katja S. "The relationship between EU law and international law", *A Companion to European Union Law and International Law* (2015): 42-61.

36. COM/2014/0158 final, op. cit., paragraph 2.

direct effect of the EU law are removed would even offer an opportunity to develop higher and better tailored standards. It is also argued that the repeal of the Charter of Fundamental Rights, which has been criticised for giving too much power to judges, would help to re-enforce the accountability of the government and democratic self-governance, consequently contributing to reinforcing the rule of law standards.³⁷

70. Therefore, the discussion on different EU mechanisms aimed at the safeguard of the founding values as well as the Brexit talks represent an excellent opportunity to launch a debate on how to frame core standards in the field of democracy, the rule of law and human rights so they could survive tumultuous political contexts. If it is recognised that some standards are not a creation of a supranational body but have already become domestically grown standards because of their long-lasting application within a national system, this would potentially alleviate consequences of the political and institutional flux.

7. Possible Council of Europe contribution to a future EU rule of law mechanism: from a strategic partnership to structural co-operation

71. Since the 2007 Memorandum of Understanding, the Council of Europe and the European Union have developed a strategic partnership based on common values. Today, both organisations have a shared responsibility for upholding the effectiveness of their respective legal frameworks, including ensuring that any overlapping competences do not create conflict.

72. A number of initiatives have already been undertaken. For instance, a Co-operation Agreement between the Council of Europe and the European Commission frames the co-operation between the former and the Fundamental Rights Agency through institutional mechanisms, which ensure that coherence of approaches are preserved. This includes close contacts between the staff of the two institutions, the participation of the Council of Europe in the FRA Executive and Management Boards, through its independent person, the annual exchange between the Council of Europe and the Management Board on co-operation, the annual exchange between the FRA Director and a group of the Committee of Ministers (GREXT), as well as joint projects. In this respect, the setting-up by the Fundamental Rights Agency of an EU Fundamental Rights Information System (EFRIS) would help towards a more systematic use of assessments of commitments countries made to the Council of Europe. Also, the Council of Europe's input, notably Venice Commission opinions, in current EU rule of law initiatives has already proven successful. The assessment made by various Council of Europe bodies has been used by the EU institutions with respect to several countries.

73. The proposals below describe some practical action which, in the long run, would lead to the removal or minimisation of the risk of double standards, for both benchmarks and final findings, in the field of human rights, democracy and the rule of law.

7.1. Setting-up of Europe-wide benchmarks

74. Any EU rule of law mechanism should be turned into an opportunity to make use of, build upon and support the effective implementation of the Council of Europe "Rule of Law standards", including the case law of the European Court of Human Rights, relevant recommendations of the Committee of Ministers, standards and opinions of the Venice Commission (including the "Rule of Law Checklist"), opinions and/or findings of the relevant Council of Europe advisory or monitoring bodies, and should be complemented by any relevant EU text.

75. For its part, the Council of Europe should be open to co-operating with the European Union on the identification of the benchmarks to be used by an EU rule of law initiative with the objective of achieving consistency. Standards agreed through peer co-operation would ensure a better change of compliance nationally, while strengthening the overall Council of Europe and EU co-operation.

7.2. Comprehensive division of competences

– Safeguard clause

76. As a minimum, any EU rule of law mechanism should contain some safeguards, such as a provision indicating that the assessment or action by the European Union will not affect existing procedures arising from Council of Europe advisory or monitoring mechanisms, along similar lines to Article 53 of the Charter of Fundamental Rights.

37. O'Cinneide Colm. "Brexit and Human Rights" (2018), British Institute of International and Comparative Law.

– *Separation between the legal/technical assessment and the political decision*

77. The initiative of political action for an alleged non-compliance with the EU legal framework would remain with the European Union, the Council of Europe offering legal and technical assessment in compliance with its monitoring or advisory bodies' competences. It would, however, be preferable if the European Union, when assessing whether the rule of law deficiency has been remedied or has ceased to exist, liaises with the relevant Council of Europe body/ies which issued the opinion or the recommendation to ensure consistency of views and avoid double-standards.

7.3. Reference to the findings of the Council of Europe advisory or monitoring mechanisms in EU documents

78. As suggested by Jean-Claude Juncker in his 2006 Report "Council of Europe-European Union: a sole ambition for the European continent", it would seem appropriate "that EU bodies should give formal effect to the spirit of Article 6.2 of the Treaty on the European Union, on which co-operation with the Council of Europe is based, by making it a working rule that the decisions, reports, conclusions, recommendations and opinions of these monitoring bodies: 1. will be systematically taken as the first Europe-wide reference source for human rights; 2. will be expressly cited as a reference in documents which they produce".

79. Therefore, it would be highly advisable that, when available, the opinions or recommendations by the Council of Europe advisory or monitoring bodies should always inform the EU institutions' assessment to determine whether rule of law-related issues arise, as well as to guide a proposal for any action to be taken.

7.4. Instituting a request for ad hoc action by an advisory/monitoring body at the request of an EU institution

80. In the course of its assessment related to the state of human rights, democracy and the rule of law, an EU institution could seek an opinion or a recommendation from a Council of Europe advisory or monitoring body with respect to a given country or a given topic. If, however, a recommendation or an opinion is not available at this given moment either because a document has not been made public yet or an assessment by the relevant body has not been carried out within the request period, the EU institution should be entitled, under certain conditions, to request such an action (i.e. assessment, recommendation or a report) by a Council of Europe body. In some cases, such a possibility already exists; in other cases, special co-operation patterns have to be worked out. It would be useful to elaborate a special guide book in which co-operation patterns and the bodies' competences and capacities would be spelt out.

7.5. Participation of the EU in Council of Europe treaties and monitoring bodies

– *EU participation in Council of Europe treaties*

81. In [Recommendation 2114 \(2017\)](#) "Defending the acquis of the Council of Europe: preserving 65 years of successful intergovernmental co-operation", the Assembly referred to the desirability of "a European Union–Council of Europe memorandum of understanding on the participation of the European Union in Council of Europe conventions which could provide for general operating rules (such as voting rights, speaking rights, reporting and financial arrangements)".

82. In recent years, the European Union has been involved in the drafting and negotiation of certain Council of Europe treaties, with the aim of ensuring better consistency of legal standards. However, the European Union, as an institution, is not a Party to the Council of Europe conventions. There are some procedural and substantive adjustments of the Council of Europe treaty-making procedure that have to be made to allow a full participation of the European Union, as an institution, in Council of Europe treaties. If such an adjustment is to be made, it must include a safeguard that the role of national experts and their expertise will be preserved.

83. As has been stated on several occasions, only the accession of the European Union to the European Convention on Human Rights can ensure the convergence of human rights standards all over Europe. Since the Court of Justice [Opinion 2/13](#), there has been a continued commitment by the EU institutions and EU chairmanships to accession without, however, concrete proposals being put forward. For its part, the Council of Europe stands ready to enter into possible negotiations, which the Assembly also calls for.³⁸

38. See the most recent texts adopted by the Assembly: [Recommendation 2114 \(2017\)](#) already mentioned, [Resolution 2041 \(2015\)](#) and [Recommendation 2065 \(2015\)](#) on the European institutions and human rights in Europe, [Recommendation 2060 \(2015\)](#) and [Resolution 2029 \(2015\)](#) on the implementation of the Memorandum of Understanding

– *EU participation in Council of Europe monitoring bodies*

84. The European Union already participates in a number of Council of Europe bodies.³⁹ It is a member of the European Pharmacopoeia and the European Audiovisual Observatory; the European Commission participates in the meetings of the Venice Commission; discussions about the European Union's participation in GRECO are ongoing. An enhanced participation of the European Union in the Council of Europe monitoring/advisory bodies, pursuant to modalities that need to be defined and which may differ from one body to another, would increase consistency in the respective organisations' approaches to common rule of law matters (and) in specific countries.

7.6. Enhanced dialogue with national parliaments

85. The European Parliament Resolution on DRF gives an important role to national parliaments in identifying shortcomings and in framing the mechanism's indicators. The European Commission also supports an interparliamentary dialogue between the European Parliament and national parliaments. There is a global understanding that national parliaments have to be better informed about outcomes of various reports on a country's compliance with human rights, rule of law and democracy standards, as well as being able to convert these reports into national rule of law and human rights compliance policies.

86. The current debate on a rule of law mechanism provides a timely opportunity to bring European decision-makers and monitoring bodies closer to national parliaments. If the lack of information in national parliaments about recommendations of various European institutions is often cited as a drawback of a rule of law compliance system, the problem could partially be addressed through an annual parliamentary debate on the rule of law organised by Parliamentary Assembly together with the EU institutions. The dual benefit of this exercise would be closer Council of Europe/EU co-ordination as well as the possibility of informing national parliamentarians of current recommendations and proposals for reforms. The Parliamentary Assembly is already a forum uniting national parliamentarians representing all political spectrums.

8. Conclusions

87. Two and a half years after its adoption, no concrete initiative has been taken by the European institutions (Council and Commission) to give effect to the European Parliament resolution and to prepare the interinstitutional agreement it called for. This is what the European Parliament regrets, in the resolution that it adopted on 14 November 2018, by which it intends to relaunch the process.⁴⁰

88. Currently, several EU rule of law initiatives exist; they are being driven by different institutions, have different dynamics and are based on different paradigms. However, some converging points can already be identified, for instance the greater involvement of national parliaments, and this opens up for the Assembly an opportunity to provide a platform for a Europe-wide discussion on the rule of law.

89. The Council of Europe has been amply referred to in the discussion on the EU rule of law initiatives. It is important to ensure that the dynamic of a greater involvement of the Council of Europe in the assessment of the EU member States, whether through expert input or the setting of a common foundation for standards, is preserved.

90. A closer co-operation, which could be achieved through a set of targeted actions, would provide a safeguard for consistency between legal systems. Moreover, current talks on the respect of human rights by the United Kingdom post-Brexit support claims for increased Council of Europe–EU dialogue with a view to preserving the coherent human rights protection system for Europe as a whole.

91. The development of EU tools and mechanisms concerning the rule of law, the ongoing procedures and their implications for the Council of Europe deserve further analysis and reflection at the level of the Assembly itself with regard to the potential impact on its own mode of operation in terms of compatibility of procedures for monitoring member States compliance with standards and values.

between the Council of Europe and the European Union, [Resolution 1836 \(2011\)](#) and [Recommendation 1982 \(2011\)](#) on the impact of the Lisbon Treaty on the Council of Europe, [Recommendation 1834 \(2008\)](#) on the accession of the European Union/European Community to the European Convention on Human Rights.

39. <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016805970c0>.

40. 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 (TA-PROV(2018)0456), www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+TA+P8-TA-2018-0456+0+DOC+PDF+V0//EN.