RECONNECT

Report addressed to the European Parliament and the Commission on policy recommendations and on Treaty changes and amendments to the EU Charter of Fundamental Rights

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Report addressed to the European Parliament and the Commission on policy recommendations and on Treaty changes and amendments to the EU Charter of Fundamental Rights

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Contents

List of Abbreviations

ARoLR	Annual Rule of Law Report
CFSP	Common Foreign and Security Policy
CJEU	Court of Justice of the European Union
COFOE	Conference on the Future of Europe
DRF	Rule of law, democracy, and fundamental rights scoreboard
ECB	European Central Bank
ECI	European Citizens' Initiative
ECtHR	European Court of Human Rights
ECOFIN	Economic and Financial Affairs Council
ECSC	European Coal and Steel Community
EMU	Economic and Monetary Union
EP	European Parliament
EPP	European People's Party
EPPO	European Public Prosecutor's Office
ESM	European Stability Mechanism
EU	European Union
EU FTAs	EU free trade agreements
EUMS	EU Member States
FRA	European Union Agency for Fundamental Rights
IPEX	Interparliamentary Exchange System
MEPs	Members of the European Parliament
MOU	Memorandum of Understanding
OLAF	European Anti-Fraud Office
OSCE	Organization for Security and Co-operation in Europe
PSPP	Public Sector Purchase Programme
RFF	Recovery and Resilience Facility
SGP	Stability and Growth Pact
TESM	Treaty Establishing the European Stability Mechanism
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
TSCG	Treaty on Stability, Coordination and Governance in the Economic and Monetary Union

Executive Summary

This report presents RECONNECT's final policy recommendations and proposals for amendments to the European Union's (EU or Union) founding Treaties, as well as to the Charter of Fundamental Rights of the European Union (Charter). The suggested changes aim to strengthen democracy and rule of law in the EU, recognizing the Union's potential to use its fundamental values to reconnect with citizens and, thus, bolster transparency and legitimacy for the European project. The report is to be read in conjunction with RECONNECT's new narrative for European integration, which also highlights the importance of fundamental values, such as democracy and the rule of law, in the everyday life of European citizens.[1] In a nutshell, the **30 main recommendations and amendments** proposed in this report are the following.

Strengthening democracy
1. Coordinate the electoral calendars of European Parliament and national elections to increase voter turnout of European Parliament elections.
2. Create transnational electoral lists from which members of the European Parliament would be elected.
3. Adapt the EU Electoral Act with a view to a stronger equivalence of national procedures for European Parliament elections.
4. Resolve the issue of the lead candidates (*Spitzenkandidaten*) process: in case of disagreement between the European Council and the European Parliament on the lead candidate for the presidency of the European Commission, convene a joint 'conciliation committee' that is to work out a compromise solution between European Parliament and European Council.
5. Equip the European Parliament with a fully-fledged legislative initiative power.
6. Make the European Commission's visits to national parliaments public and organise them as hearings, so that national parliaments can scrutinise EU decision-making.
7. Institutionalise the Eurogroup as a formal body of the EU and codify its tasks.
8. Integrate the acquis of the Treaty on Stability, Coordination and Governance (also called the Fiscal Compact) into the EU Treaties.
9. Strengthen further democratic governance in EMU.
10. Discuss reducing the cases of unanimous decision-making in the Council.
11. Discuss unanimity in the EU Treaty reform process.
12. Establish an EU Democracy Framework as a complementary repertoire of measures to the existing ones in order to address backsliding by EU Member States.
13. Establish an Athens Commission on the Quality of Political Discourse.
14. Institutionalise a European Citizens' Assembly, with particular attention for young people.

Strengthening the rule of law
15. Insert an explicit legal basis for regular monitoring of rule of law and other EU fundamental values into the Treaties.
16. In the area of freedom, security and justice, introduce a mechanism dedicated to regularly check EU Member States' compliance with the values underlying mutual trust; put in place measures for an objective and impartial evaluation of the implementation of Union policies in this area in order to facilitate the full application of the principle of mutual recognition.
17. Amend Article 7 TEU to bolster the sanctions regime and legal consequences to backsliding regarding EU fundamental values: (1) define more clearly the scope of application of the Article 7(1) and Article 7(2) procedures; (2) outline explicitly the right of the European Parliament to participate in the Council's Article 7(1) hearings, in particular when the Parliament is the activating authority; (3) amend

[1] Paul Blokker, 'Report on new, imaginative justificatory discourses and a narrative for European integration' (2022) <https://reconnect-europe.eu/wp-content/uploads/2022/03/D14.4.pdf> accessed 31 March 2022.

the voting rules in the Council; and (4) expand the list of possible sanctions, including possibly forced expulsion of a Member State.
18. Adopt a notice regarding the various procedures available before the Court of Justice of the European Union in case of a violation of the EU's fundamental values.
19. Adopt a notice regarding the scope of Article 19 TEU, taking stock of the rich case-law of the Court of Justice of the European Union.
20. Consider the introduction of specific remedies or mechanisms in a context of rule of law backsliding.
21. Establish an EU Conference of the Heads of Constitutional and Supreme Courts of the Member States and the Union with advisory jurisdiction over issues of Union competence.
22. Share OLAF findings publicly when Member States are irresponsive to the misconduct indicated in its reports, and introduce mechanisms of consequences attached to OLAF findings.
23. Devise incentives for (or consequences for lack of) membership of the European Public Prosecutor's Office.
24. Enhance the functioning of the Authority for European Political Parties and European Political Foundations.

Strengthening the Charter
25. Reconsider Articles 47 and 51 of the Charter with a view to strengthening effective remedies and the Charter's enforcement.
26. Launch a broad-based process to consider adding new rights, freedoms and principles to the Charter.

Strengthening transparency and access to documents
27. Update Transparency Regulation 1049/2001 in order to reflect the Treaty framework after the entry into force of the Treaty of Lisbon.
28. Make the reports of the trilogue meetings and other relevant documents under the ordinary legislative procedure publicly available.
29. Update the legislative framework to consider new forms of digital governance and set up well-kept document registries.
30. Work towards making the process leading to EU trade agreements and their implementation more transparent and inclusive.

I. Introduction

Four years ago, the RECONNECT research project on 'Reconciling Europe with its Citizens through Democracy and the Rule of Law' set out to strengthen the EU's legitimacy through democracy and the rule of law. Since 2018, the multidisciplinary RECONNECT research team consisting of 18 partners from 14 countries has sought to build a new narrative for European integration, enabling the Union to become more attuned to the expectations of its citizens by strengthening its founding values, in particular democracy and the rule of law. Based on RECONNECT's research, this report puts forth policy recommendations and proposed amendments to the EU Treaties as well as the Charter.

The dramatic recent events at the Union's Eastern borders – the war resulting from Russia's invasion of Ukraine and all the consequences thereof, including large waves of refugees, unprecedented EU sanctions and the bolstering of Europe's strategic autonomy in a great number of areas, including energy and defence – should not make us forget that the EU's foundational values of democracy and the rule of law have increasingly come under pressure in multiple EU Member States (EUMS). In a way, these recent events themselves can be linked to the absence of sufficient democratic and rule of law safeguards within the EU's largest neighbour, Russia.

In the past fifteen years, numerous crises, such as the financial crisis, the Eurozone sovereign debt crisis, the migration crisis and the COVID-19 health crisis, have resulted in a growing distrust and disconnect between the Union and its citizens. This triggered and strengthened waves of populism, nationalism, autocracy, and a rapid dismantlement of rule of law and democratic principles in domestic legal systems (so-called 'backsliding').

Through a comprehensive examination of the concepts of democracy and the rule of law, RECONNECT has sought to assess whether there is a coherent notion of these concepts which can count on similar interpretations in the EU and its Member States. Moreover, RECONNECT has investigated the extent to which these concepts fail to resonate with Europe's citizens and how this impacts the current and future narrative of the European integration project. Having established the main problem areas for the principles and practices of democracy and the rule of law in the EU, RECONNECT now embarks on its final mission of presenting policy proposals, as well as suggestions for possible EU Treaty changes, that could help the Union both in enhancing its proper democratic functioning and standing its ground against backsliding Member States.

The Treaties referred to in this document are the two principal treaties on which the Union is based, namely the Treaty on European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU).[2] The TEU essentially sets out the Union's objectives and fundamental principles as well as the governance of its institutions. The TFEU defines the competences of the Union and the concrete scope for action within its policy areas.[3] There are also protocols attached to the Treaties that stipulate detailed provisions or specific arrangements with regard to particular institutions or policies.[4] Besides possible improvements to the Treaties, this report also discusses potential changes to the Charter of Fundamental Rights of the European Union (Charter), which brings together the most important rights, freedoms and principles into one document, which since the Treaty of Lisbon has the same legal value as the Treaties.[5]

[2] Where pertinent, of course, attention should also be paid to the Treaty establishing the European Atomic Energy Community.
[3] Only one policy area is not governed by the TFEU but rather by the TEU: the common foreign and security policy (CFSP).
[4] These protocols are annexed to the TEU, to the TFEU and/or to the Treaty establishing the European Atomic Energy Community. Pursuant to Article 51 TEU they form an integral part of the Treaties.
[5] See Article 6(1) TEU.

The present report is the result of an extensive consultative process. After gathering ideas on possible Treaty changes among RECONNECT consortium members, recommendations were formalised in writing by various partners to be included in this report, and presented back to RECONNECT consortium members for peer review. The proposals are organised along the two main lines of RECONNECT: the EU's potential to use democracy and the rule of law to reconnect with its citizens and bolster the legitimacy of the Union. After this introduction, Chapter II addresses questions of further democratisation. While the Union can be considered to live up to minimum standards of a democratic political system, it still struggles with a number of crucial obstacles on its way towards further democratisation. To this end, various policy recommendations and proposed Treaty changes address democratic participation, the democratic process (including decision-making, law-making and treaty-making), democratic safeguards at national level, and citizens' participation. Chapter III presents the second group of policy recommendations and proposed Treaty changes aimed at strengthening the rule of law in the EU through safeguards, monitoring, sanctions, and other legal consequences attached to violations, while Chapter IV contains proposals regarding the Charter. Cross-cutting recommendations concerning the need to enhance transparency in EU decision-making follow in Chapter V. As we are aware that many of the proposals and suggestions contained in the present report may cause controversy, Chapter VI addresses some of the challenges that our recommendations entail.

In essence, the aim of this report is to present all policy recommendations and suggestions for Treaty reform that were brought to the table within RECONNECT, and allow these ideas to inspire and feed into future debates on how the EU and its Treaties, laws and policies should evolve. The report is hence addressed to EU policy-makers and institutions, in particular the European Commission (Commission) and the European Parliament (EP).[6] The suggested Treaty changes and recommendations – which sometimes also pertain to secondary law – are to be read together with RECONNECT's proposed new narrative for European integration[7], which highlights the importance of adhering to democratic and rule of law principles to the benefit of everyday life for European citizens.

One last consideration should be highlighted. Some of the proposals presented here suggest further steps in the integration process, based on a conviction that this will strengthen the respect of the Union's fundamental values and its sustainability. It is a foundational premise of democratic governance that integration should only deepen if the process enjoys the support of the majority of European citizens. Integration should progress in pace with deepening European democracy. Admittedly, there are tensions between some empirical findings – one of the RECONNECT citizen surveys[8] reveals that a majority of European citizens does not generally support a drive towards further integration and prefers to maintain the status quo – and the recommended Treaty changes. This tension between citizens' current preferences and proposals for further strengthening the EU might not easily be overcome (see the discussion below, in Chapter VI). Significant efforts will need to be made to debate with citizens about the need and shape of these reforms, which aim to better safeguard the respect of the fundamental values on which the Union is built. Indeed, the need to engage more widely and thoroughly with citizens has not only been very clear among the partners of RECONNECT during the project's lifespan, but has also inspired the Conference on the Future of Europe (COFOE), which has offered European citizens the opportunity to debate on Europe's challenges and priorities. This report intends to add to these debates on the basis of RECONNECT research.

[6] The present report builds on a previous RECONNECT report which provided an overview of the main findings and recommendations of RECONNECT reports: see Viktor Kazai and Petra Bárd (eds.), 'Communication Strategy of the EU for best practice and policy recommendation' (2021) <https://reconnect-europe.eu/wp-content/uploads/2021/10/D15.1_web.pdf> accessed 31 March 2022.

[7] Paul Blokker, 'Report on new, imaginative justificatory discourses and a narrative for European integration' (2022) <https://reconnect-europe.eu/wp-content/uploads/2022/03/D14.4.pdf> accessed 31 March 2022.

[8] Constantin Schäfer, Bernd Schlipphak and Oliver Treib, 'The ideal setting of the EU in the mind of European citizens' (2021) <https://reconnect-europe.eu/wp-content/uploads/2021/04/D9.2.pdf> accessed 31 March 2022.

II. Strengthening Democracy

This chapter presents the recommendations on democratising and strengthening the democratic fabric of the Union and, to some extent, of its Member States. They include points on interinstitutional relations, with a focus on the role of the EP, in order to ensure that the balance of powers allows for legitimacy and authority of EU government, such as the organisation of elections. Further recommendations concern democratising law- and decision-making practices and procedures within EU institutions as well as the process of Treaty reform. The chapter also covers recommendations regarding the enforcement and monitoring of democratic safeguards in the EU, as well as propositions on strengthening public deliberation.

II.1. Democratic Participation: Elections

II.1.1. Coordinate the Electoral Calendar of European Parliament and National Elections, and Introduce Transnational Electoral Lists

Voter participation in EP elections is a major challenge for the representativeness of the EP and for the legitimacy of the Union in general.[9] Overall voter turnout at European elections has been consistently lower than for national parliamentary elections and, despite the increase observed in 2019, has followed a downward trend since 1979. Enhancing the levels of popular participation at these elections would contribute to reconnecting EU institutions with European citizens.

RECONNECT has thoroughly analysed the factors that affect the level of voter turnout in view of making concrete proposals for reform.[10] One important finding is that turnout is directly affected by the institutional conditions shaping the voting opportunities for European citizens. In particular, we found that compulsory voting and concurrent national elections are the two factors that affect voter turnout most strongly. Additionally, we found that voter turnout in EP elections is negatively affected by the proximity of preceding national or regional contests. The **coordination of electoral agendas across levels of government** thus represents a potential action point within the political system.

It must be noted, however, that the procedures for the election of the EP are governed both by EU law laying down rules common to all Member States – the so-called EU Electoral Act[11] – and by specific national provisions, which vary from one Member State to another.[12] Voting procedures depend to a large extent on national rules that are often enshrined in national constitutions, laws and traditions,

[9] Julien Navarro, 'Electoral Accountability in the European Union: An Analysis of the European Parliament Elections with Respect to the EU's Political Deficit' (2020) 5 (1) European Papers 209-223.

[10] Camille Kelbel, Julien Navarro and Giulia Sandri (eds.), 'Working Paper on Citizens' Participation and Electoral Linkages' (2020) <https://reconnect-europe.eu/publications/deliverables/> accessed 31 March 2022.

[11] Act concerning the election of the members of the European Parliament by direct universal suffrage, annexed to Council Decision 76/787/ECSC, EEC, Euratom. The original reference is: Act concerning the election of the representatives of the Assembly by direct universal suffrage (1976) OJ L278/5, annexed to Decision 76/787/ECSC, EEC, Euratom of 20 September 1976 of the representatives of the Member States meeting in the Council. The term 'Assembly' was replaced by 'European Parliament' in 2002: Council Decision 2002/772/EC, Euratom of 25 June 2002 and 23 September 2002 amending the Act concerning the election of the representatives of the European Parliament by direct universal suffrage, annexed to Decision 76/787/ECSC, EEC, Euratom (2002) OJ L283/1. The Act was last amended by Council Decision (EU, Euratom) 2018/994 (2018) O.J L178/1.

[12] See *inter alia* Jan Wouters 'The Long and Winding Road towards a European Electoral Law' in Carolina Plescia, James Wilhelm, Sylvia Kritzinger, Kolja Raube and Jan Wouters (eds.), *Assessing the 2019 European Elections* (Routledge 2020).

which are difficult to harmonise. RECONNECT therefore recommends to act through legally binding EU measures where possible, and to have recourse to soft law in other cases.

The first RECONNECT recommendation is twofold: it is to **abolish voting on weekdays, as this reduces participation, and extend the voting period over more than one day**. In other words, we suggest to hold elections on two consecutive days – a Saturday and a Sunday – across the whole EU. While this recommendation as such does not require changing the Treaties, it presupposes amending another instrument of EU primary law, namely Article 10 of the EU Electoral Act. For such a modification to enter into force, all Member States must adopt the change – like any other changes to the EU Electoral Act – in accordance with their respective constitutional requirements.[13]

The second RECONNECT proposal is for the EU institutions to issue a recommendation asking the Member States to **avoid holding local, regional or national elections in the six-month period preceding EP elections.** Where allowed by national laws, such election(s) should be coordinated to take place on the same day(s) as EP elections.

The third RECONNECT recommendation relating to EP elections concerns the election process of Members of the European Parliament (MEPs). As is known, the **introduction of transnational electoral lists** could bolster voter turnout and benefit the quality of democratic representation in the EU.[14] European elections currently are in fact 27 parallel national elections, in which predominantly national issues are debated, and the elected MEPs still represent rather a national demos with national concerns. Transnational lists – in addition to the existing national lists – would put forth a number of European candidates, nominated by European political parties, and elected into the EP by an EU-wide constituency. The precise design of the electoral procedure – e.g., how many members would be elected from European lists, and which place they would occupy in parallel to members elected from national lists – seems less crucial to us than the prerequisites that should be met in order to materialise such transnational lists. The latter include, for example, the need to create a European public space through transnational electoral campaigns and programmes, and transnational, multilingual debates. Such campaigns and debates would crucially reinforce participation of citizens and de facto bring about a pan-European democracy. In line with the forthcoming recommendations from the European Citizens' Panels as part of the COFOE[15], it is recommended to pursue the creation of **transnational European Parliament lists**. This would require amending the EU Electoral Act and, again, Member States adopting the change in accordance with their respective constitutional requirements. It would also require a modification to Decision (EU)2018/937[16], establishing the current composition of the EP. In this regard, RECONNECT welcomes the very recent adoption (28 March 2022) of a draft report by the EP's Committee on Constitutional Affairs, with a view of establishing a European constituency which would directly elect 28 MEPs from transnational lists, in addition to those elected in each EUMS.[17]

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[13] See, e.g., Article 3(1) of Council Decision 2002/772/EC, Euratom (2002) OJ L283/1.

[14] For example: Maria Díaz Crego, 'Transnational electoral lists. Ways to Europeanise elections to the European Parliament' (2021) <https://www.europarl.europa.eu/thinktank/en/document/EPRS_STU(2021)679084> accessed 31 March 2022.

[15] Conference on the Future of Europe, European Citizens' Panel 2 'European democracy/ Values and rights, rule of law, security': Citizens' recommendations and the EU context: Panel 2 of the Conference on the Future of Europe (2021) <https://www.europarl.europa.eu/thinktank/en/document/EPRS_STU(2022)698928> accessed 31 March 2022.

[16] European Council Decision (EU) 2018/937 of 28 June 2018 establishing the composition of the European Parliament (2018) OJ L165I/1.

17 Draft Compromises of 28 March 2022, proposal for a Council Regulation on the election of the members of the European Parliament by direct universal suffrage, repealing Council Decision (76/787/ECSC, EEC, Euratom) and the Act concerning the election of the members of the European Parliament by direct universal suffrage annexed to that decision, and amending Regulation (EU, Euratom) No 1141/2014 <https://aeur.eu/f/10d> accessed 31 March 2022.

II.1.2. Adapt the EU Electoral Act With a View to a Stronger Equivalence of National Procedures for European Parliament Elections

The difficult combination of electoral rules being laid down at both national law level and EU law level has already been touched upon in the first proposal under this chapter. Another consequence of this patchwork of electoral laws is that it generates inequalities among European citizens and complicates the democratic representativeness of the EP.[18] This divergence also contributes to the second-order nature of EP elections compared to national elections.

Currently, national rules vary significantly on issues concerning the eligibility to stand as a candidate and to vote. Differences in eligibility to stand as candidate include the required minimum age, the question whether candidates must be nominated by political parties or can stand as independents, as well as whether a candidacy requires deposits or lists of signatures, the existence of minimum thresholds for the allocation of seats, whether a country has regional constituencies, and whether there are preferential lists.[19] Voting requirements can differ in aspects such as the minimum voting age (e.g., 17 in Greece, 16 in Austria and Malta and 18 in other Member States). Other differences are noted in rules governing campaign expenses and the layout of ballot papers.

For most aspects of EP elections still regulated by these diverging national rules, RECONNECT proposes to modify Article 7 of the EU Electoral Act in order to unify, or at least attain a stronger equivalence of, the national procedural rules that govern EP elections in the Member States and abolish the electoral inequalities that currently exist among European citizens. The original formulation of Article 7 still referred to the prospect of this rule being changed 'through the entry into force of a uniform electoral procedure', but this was deleted by the 2002 reforms. Still, in the view of RECONNECT more uniform electoral procedures are needed: apart from reducing inequalities between citizens, they will strengthen the democratic fabric of the EU by contributing to the democratic representativeness of the EP and by reducing the second-order nature of EP elections.

II.1.3. Resolve the Lead Candidates (*Spitzenkandidaten*) Election Process

The lead candidates (*Spitzenkandidaten*) process is an informal procedure to elect the President of the Commission with special attention for the results of the EP elections in order to increase the democratic legitimacy of the Commission. Each major European political party elects one lead candidate, and the political group in the European Parliament that ends up with most seats gains the presidency of the Commission. However, after the EP elections of 2019, the European Council refused to propose any of the lead candidates for the position of President of the Commission.[20] Instead, it proposed the German Minister of Defence, Ursula von der Leyen, who had not even stood as a candidate in the 2019 EP elections. Ever since, it has been clear that the election process of the Commission President needs to be revisited. The European political parties had initiated the *Spitzenkandidaten* process as an attempt to create a direct link between EP elections and the composition of the Commission.[21] It was aimed at

[18] Jan Wouters 'The Long and Winding Road towards a European Electoral Law' in Sylvia Kritzinger, Caroline Plescia, Kolja Raube and Wilhelm James (eds.) *Assessing the 2019 European Parliament elections* (Routledge, 2020) 9.
[19] ibid 14.
[20] This analysis and proposal are based on Ben Crum, 'Why the European Parliament lost the Spitzenkandidaten-process', (2022) Journal of European Public Policy <https://www.tandfonline.com/doi/full/10.1080/13501763.2022.2032285?scroll=top&needAccess=true> accessed 31 March 2022.
[21] Kolja Raube, 'From Dawn to Doom: The Institutionalization of the Spitzenkandidaten-Process During European Elections and Its Final Negation' in Carolina Plescia, James Wilhelm, Sylvia Kritzinger, Kolja Raube and Jan Wouters (eds.), *Assessing the 2019 European Elections* (Routledge 2020) 19-36; Pieter De Wilde, 'The fall of the

enhancing the democratic legitimacy of the Commission and to increase the stakes of the elections. Also, it was expected to strengthen the grip of the EP on the Commission.

At the time of the 2014 EP elections, this plan worked: the European People's Party (EPP) had designated former Luxembourg Prime Minister Jean-Claude Juncker as its *Spitzenkandidat*. With the two largest groups in the EP – EPP and S&D – supporting Juncker as Commission President after the EP elections in a 'grand coalition', the European Council saw no better alternative than to endorse him.[22] However, in 2019, led by French President Emmanuel Macron, the European Council followed a different path. It refused to propose Manfred Weber – the *Spitzenkandidat* for the EPP and EPP faction leader in the EP – or his main opponent, the candidate of the Party of European Socialists (PES), First Vice President of the Commission Frans Timmermans. Instead, as indicated above, the European Council agreed on proposing Ursula von der Leyen, who was eventually elected by the EP with a relatively slim majority of 383 against 327 votes.

The resulting situation and uncertainty is a source of political concern. In 2019, the European Council essentially rejected an initiative that was meant to enhance the democratic legitimacy of the Commission and, hence, of the EU. Without a solution, European parties will be tempted to initiate the lead candidates process again for the 2024 EP elections. However, the fate of the process will be uncertain and the political price of it becoming the object of political wrangling between the EP and the European Council could be high.

The importance of a timely solution to the *Spitzenkandidaten* conundrum was recognised in the 'Franco-German non-paper on key questions and guidelines'[23] prepared ahead of the COFOE in November 2019, which listed the 'lead candidate system' as one of the issues that were to be resolved by the Summer of 2020. However, the COFOE has been delayed considerably, and as of yet it is unclear that it will come up with a solution to this issue. The European Citizens' Panel that was dedicated to European democracy and institutional reform[24] has not offered an opinion on the lead candidates process.

A critical problem in resolving the situation lies in the difficulty of thinking of a democratic Union in another way than as a federal State in which the EP is the main source of democratic legitimacy and the Commission operates under its scrutiny.[25] Such an idea of a fully 'parliamentarised' Union also underlies much of the literature that has analysed the ability of the EP to expand its powers.[26] However, in the

Spitzenkandidaten: political parties and conflict in the 2019 European elections' in Carolina Plescia, James Wilhelm, Sylvia Kritzinger, Kolja Raube and Jan Wouters (eds.), *Assessing the 2019 European Elections* (Routledge 2020) 37-51; Julie Smith 'The Spitzenkandidaten system' in Camille Kelbel, Julien Navarro and Giulia Sandri (eds.) 'Working Paper on Citizens' Participation and Electoral Linkages' (2020) <https://reconnect-europe.eu/wp-content/uploads/2020/09/D6.1_vAug2020.pdf> accessed 31 March 2022.

[22] Thomas Christiansen, 'After the Spitzenkandidaten: fundamental change in the EU's political system?' (2016) 39(5) West European Politics 992–1010.

[23] Conference on the Future of Europe, November 2019 <https://eulawlive.com/app/uploads/conference-on-the-future-of-europe.pdf> accessed 31 March 2022.

[24] Conference on the Future of Europe (2021) <https://futureu.europa.eu/assemblies/citizens-panels/f/299/> Accessed 31 March 2022; European Citizens' Panel 2 'European democracy/ Values and rights, rule of law, security': Citizens' recommendations and the EU context: Panel 2 of the Conference on the Future of Europe (2021) <https://www.europarl.europa.eu/thinktank/en/document/EPRS_STU(2022)698928> accessed 31 March 2022.

[25] Ben Crum, 'Party-Groups and Ideological Cleavages in the European Parliament After the 2019 Elections', in Carolina Plescia, James Wilhelm, Sylvia Kritzinger, Kolja Raube and Jan Wouters (eds.), *Assessing the 2019 European Elections* (Routledge, 2020) 54-64.

[26] Simon Hix, 'Constitutional Agenda-Setting through Discretion in Rule Interpretation: Why the European Parliament Won at Amsterdam' (2002) 32(2) British Journal of Political Science 259 –280; Berthold Rittberger and Frank Schimmelfennig, 'Explaining the Constitutionalization of the European Union' (2006) 13(8) Journal of European Public Policy 1148–1167; Adrienne Héritier, Katharina L. Meissner, Catherine Moury and Magnus G.

current institutional set-up of the EU, national governments remain at least as important as the EP as indirect sources of the democratic legitimation of EU decision-making (see Article 10(2) TEU).[27] If one recognises the democratic authority bestowed on national governments, the inclination of the European Council to push back against the lead candidates process becomes better understandable. Still, from a long-term perspective, it is clear that Member State governments have been willing to share EU decision-making powers with the EP. The EP has evolved from a mostly consultative body to a full legislator on a par with the governments represented in the Council. Similarly, the EP has been given a veto power of the appointment of the Commission as a body, and has since the very beginning had the power to vote a motion of censure against the Commission.[28]

The current procedure for electing the Commission President, laid down in Article 17(7) TEU, foresees a back-and-forth procedure. First, the EP elections take place. Then, taking into account the elections, the European Council, acting by qualified majority, proposes to the EP a candidate for President of the Commission. Finally, that nominee needs to be elected by a majority of the EP. If that process fails, the Treaty simply provides for the same procedure to be run again: 'If [the candidate] does not obtain the required majority, the European Council, acting by a qualified majority, shall within one month propose a new candidate who shall be elected by the European Parliament following the same procedure.' That solution seems untenable, as it risks generating a permanent stand-off between the EP and the European Council and creates exactly the void that the EP sought to exploit by initiating the *Spitzenkandidaten* process.

Instead, following the reasoning developed above, an appropriate solution of the process needs to respect the equal powers and involvement of the Member State governments and the EP. For this, RECONNECT proposes a solution that is inspired by the Treaty provisions regarding an ongoing disagreement between the EP and the Council in the context of the ordinary legislative procedure, namely through the convening of **a 'joint Committee' that is to hammer out a compromise solution acceptable to both institutions.** Inspired by Article 294(10) TFEU, it is proposed that, rather than re-running the procedure as is currently foreseen, the final sentence of the first paragraph of Article 17 (7) TEU be amended as follows:

> *If s/he does not obtain the required majority, a Committee which shall be composed of the members of the European Council or their representatives and an equal number of members representing the European Parliament, shall have the task of reaching agreement on a new candidate, by a qualified majority of the members of the European Council and by a majority of the members representing the European Parliament within one month of its being convened.*

The aforementioned Treaty change proposal is pragmatic and limited in scope. It would be far more radical to combine this proposal with another idea, namely the **merger of the office of President of the Commission and of President of the European Council**. It has been said that such a merger, if the political decision were taken thereto, could be operated without a Treaty change, as Article 15(6), third paragraph TEU only stipulates that the President of the European Council 'shall not hold a national office'. If such a change were contemplated, and operationalised in combination with the lead candidate process proposed above, it would significantly boost the democratic legitimacy of the person holding

Schoeller, *European Parliament Ascendant. Parliamentary Strategies of Self-Empowerment in the EU* (Palgrave Macmillan, 2019).

[27] See *inter alia* the literature on the EU as a demoi-cracy: Kalypso Nicolaïdis, 'European demoicracy and its crisis' (2013) 51(2) Journal of Common Market Studies 351–369; Francis Cheneval and Frank Schimmelfennig 'The case for demoicracy in the European Union' (2013) 51(2) Journal of Common Market Studies 334–350. But see, critically, Robert Schütze, 'Models of democracy: some preliminary thoughts' (2020) EUI Working Paper Law 2020/8 <https://cadmus.eui.eu/handle/1814/67823> accessed 31 March 2022.

[28] See, respectively, Articles 17(7) third paragraph, and 17(8) TEU, together with Article 234 TFEU. See already (concerning the High Authority) Article 24 of the Treaty establishing the European Coal and Steel Community, signed in Paris on 18 April 1951.

the combined office. Not only (i) would she or he have stood as a lead candidate in EP elections and her or his political group won the highest number of seats, but when required, (ii) she or he would have also been the subject of the aforementioned procedure for finding a compromise solution between the European Council and the EP. However, the institutional and political ramifications of such a merger should be studied very carefully beforehand.

II.2. Democratic Process: Decision-Making and Law-Making

II.2.1. Equip the European Parliament with a Legislative Initiative Power

The EP currently only has a limited and indirect right of legislative initiative under Article 225 TFEU.[29] To enhance its legislative position and legitimacy as the only directly elected EU institution, RECONNECT proposes to transform this right into a **fully-fledged right of legislative initiative**. By so doing, the EU would fill a gap in parliamentary prerogatives and put the EP on a par with most national parliaments in the EUMS.

Such a reform would not only improve the institutional balance within the EU, as well as the legislative process as a whole. It would also enhance the capacity of the EP to fulfil its representative role since MEPs would be able to decide which policy areas should be prioritised. Another consequence of a parliamentary right of initiative would be that it increases the political stakes of EP elections.

The introduction of a right of legislative initiative for the EP is consistent with the founding principles of the EU and in particular Article 10(1) TEU, pursuant to which '[t]he functioning of the Union shall be founded on representative democracy.' It would nevertheless require important changes to the Treaties, notably in Articles 17 (2) TEU, 289, 293 and 294 TFEU.

II.2.2. Democratise the European Commission's Visits to National Parliaments

In democratic systems, the main forums in which, as a general rule, democratic accountability takes place, are parliaments. They are the arenas in which political executives are brought to justify their decisions and they enjoy a particularly visible role in the public sphere. For the EU, this focus of democratic accountability on parliaments runs into two complications. The first is that, as indicated above, the Union knows two channels of democratic representation (Article 10(2) TEU): citizens are both directly represented at Union level in the EP as well as indirectly through their respective national parliaments, which authorise and scrutinise their national governments that control most of EU decision-making. The second complication is that there is no integrated EU public sphere.

After earlier attempts, the Treaty of Lisbon incorporated national parliaments in the EU polity by giving full recognition to the role which national parliaments play in providing democratic legitimacy for EU decision-making.[30] Most importantly, it allowed EU institutions like the Commission to engage directly

29 Camille Kelbel and Julien Navarro (eds.) 'Working Paper on the Interinstitutional Relations in the EU' (2020) <https://reconnect-europe.eu/publications/deliverables/> accessed 31 March 2022. In her address in July 2019 and in her Political Guidelines, Ursula von der Leyen pledged to strengthen the partnership with the EP *inter alia* by responding with a proposal for a legislative act whenever the EP, acting by a majority of its members, would adopt a resolution requesting that the Commission submit legislative proposals: Silvia Kotanidis, 'Parliament's right of initiative', European Parliament Briefing PE 646.174 https://www.europarl.europa.eu/RegData/etudes/BRIE/2020/646174/EPRS_BRI(2020)646174_EN.pdf> accessed 31 March 2022.

30 See in particular Article 12 TEU, Protocol (No 1) on the role of National Parliaments in the European Union and Protocol (No 2) on the application of the principles of subsidiarity and proportionality. See further Tapio Raunio,

with national parliaments, bypassing the gatekeeping function that national governments have traditionally played in this regard.[31] This direct relationship became most concrete in the obligation of the Commission to communicate its documents to national parliaments rather than to leave it at the discretion of national governments to forward them (Article 12(a) TEU, Articles 1 and 2 Protocol (No 1)).

In parallel to these communications, the Commission has also recently invested in visiting national (and regional) parliaments. In the pre-COVID-19 years, all Commissioners together paid up to 200 visits a year to such parliaments.[32] In these visits one sees the emergence of an **innovative informal channel of accountability of EU decision-making**. It is innovative because of its cross-level character, in which a supranational executive institution like the Commission interacts directly, and often publicly, with national (and regional) parliaments, thus excluding the respective government from this interaction.[33] Moreover, by visiting such parliaments, the Commission gets access to the heart of domestic public spheres and may thus increase the visibility of its decisions and policies.

However, RECONNECT research[34] reveals that there is little consistency in the Commissioners' meetings with national (and regional) parliaments and that most of these parliaments have not (yet) fully embraced their role as integral actors in the EU political system that the Treaty of Lisbon bestowed on them. The parliaments tend to approach the Commission visits as a mere source of information or indeed as an opportunity to exercise ('upstream') influence on the EU decision-making process rather than to secure ('downstream') accountability. Commissioners are mainly treated as outside visitors.

RECONNECT's findings suggest that it would be beneficial, from a democratic accountability perspective, to adopt some **good practices**, without requiring any Treaty change, as to how national (and regional) parliaments can organise the visits of Commissioners in order to live up to their role in the wider framework of the multilevel EU polity. We make four suggestions in this respect. A first suggestion is that **these visits need to be public meetings**. Secondly, it seems appropriate that these meetings are **organised by the relevant parliamentary policy committee**. Unless the topics discussed are specifically related to EU institutional affairs, there seems little need for a leading role of the EU affairs committee in question. Thirdly, we suggest to **organise these meetings as 'hearings'**, which indicates that they are not a symmetrical exchange, but that the Commissioner is actually subject to scrutiny. While this should not preclude a presentation by the Commissioner, the focus and issues to be discussed should be firmly controlled by the parliamentarians in question. To ensure this, it may be helpful to have the Commissioner's intervention preceded by a substantial introduction by the parliamentary committee chair. Fourthly, if one takes these meetings seriously as a scrutiny mechanism in the context of the EU political system, they need to be **properly recorded** (if possible by video), so that other parliamentarians can refer to what has been said, and be made available to other parliaments through the Interparliamentary Exchange System (IPEX).

As national politics has become increasingly intertwined in the EU polity, it makes a lot of sense for supranational politicians to engage directly with national (or regional) parliaments, as they remain the main democratic institutions and are closer to citizens (cf. Article 1, second paragraph TEU and Article 10(3) TEU). If members of national (or regional) parliaments aspire to a substantial role in the multilevel

'The Gatekeepers of European Integration? The Functions of National Parliaments in the EU Political System' (2011) 33(3) Journal of European Integration 303-321.

[31] Ian Cooper, 'The Emerging Order of Interparliamentary Cooperation in the Post-Lisbon EU' In Davor Jančić, (ed.) *National Parliaments after the Lisbon Treaty and the Euro Crisis* (Oxford University Press, 2017) 227–46.

[32] Commission, 'Relations with National Parliaments' <https://bit.ly/3qGb5t4> accessed 31 March 2022.

[33] Katrin Auel, 'Democratic Accountability and National Parliaments: Redefining the Impact of Parliamentary Scrutiny in EU Affairs' (2007) 13(4) European Law Journal 487-504.

[34] Ben Crum and Alvaro Oleart, 'Accountability and Transparency in a Multilevel Polity: European Commissioners in National Parliaments' (2020) <https://reconnect-europe.eu/wp-content/uploads/2021/01/D6.3.pdf> accessed 31 March 2022.

EU political system, they need to approach visits of Commissioners more as political hearings and less as information briefings.

II.2.3. Institutionalise and Formalise the Eurogroup

The Eurogroup, an informal body where the ministers of the Euro area Member States meet, has come about and evolved as a consequence of the introduction of the Euro. The implementation of the common currency has gradually transformed the macroeconomic and fiscal governance of the Union. While the 1992 Treaty of Maastricht stipulated that the decision-making belonged to the Economic and Financial Affairs Council (ECOFIN), some matters related to the Euro were restricted only to the Euro area Member States. Hence, the introduction of an informal meeting of the finance ministers of these countries was reasonable, and even desirable.[35] In this way, the Eurogroup was included in Article 137 TFEU, and its arrangements were established in Article 1 of Protocol (No 14): 'the Ministers of the Member States whose currency is the Euro shall meet informally' with the aim, as stated in the preamble of said Protocol, of promoting 'conditions for stronger economic growth in the European Union and, to that end, to develop ever-closer coordination of economic policies within the euro area'. In addition, it was added that the Commission and the ECB would take part in this forum.

Nevertheless, the financial crisis and the ensuing Eurozone sovereign debt crisis since 2008 have inflated the role of this informal body. The latter crisis required implementing strong measures to stabilise the domestic economies of Euro area Member States. These reforms, while urgent and technical, altered the macroeconomic and fiscal governance of the Euro area: the European response acquired a strong intergovernmental character, bypassing the EU Treaties due to the rigidities of their procedures (see below, Section 2.5.2). In this context, the Eurogroup became the best positioned entity to lead and coordinate the economic measures within the Euro area. The Eurogroup, an informal forum of the finance ministers of Euro area Member States, obtained certain powers that were not at all included in its governing provisions under the EU Treaties.

Currently, the Eurogroup participates in different stages of the policy-making process, such as in policy planning, execution and implementation.[36] In addition, as Eurogroup meetings are always held before the ECOFIN Council meets, it anticipates the decisions of the latter.[37] Consequently, the conclusions reached in this informal body have a direct impact on fiscal, monetary, and structural policies of the Euro area Member States. Moreover, the **Treaty on Stability, Coordination and Governance in the Economic and Monetary Union (TSCG)[38]**, also called the Fiscal Compact, reserves to the Eurogroup the responsibility of preparing the Euro Summit.[39] In addition, the President of the Eurogroup is entitled to attend the Euro Summits.[40] Especially during the Eurozone sovereign debt crisis (see below), Eurozone

[35] Mervyn King, 'The Political Economy of European Monetary Union' (1998) European Investment Bank Lectures Series <https://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.934.1686&rep=rep1&type=pdf> accessed 31 March 2022.

[36] Paul Craig, 'The Eurogroup, power and accountability' (2017) 23 (3-4) European Law Journal 234-249.

[37] Daniela Piana and Alessandro Nato, 'Strengthening legitimacy and authority in the EU: a new model based on democratic rule of law' (2020) 24 <https://reconnect-europe.eu/wp-content/uploads/2021/01/D4.4.pdf> accessed 31 March 2022.

[38] See <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=legissum:1403_3> accessed 31 March 2022. Remarkably, the TSCG was not published in the Official Journal of the EU.

[39] See Article 12(4) TSCG. Pursuant to Article 12(1) TSCG, the Euro Summit constitutes an informal meeting of '[t]he Heads of State or Government of the Contracting Parties whose currency is the euro […], together with the President of the European Commission. The President of the European Central Bank shall be invited to take part in such meetings.'

[40] See Article 12(4) TSCG.

economic governance relied on these summits.[41] Beyond the discursive functions assigned by Article 137 TFEU and Protocol (No 14), the Eurogroup holds a central role in the decision-making of the Euro area.

During the Eurozone sovereign debt crisis, the Eurogroup steered decisions on some of the most critical issues, such as the Greek and Cypriot bailouts. It acted as a broker of agreements, for instance by in effect and publicly leading the negotiations with the Greek government. It discussed the terms of financial assistance for Euro area Member States that were experiencing severe difficulties. And it monitored the compliance by Euro area Member States with these agreements and with the Stability and Growth Pact. The intertwining of the Eurogroup and crisis governance reached the point where the Eurogroup's President, Jeroen Dijsselbloem (2013-2018), chaired at the same time the Board of Governors of the European Stability Mechanism (ESM), the instrument through which financial aid was distributed.

However, as these competences are not formally included in the EU Treaties, the Eurogroup enjoys a high level of discretion, and, above all, it lacks democratic legitimacy and accountability. The Eurogroup cannot even be challenged for its acts before the EU courts due to the informal nature expressed in the wording of Protocol (No 14). The CJEU case-law developed in the *Mallis*[42], *Ledra*[43] and *Chrysostomides*[44] cases about the financial aid to the Cypriot banking system are fundamental to understand the position of the Eurogroup.[45] Ultimately, these cases reinforced the informal and intergovernmental nature of the Eurogroup. Notwithstanding the Eurogroup's de facto powers described before, its lack of formalisation in the EU Treaties makes that it cannot be held accountable for its acts. National parliaments, too, only have a limited ability to scrutinise the actions of their respective governmental representative in European economic governance.[46]

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[41] Viktor Kazai and Petra Bárd (eds.), 'Communication Strategy of the EU for best practice and policy recommendation' (2021) 58 <https://reconnect-europe.eu/wp-content/uploads/2021/10/D15.1_web.pdf> accessed 31 March 2022.

[42] Joined cases C-105/15 P to C-109/15 P, *Konstantinos Mallis and Others v European Commission and European Central Bank (ECB),* ECLI:EU:C:2016:702.

[43] Joined cases C-8/15 P to C-10/15 P, *Ledra Advertising Ltd and Others v European Commission and European Central Bank (ECB)*, ECLI:EU:C:2016:701.

[44] Joined cases C-597/18 P, C-598/18 P, C-603/18 P and C-604/18 P, *Council v Chrysostomides & Co. and Others,* ECLI:EU:C:2020:1028.

[45] Isabel Staudinger, 'The Court of Justice's Self-Restraint of Reviewing Financial Assistance Conditionality' (2021) 6(1) European Papers 177-188. To put in context, Cyprus suffered a banking crisis, and the Commission and the ECB, agreed with the International Monetary Fund (IMF) to concede financial assistance. But in exchange, they imposed certain conditionality and adjustment measures through a memorandum of understanding (MoU). Also, the Eurogroup published a contested statement about the debts and liabilities restructuration informing that only small bank deposits (less than 100,000 euros) would be fully covered. This statement created the basis for the Cypriot bailout and the bank restructuring, and, thereby, it provoked the loss of those deposits that were not secured. As a result, the owners of those bank deposits challenged the statement before EU courts. Three CJEU – General Court, Advocate General and the Court of Justice of the EU - argued that the action against the Eurogroup was not valid. Leaving aside the details of the case, the GC considered the Eurogroup was a 'forum for discussion, at ministerial level, between representatives of the member states whose currency is the euro, and not a decision-making body'. Hence, a Eurogroup's statement cannot therefore 'be regarded as a measure intended to produce legal effects with respect to third parties'. The Eurogroup did not formally qualify as an EU body/agency, so the CJEU denied legal protection under Article 263 TFEU (action for annulment) in the case of *Mallis*, and under Article 340 TFEU (action for damages), in the *Ledra* case.

[46] Carlos Closa Montero, Felipe González De León and Fernando Losada Fraga, 'Democracy vs technocracy: national parliaments and fiscal agencies in EMU governance' (2020) <https://reconnect-europe.eu/wp-content/uploads/2020/11/D10.2.pdf> accessed 31 March 2022.

Although Article 263 (4) TFEU provides that any natural or legal person may 'institute proceedings against an act addressed to that person or which is of direct and individual concern to them' and even if measures taken during the crisis were highly disputed, the CJEU has not considered valid actions against the Eurogroup, since Article 263 proceedings can only be brought against acts with legal effects. The institutionalisation of the Eurogroup would guarantee that there is effective judicial protection and legal accountability.

For these reasons, RECONNECT considers Treaty changes in relation to fiscal and macroeconomic governance indicated. An explicit **formalisation of the functions, procedures and responsibilities of the Eurogroup would improve its democratic accountability**.[47] As mentioned before, under the current informal nature of the Eurogroup, important macroeconomic decisions in relation to the single currency are taken. In this sense, a Treaty formalisation of the Eurogroup (composition, functions, procedure, election of President, etc.) would increase the transparency of the decision-making processes affecting Economic and Monetary Union (EMU).

A crucial aspect in the formalisation process concerns the **election of the President of the Eurogroup**. Treaty provisions should regulate the procedure in order to improve accountability and transparency. Due consideration should be given to two aspects of the current system: the secrecy of the vote and the equal ponderation of the votes of each Euro area Member State. Both aspects may lead to the paradox that a coalition of small States with a marginal weight in the Euro area's economy could systematically impose their candidate. Instead, a public vote and weighting of the votes would ensure fairer elections.

In conclusion, the Eurogroup emerged as a forum where the ministers of finance of the Euro area can coordinate the macroeconomic policies of their countries. Nevertheless, due to the urgency of the Eurozone sovereign debt crisis, the Eurogroup acquired significant de facto executive powers that were not included in any legal instrument, so that it cannot be held accountable for its actions. Nowadays, the heat of the crisis has passed. However, providing democratic legitimacy to this informal body remains a pending issue.[48] Indeed, the election of its new President in 2020 suggests that the lightly regulated Eurogroup still plays an important role in EU macroeconomic policy decision-making.

II.2.4. Integrate the TSCG and TESM into the EU Treaties

The European response to the financial and economic crisis of 2008-2013 resulted in a real constitutional mutation of the fiscal and macroeconomic governance of the EU.[49] In total, three treaties, two ad hoc mechanisms and two sets of regulations were implemented, with the TSCG, also called the Fiscal Compact, signed in 2012 as the culmination of the new macroeconomic governance framework. The urgency of the crisis led to an ad hoc approach, where the reforms were carried out while bypassing the formal procedures and the EU Treaties.[50] In this sense, the exceptional nature of these reforms was implicit in the wording of the TSCG itself, of which Article 16 stipulates: 'Within five years, at most, of

[47] See Viktor Kazai and Petra Bárd (eds.), 'Communication Strategy of the EU for best practice and policy recommendation' (2021) <https://reconnect-europe.eu/wp-content/uploads/2021/10/D15.1_web.pdf> accessed 31 March 2022.

[48] Carlos Closa Montero, 'Looking ahead: pathways of future constitutional evolution of the EU' (2015) Policy Department C: Citizens' Rights and Constitutional Affairs, Directorate General for Internal Policies < https://www.europarl.europa.eu/RegData/etudes/IDAN/2015/510005/IPOL_IDA(2015)510005_EN.pdf> accessed 31 March 2022.

[49] Carlos Closa Montero, 'Los cambios institucionales en la gobernanza macroeconómica y fiscal de la UE: hacia una mutación constitucional europea' (2014) 165 Revista de estudios políticos 65-94.

[50] Carlos Closa Montero, 'The transformation of macreoeconomics and fiscal governance in the EU' in Serge Champeau, Carlos Closa Montero, Daniel Innerarity and Miguel Poiares Maduro, *The future of Europe: democracy, legitimacy and justice after the Euro crisis* (Rowman & Littlefield International 2015) 37-56.

the date of entry into force of this treaty, on the basis of an assessment of the experience with its implementation, the necessary steps shall be taken, in accordance with the TEU and TFEU, with the aim of incorporating the substance of this treaty into the legal framework of the European Union'. Thus, the purpose of this section is not to discuss the necessity of these changes, but to observe that the TSCG's mandate remains unfulfilled.

The financial and economic crisis highlighted some limitations of the Stability and Growth Pact (SGP) in monitoring the fiscal performance of Member States. Hence, the so-called Six Pack (2011) was adopted based on the SGP. The Six Pack consists of five regulations and one directive that determine the rules that guide macroeconomic and fiscal policy. Together, they constituted a preventive stage (European Semester) and a corrective one. In addition, another set of regulations, the Two Pack (2013), followed the Six Pack in order to enforce control of compliance with fiscal discipline. However, all these instruments are at the level of EU legislation and some actors demanded to increase the rigidity of these norms by granting them constitutional status. Therefore, the TSCG, which completed the EU macroeconomic governance framework, emerged as a measure to crystallise fiscal rules in treaty law.

The fundamentals of the EU macroeconomic governance framework are often seen as already laid out in the Six Pack, thus delegating the TSCG to a mere symbolic gesture to increase rigidity and please Germany. Consequently, it might be argued that the requirements stipulated in Article 16 of the TSCG are already met, as the 'substance of the treaty' was previously incorporated into the EU acquis through the Six and Two Packs.[51] Nevertheless, the TSCG also contains novelties. First of all, it is not clear that the Fiscal Compact and the Six Pack refer to the same concepts: while the former requires the Contracting Parties' budgetary position to be 'balanced or in surplus', the latter only demands budgets to be 'close to equilibrium or surplus'. Secondly, the TSCG has reinforced fiscal oversight and incorporated automatic mechanisms in the event of possible deviations. Third, the simple measure of transferring the content of the Six Pack to treaty law has had considerable consequences for democratic politics and even for the legitimation of the European integration project.[52]

International treaties, insofar as they constrain the freedom of domestic parliaments and governments, may act as a kind of constitution at the national level. In particular, the TSCG works in two dimensions: European and national. Firstly, whereas it is not included in the acquis of the Union, it has crystallised certain fiscal and macroeconomic preferences that are laid down in EU legislation. Second, given that the Member States had to incorporate fiscal discipline into their constitutional framework through the 'golden rule', national governments saw the scope of their fiscal policy significantly reduced. In other words, there has been a 'constitutionalisation of strict and predefined fiscal rules' that has made domestic preferences irrelevant, generating tensions and conflicts that have exacerbated the EU's democratic deficit.[53] Moreover, this constitutionalisation occurred through a process of limited democratic quality: the procedure for EU Treaty changes laid down in Article 48 TEU was bypassed and the agenda, unlike for other Treaty reforms, was limited to matters of fiscal monitoring.[54]

Finally, attention should also be paid to other instruments that complemented the European response to the financial crisis: the European Financial Stability Facility (2010) and the Treaty Establishing the European Stability Mechanism (TESM) (2012).[55] Both ad hoc mechanisms were used to grant loans to

[51] *Closa* (n 47).

[52] Carlos Closa Montero, José Fernández-Albertos, and Felipe González De León,'Democratic Legitimacy in EU Fiscal and Macroeconomic Policy. An Overview from Parties' Manifestos' (2020) <https://reconnect-europe.eu/wp-content/uploads/2020/07/D10.1.pdf> accessed 31 March 2022.

[53] ibid.

[54] Carlos Closa Montero, 'La gobernanza fiscal y macroeconómica europea y sus limitaciones democráticas' (2012) Revista Aranzadi Unión Europea (12), 51-65.

[55] Treaty Establishing the European Stability Mechanism <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:42012A0202(01)&from=EN>, amended by

Euro area Member States with financial risks. In particular, the ESM obtained permanent status, but also involved strong elements of conditionality.[56] In addition, also the TESM was adopted outside the EU Treaties, thus bypassing the formal Treaty change procedures of Article 48 TEU. The CJEU concluded in the *Pringle* case that the TESM was external to the TFEU. [57] Therefore, given the important role played by the ESM during the crisis, especially through loan conditionality, as demonstrated in the Memorandums of Understanding (MoU), and notwithstanding the fact that unlike the TSCG the TESM does not include an implicit merger mandate, the **TESM acquis must be brought into the EU Treaties as well** (see also below, Section 2.5).

II.2.5. Strengthen further democratic governance in EMU

In 2017 the Commission published a proposal about developing the ESM into a European Monetary Fund and incorporating it into the EU constitutional and institutional architecture,[58] but the proposal has not advanced. During the past years, the ESM has received a new role as a back-stop for the banking union. Its new programmes have seen a weakened dimension of conditionality. The future use of the ESM may be fundamentally different from the reasons justifying its original founding, and will need to be appropriately reflected in its decision-making structures, including preparatory work in the Eurogroup (discussed above in Section 2.4.)

Over the last years, the broader EU economic and financial architecture has experienced further changes. Whereas the financial and euro crises made the Euro area the vanguard of EU economic and financial integration, the COVID-19 crisis reversed this development and shifted the pendulum decisively back to the EU27.

The EU has approved a new type of instrument, the Recovery and Resilience Facility (RFF)[59], for large scale redistribution between EUMS to fund various national reforms ranging from traditional investments in infrastructure and energy to IT projects, reforms of budgetary planning, judicial systems, insolvency systems, taxation, pension systems and labour markets, and measures in the field of education, social policies and housing. The increased use of EU funds is likely to continue, as new funding needs in areas such as green transition and defence have emerged as a result of the crisis in Ukraine, which are likely to involve the EU27 as a whole. The massive amounts of EU funding distributed to the EUMS have also led to concerns about the need for a more stringent monitoring of how EU funds are spent at national level (see below, Sections 3.2. and 3.3.) and strong demands for tighter rule of law conditionality.

As regards the EU economic governance framework described above, the application of the fiscal rules has been suspended at least until the end of 2022. The European Semester will be adapted to take into

<https://www.consilium.europa.eu/media/48069/agreement-amending-the-treaty-establishing-the-european-stability-mechanism-27-january-2021_en.pdf> accessed 31 March 2022, signed on 27 January and 8 February 2021 by ESM member countries. This treaty and its amendments were not published in the Official Journal of the EU either.

[56] Miguel Otero Iglesias 'La Unión Económica y Monetaria: Logros y Desafíos' in Cristina Ares and Luis Bouza, *Política de la Unión Europea: crisis y continuidad* (CIS - Centro de Investigaciones Sociológicas 2019) 65-86.

[57] Judgment in Case C-370/12, *Pringle,* (2012) ECLI:EU:C:2012:756 paras 108–114 .

[58] Proposal for a Council Regulation on the establishment of the European Monetary Fund COM(2017) 827 final.

[59] Regulation (EU) 2021/241 of the European Parliament and of the Council of 12 February 2021 establishing the Recovery and Resilience Facility (2021) OJ L57/17.

account the creation of the Recovery and Resilience Facility. These changes will also be reflected in the ongoing review of the economic governance framework.[60]

Another major shift in the EU constitutional structure involves the funding source of the RFF: it is largely funded through debt, which will be partly repaid through the introduction of new own resources. Like many earlier EMU developments, the COVID-19 measures have also led to discussions about the limits of EU competence and the relationship between creative Treaty interpretation and constitutional control (see below, Section 3.1).[61]

Many of these developments demonstrate the importance of RECONNECT recommendations in the area of democratic governance, especially since decisions on public revenue and public expenditure belong to the core of democratic decision-making and should thus be taken in parliamentary procedures.[62] For this reason, there is a particular need to ensure respect for democratic procedures and assure democratic accountability at both EU and national levels.

RECONNECT has aimed at democratising and strengthening the democratic fabric of the Union. While deeper fiscal integration should advance in step with broad democratic support, it also provides possibilities for deepening EU level democracy. In the view of RECONNECT, questions involving the priorities in the allocation of EU funds and possible own resources should in the future form a core element of electoral campaigns preceding EP elections. Public debate about core questions of European policies would strengthen EU democracy and enable citizen input into key choices on the European agenda (see above, Section 1.1.).

II.2.6. Discuss reducing the cases of unanimous decision-making, including in the Treaty change process

II.2.6.1. Unanimity in Council decision-making

If there is one overarching theme running through all the most recent Treaty changes of the EU Treaties (Single European Act, Maastricht, Amsterdam, Nice and Lisbon) next to strengthening the role of the EP in EU decision-making, it is about reducing the number of cases in which the Council adopts decisions with unanimity. The Treaty of Lisbon has succeeded in extending qualified majority voting (QMV) in the Council in an unprecedented manner.[63] However, it remains the case that both under the TFEU and the TEU there is still a considerable number of areas and instances where the Council can only decide unanimously.[64] This goes from Union citizenship, non-discrimination legislation and the harmonisation of national tax rules – where proposals to do away with unanimity have never been adopted by previous intergovernmental conferences – to the EU's CFSP and common security and defence policy (CSDP),

[60] Commission, 'The EU Economy after COVID-19: Implications for Economic Governance' (Communication to the European Parliament, the Council, the European Central Bank, the European Economic and Social Committee, the Committee of the Regions) COM(2021) 662 final.

[61] See Päivi Leino-Sandberg and Matthias Ruffert, 'Next Generation EU and its constitutional ramifications: a critical assessment' (2022) 59(2) Common Market Law Review.

[62] This is often stressed in particular by the German Constitutional Court, starting from BVerfG, judgment of the Second Senate of 7 Sept. 2011, 2 BvR 987/10, para 124.

[63] See Jean-Claude Piris, *The Lisbon Treaty. A Legal and Political Analysis* (Cambridge University Press 2010) 212, according to whom the Treaty of Lisbon "extends the coverage of QMV to about twenty new cases, and contains about thirty new provisions which provide for QMV". The Treaty of Lisbon also introduced a new method for calculating QMV: ibid, at 213-225.

[64] ibid 213: according to Piris, in eighty cases unanimity remains required.

where unanimous decision-making in the Council (and the European Council) is the general rule (see Articles 24(1) and 31(1) TEU).

While this problématique has as such not been the focus of RECONNECT research, it is clear that it touches on important questions regarding the democratic functioning of the EU, as well as on the latter's ability to respond to the legitimate concerns of its citizens, especially in times of crisis. In the domain of EU external relations in particular, where the unity of EU action is of paramount importance in a world characterised by increased tensions and contestation of the rules-based international order, a flexibilisation of Council decision-making is highly needed. In September 2018, the Commission adopted a communication exploring avenues for more majority-based decision-making in CFSP.[65] It is worth quoting the Commission's arguments supporting QMV:

> *'The reason for replacing unanimity by qualified majority is simple, compelling and has always been the same. Member States have recognised that when a certain level of ambition is sought in particular policy area, there comes a moment when the unanimity rule slows down progress and in some cases prevents the EU from adjusting to changing realities. In this sense, every move towards qualified majority has been a major step forward for the EU. Based on a culture of compromise, qualified majority voting opens up more space for discussion and pragmatic outcomes that reflect the interests of all. Flexible, efficient and quick decision-making has thus allowed the Union to become a global reference and standard setter in policy areas such as environmental and consumer protection, data protection as well as free and fair trade.'*[66]

More recently, both the Juncker and Von der Leyen Commissions have called for extending the scope of QMV in CFSP.[67] For the reasons stated by the Commission in the aforementioned citation, and with a view to strengthening the EU's actorness both in its internal and external policies, RECONNECT recommends to launch a new discussion on reducing the instances of unanimous decision-making in the Council (and European Council). If need be, the introduction of QMV can be accompanied by a clause providing for a reference from the Council to the European Council in case of fundamental objections by a Member State; inspiration for such referral can be found in Articles 31(2) TEU, 48, second para., 82(3), 86(1), and 87(1) TFEU.

II.2.6.2. Unanimity in EU Treaty reform

Unanimity should not only be re-examined for Council decision-making when the latter acts as a legislator or policymaker in various EU areas of (internal or external) action. More fundamentally, RECONNECT believes it should also be discussed when it comes to the EU Treaty reform process itself.[68]

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[65] Commission, 'A stronger global actor: a more efficient decision-making for EU Common Foreign and Security Policy' (Communication to the European Council, the European Parliament and the Council) COM(2018) 647 final.
[66] ibid 2.
[67] See e.g. the Juncker Commission's call upon EU leaders to agree to extend the scope of QMV in CFSP on the basis of Article 31(3) TEU at the summit in Sibiu on 9 May 2019; the mission statement letter of President-elect von der Leyen to vice-president Josep Borrell of XX September 2019; and the state of the Union address of President von der Leyen of 16 September 2020, in which she urged EUMS to embrace QMV in external relations, "*at least on human rights and sanctions implementation.*"
[68] See *inter alia* Carlos Closa Montero, 'Ratification of the Constitution of the EU: A Minefield' (2004) 120/2004 ARI RIE; id, 'Constitution and Democracy in the Draft treaty Establishing a Constitution for Europe' (2005) 11(4) European Public Law 411-31; id, 'After Ireland: Referendum and Unanimity' (2008) 62/2008 ARI RIE; id, 'Moving Away from Unanimity' (2011) 2011/38 RECON Online Working Paper; id, 'Between a rock and a hard place: the future of EU treaty revisions' (2014) European Policy Analysis, 2; *Closa* (n 47); id, 'The transformation of macreoeconomics and fiscal governance in the EU' in Serge Champeau, Carlos Closa Montero, Daniel Innerarity, and Luis Miguel Poiares Pessoa Maduro (eds.), *The future of Europe: democracy, legitimacy and justice after the Euro crisis* (Rowman & Littlefield International 2015) 37-56.

The present report compiles not just policy recommendations, but also Treaty reform proposals that aim to contribute to strengthening the EU's fundamental values of democracy and rule of law, based on the past four years of RECONNECT research. The implementation of these proposals happens through the Treaty reform procedure as laid down in Article 48 TEU. For the reasons indicated below, RECONNECT suggests to launch a discussion about the role of the unanimity principle in this reform procedure.

In essence, the 2007 Treaty of Lisbon has been the last great reform of the EU Treaties. More than twelve years after its entry into force on 1 December 2009, evidence in this report demonstrates the necessity of Treaty changes and amendments. Especially the financial crisis and Eurozone sovereign debt crisis of a decade ago have required EU responses, for instance in the form of the TESM and the TSCG, which have meant a true constitutional transformation that still needs to be incorporated in the Treaties (see above, Section 2.4).

However, as stated in Article 48 TEU, treaty revision and domestic ratification require the unanimity of all EUMS. As the **number of veto actors and the importance of issues addressed have increased over the years, EU Treaty reform has become ever more complex and unlikely.**

From a theoretical and constitutional perspective, the **unanimity criterion** foreseen in Article 48 TEU has its ***raison d'être***. According to the classical distinction of Buchanan and Tullock[69], ordinary politics (typical of the legislative power) can be decided on the basis of majority as long as constitutional politics (i.e. the set of framework rules that define the limits of ordinary politics) are based on consensus. And consensus in that context meant unanimity. The practice of treaty drafting elevated unanimity to the key negotiation tool on sensitive domestic topics. Within the EU, the 1951 Treaty establishing the European Coal and Steel Community (ECSC) set the path followed in the years to come. Initially, the burden imposed by unanimity was not so great since only six countries formed the ECSC. The unanimity principle generated equality among all Member States, without considering size, population, or GDP, and it set out that the framework rules had to be set by consensus.

Nevertheless, Buchanan and Tullock themselves realised that unanimity might be **inefficient** and lead to deadlocks. Notwithstanding the five most recent rounds of successful Treaty reforms (the Single European Act, Maastricht, Amsterdam, Nice and Lisbon), there have been some undeniable failures: the Constitutional Treaty (2005) with negative referendums in France and the Netherlands, the European Defence Community (EDC) in the French Parliament (1954) and the negative referendums in Denmark on Maastricht (1992) and in Ireland on Nice (2000) and Lisbon (2008). In fact, with the enlargement of the EU, the ratification process' duration (as a proxy of complexity) has increased relative to the number of veto players: parliaments (up to 47 already), chambers, higher (Constitutional and Supreme) Courts, and voters (through referendums). Revision of the EU Treaties has become a real minefield: the possibility that a Member State might not ratify a treaty reform is high.

The unanimity principle may also run **against its own purpose**. It is not true that unanimity nowadays expresses equality among EUMS. In practice, it protects larger countries: for instance, it sufficed that only France, followed by the Netherlands, voted down the Constitutional Treaty in a referendum. In addition, the results of these intergovernmental negotiations are far from being the general framework rules that Buchanan and Tulloch had in mind: due to the unanimity requirement, the European primary rules are very detailed and specific, since each Member State tries to have its interests taken into account. Hence, the outcome is a large and rigid framework of 'constitutional' rules, that majorities find very difficult to modify.

Unanimity may be **undemocratic** as well. While unanimity provides legitimacy to the European integration process from the viewpoint of an individual country, at the same time, it can prevent a large

[69] James Buchanan and Gordon Tullock, *The Calculus of Consent: Logical Foundations of Constitutional Democracy* (University of Michigan Press 1962).

majority of Member States from reaching an agreement desired by them. For example, only 110,000 votes in the Irish referendum on the Treaty of Lisbon prevented its approval, and thereby decided the future of 500 million Europeans. Unanimity makes it possible that a domestic referendum determines the fate of the rest of European citizens.[70]

Buchanan and Tullock were aware of these negative aspects of unanimity and developed the concept of an optimal 'non-unanimity' rule. Unanimity must be 'a kind of aspirational rule which inspires operational rules', that is, **a majority as close to consensus as possible**. Indeed, the last constitutional developments (TESM and TSCG: see above, Section 2.4) were achieved via intergovernmental treaties under 'less' than unanimity, proving that the result may come very close to unanimity. In the case of the TESM, the ratification through Euro area Member States holding at least 90% of the fund capital, that is to say, the support of the four largest states (Germany, France, Italy and Spain), was indispensable. Eventually, after only eight months, the treaty was ratified by all Euro area Member States. In the case of the TSCG, the approval of 12 out of 17 Euro states was required. Finally, the TSCG was ratified by all 27 Member States, although its Title III (the Fiscal Compact) binds only 22 EUMS: the 19 Euro area Member States plus Bulgaria, Denmark and Romania.[71] Therefore, the outcomes were very close to unanimity and consensus, and without an externalisation effect. In addition, it avoided veto actors, and more than halved the external treaties ratification's duration compared to the Article 136 TFEU revision, which followed the procedures contained in Article 48 TEU.

The above makes clear that there are currently only two possible Treaty revision procedures: either adhering to the existing procedure of unanimity (Article 48 TEU) or bypassing the EU Treaties. The former provides legitimacy through unanimity, but it is unfeasible, rigid, inefficient and even undemocratic. The latter, acting outside the EU's formal structure (as in the case of TESM and TSCG) may lack democratic quality, accountability and transparency (as noted above, the TSCG itself mandates, in Article 16, the integration of this treaty within the EU Treaties).

For this reason, RECONNECT advises to launch a **discussion on reconsidering Article 48(5) TEU with regard to the problem of non-ratification of Treaty amendments by one or more Member States** when a great majority of Member States have proceeded with ratification. The current text of this provision states:

> *'If, two years after the signature of a treaty amending the Treaties, four fifths of the Member States have ratified it and one or more Member States have encountered difficulties in proceeding with ratification, the matter shall be referred to the European Council.'*

We believe this provision should either be complemented by a **European Council statement of principle** on how to proceed (reflecting the criterion mentioned hereafter), or, ideally, should be amended to introduce a **special majority mechanism** to allow the Treaty amendments to enter into force. Such mechanism could be inspired by the calculation method for qualified majority voting laid down in Article 16(4) TEU, albeit with higher thresholds: for instance, building on Article 48(5) TEU, one could require a majority of four fifths of the Member States and representing Member States comprising at least 90 % of the population of the Union.

[70] Unanimity can also produce the externalisation of the cost of decision. For example, the negative decision of one country affects other EUMS, as is shown by the example of the negative outcome of the Danish referendum on the Treaty of Maastricht Treaty in June 1992, which impacted on the value of other currencies (the peseta, sterling, the lira and the franc), but not on the Danish crown.

[71] See the overview at <https://www.consilium.europa.eu/en/documents-publications/treaties-agreements/agreement/?id=2012008> accessed 31 March 2022.

II.3. Democratic Safeguards: Monitoring and Enforcement

II.3.1 Establish an EU Democracy Framework

Democratic and rule of law backsliding are major concerns in the EU. In recent years there has been particular concern with rule of law backsliding in Hungary and Poland. The Article 7 procedures that are foreseen in the TEU have been complemented by a rule of law framework (see below, Chapter II.1). In 2017, the Commission initiated an Article 7(1) TEU procedure against Poland because of concerns about the rule of law. In 2018, the EP voted to initiate an Article 7(1) TEU procedure against Hungary on a broad list of concerns, including the functioning of the constitutional and electoral system, the independence of the judiciary, and the protection of fundamental rights. Both with regard to Hungary and Poland, the concerns affect many of the fundamental values that are listed in Article 2 TEU. However, the EU's current rule of law toolbox has its limits, and the underlying problems are as much political as legal in character.[72] Hence, if the concerns over fundamental values are to be resolved, it is unlikely to be done by legal means alone.

RECONNECT research points to **significant concerns regarding the value of democracy** that are partly independent from the rule of law concerns, while also reinforcing them. The democratic concerns specifically involve measures that national governments adopt to undermine the effectiveness of political opposition. Such measures typically involve reforms of electoral law (as flagged by the EP in the case of Hungary), the forced closure of media outlets, and the frustration of civil society mobilisation. Such measures help to lock in value violations in Member States and they cannot be addressed through EU rule of law measures alone.

The Union was never meant to include autocratic countries among the EUMS. When national governments violate the value of democracy, not only does it put in doubt their own legitimacy and their participation in the EU's institutions, it also affects the validity of the decisions taken by those institutions. A genuine commitment to democracy should be reflected also in an EU-wide commitment to fostering processes of contestation at both the European and the national level and the maintenance of civic spaces in which alternative visions of society can interact with each other.

In that spirit, RECONNECT proposes the establishment of an **EU Democracy Framework that offers a repertoire of measures complementary to the existing or proposed ones**[73] **in order to address democratic backsliding by EUMS.** To respond to national political decisions, these measures are more political in character. Recognising the political nature of these interactions also means that these measures rely less on a logic of conditionality or on sanctions. Instead, our proposal focuses on measures that directly or indirectly – through public shaming and public opinion – put pressure on the government involved and aim to rebalance the democratic playing field. These measures highlight the mutual concern that informs the high level of political interdependence between EUMS as well as the fact that Union membership is as much a matter of Member State governments as it is a relation with a Member State's people.

The EU Democracy Framework aims to ensure the fairness and openness of the democratic process in EUMS. As it goes beyond firm legislative competences of the Union in the current state of EU law, it may have to be developed mainly through **non-binding instruments of the Commission and the Council** (e.g. recommendations, Council conclusions). Ideally, however, such initiatives would be backed up by a Treaty provision that explicitly recognises that the EU and its Member States have a collective stake in,

[72] For the argument that the EU and the Commission have followed a too legalistic-technocratic assessment of compliance with rule of law principles rather than endorsing a broader view of Article 2 TEU that combines all of its values, see Jan Wouters, 'Revisiting Art. 2 TEU: A True Union of Values?' (2020) 5 European Papers 255.

[73] In particular in the framework of the Commission's European Democracy Action Plan: see <https://ec.europa.eu/commission/presscorner/detail/en/ip_20_2250> accessed 31 March 2022.

and commitment to, upholding and strengthening the quality of democracy in all EUMS and develop policies towards that aim.

The EU Democracy Framework is to consist of a series of instruments organised around **three pillars**. A **first pillar** is for the EUMS to demonstrate greater concern with the fairness and openness of the elections in each other's countries. There is a well-established practice of general election monitoring by the Organization for Security and Co-operation in Europe (OSCE) that is also applied to all EUMS. Importantly, the OSCE's method[74] does not merely concern the legal proceedings and the execution of the actual vote: it also looks at the conduct of the campaign, the media environment, and equitable media access. As part of the EU Democracy Framework, the Commission should follow each OSCE election report up with an opinion that it puts before the Council. In case there are substantive concerns, the opinion can be accompanied by a recommendation.

A **second pillar** of the EU Democracy Framework would consist of an EU fund that can be activated to support media outlets and civil society organisations that are essential for preserving democratic pluralism in EUMS but whose persistence is under threat for legal or financial reasons. In this way, the EU Democracy Framework would constitute an internal complement to the Global Europe Human Rights and Democracy programme of the EU (2021)[75], which also aims to support 'pro-democracy organisations and networks' as well as 'independent, pluralistic and quality media'. It would indeed be rather remarkable if what the EU is doing 'abroad' cannot be done internally.

A possible **third pillar** could be the Athens Commission on the Quality of Deliberation, as suggested below.

II.3.2. Establish an Athens Commission on the Quality of Political Discourse

While there are clear ways in which the EU can improve its guardianship of EU fundamental values within Member States through new EU measures, there are also valuable options outside direct EU decision-making. One such approach, suggested by RECONNECT, is the creation of an '**Athens Commission on the Quality of Political Discourse**' (Athens Commission).

The Athens Commission could be modelled on the existing Venice Commission, an expert body under the auspices of the Council of Europe that monitors and reports on the state of rule of law and democracy in all Member States of the Council of Europe. Still, RECONNECT suggests it to be established within the EU and not under the auspices of the Council of Europe. While fully subscribing to the fundamental importance of safeguarding human rights and the rule of law, RECONNECT research has documented the relative neglect of other components of liberal democracy that are under direct pressure from democratic backsliding in Central and Eastern European Member States. Most notably, RECONNECT research points to problems in the way in which politics are discussed in the public sphere.[76] Political opponents are sometimes depicted as enemies to be destroyed or criminals that need to be locked up, rather than as fellow countrymen who happen to have different points of view on important issues. All too often, political elites provide no clear reasons for why they advocate the policies that they advocate, and hence they fail to persuade the public of the merit of their actions. The deterioration in the quality of public discourse in Member States like Hungary and Poland, but also in

[74] OSCE, *Election Observation Handbook* (2010) 6th Edition. Warsaw: Organization for Security and Co-operation in Europe.

[75] Commission, 'Multi-Annual Indicative Programming for the NDICI-Global Europe Thematic Programme on Human Rights and Democracy 2021-2027' (2021) <https://ec.europa.eu/international-partnerships/system/files/mip-2021-c2021-9620-human-rights-democracy-annex_en.pdf> accessed 31 March 2022.

[76] Anna Gora and Pieter de Wilde,'The Essence of Democratic Backsliding in the European Union: Deliberation and Rule of Law' (2020) 29/3 Journal of European Public Policy 342-362.

Romania, outpaces the deterioration in rule of law. Still, this problem has largely been overlooked by the EU so far.

The proposed Athens Commission pays tribute to the polity that birthed democratic deliberation, in its ancient Agora. It underlines the importance that the ancient Greeks already ascribed to pointed, yet at least somewhat polite, argumentation as the soft but crucial bedrock of democratic culture. Staffed with a variety of experts from the social sciences, linguists and computer scientists, the Athens Commission should monitor the quality of political discourse in EUMS in real time through continuous web scraping of parliamentary, mass media and social media archives and websites and subsequent automated content analysis. The methods and tools for this exist. It would produce an index on the quality of political discourse in each EUMS on a daily basis.

Without high quality public deliberation, there is no consensus. Without it, minorities whose viewpoints are not turned into policy will feel unheard and excluded from political decision-making. Political elites and citizens alike will feel alienated and perhaps demonised. This erodes the willingness to share power, to compromise, to defer to the winners of elections and to accept a plurality of views within society. Once this bedrock has eroded, it becomes extremely difficult, if not impossible, to defend the formal institutions of democracy and rule of law, such as independent courts and free and fair elections.

The problem is that, while being equipped with tools aimed at safeguarding the rule of law, the EU currently only has tools directed at protecting formal institutions of democracy. What is needed is a toolbox for supporting the underlying democratic culture.

The quality of political discourse index to be produced by the Athens Commission would aim at attracting media attention and put pressure on Member State governments via the detour of public opinion. The power of such indexes has been illustrated during the COVID-19 pandemic. Infection and vaccination rates in different countries are eagerly picked up by mass media and opinion makers to either credit or shame their own governments, depending on how well they do in comparison to those of other countries. The pressure to perform well can be immediate and immense, as for example illustrated by the pressure that mediated low vaccination rates in the EU in comparison to the UK put on the Commission during the height of its row with the UK about the delivery of AstraZeneca vaccines in late 2020 and early 2021.

One can expect strong reactions and manipulation should the Athens Commission be created. Political actors will try to mask their language in ways that still demonise opponents but avoid triggering the algorithms of the Athens Commission. That is why a group of experts must likely continuously staff the Athens Commission, to be able to adapt its method of measuring the quality of political discourse. Complicated access to the platforms of social media companies will have to be negotiated, where privacy concerns will have to be weighed against the capacity to do comprehensive real-time monitoring. It should be noted that the establishment of such a Commission is not free of risks since it can possibly be abused by populist actors who could use this new Athens Commission as an opportunity to further pursue their Eurosceptic agenda.

II.4. Citizen's Participation: Institutionalise a European Citizens' Assembly

The Treaty of Lisbon identifies representative democracy explicitly as an essential dimension of the functioning of the Union (Article 10(1) TEU). Representative democracy is, however, facing challenges everywhere, such as widespread citizen distrust, the mainstreaming of anti-pluralist positions, or the capacity of political parties to represent citizens in a meaningful way. In view of these challenges, representative democracy needs to be re-invented, also in the face of its limits, in particular its emphasis on indirect, mediated forms of democratic politics.

Democratic governance in our times calls for additional attention to new forms of **deliberative democracy** and citizen's engagement. This is equally true at the level of the Union. While the Treaty of Lisbon tasks the EU's institutions with giving 'citizens and representative associations the opportunity to make known and publicly exchange their views in all areas of Union action' (Article 11(1) TEU), such opportunities remain only weakly developed in EU politics and decision-making processes. The disconnect between EU institutions, officials, and politicians, on the one hand, and citizens, on the other, remains deep. Efforts by the Commission to include citizens in consultation procedures and communication strategies remain strongly focused on civil society organisations (and representatives of business interests) rather than citizens, and prove in many ways ineffective in engaging citizens. One way to live up to the promise of citizens' engagement, going significantly beyond current forms of engagement, would be a **structural and regular deliberative forum with citizens as deliberators**.[77] This is also what is borne out by the unique experiment of the COFOE, whose innovative potential, in spite of the criticism, is hard to deny.[78]

Institutionalising a **European Citizens' Assembly**, with particular attention for the representation of young persons, would be an innovative step forward in the democratisation of the EU. It would constitute a decisive move towards realising a Europe closer to citizens, and it would highlight the innovativeness and uniqueness of the European integration project also in the democratic sphere. European citizens consistently demand more opportunities for being heard on the EU level and to have a say in the shaping of European policies. This has become clear, besides, in the citizens' recommendations adopted in the COFOE Citizens' Panel 2 on democracy and the rule of law.[79]

Admittedly, experiments with citizens' assemblies in representative democratic contexts are a relatively recent phenomenon, with no unequivocal success. Large-scale assemblies have inter alia been set up in Canada, the Netherlands, Iceland, France, Ireland and now in the form of the COFOE. These experiences have revealed both clear benefits as well as potential pitfalls. A European Citizens' Assembly, taking inspiration, for instance, from the Irish Convention and subsequent Assembly, or the Icelandic constitutional drafting process, may significantly increase identification with, and boost citizens' trust in, EU institutions. It would select citizens randomly, through a sortition process with special attention for young people, and allow the **selected citizens to engage in in-depth deliberation, assisted by experts, on specific policy issues and problems**. As Gráinne de Búrca argues, in specific cases (like for instance migration policy), citizens' assemblies might considerably increase the likelihood of finding a broadly based consensus, as even in the absence of a clear-cut policy outcome, distinctive 'participatory democratic and legitimacy rewards' might be gained. In addition, a carefully designed 'trans-EU citizens' forum' might be an effective antidote to illiberal and populist forces and their politics towards the EU.[80]

Practical experiments show that deliberative assemblies present significant challenges. The most noteworthy shortcomings stem from the fact that citizens' assemblies have been predominantly ad hoc attempts at citizens' participation, with often insufficient resources, and unclear objectives and policy implications. The citizens' panels of the COFOE also suffered from quite a number of these 'growing pains': an ad hoc set up, a lack of transparency, a short duration, an agenda overloaded with topics, a

[77] Graham Smith 'The European Citizens' Assembly' (2021) In Alberto Alemanno and James Organ, *Citizen Participation in Democratic Europe: What Next for the EU*, (ECPR Press 2021).

[78] Alberto Alemanno and Kalypso Nicolaïdis, 'Citizen Power Europe. The Making of a European Citizens' Assembly' (2022) In Alberto Alemanno and Pierre Sellal, 'The Groundwork of European Power' (2022) 3 Revue Européenne du Droit.

[79] European Citizens' Panels <https://futureu.europa.eu/assemblies/citizens-panels/f/299/?locale=en> accessed 31 March 2022.

[80] Gráinne De Burca 'Reinvigorating Democracy in the European Union: Lessons from Ireland's Citizens Assembly?' (2020) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3636244> accessed 31 March 2022; Gráinne de Burca, 'An EU citizens' assembly on refugee law and policy' (2020) 21(1) German Law Journal 23-28.

lack of balanced expert interventions, few constructive forms of interaction between experts, political representatives and citizens, and unsure outcomes.

Still, such problems can be remedied by turning a citizens' assembly into a **structural feature of the EU institutional landscape**. Such an institutionalised assembly might not require a Treaty change if it remains a largely consultative instrument. If however at least some obligation in terms of response and follow-up with regard to citizens' recommendations is to be foreseen, a Treaty change becomes indicated, most probably in the form of an **amendment to Article 11 TEU**. Further legal changes needed in the Treaties depend on the distinctive design of the assembly and the role it plays in the policy- and law-making and / or in the Treaty change process.

An important distinction to make is between an assembly that is part of the Treaty reform process, and one that is part of the EU's legislative process. There are several options for positioning the assembly within the EU's legislative framework.[81] A 'light' option would institutionalise an assembly that is an advisory body, to be part of the already existing consultation procedures of the Commission. This would be an option that is relatively easy to realise, but it would also have only very modest benefits in terms of political legitimation and increasing citizen trust, if at all. A more 'robust' option would be to make the assembly an intrinsic part of the legislative process, by ensuring that an opinion by an assembly on a specific legislative initiative constitutes an obligatory step in EU law-making. Still, much depends on the extent to which the opinion of the assembly is to be taken into account by the institutions. If it is as with the European Citizens' Initiative (ECI), the scope of citizen participation might remain limited and inconsequential. A third option is to tie the assembly directly to the ECI, allowing citizens to engage in setting the political agenda. This could also include proposals for Treaty reform. A final option might be a fully-fledged European Citizens' Assembly (ECA), to be realised as a new body on the EU level, hence changing the power balance of the current institutional triangle by adding a new, citizens-driven entity. In the latter case, and depending on the exact powers of such an ECA, the legitimating effects could be considerable.

III. Strengthening the Rule of Law

This chapter sums up the recommendations on strengthening the rule of law in the EU. Firstly, it explains how and why systemic and comprehensive monitoring of fundamental values can and should be introduced into the Treaties. Secondly, it makes concrete recommendations on the sanctioning regime of Article 7 TEU and regarding the various procedures before the CJEU in case of a violation of the EU's fundamental values, in particular the rule of law. The chapter ends with some additional proposals concerning bodies such as the European Anti-Fraud Office, the European Public Prosecutor's Office and the Authority for European Political Parties and European Political Foundations.

III.1. Systemic and Comprehensive Monitoring of EU Fundamental Values

RECONNECT research has borne out that the *sine qua non* of any legitimate EU response to rule of law decline or backsliding is a thorough monitoring mechanism (i) based on objective, pre-set criteria,

[81] Graham Smith 'The European Citizens' Assembly' (2021) In Alberto Alemanno and James Organ, *Citizen Participation in Democratic Europe: What Next for the EU* (ECPR Press 2021); Christoph Niessen, Min Reuchamps 'Designing a permanent deliberative citizens' assembly' (2019) 6 Centre for Deliberative Democracy and Global Governance Working Paper Series 1-19.

qualitative contextual analysis, and (ii) which should constitute a regular exercise, following the principle of equal treatment of EUMS.

Along these lines, in its Resolution adopted on 8 September 2015,[82] the EP invited the Commission to draft an internal strategy on the rule of law, which should be *'accompanied by a clear and detailed new mechanism, soundly based on international and European law and embracing all the values protected by Article 2 TEU, in order to ensure coherence with the Strategic Framework on Human Rights and Democracy already applied in EU external relations and render the European institutions and Member States accountable for their actions and omissions with regard to fundamental rights.'* [83] Having regard to this 2015 Resolution, the EP passed another Resolution in October 2016, accompanied by a thorough European added value assessment, calling upon the Commission to initiate legislation on a comprehensive **rule of law, democracy, and fundamental rights (DRF) scoreboard**.[84]

However, in its follow-up the Commission rejected the ideas and recommendations proposed by the EP[85] and came up with its own idea of rule of law monitoring instead. In 2019 it published its proposal to launch annual rule of law reports with respect to all EUMS. The first edition of the Commission's **Annual Rule of Law Report (ARoLR)** was published on 30 September 2020,[86] the second was published on 20 July 2021.[87]

As Van Ballegooij has indicated, four major differences distinguish the EP's proposal from that of the Commission: (i) the EP's plan was based on an inter-institutional agreement; (ii) it was broader in scope covering democracy, the rule of law and fundamental rights, not just rule of law matters; (iii) the EP plan would invite an expert panel to do the assessment, whereas the Commission wished to take up this task itself; (iv) the EP emphasised the need for a follow-up, whereas the Commission opted for more

[82] European Parliament Resolution of 8 September 2015 on the situation of fundamental rights in the European Union (2013-2014) (2014/2254(INI)) OJ C 316.

[83] ibid para 10.

[84] European Parliament resolution of 25 October 2016 with recommendations to the Commission on the establishment of an EU mechanism on democracy, the Rule of Law and fundamental rights (2015/2254(INL)), P8_TA-PROV(2016)0409; Wouter van Ballegooij, Tatjana Evas, 'An EU Mechanism on Democracy, the Rule of Law and Fundamental Rights', Interim European Added Value Assessment accompanying the Legislative initiative report (Rapporteur Sophie in 't Veld), (EPRS 2016), PE.579.328; Laurent Pech, Erik Wennerström, Vanessa Leigh, Agnieszka Markowska, Linda De Keyser, Ana Gómez Rojo and Hana Spanikova, 'Assessing the need and possibilities for the establishment of an EU scoreboard on democracy, the Rule of Law and fundamental rights' annex I (2016) ; Petra Bárd, Sergio Carrera, Elspeth Guild and Dimitry Kochenov, with a thematic contribution by Marneffe, 'Assessing the need and possibilities for the establishment of an EU Scoreboard on democracy, the Rule of Law and fundamental rights' annex II (2016) <https://www.europarl.europa.eu/EPRS/EPRS_STUD_579328_AnnexII_CEPS_EU_Scoreboard_12April.pdf> accessed 31 March 2022.

[85] Commission, 'Follow up to the European Parliament resolution on 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' SP(2017)16.

[86] Commission, 'The Rule of Law situation in the European Union' (Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions) COM/2020/580 final. For the individual country chapters see <https://ec.europa.eu/info/publications/2020-rule-law-report-communication-and-country-chapters_en> accessed 31 March 2022.

[87] Commission, 'The Rule of Law situation in the European Union' (Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions) COM/2021/700 final. For the individual country chapters see <https://ec.europa.eu/info/policies/justice-and-fundamental-rights/upholding-rule-law/rule-law/rule-law-mechanism/2021-rule-law-report/2021-rule-law-report-communication-and-country-chapters_en> accessed 31 March 2022.

dialogue, i.e. inter-parliamentary debates and discussions within the Council.[88] Making use of its right to propose an interinstitutional agreement, the EP adopted a resolution on the mechanism in October 2020.[89]

Whether in the form of a DRF scoreboard or in the form of an Annual Report, by the Commission, the EU's Agency for Fundamental Rights (see below, Section 2.1), or another body, RECONNECT **deems advisable the insertion of an explicit legal basis for a regular rule of law – and more generally, fundamental values – monitoring into the Treaties.** This recommendation is made in light of a persisting disagreement between EU institutions: whereas the Council Legal Service – without much explanation – contends that any rule of law mechanism outside Article 7 TEU would be *ultra vires*[90], other EU institutions disagree with this analysis. While no Treaty change is necessary *per se* for the establishment of a monitoring mechanism, such a change would put an end to the current inter-institutional discussion.

The question is what consequences should be attached to negative findings of a rule of law or values monitoring. It does not only raise the question of **sanctioning procedures** (see below), but also a wider point about the prerequisites for the functioning of essential parts of EU law, in particular the internal market and the area of freedom, security and justice. These vital parts of the EU economic, legal and/or political order are based on the presumption that all EUMS adhere to the rule of law and the other fundamental values of the EU, including fundamental rights. Most prominently, the principle of **mutual recognition** is at risk of working inadequately, or to simply become inoperative, if its foundations in the legal orders of the EU and the EUMS are not based on solid grounds. For example, the rebuttable presumption of 'mutual trust' set by the CJEU,[91] arguably the *conditio sine qua non* of the whole system, requires that independent national judicial authorities be mandated to constantly verify the conditions of this presumption. Several pieces of EU legislation in the criminal justice and asylum law area have been adopted on the basis of mutual trust, without leeway to opt out if doubts arise concerning the respect for EU fundamental values by the Member State concerned. However, it has become clear in light of recent developments that mutual trust may be unjustified: certain Member States regularly violate the rule of law principle, engage in systemic human rights violations and jeopardise judicial independence.[92]

For this reason, RECONNECT suggests that in the EU's area of freedom, security and justice the concept of **mutual trust** and the **automatic mutual recognition of judgments should be replaced by a system based**

[88] Wouter van Ballegooij, 'European Added Value Assessment. European added value of an EU mechanism on democracy, the Rule of Law and fundamental rights: Preliminary assessment' (2020) EPRS PE 642.831 <https://www.europarl.europa.eu/RegData/etudes/BRIE/2020/642831/EPRS_BRI(2020)642831_EN.pdf> accessed 31 March 2022; Wouter van Ballegooij, 'Addressing violations of democracy, the Rule of Law and fundamental rights' (2020) 5 EPRS Ideas PE 652.070 <https://www.europarl.europa.eu/RegData/etudes/BRIE/2020/652070/EPRS_BRI(2020)652070_EN.pdf> accessed 31 March 2022.

[89] European Parliament resolution of 7 October 2020 on the establishment of an EU Mechanism on Democracy, the Rule of Law and Fundamental Rights (2020/2072(INI)).

[90] See the Council Legal Service's opinion analysing the Commission's 2014 Rule of Law Framework. Council of the European Union, 'Opinion of the Legal Service' 10296/14. For a critical analysis, see Dimitry Kochenov and Laurent Pech, 'Monitoring and Enforcement of the Rule of Law in the EU: Rhetoric and Reality' (2015) 11 European Constitutional Law Review 512-540.

[91] C-411/10 *N.S. v Secretary of State for Home Department* (2010) ECLI:EU:C:2011:865; and C-493/10, *M.E. v Refugee Applications Commissioner* (2011) ECLI:EU:C:2011:865.

[92] Petra Bárd, 'Saving EU Criminal Justice Proposal for EU-wide supervision of the Rule of Law and fundamental rights' (2018) no 2018-1 CEPS <https://www.ceps.eu/ceps-publications/saving-eu-criminal-justice-proposal-eu-wide-supervision-rule-law-and-fundamental-rights/> accessed 31 March 2022. See also the recent judgements of the CJEU concerning asylum law C-821/19, *Commission v. Hungary*, ECLI:EU:C:2021:930 and C-808/18, *Commission v. Hungary*, ECLI:EU:C:2020:1029.

on 'earned trust'. We therefore recommend putting in place measures for an objective and impartial evaluation of the implementation of Union policies in the area of freedom, security and justice on the basis of Article 70 TFEU, in order to facilitate the full application of the principle of mutual recognition. The introduction of a mechanism dedicated to regularly check EUMS' compliance with the values underlying mutual trust could serve as the basis for determining when criminal cooperation on the grounds of mutual recognition-based law is to be suspended. This would lift the burden, currently on the shoulders of national courts, to determine on a case-by-case basis when to comply with mutual recognition-based law and would allow instead the suspension of criminal cooperation and recognition of judgments, if a particular Member State fails to respect the EU's fundamental values. This mechanism could also be used to indicate whether the detected problems have been remedied and mutual trust can be reinstated. Article 70 TFEU could be the basis of a Council-driven evaluation procedure carried out together with the Commission. As suggested by Mitsilegas, Carrera and Eisele, the proposed mechanism could take as a model the Schengen evaluation system adopted in October 2013, making use of Article 70 TFEU for the first time.[93]

Mutual trust could also be established by way of an all-encompassing monitoring mechanism for the rule of law, democracy and fundamental rights, including procedural guarantees, victims' rights and detention conditions, as suggested earlier, when discussing the ARoLR[94] and the DRF mechanism.[95]

III.2. Sanctions Regime and Legal Consequences of Rule of Law Backsliding

This subchapter is structured as follows: it first proposes amendments to already existing rule of law mechanisms, notably the procedures under Article 7 TEU and the procedures before the Court of Justice (2.1. and 2.2., respectively), then turns to potential changes related to the principle of judicial independence (2.3. and 2.4.), and suggests the introduction of two new mechanisms (2.5. and 2.6.).

III.2.1. Procedures under Article 7 TEU

Article 7 TEU constitutes an exceptional tool of the EU specifically devoted to handling systemic threats to, or systemic violations of, the Union's fundamental values in the EUMS. However, in light of the lack of progress of the proceedings initiated under Article 7(1) TEU by the Commission in 2017 against Poland[96] and by the EP in 2018 against Hungary,[97] this mechanism, primarily due to the Council's

[93] Valsamis Mitsilegas, Sergio Carrera and Katharina Eisele, 'The End of the Transitional Period for Police and Criminal Justice Measures Adopted before the Lisbon treaty: Who monitors trust in the European Criminal Justice area?' (2014) 74 CEPS Paper in Liberty and Security in Europe 3 and 34 <https://www.ceps.eu/ceps-publications/end-transitional-period-police-and-criminal-justice-measures-adopted-lisbon- treaty-who/> accessed 31 March 2022.

[94] For further discussion of this topic see Laurent Pech and Dimitry Kochenov, 'Strengthening the Rule of Law Within the European Union: Diagnoses, Recommendations, and What to Avoid, RECONNECT Policy Brief' (2019) 8–9 <https://reconnect-europe.eu/wp-content/uploads/2019/07/RECONNECT-policy-brief-Pech-Kochenov-2019June-publish.pdf> accessed 31 March 2022.

[95] European Parliament resolution of 25 October 2016 with recommendations to the Commission on the establishment of an EU mechanism on democracy, the Rule of Law and fundamental rights (2015/2254(INL)).

[96] Commission, Proposal for a Council decision on the determination of a clear risk of a serious breach by the Republic of Poland of the Rule of Law (Communication) COM(2017) 835 final.

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

lacklustre use of it, has proved inadequate to halt, let alone reverse the serious and continuing rule of law backsliding in these Member States. The shortcomings stem partly from political practice and can be remedied by 'simply' changing the attitude of EUMS and how EU actors operate this tool.[98]

RECONNECT also draws attention to the continued failure of the institutions to engage the **EU Agency on Fundamental Rights** (FRA) within the Article 7 TEU framework. The FRA's task is to 'provide the relevant institutions, bodies, offices and agencies of the [EU] and its Member States when implementing [EU] law with assistance and expertise relating to fundamental rights in order to support them when they take measures or formulate courses of action within their respective spheres of competence to fully respect fundamental rights'.[99] The FRA may carry out its tasks at the request of EU institutions or on its own initiative, but in the latter case only within its five-year Multi-annual Framework, which has so far excluded references to the rule of law. It is evident that far more could be gained by benefiting from the FRA's expertise and support in this area. [100] While the limitations of the FRA's mandate with respect to police and judicial cooperation have been repeatedly debated in the Council[101], it remains difficult to understand why the FRA is not being mandated to monitor compliance with the rule of law within the Union and assist EU institutions in detecting the emergence of systemic threats or breaches in this area.[102] The legal basis of the Agency (now Article 352 TFEU) should not be an excuse not to use its expertise where it matters most.

RECONNECT has already offered many **policy recommendations to enhance the efficiency and the effectiveness of the proceedings** that do not need to be repeated here.[103] Instead, in the following paragraphs we will focus exclusively on those problems that need to be, or should preferably be, corrected by amending the relevant provisions of the EU Treaties.[104]

III.2.1.1. Scope of Application of Article 7 Procedures

First of all, it would be useful to **clarify the scope of application of the Article 7(1) and Article 7(2) procedures.** In its current form Article 7 TEU consists of two procedures: a preventive one (Article 7(1): determining a clear risk of breach) which serves as a platform for dialogue and early warning, and a corrective one (Article 7(2): determining a serious and persistent breach), with Article 7(3) devoted to

[98] Barbara Grabowska-Moroz, 'Understanding the Best Practices in the Area of the Rule of Law' (2020) 42-44 <https://reconnect-europe.eu/wp-content/uploads/2020/05/D8.1.pdf> accessed 31 March 2022.

[99] Council Regulation (EC) 168/2007 establishing a European Union Agency for Fundamental Rights, Article 2 (replacement of "Community" by "EU" by the authors).

[100] Laurent Pech and Joelle Grogan, 'Upholding the rule of law in the EU. What role for FRA?' in Rosemary Byrne and Han Entzinger (eds.) *Human Rights Law and Evidence-Based Policy. The Impact of the EU Fundamental Rights Agency* (Routledge 2019).

[101] See in this respect the proposal of the Commission of 6 June 2020 for amending Council Regulation (EC) 168/2007, COM(2020) 225 final.

[102] See also the EP Resolution of 25 October 2016 with recommendations to the Commission on the establishment of an EU mechanism on democracy, the Rule of Law and fundamental rights, *supra* 74; Jan Wouters and Michal Ovádek, 'Exploring the Political Role of FRA: Mandate, Resources and Opportunities', in Rosalyn Byrne and Han Entzinger (eds.), *Human Rights Law and Evidence-Based Policy: The Impact of the EU's Fundamental Rights Agency* (Routledge 2019) 82-102.

[103] Laurent Pech and Dimitry Kochenov 'Strengthening the Rule of Law Within the European Union: Diagnoses, Recommendations, and What to Avoid, RECONNECT Policy Brief' (2019) <https://reconnect-europe.eu/wp-content/uploads/2019/07/RECONNECT-policy-brief-Pech-Kochenov-2019June-publish.pdf> accessed 31 March 2022.

[104] Please note that the comprehensive reform of the Article 7 procedure would also require the amendment of the Council's rules of procedure. See Laurent Pech, 'Article 7 TEU: From 'Nuclear Option' to 'Sisyphean Procedure'?' in Uladzislau Belavusau and Aleksandra Gliszczynska-Grabias (eds.) *Constitutionalism under Stress* (Oxford University Press 2020).

sanctions to follow up on Article 7(2). The preventive arm of Article 7 TEU was introduced by the Treaty of Nice as a response to the so-called 'Haider affair'. As a reaction to the far-right Freedom Party's joining the Austrian governing coalition after the 1999 elections, the then EUMS adopted coordinated bilateral sanctions against Austria instead of activating the corrective arm of Article 7 (the only procedure existing at the time), which had been introduced by the Treaty of Amsterdam. The handling of the Austrian case had ambiguous consequences, and one can argue that this experience got 'deeply impressed into the consciousness of EU officials as a negative model by the time the Hungarian government started dismantling its constitutional order after 2010',[105] even though the preventive arm of Article 7 already existed at that moment and the conditions of its application were interpreted by the Commission.[106]

The failure to launch Article 7 proceedings against Hungary and Poland in due time was partially the result of political considerations. However, the Treaty article is not flawless either. Firstly, the ambiguity of the provisions has allowed political actors to exercise a great degree of discretion when activating Article 7. For example, it was rather surprising that the Commission launched Article 7(1) proceedings against Poland in 2017 but not against Hungary, even though the Hungarian government already had a much worse track record of rule of law violations.[107] Also, based on the vast amount of evidence showing a persistent and serious infringement of the rule of law in Hungary and Poland[108], it is puzzling that the Council has been investigating for many years whether there is a clear *risk* of a breach of EU fundamental values. While this room of manoeuvre is to a great extent the result of the unwillingness to trigger Article 7 TEU, it can be argued that it partially results from the lack of a clear definition of what constitutes 'a clear risk of a serious breach' and 'a serious and persistent breach' of EU fundamental values.[109]

For the above reasons, RECONNECT recommends to clarify what is understood by 'a clear risk of a serious breach' and 'a serious and persistent breach', for instance through a Protocol or a Declaration attached to the TEU. Some of us take the view that it would also be useful to stipulate the mandatory or automatic initiation of Article 7 proceedings in case a clear risk of a serious breach of EU fundamental values is detected either in the Commission's ARoLR or the EP's DRF mechanisms mentioned above.[110]

It would also be good to clarify that the activation of Article 7(1) does not depend on any kind of preliminary proceedings (e.g. the Commission's Rule of Law Framework, which was triggered in the case of Poland). In a similar vein, it should be stated unequivocally that the Article 7(1) procedure is not

[105] Kim Lane Scheppele and Laurent Pech, 'Didn't the EU Learn That These Rule-of-Law Interventions Don't Work?', (*Verfassungsblog*, 9 March 2018) <https://verfassungsblog.de/didnt-the-eu-learn-that-these-rule-of-law-interventions-dont-work/> accessed 31 March 2022.

[106] Commission, 'Article 7 of the Treaty on European Union - Respect for and promotion of the values on which the Union is based' (Communication from the Commission to the Council and the European Parliament) COM(2003) 0606 final.

[107] Dimitry Kochenov, 'Article 7: A Commentary on a Much Talked-About 'Dead' Provision' in Armin von Bogdandy,Piotr Bogdanowicz, Iris Canor, Christoph Grabenwarter, Maciej Taborowski andMatthias Schmidt (eds.) *Defending Checks and Balances in EU member states* (Springer 2021); Carlos Closa Montero, 'Institutional logics and the EU's limited sanctioning capacity under Article 7 TEU' (2020) International Political Science Review 1-15.

[108] Petra Bárd and Barbara Grabowska-Moroz (eds.) 'The strategies and mechanisms used by national authorities to systematically undermine the Rule of Law and possible EU responses' (2020) 21–36, <https://reconnect-europe.eu/wp-content/uploads/2021/01/D8.2.pdf> accessed 31 March 2022.

[109] The key terms of Article 7 were interpreted by the Commission already in 2003, but this does not make a Treaty change less indicated. See Commission, 'Article 7 of the Treaty on European Union - Respect for and promotion of the values on which the Union is based' (Communication from the Commission to the Council and the European Parliament) COM(2003) 0606 final.

[110] Otherwise we endorse the opinion of the EP on the complementarity of the DRF mechanism, the ARoLR and the Article 7 proceedings. See European Parliament resolution of 24 June 2021 on the Commission's 2020 Rule of Law Report (2021/2025(INI)), especially para. 54-55. See also Laurent Pech and Petra Bárd 'The Commission's Rule of Law Report and the EU Monitoring and Enforcement of Article 2 TEU Values'(2022) European Parliament Policy Department for Citizens' Rights and Constitutional Affairs, Directorate-General for Internal Policies PE 727.551.

necessarily the antechamber of triggering Article 7(2). Instead, institutions should move directly to the latter provision when a Member State's serious and persistent breach of the fundamental values referred to in Article 2 TEU is detected.

III.2.1.2. Participation of the Activating Authority

Secondly, it is recommended to assure **the right of the EP to participate in the Council's Article 7(1) hearings, at the very least when it is the activating authority.** When the Council adopted the first set of procedural rules governing Article 7(1) TEU hearings in July 2019, it unilaterally decided to make the Commission the proxy for the EP and thus to exclude the latter from the proceedings. As this differential treatment of the Commission and the EP as activating bodies under Article 7(1) does not find any basis in the Treaties and seems to go against the principle of institutional balance[111], we recommend inserting a basic procedural principle in Article 7 stipulating the involvement of the activating authority in Council discussions and formal hearings; more generally, it seems appropriate to always enable the EP to participate in such hearings.[112]

III.2.1.3. Voting Rules

Thirdly, **the rules of voting in the Council should be amended to enhance the political feasibility of the process.** Voting rules in the Council, especially the unanimity requirement of Article 7(2) for determining the existence of a serious and persistent breach of EU fundamental values, a necessary condition before the application of any sanctions, pose an insurmountable obstacle, depriving this provision of any dissuasive effect. Unanimity not only implies the possibility of veto, hence making Article 7 impossible to use when rule of law problems are present in more than one Member State – as is the case today[113] – but it also dissuades the Commission from activating the procedure due to its extremely low likelihood of success.[114] **Replacing the unanimity criterion of Article 7(2) with a supermajority of four-fifths** 'would then make Article 7 easier to use in practice'[115] – or at least it may increase its dissuasive effect –, especially in cases when rule of law deficiencies are present in several Member States.

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[111] Laurent Pech, Dimitry Kochenov and Sébastien Platon 'The European Parliament Sidelined. On the Council's distorted reading of Article 7(1) TEU' (*Verfassungsblog*, 8 December 2019) <https://verfassungsblog.de/the-european-parliament-sidelined/> accessed 31 March 2022.

[112] Laurent Pech and Dimitry Kochenov 'Strengthening the Rule of Law Within the European Union: Diagnoses, Recommendations, and What to Avoid' (2019) 7 <https://reconnect-europe.eu/wp-content/uploads/2019/07/RECONNECT-policy-brief-Pech-Kochenov-2019June-publish.pdf> accessed 31 March 2022.

[113] Kim Lane Scheppele 'Can Poland be Sanctioned by the EU? Not Unless Hungary is Sanctioned Too' (*Verfassungsblog*, 2016) <https://verfassungsblog.de/can-poland-be-sanctioned-by-the-eu-not-unless-hungary-is-sanctioned-too/> accessed 31 March 2022; Dimitry Kochenov, 'Article 7: A Commentary on a Much Talked-About 'Dead' Provision' in Armin von Bogdand, Piotr Bogdanowicz, Iris Canor, Chirstoph Grabenwarter, Maciej Taborowski and Matthias Schmidt (eds.) *Defending Checks and Balances in EU member states* (Springer 2021).

[114] Carlos Closa Montero 'The politics of guarding the Treaties: Commission scrutiny of Rule of Law compliance' (2019) 26(5) Journal of European Public Policypp. 696-716.

[115] Bojan Bugarič, 'Protecting Democracy inside the EU: On Article 7 TEU and the Hungarian Turn to Authoritarianism' in Carlos Closa Montero and Dimitry Kochenov (eds.) *Reinforcing Rule of Law Oversight in the European Union* (Cambridge University Press 2016). For the calculation of the qualified majority requirement see Dimitry Kochenov, 'Article 7: A Commentary on a Much Talked-About 'Dead' Provision' in: Armin von Bogdandy, Piotr Bogdanowicz, Iris Canor, Christoph Grabenwarter, Maciej Taborowski and Matthias Schmidt (eds.) *Defending Checks and Balances in EU member states* (Springer 2021) 143.

Article 354 TFEU clearly states that the purpose of Article 7 TEU is that the Member State in question shall not be counted in the calculation of the necessary majority. However, the course of action if Article 7(1) or 7(2)(3) proceedings are initiated against multiple Member States simultaneously is not regulated unequivocally. The Member States concerned might protect each other by using their veto rights in a procedure launched against their ally. In fact, the Hungarian government and the Polish government have already vowed to shield each other from sanctions.[116] This is why RECONNECT suggests, in order to guarantee the *effet utile* of Article 7, that a reform of this provision should at least introduce an **automatic exclusion of a Member State already subjected to Article 7(1)** – or any other type of Article 7 procedure – from another Article 7 procedure involving a different Member State.[117] Another solution would be the initiation of Article 7 proceedings against these Member States in one bundle, so that both or all of them are excluded from voting.

III.2.1.4. Sanctions

Finally, the Treaty provision on sanctions pose several problems. Firstly, Article 7(3) TEU provides that where a determination under Article 7(2) has been made about the existence of a serious and persistent breach, the Council 'may decide to suspend certain of the rights deriving from the application of the Treaties to the Member State in question'. This paragraph mentions as an example only the suspension of the voting rights of the representative of the government of that Member State in the Council. The open-ended nature of this provision is problematic, because it gives almost unlimited discretionary power to the Council, which may lead to an unreasonably weak or, on the contrary, an irrationally strong outcome. A certain degree of precision is needed to prevent arbitrariness. Therefore, it would be desirable to **expand the list of possible sanctions** – such as the suspension of certain rights or the potential expulsion of the Member State(s) concerned – and to offer some guidance for the differentiated application of the legal consequences based on the gravity of the breach detected in the Member State in question.

Secondly, the potential use of other EU policy measures, or instruments like sanctions, raises an additional problem, namely that it would be contrary to their original purpose. Such measures and instruments – e.g., adopted for the establishment of the single market based on the free movement of goods, persons, services and capital – were not designed to serve a retributive function. Therefore, it is very uncertain whether policy measures and instruments can at all be used within the framework of actions under Article 7(2). Their application as sanctions would have a negative impact not only on the targeted Member State, but potentially on the whole EU.

Thirdly, in light of the seriousness of the rule of law crisis and democratic backsliding in some Member States, the EU may need stronger instruments not only for sanctioning and enforcement, but also for protecting itself from implosion. Hence, RECONNECT suggests to reflect on the possible introduction of a **new procedure that allows for the expulsion of a Member State** as a mechanism of last resort, as has been already proposed by some authors.[118] As the EU Treaties are currently silent on this option, Treaty

[116] Andrew Rettman, 'Poland to veto EU sanctions on Hungary' (*EUobserver*, 13 September 2018) <https://euobserver.com/justice/142825> accessed 31 March 2022.

[117] Kim Lane Scheppele 'Can Poland be Sanctioned by the EU? Not Unless Hungary is Sanctioned Too' (*Verfassungsblog*, 2016), <https://verfassungsblog.de/can-poland-be-sanctioned-by-the-eu-not-unless-hungary-is-sanctioned-too/> accessed 31 March 2022.

[118] Jan-Werner Müller, 'Safeguarding Democracy Inside the EU: Brussels and the Future of Liberal Order' (2013) Transatlantic Academy Paper Series No. 3; Carlos Closa Montero and Dimitry Kochenov, 'Reinforcement of the Rule of Law Oversight in the European Union: Key Options' in Werner Schroeder (ed.) *Strengthening the Rule of Law in Europe: From Common Concept to Mechanisms of Implementation* (Hart Publishing 2016); Bojan Bugarič, 'Protecting Democracy inside the EU: On Article 7 TEU and the Hungarian Turn to Authoritarianism' in Carlos Closa Montero and Dimitry Kochenov (eds.) *Reinforcing Rule of Law Oversight in the European Union* (Cambridge

reform is unavoidable should this path be considered a fruitful one.[119] In truth, this is not such a radical proposal: other international organisations foresee it as well, such as, for example, the Statute of the Council of Europe, which in its Article 8 provides for the termination of membership of any member that violates its values.[120] The introduction of such a provision may not only help to solve the rule of law and democratic backsliding crises, but also to reinforce the constitutional and supranational nature of the EU. Firstly, because although the activation of this instrument would probably face the same difficulties as Article 7,[121] the use of this provision may not be its main objective. Instead, the expulsion clause might provide the Union with a new 'deterrent mechanism' that dissuades Member States from refusing to comply with the Union's fundamental values. Secondly, it may help to better define the boundaries of membership: there is no place for illiberal regimes within the Union.[122]

To be clear, we do not recommend a transfer of the Article 8 procedure of the Council of Europe to the EU Treaties without any alterations. Any possible expulsion mechanism must take into consideration the specificities of the EU and of its *sui generis* legal order. Most importantly, it needs to be emphasised that this sanction could only be used an *ultima ratio* when there seems to be no other solution to force a Member State to comply with the Union's fundamental values. Procedural safeguards will need to be included. It should also be stressed that the protection of the rights and interests of EU citizens living in the Member State(s) concerned (who may be taken 'hostages' by the respective national government) must enjoy priority.

Lastly, in addition to the suspension of certain rights and the potential expulsion of the Member State(s) concerned, it would be advisable to create an explicit legal basis in the Treaties for the **application of other legal consequences** aimed not primarily at the sanctioning of the Member State concerned, but at the preservation of the good functioning of the EU, which may be disrupted as a result of the legal and political measures put in place by the said Member State. For example, for the sake of preserving the integrity of the Union's legal order, the application of the principle of mutual recognition based on mutual trust should be suspended with regard to the Member State in which a clear risk of a serious breach, or an actual serious and persistent breach, of EU fundamental values is detected in the ARoLR or the DRF mechanism.

University Press 2016); Carlos Closa Montero, 'Paradoxes and Dilemmas in Compliance and Enforcement' (*Verfassungsblog*, 2020) <https://verfassungsblog.de/paradoxes-and-dilemmas-in-compliance-and-enforcement/> accessed 31 March 2022.

[119] Tom Theuns, 'The Need for an EU Expulsion Mechanism: Democratic Backsliding and the Failure of Article 7' (2022) Res Publica < https://link.springer.com/article/10.1007/s11158-021-09537-w> accessed 31 March 2022.

[120] *"Any member of the Council of Europe which has seriously violated Article 3 may be suspended from its rights of representation and requested by the Committee of Ministers to withdraw under Article 7. If such member does not comply with this request, the Committee may decide that it has ceased to be a member of the Council as from such date as the Committee may determine."* On 16 March 2022 the Committee of Ministers unanimously decided to expel the Russian Federation from the Council of Europe.

[121] It should be noted, though, that after the 1967 military coup, Greece withdrew from the Council of Europe on the basis of Article 8 of the Statute of the Council of Europe. About the difficulties and dilemmas of the application of this provision, see Kanstantsin Dzehtsiarou and Donal K. Coffey, 'Suspension and expulsion of members of the Council of Europe. Difficult decisions in troubled times' (2019) 68(2) International & Comparative Law Quarterly 443-476.

[122] Carlos Closa Montero, 'Reinforcing EU Monitoring of the Rule of Law: Normative Arguments, Institutional Proposal and the Procedural Limitations' in Carlos Closa Montero and D. Kochenov (eds.) *Reinforcing Rule of Law Oversight in the European Union* (Cambridge University Press 2016)

III.2.2. Procedures before the Court of Justice

Even though originally the mechanism of infringement procedures laid down in Articles 258, 259 and 260 TFEU was not intended to serve specifically the protection of the rule of law, it currently constitutes a very important tool for the Commission to defend the Union's fundamental values. Indeed, the last few years have shown that, in practice, infringement procedures have yielded much more positive results than other rule of law mechanisms, such as the Article 7(1) procedure. Still, the use of this tool could be improved.[123] Rather than suggesting specific Treaty changes in this respect, RECONNECT suggests that the Commission – as it has done in many other areas of EU law[124] – adopts a **notice about the various procedures before the CJEU and their utility for the protection of the rule of law**, thereby taking stock of the progressively developed case-law of the latter.

A first problem to be addressed requires some soul-searching by the Commission itself. In the past, the Commission often failed to frame a rule of law issue as such and instead focused in its infringement cases on the violation of specific EU legislation and fundamental rights provisions.[125] It thereby not only missed the chance to send a clear warning to those governments who violate the rule of law; it also made it difficult to find an adequate remedy to the problem. A notorious example of such a misframing was the forced retirement of judges put in place by the Hungarian government. The Commission attacked this measure as a workplace discrimination, allowing the Fidesz ruling party to get rid of the most senior, experienced and independent judges despite the judgment of the CJEU finding a breach of EU law.[126] Building on the case-law of the CJEU, it could be clearly stated in the notice that **rule of law violations can be litigated on the combined basis of Articles 2, 4(3) and 19(1) TEU** even without any additional infringement of EU secondary law or fundamental rights provisions.[127]

In the notice, the Commission could also elaborate on the **procedural dimension of rule of law infringement procedures**. Member States dismantling the rule of law capitalise on the slowness of these procedures because it allows them to complete their plans and make them irreversible before the delivery of the CJEU judgment. This is why accelerated infringement actions should be the default rule when a Member State violates the Union's fundamental values. This means, among other things, that both the Commission and the CJEU should be bound to respect reasonably tight deadlines. In addition, applications for interim measures should be systematically considered by the Commission.[128] The procedure could be further improved by presenting alleged rule of law infringement cases as a **'package'** to make it clear to the CJEU that fundamental values are being persistently and seriously violated in a particular Member State. An even more ambitious suggestion is for the Commission to consider

[123] For a detailed analysis of the current problems and their solution without any legislative amendments, see Laurent Pech, 'Written submission in response to the Rule of Law call by the Joint Committee on European Union Affairs of the Houses of the Oireachtas' (2022) <Policy-brief-LP-written-submission-in-response-to-the-call-22JAN21_update.pdf (reconnect-europe.eu)> Accessed 31 March 2022.

[124] See e.g. Commission Notice on the notion of State aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union (2016) OJ C262.

[125] Petra Bárd and Anna Sledzinka-Simon 'On the principle of irremovability of judges beyond age discrimination: Commission v. Poland' (2020) 57:5 Common Market Law Review 1555-1584.

[126], C-286/12, *Commission v. Hungary* ECLI:EU:C:2012:687.

[127] Cf. Laurent Pech and Dimitry Kochenov,'Strengthening the Rule of Law Within the European Union: Diagnoses, Recommendations, and What to Avoid' (2019) 5 <https://reconnect-europe.eu/wp-content/uploads/2019/07/RECONNECT-policy-brief-Pech-Kochenov-2019June-publish.pdf> accessed 31 March 2022.

[128] Guidance for this can be taken from the position in case C-441/17, *Commission* v *Poland Białowieża Forest* ECLI:EU:C:2018:255.

launching **'systemic infringement' actions**[129] pointing to a pattern of violations that adds up to more than the sum of the parts based on Articles 2, 4(3) and 19(1) TEU (in combination with other EU legal provisions if necessary), when the deliberate systemic violation of EU fundamental values by a Member State is detected. If the CJEU finds a violation, the Commission should closely scrutinise and carefully assess whether the Member State in question took the necessary measures to comply with the judgment; if not, it should bring the matter again before the CJEU, specifying the amount of the lump sum or penalty payment to be paid by the Member State. The notice could indicate as a matter of principle that, due to their importance, rule of law infringement cases enjoy preferential treatment, also in terms of **scrutinising the follow-up** of earlier judgments.

Not only the Commission, but also Member States can stand up for the enforcement of the respect of the Union's fundamental values. They can do so either by intervening in rule of law infringement procedures on the side of the Commission or by taking action themselves on the basis of **Article 259 TFEU** when the Commission does not start an infringement case.[130] Practice shows that this scenario is not unrealistic.[131] However, it should be considered as a last resort, firstly, because such litigation may compromise the relations between the Member States; secondly, safeguarding the respect of the Treaties, including their fundamental values, is primarily the responsibility of the Commission as the Union's watchdog. Therefore, in these cases it would be desirable to specify in the notice the Commission's commitment to **take over the case from the Member State(s) initiating an Article 259 TFEU procedure**.

Finally, RECONNECT notes with regret that several important judgments of the CJEU have remained unimplemented due to the misleading actions of the Member State concerned and the inaction of the Commission. The case of the Central European University demonstrates that a slow judicial procedure coupled with half-hearted actions are inadequate to solve such a serious rule of law violation as the forced relocation of a higher education institution to another country.[132] RECONNECT calls for **higher vigilance and more proactivity** in this respect.

III.2.3. The Scope of Article 19 TEU

National courts and the principle of judicial independence play an essential role in protecting the rule of law in the EU and its Member States. Articles 2 and 19 TEU have been the cornerstones for the CJEU to give expression, in numerous cases, to the importance of these courts in the overall structure of the legal edifice of the Union. Still, RECONNECT considers that it may be advisable to increase the visibility of certain constitutional fundamentals. To recall the CJEU, 'Article 19 TEU […] gives concrete expression

[129] Kim Lane Scheppele, 'Enforcing the Basic Principles of EU Law through Systemic Infringement Actions from Part II – Proposing New Approaches' in Carlos Closa, Dimitry Kochenov, *Reinforcing Rule of Law Oversight in the European Union* (Cambridge University Press 2016) 105-132.

[130] Dimitry Kochenov, 'Biting Intergovernmentalism: The Case for the Reinvention of Article 259 TFEU to Make It a Viable Rule of Law Enforcement Tool' (2015) 7 The Hague Journal of the Rule of Law 153–174.

[131] Consider the examples of the Dutch parliament that adopted a resolution in December 2020 obliging the government to file a claim against Poland at the European Court of Justice, for disrespecting the Rule of Law. Aleksandra Krzysztoszek, 'Dutch government urged to sue Poland in top EU court over Rule of Law debacle' (*Euractiv,* 2020) <https://www.euractiv.com/section/politics/short_news/dutch-government-urged-to-sue-poland-in-top-eu-court-over-rule-of-law-debacle/> accessed 31 March 2022.

[132] Petra Bárd, 'A Strong Judgment in a Moot Case: Lex CEU before the CJEU' (*RECONNECT blog*, 2020) <https://reconnect-europe.eu/blog/a-strong-judgment-in-a-moot-case-lex-ceu-before-the-cjeu/> accessed 31 March 2022; Central European University, 'Statement on Proposed Amendment to Lex CEU' (2021) <https://www.ceu.edu/article/2021-04-20/statement-proposed-amendment-lex-ceu> accessed 31 March 2022.

to the value of the rule of law affirmed in Article 2 TEU [and] entrusts the responsibility for ensuring the full application of EU law in all Member States […]'[133]

We believe that, if the Commission were to **adopt a notice about the scope of Article 19 TEU in conjunction with Article 2 TEU**, taking stock of the CJEU's rich case-law, this would benefit citizens' awareness of what the Union stands for and why it must protect its own legal order and ethos against authoritarian tendencies taking root in some Member States.

Through its research, RECONNECT has demonstrated that the rule of law must be understood as a fundamental principle with a clear non-negotiable minimum that is binding on all EU actors, i.e. both the institutions and the EUMS and their authorities at any level (central, regional, local) and of any branch (legislative, executive, judiciary). The rule of law has implicitly underpinned the original Treaties in 1951 and 1957, shaping the Communities' supranational legality, and continues to do so explicitly in today's Union more than sixty years later. Without the commitment to the rule of law and the correlated confidence that the EU and EUMS will steadfastly honour the independence of their courts, the European edifice would implode.

The combined reading and application of Articles 19 and 2 TEU is essential, as it expresses the unique value of the rule of law by reference to effective judicial protection and judicial independence as essential prerequisites and components of the right to a fair trial, which is recognised by Article 47 of the Charter.[134] It is important to acknowledge this in a **notice** explaining the fundamental principles elaborated in the CJEU's case-law: from the *Portuguese Judges* case onwards, to more recent cases on the significance of Articles 2 and 19 TEU in the field of judicial independence[135] and the implications of this case-law for other areas of EU law.[136] Such a notice should also, in the view of RECONNECT researchers, emphasise (i) the intrinsic connection between Articles 2 and 19 TEU when it comes to the relationship between the rule of law, effective judicial protection and judicial independence; (ii) the central role of national courts as courts of general jurisdiction of EU law, since Article 19 TEU lays down the constitutional foundation for the shared judicial mandate and responsibility of the CJEU and the courts of the EUMS ; (iii) that every Member State must ensure that the bodies which, as 'courts or tribunals' within the meaning of EU law, come within its judicial system in the fields covered by Union law, meet the requirements of effective judicial protection; and (iv) that EUMS are obliged, by virtue of

[133] Judgment of the Court (Grand Chamber) 24 June 2019 in Case C-619/18, action under Article 258 TFEU for failure to fulfil obligations, brought on 2 October 2018.

[134] The strong interconnectedness of the rule of law and judicial independence is acknowledged in Laurent Pech and Dimitry Kochenov, 'Respect for the Rule of Law in the Case Law of the European Court of Justice. A Casebook Overview of Key Judgments since the Portuguese Judges Case' (Swedish Institute for European Policy Studies 2021).

[135] Case C-64/16, *ASJP Portuguese Judges* (2018) ECLI:EU:C:2018:117 ; Case C-791/19, *Commission v. Poland* (2021) ECLI:EU:C:2021:596; C-441/17 *Białowieża Forest* (2018) ECLI:EU:C:2018:255; C-619/18 *Commission v. Poland* (2019) ECLI:EU:C:2019:531; C-204/21 *Commission v. Poland* (2021) ECLI:EU:C:2021:878; C-192/18 *Commission v. Poland* (2019) ECLI:EU:C:2019:924; Joined Cases C-585/18, C-624/18 and C-625/18, *A.K. e.a. v Sąd Najwyższy* (2019) ECLI:EU:C:2019:982; Joined Cases C-558/18 and C-563/18 *Miasto Łowicz and Prokurator Generalny* (2020) ECLI:EU:C:2020:234 ; C-896/19 *Maltese Judges* (2021) ECLI:EU:C:2021:311; Joined Cases C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19 *Romanian Judges* (2021) ECLI:EU:C:2021:393; Case C-791/19 *European Commission v Republic of Poland* (2021) ECLI:EU:C:2021:596; Case C-824/18 *A.B. and Others v Krajowa Rada Sądownictwa and Others* (2021) ECLI:EU:C:2021:153; C-824/18, *AB and others v Krajowa Rada Sądownictwa* (2021) ECLI:EU:C:2021:153.

[136] C-274/14 *Banco de Santander* (2020) ECLI:EU:C:2020:17*;* Joined Cases C-508/18 and C-82/19 *PPU* (2019) ECLI:EU:C:2019:456; C-509/18 *Minister for Justice and Equality v PF* (2019) ECLI:EU:C:2019:457 ; C-284/14 *Commission v. France;* C-284/16 *Achmea* (2018) ECLI:EU:C:2018:158; C-216/18 *PPU LM* (2018) ECLI:EU:C:2018:586; Joined Cases C-542/18 *RX-II Simpson* and C-543/18 *RXII HG* (2020) ECLI:EU:C:2020:232.

the principle of sincere cooperation set out in the first subparagraph of Article 4(3) TEU, to ensure, in their respective territories, the full application of and respect for EU law.

RECONNECT also recommends an explicit reference in the aforementioned notice to the central importance, for the credibility and legitimacy of the EU courts, of the work of the **panel established under Article 255 TFEU**. As is known, this panel, set up in 2010 on the basis of the Treaty of Lisbon, gives an opinion on candidates' suitability to perform the duties of Judge and Advocate-General of the CJEU and the General Court before the governments of the Member States make the appointments. The work of this panel has proven to be fundamental in order to ensure the suitability of future judges and advocates-general and to assess the performance of judges and advocates-general that stand for renewal of their mandates. While some RECONNECT researchers consider desirable a Treaty change in which the opinions of the panel should be binding for the Member States' governments, we trust that the current practice, which has consistently seen governments following the opinions of the panel, will continue unabated. Should this change in the future, such a Treaty change could be contemplated.

III.2.4. Consider the Introduction of Specific Remedies or Mechanisms in a Context of Rule of Law Backsliding

According to RECONNECT, the current context of rule of law backsliding in a number of EUMS requires serious thinking about the possible introduction of specific remedies or mechanisms. Two ideas are referred to here below: (i) to consider the introduction of a special EU remedy for the protection of EU fundamental rights at Member State level[137]; and (ii) to consider the introduction of a special remedy for national judges regarding judicial independence.

III.2.4.1. Fundamental Rights

Respect for fundamental rights, to the extent that it helps to prevent an arbitrary use of public power, is normally viewed as a core element of the principle of the rule of law.[138] Unsurprisingly, the lack of a specific appeal for violation of EU fundamental rights has been frequently lamented and multiple proposals to **confer on individuals the right to appeal directly to the Court of Justice** have been put forward following the publication of the 1975 Tindemans Report.[139] This idea was again debated when the European Convention began working on the draft text of the Constitutional Treaty. Most recently, the EP has invited 'the Conference on the Future of Europe to consider strengthening the role of the CJEU in protecting the Union's fundamental values.'[140]

[137] This part of the section builds on Laurent Pech, 'A Union Founded on the Rule of Law': Meaning and Reality of the Rule of Law as a Constitutional Principle of EU Law' (2010) 6(3) European Constitutional Law Review 388-389.
[138] See e.g. Jean-Paul Jacqué, *Cours général de droit communautaire* (Martinus Nijhoff 1990) 276; Walter van Gerven, *The European Union: A Polity of States and People* (Stanford University Press 2005) 104.
[139] In his report, the Prime Minister of Belgium noted that 'the gradual increase in the powers of the European institutions … make it imperative to ensure that rights and fundamental freedoms, including economic and social rights, are both recognized and protected' and proposed that individuals should gain 'the right of direct appeal to the Court of Justice against an act of an institution in violation of these fundamental rights.' Report by Mr. Tindemans to the European Council, *Bulletin of the European Communities*, Supplement 1/76, 26-27.
[140] European Parliament resolution of 24 June 2021 on the Commission's 2020 Rule of Law Report – COM(2020)0580 (2021/2025(INI)) para 55.

While calls to improve the rights of the individual to challenge EU measures before the CJEU by means of an EU *Verfassungbeschwerde*[141] or *recurso de amparo*[142] have been regularly made, the idea of establishing a special remedy was not recommended by the relevant working group of the European Convention in 2002, on account of the reservations expressed by a majority of its members.[143] Indeed, serious and primarily pragmatic counter-arguments can be offered. As 'issues of fundamental rights already arise in connection with the application of the ordinary remedies, often in combination with other issues (e.g. equal treatment, proportionality, etc.),' it has been argued that such matters 'can and should continue to be dealt with in principle within the habitual procedural framework.'[144]

However, RECONNECT takes the view that the 'habitual procedural framework' has been found wanting in an age of democratic and rule of law backsliding at the level of EUMS, which has resulted inter alia in political pressure, disciplinary sanctions and criminal proceedings brought against national judges to discourage them from initiating preliminary ruling proceedings before the CJEU under Article 267 TFEU in relation to the right to an independent tribunal established by law, and 'the growing and deliberate lack of compliance with CJEU rulings'[145], but also with rulings of the European Court of Human Rights (ECtHR).[146] The process of democratic and rule of law backsliding in a number of EUMS has increasingly led to state-sponsored harassment and open targeting of individual critics, minority groups and more generally, increasing violations of fundamental rights.[147] This has been happening in a broader context where the Commission's practice of bringing infringement cases has seen a significant decrease since 2004.[148] As noted by Professors Kelemen and Pavone, 'the Commission's reluctance to bring enforcement actions took root at a particularly bad time: shortly before member governments like Hungary and Poland started to autocratise and challenge the very foundations of the EU legal order — precisely when muscular use of the EU's legal tools was imperative'.[149]

In the view of RECONNECT, the present context calls for revisiting the case for a **special EU remedy for the protection of fundamental rights guaranteed in the Charter** as regards national measures falling within the scope of EU law. This remedy, the elaboration of which should be studied carefully, should notably allow natural and legal persons to access the Court of Justice in a situation where a Member State's courts of last resort have been captured and national judges more generally are precluded from

[141] In Germany, subject to some procedural conditions, individuals can lodge a complaint with the Federal Constitutional Court when they are of the view that their fundamental rights have been infringed by the decision or action of a public authority. The complaint may be directed against a measure of an administrative body, a statute, or against a court's judgment of a court.

[142] Under Spanish constitutional law, citizens may lodge a special appeal with the Constitutional Court on fundamental rights ground but this remedy may only be used to challenge administrative decisions or actions.

[143] The European Convention, Final Report of Working Group II 'Incorporation of the Charter/ accession to the ECHR', CONV 354/02, 22 Oct. 2002 15.

[144] Francis Jacobs, 'Necessary changes to the judicial system of judicial remedies', Note for the working group on the Charter/ECHR, the European Convention, Working group II, Working document 20, 27 September 2002, 3.

[145] European Parliament resolution of 24 June 2021 on the Commission's 2020 Rule of Law Report – COM(2020)0580 (2021/2025(INI)) para 16.

[146] Hungarian Helsinki Committee, 'Non-execution of domestic and international court judgments in Hungary' (2021) <https://helsinki.hu/en/wp-content/uploads/sites/2/2021/12/HHC_Non-Execution_of_Court_Judgments_2021.pdf> accessed 31 March 2022.

[147] Anna Wójcik and Barbara Grabowska-Moroz, 'Reframing LGBT rights advocacy in the context of the rule of law backsliding. The case of Poland' (2021) 7(4) Intersections. East European Journal of Society and Politics 85.

[148] Daniel Kelemen and Tommaso Pavone, 'The curious case of the EU's disappearing infringements', (*Politico*, 13 January 2022) <https://www.politico.eu/article/curious-case-eu-disappearing-infringements/> accessed 31 March 2022.

[149] ibid.

referring preliminary questions to the CJEU, as is the case currently in Poland in relation to judicial independence matters.[150]

III.2.4.2. Judicial Independence

The systemic undermining of judicial independence witnessed in Poland and to some extent in Hungary in the past decade has, inter alia, been characterised by a growing and deliberate lack of compliance with CJEU rulings, in addition to disciplinary and criminal proceedings brought against national judges to discourage them from referring preliminary questions to the CJEU under Article 267 TFEU.[151] In light of this, RECONNECT researchers call for the introduction of a mechanism with the aim of enabling **national judges to bring to the attention of the CJEU national measures which aim to prevent them from or punish them for applying EU law**, including CJEU judgments.

To further justify the need for such a new remedy, it is worth recalling the current situation in Poland. Following the adoption of what became known as Poland's 'Muzzle Law' of 20 December 2019, Polish judges are not allowed to apply certain provisions of EU law protecting judicial independence, and to make references for preliminary rulings on such questions to the CJEU. This law is manifestly incompatible with the principle of primacy of EU law, the functioning of the preliminary ruling procedure and Article 19(1) TEU read in connection with Article 47 of the Charter, which establish a right to an effective remedy before an independent and impartial tribunal previously established by law. Yet, the 'Muzzle law' continues to be applied in Poland to this date. In addition, Polish judges continue to be unlawfully suspended by Polish authorities with the Disciplinary Chamber continuing to function, notwithstanding the multiple rulings of Poland's Supreme Court holding it not to constitute a tribunal established by law, the judgment of the CJEU holding it to be incompatible with EU law, and the judgment of the ECtHR holding it not to be a tribunal established by law within the meaning of Article 6 of the European Convention on Human Rights.[152]

There have been multiple instances of Polish judges subject to proceedings and sanctions for applying EU law, including for the mere act of referring preliminary questions to the CJEU. One may refer, for instance, to the suspension of Judge Maciej Ferek for applying CJEU and ECtHR rulings in relation to the judicial status of individuals appointed by the post 2018 National Council of the Judiciary[153], the suspension of Judge Maciej Rutkiewicz for applying EU requirements relating to judicial independence as interpreted by the CJEU[154], and the suspension of Judge Agnieszka Niklas-Bibik on account of the request for a preliminary ruling submitted to the CJEU.[155]

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[150] Laurent Pech and Dimitry Kochenov, 'Respect for the Rule of Law in the Case Law of the European Court of Justice: A Casebook Overview of Key Judgments since the Portuguese Judges Case (Swedish Institute for European Policy Studies 2021).

[151] European Parliament resolution of 24 June 2021 on the Commission's 2020 Rule of Law Report – COM(2020)0580 (2021/2025(INI)) para 16.

[152] For further analysis and references, see *Pech and Kochenov* (n 149).

[153] Mariusz Jałoszewski, 'The illegal disciplinary chamber is working again. And has suspended Judge Ferek for applying EU law' (*Oko.press*, 16 November 2021) English translation: <http://themis-sedziowie.eu/materials-in-english/the-illegal-disciplinary-chamber-is-working-again-and-has-suspended-judge-ferek-for-applying-eu-law-by-m-jaloszewski-oko-press/> accessed 31 March 2022.

[154] 'Judge Rutkiewicz of Elbląg suspended for applying EU law. Against the CJEU order', (*Rule of Law in Poland*, 2021) <https://ruleoflaw.pl/judge-rutkiewicz-of-elblag-suspended-for-applying-eu-law-against-the-cjeu-order/> accessed 31 March 2022.

[155] Mariusz Jałoszewski, 'Judge Niklas-Bibik suspended for applying EU law and for asking preliminary questions to the CJEU' (*Rule of Law in Poland*, 2021) <https://ruleoflaw.pl/judge-niklas-bibik-suspended-for-applying-eu-law-and-for-asking-preliminary-questions-to-the-cjeu/> accessed 31 March 2022.

In addition to criminal proceedings, suspensions and pay cuts,[156] a number of Polish judges have faced unlawful administrative repression in the form of transfers to other departments without their consent.[157] For instance, Judge Agnieszka Niklas-Bibik, mentioned above, was transferred in October 2021 for overturning a judgment passed by an irregularly appointed judge in application of relevant case-law of the CJEU and ECtHR. Another example is the case of Judge Waldemar Żurek, who was transferred first in 2018. The judge appealed and, on the basis of his case, the CJEU issued an important judgment in October 2021 in Case C-487/19, holding inter alia that judges cannot be transferred arbitrarily.[158] The Polish Supreme Court has since prevented the implementation of this CJEU judgment by blocking the return of the case file to the judges who submitted the reference in Case C-487/19.[159]

While disciplinary proceedings and other forms of intimidation are less frequent and open in Hungary, these problems also arise there. It is sufficient to recall the case of Judge Csaba Vasvári, whose preliminary reference submitted to the CJEU has been declared illegal by the Hungarian Supreme Court, the *Kúria*; and as a retaliation, disciplinary proceedings have been initiated against him.[160] One can also recall the case of junior Judge Gabriella Szabó, who requested a preliminary ruling from the CJEU. As a consequence, she was declared unsuitable for judicial office and her appointment as a judge was not finalised.[161]

For these reasons, RECONNECT researchers call for the elaboration of a special remedy, or at least a special mechanism, that would allow **national judges subject to national measures** such as the ones outlined above **to bring these measures to the attention of the CJEU** in order to review their compatibility with the EU requirements relating to judicial independence.

[156] For a recent and comprehensive report, see THEMIS (Polish Association of Judges), In-depth report: 'Internal Affairs Department of the State Prosecution Service as a politicized tool of oppression of Polish judges and prosecutors' prepared by Dariusz Mazur, press officer of the association of judges 'Themis' (2021) <http://themis-sedziowie.eu/materials-in-english/in-depth-report-internal-affairs-department-of-the-state-prosecution-service-as-a-politicized-tool-of-oppression-of-polish-judges-and-prosecutors-prepared-by-dariusz-mazur-press-o/> accessed 31 March 2022.

[157] More details available in 'Judge Rutkiewicz of Elbląg suspended for applying EU law. Against the CJEU order', (*Rule of Law in Poland*, 2021) <https://ruleoflaw.pl/judge-rutkiewicz-of-elblag-suspended-for-applying-eu-law-against-the-cjeu-order/> accessed 31 March 2022.

[158] C-487/19 (2021) ECLI:EU:C:2021:798.

[159] Mariusz Jałoszewski, 'Małgorzata Manowska blocks the implementation of an important CJEU judgment', (*Rule of Law in Poland*, 2022) <https://ruleoflaw.pl/malgorzata-manowska-blocks-the-implementation-of-an-important-cjeu-judgment/> accessed 31 March 2022.

[160] The CJEU declared these moves to be incompatible with EU law for endangering judicial independence and for jeopardizing the use of preliminary references. Case C-564/19 *IS* (2021) ECLI:EU:C:2021:949.

[161] In Hungary, judges first serve a kind of a probationary period, and if they are considered fit, their mandate as a judge is prolonged for an indeterminate period. The Venice Commission criticized this practice back in 2012, but the Hungarian government failed to follow the recommendations, and now this possibility of terminating a judicial career at an early stage was abused. Opinion on Act CLXII of 2011 on the Legal Status and Remuneration of Judges and Act CLXI of 2011 on the Organisation and Administration of Courts of Hungary, adopted by the Venice Commission at its 90th Plenary Session (Venice, 16-17 March 2012), CDL-AD(2012)001-e. The above cases are discussed exhaustively in Petra Bárd, 'In courts we trust, or should we? Preliminary rulings and judicial independence' (2022 – forthcoming)European Law Review, 2022.

III.3. Introduce Mechanisms through EU Bodies to Boost the Rule of Law

III.3.1. Establish an EU Conference of the Heads of Constitutional and Supreme Courts of the Member States and the Union with Advisory Jurisdiction over Issues of Competence

The EU continues to raise fundamental questions of constitutionality. The 2001 Laeken Declaration on the Future of Europe already included a call for 'a better division and definition of competence in the European Union', and stressed the need 'to clarify, simplify and adjust the division of competence between the Union and the Member States' and 'to ensure that a redefined division of competence does not lead to a creeping expansion of the competence of the Union or to encroachment upon the exclusive areas of competence of the Member States'.[162] The Treaty of Lisbon introduced a number of new and detailed provisions on the categories of Union competence and emphasises in Article 5(2) TEU that '[u]nder the principle of conferral, the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein. Competences not conferred upon the Union in the Treaties remain with the Member States.'[163]

However, these and other reforms have not resolved the continuing fears of 'EU competence creep'. The interpretation of the EU Treaties remains an elastic process, especially since updating the Treaties through a formal reform process is nowadays increasingly considered as too risky and too cumbersome (see above, Chapter II, Section 2.6.2). These concerns have particularly come to the fore in the context of the series of crises that the EU has faced since the entry into force of the Treaty of Lisbon in 2009. First, in the context of the Eurozone sovereign debt crisis, Member States resorted to new measures outside of the EU Treaties and some of the measures adopted on the basis of the Treaties were challenged before the courts, most notably the German *Bundesverfassungsgericht* (Federal Constitutional Court). Second, the broad interpretation by the European Central Bank (ECB) of its mandate has led to a permanent tension between the CJEU and the *Bundesverfassungsgericht*; a tension that is likely to continue in the context of the EU measures adopted in response to the COVID-19 crisis (Next Generation EU). Also in current debates about violations of the rule of law in EUMS (Hungary and Poland in particular), questions of EU constitutionality are being raised.

As RECONNECT has found[164], such **constitutional questions are natural and, in many respects, an inevitable element of the process of European integration**. Not only is the EU a polity that is still in development, it is also a polity the competences of which are derived from firmly established States. What is more, the Union is an inherently very diverse polity, which at the same time is committed to democracy. Beyond the fundamental values that are enshrined in Article 2 TEU, there is a wide range of ideas about what the EU should be in the first place.

If the EU is to be democratic, it is essential that the legitimacy of the diversity of these ideas is recognised and that no idea is prioritised, nor that some ideas are disqualified. The only boundaries that apply here are the ones drawn by the fundamental values of Article 2 TEU and the commitment to democracy: views that actively seek to oppress other competing views are to be disqualified. In that sense, the views currently propagated by the governments of Hungary and Poland, which use political and legal means to stifle opposing voices, are clearly problematic.

Those extremes apart, there remains a broad diversity of opinion about what the EU is, which competences it should have, and how it should exercise them. In spite of the pluralism of conceptions, there is at present very little scope and there is hardly any arena for these views to enter in deliberation

[162] European Council (2001) The Future of the EU: Declaration of Laeken 15 December (SN 273/01).
[163] See also Article 4(1) TEU.
[164] Bertjan Wolthuis, Ben Crum, Alvaro Oleart and Patrick Overeem 'Democratic implications of EU membership: incorporating the contested character of the EU'(2020) <https://reconnect-europe.eu/wp-content/uploads/2021/01/D5.3.pdf> accessed 31 March 2022.

with each other. Too often such debates are cut short, or they take place within the European Council, where democratic scrutiny is limited and decision-making is highly untransparent. This was clear in the case of the Greek bailout, where the majority of EUMS imposed a specific conception of the rights and duties involved in membership of the Euro area. Similarly, in the case of the ECB's Public Sector Purchase Programme (PSPP), contestation is channelled through the courts and gets stalled when the CJEU rules in one way and the *Bundesverfassungsgericht* or another national constitutional or supreme court takes a divergent view. What is notably lacking is an arena where these conceptions can enter in a debate with each other.

The Union ought to **facilitate the open exchange of, and dialogue between, different constitutional conceptions rather than foreclosing such debates.** This requires an attitude that recognises that, what may appear as fundamental challenges to European integration, are in fact natural debates that are invited by the very nature of the Union. It requires all actors to recognise that their view of the EU is only one possible view among many, and that we can only engage with each other within Europe if we not only tolerate but actively recognise the legitimacy of alternative views. Such an attitude marks a break with the linear teleological thinking that so often dominates debates on the EU and in which any proposal is assessed in light of its presumed end-state, be it a federation, a confederal union or a looser, intergovernmental organisation.

For this purpose, RECONNECT proposes the establishment of an **EU Conference of the Heads of Constitutional and Supreme Courts of the Member States and the Union with advisory jurisdiction over issues of competence.** This conference can partly take inspiration from the existing Network of the Presidents of the Supreme Judicial Courts of the European Union established in 2004 (which however does not count the constitutional courts of the Member States)[165] and from the recent initiative to convene, under the 2022 French Presidency of the Council, a Conference of the heads of the supreme courts of the EU Member States (organised by the French *Conseil constitutionnel*, *Conseil d'Etat* and *Cour de cassation*), in which also presidents of constitutional courts as well as the presidents of the CJEU, the European Court of Human Rights and the Venice Committee participated.[166]

The Conference would essentially serve as a platform for a horizontal dialogue between the highest EU and Member State courts to discuss issues of competence, without impeding on the jurisdiction and prerogatives of any of these courts.

In order to give the Conference a firm constitutional footing, it should ideally be the subject of a new protocol to the TEU and TFEU. Its establishment would mark the fact that the Union legal order is ultimately owned by the EU institutions and the EUMS collectively. It would bring about a more balanced and open relationship between the national constitutional and supreme courts and the CJEU. And it would provide a forum in which fundamental EU constitutional debates would be subject to direct and public deliberation. Above all, the Conference should highlight that the Union constitutes an evolving polity in which different constitutional positions interact with each other and seek collectively acceptable arrangements to navigate common concerns.[167]

[165] See <https://www.network-presidents.eu/> accessed 31 March 2022.

[166] See <https://www.courdecassation.fr/en/toutes-les-actualites/2022/02/16/conference-heads-supreme-courts-european-union-member-states> accessed 31 March 2022; <https://www.conseil-etat.fr/en/news/conference-of-the-heads-of-the-supreme-courts-of-the-eu-member-states> accessed 31 March 2022; <https://presidence-francaise.consilium.europa.eu/en/news/conference-of-heads-of-the-supreme-courts-of-the-european-union-member-states/> accessed 31 March 2022.

[167] See also Païvi Leino-Sandberg 'Next Generation EU. A Constitutional Change without a Constitutional Change' (*Reconnect Blog*, 2021) <https://reconnect-europe.eu/blog/new-generation-eu-a-constitutional-change-without-constitutional-change/> accessed 31 March 2022; Païvi Leino-Sandberg, *The Politics of Legal Expertise in EU Policy Making* (Cambridge University Press 2021).

III.3.2. Share OLAF Report Findings Publicly and Introduce a Mechanism with Consequences Attached to OLAF Findings

The European Anti-Fraud Office (OLAF) has the competence to investigate corruption cases related to the use of EU funds. However, once the investigation is closed, the results are transferred to the Member States, who can decide on taking further action, even prosecution if necessary. The shortcoming of this system is that many corruption cases are likely to die when taken over by the domestic authorities. This is especially worrying in those Member States in which the government is deeply involved in corruption and shows no willingness whatsoever to investigate, let alone prosecute, high-level corruption cases. The so-called Elios case, which involved public lighting projects financed by the EU, is a perfect example. The tenders were won by Elios Zrt, a company in which the Hungarian Prime Minister's son-in-law previously held an interest. OLAF launched an investigation and suggested the withdrawal of € 43.7 million of support. OLAF, the Commission and the Hungarian government all refused to publish the conclusions of OLAF. Due to the persistence of the Hungarian Civil Liberty Union, however, the General Tribunal annulled the decision of OLAF rejecting a confirmatory application for access to documents.[168]

In light of this, RECONNECT suggests various ways of improving the functioning and impact of OLAF. At a minimum, OLAF's **findings should be shared publicly when Member States are irresponsive to the misconduct exposed in its reports**. Secondly, we suggest to explore the possibility of introducing an EU mechanism which can lead to **autonomous EU consequences attached to OLAF findings of corruption**, irrespective of Member States' prosecution offices. For instance, OLAF findings might be used by the Commission to determine that 'there is a serious deficiency in the effective functioning of the management and control system of the operational programme' in an EU Member State and therefore to temporarily suspend the payments of relevant European Structural and Investment Funds under Article 142(a) of the Common Provisions Regulation.[169]

III.3.3. Develop Incentives for (or Consequences for Lack of) Membership of the European Public Prosecutor's Office

The European Public Prosecutor's Office (EPPO) was designed and intended to become the independent and decentralised prosecution office of the EU. Unsurprisingly, neither Hungary nor Poland have signed up among the founding States. It is submitted that the Commission should investigate means of limiting access to EU funds for those EUMS who do not sign up to the EPPO[170], or, alternatively, creating incentives through additional EU funds made available for those who have signed up to the EPPO.

[168] Case T-517/19, *Homoki v Commission* (2019) , ECLI:EU:T:2021:529.

[169] Regulation (EU) No 1303/2013 of the European Parliament and of the Council of 17 December 2013 laying down common provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund, the European Agricultural Fund for Rural Development and the European Maritime and Fisheries Fund and laying down general provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund and the European Maritime and Fisheries Fund and repealing Council Regulation (EC) No 1083/2006.

[170] Jasna Šelih, Ian Bond and Carl Dolan, 'Can EU funds promote the Rule of Law in Europe?' (*Center for European Reform*, 2017) <https://www.cer.eu/sites/default/files/pbrief_structural_funds_nov17.pdf> accessed 31 March 2022.

III.3.4. Enhance the Functioning of the Authority for European Political Parties and European Political Foundations

European political parties play an important role in the functioning of the EU rule of law enforcement mechanisms. However, they tend to turn a blind eye even to the most serious problems within their families because of political reasons. For example, the European People's Party (EPP) has been criticised for shielding Fidesz in the EP from any political decisions aimed at limiting the government in Hungary.

Therefore, the independent Authority for European Political Parties and European Political Foundations has been charged with the task of registering, controlling, and imposing sanctions on European political parties and European political foundations[171], and a Committee of Independent Eminent Persons[172] has been tasked to help it with providing evidence about compliance with EU fundamental values. This was a significant step towards ensuring compliance with Article 2 TEU.[173]

Nevertheless, RECONNECT research bears out that there is room for improvement.[174] Firstly, **funding** for an entire European party as foreseen by Regulation 1141/2014[175] could be **suspended until rule of law backsliding conducted by a national member party is addressed**.[176] To further this end and more generally to aid the work of the Authority, **any citizen should be given direct access to the Authority to report (complicity in) systematic violations of EU fundamental values**. Currently, a group of 50 citizens may only ask the President of the EP to lodge with the Authority a request for verification of a specific European political party's compliance with Article 2 TEU. This means, however, to give a concrete example, that currently any request from a group of 50 citizens concerning the EPP's alleged lack of compliance with Article 2 TEU has to go through an EP President who belongs to the same political party. A first attempt to use this procedure has revealed a problematic interpretation of relevant rules by the office of the EP President. This is why it is recommended that the Commission proposes an amendment to Regulation 1141/2014 so as to enable any group of 50 citizens to submit a reasoned proposal directly to the Authority.

Secondly, the initiation of any type of **Article 7 TEU procedure should automatically trigger the Article 2 TEU verification mechanism under the Regulation**. This could ensure that no European political party is contaminated by a party in violation of EU law, and that no party in violation of Article 2 TEU is shielded by its party family from criticism.

Finally, not only European political parties, but also **political groups should be monitored for compliance with Article 2 TEU values.**[177]

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[171] See Article 6 of Regulation No 1141/2014, and <http://www.appf.europa.eu/appf/en/authority/welcome.html> accessed 31 March 2022.

[172] ibid Article 11.

[173] For a recent evaluation of the regulation and the practice based on it, see Dimitry Kochenov and John Morijn, 'Strengthening the Charter's Role in the Fight for the Rule of Law in the EU: The Cases of Judicial Independence and Party Financing' (2021) 27 (4) European Public Law 774-777.

[174] See also the recent proposal of the Commission to revise, as part of its European Democracy Action Plan, the rules on funding of European political parties and foundations: Commission Press Release, 'European Democracy: Commission sets out new laws on political advertising, electoral rights and party funding' (25 November 2021) <https://ec.europa.eu/commission/presscorner/detail/en/ip_21_6118> accessed 31 March 2022.

[175] Regulation (EU, Euratom) No 1141/2014 of the European Parliament and of the Council of 22 October 2014 on the statute and funding of European political parties and European political foundations (2014) OJ L317/1.

[176] On the limitations and potentials of Regulation 1141/2014 see John Morijn, 'Responding to 'populist' politics at EU level: Regulation 1141/2014 and beyond' (2019) 17 IJCL 617–640.

[177] John Morijn shares his recommendations for the European Commission on the International Day of Democracy (*RECONNECT video*, 2020) <https://reconnect-europe.eu/news/prof-john-morijn-shares-his-recommendations-for-the-european-commission-on-the-international-day-of-democracy/> accessed 31 March 2022.

IV. EU Charter of Fundamental Rights

As indicated above, since the entry into force of the Treaty of Lisbon, the Charter has Treaty status, meaning that it is legally binding as primary law of the Union (Article 6(1) TEU). However, some aspects still hamper its full effectiveness. This chapter outlines two RECONNECT recommendations in this respect. The first proposal is to reconsider the formulation of Articles 47 and 51 of the Charter with a view to strengthening effective remedies and the enforcement of the Charter. The second suggestion pertains to launching a broad-based process to consider adding new rights, freedoms and principles to the Charter.

IV.1. Reconsider Articles 47 and 51 of the Charter with a View to Strengthening Effective Remedies and the Charter's Enforcement

In the wake of the Charter's status of primary law, the CJEU has developed a considerable case-law on the interpretation and application of the Charter's provisions, given EU fundamental rights protection a significant boost.[178] Still, RECONNECT considers that the formulation of two provisions of the Charter may need to be revisited in the light of the current context of rule of law backsliding in various EUMS.

First of all, there is Article 51(1) of the Charter, which famously stipulates that '[t]he provisions of the Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity *and to the Member States only when they are implementing Union law*.' (emphasis added) Article 52(5) of the Charter adds to this that '[t]he provisions of the Charter which contain principles may be implemented by legislative and executive acts taken by institutions, bodies, offices and agencies of the Union, and by *acts of Member States when they are implementing Union law, in the exercise of their respective powers*.' (emphasis added)

The very fact that the Charter applies not only to EU institutions but also to EUMS makes for a scope of application that is not at all that narrow, as demonstrated in the CJEU's *Åkerberg Fransson* ruling.[179] It provides a unique opportunity to apply the Charter also to cases of systemic rule of law backsliding.[180] As mentioned before, the Charter covers some of the main elements of the rule of law, such as the principle of effective judicial protection.[181] As a result, its application can, directly or indirectly, strengthen the protection of the rule of law in the EU and in EUMS.

Even though the CJEU has interpreted the provisions of the Charter extensively, the Charter's limited scope remains one of the main obstacles to its use as an effective rule of law tool. This is why academic and political proposals suggest to go one step further and **abolish Article 51 of the Charter, so that all Charter rights become applicable and justiciable in the EUMS**.[182] Such a move would transform the Charter into a 'Union standard', as it would eventually apply 'irrespective of the subject-matter at issue,

[178] For an overview, see inter alia Jan Wouters and Michal Ovádek, *The European Union and Human Rights: Analysis, Cases and Materials* (Oxford University Press 2021) 99-146.
[179] Case C-617/10 *Åkerberg Fransson* (2013) ECLI:EU:C:2013:105.
[180] See Frank Hoffmeister, 'Enforcing the EU Charter of Fundamental Rights in member states: How Far Are Rome, Budapest and Bucharest from Brussels?' in Armin von Bogdandy and Pál Sonnevend (eds.), *Constitutional Crisis in the European Constitutional Area: Theory, Law and Politics in Hungary and Romania* (Hart Publishing 2015) 206-208; See also András Jakab, 'Application of the EU Charter in National Courts in Purely Domestic Cases' in András Jakab and Dimitry Kochenov (eds.) *The Enforcement of EU Law and Values* (OUP 2017).
[181] See Gabriel Toggenburg and Jonas Grimheden, 'Upholding Shared Values in the EU: What Role for the EU Agency for Fundamental Rights?' (2016) 1103 Journal Common Market Studies; Gabriel Toggenburg and Jonas Grimheden, 'The Rule of Law and the Role of Fundamental Rights' in Carlos Closa and Dimitry Kochenov (eds.), *Reinforcing Rule of Law Oversight in the European Union* (Cambridge University Press 2016) 147.
[182] See inter alia Viviane Reding, 'The EU and the Rule of Law – What Next?' (*Press Corner*, 4 September 2013), <https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_13_677> accessed 31 March 2022.

that is to say irrespective of whether it falls within federal or state competence.'[183] Since many rule of law problems have direct fundamental rights implications, tackling the latter might also be beneficial from the perspective of the rule of law.[184]

As mentioned above (III.2.3 and III.2.3.2), the CJEU's case-law has made crucial connections between Article 47 of the Charter, which confirms the right to an effective remedy and to a fair trial, with Articles 2 and 19 TEU. For clarity, internal coherence, and in order to make more comprehensive the legal framing of future cases brought before the CJEU, RECONNECT recommends to **reconsider the formulation of Article 47 of the Charter in order to reflect the CJEU's case-law** in question.

IV.2. Launch a Broad-Based Process to Consider Adding New Rights, Freedoms and Principles to the Charter

The Charter was drafted by the very first European Convention in 1999-2000 and was proclaimed on 7 December 2000 at the Nice Summit. However, the EU and the world in general have changed considerably over the past 22 years. New societal challenges and risks have emerged and heighten the need for a more modern approach to fundamental rights that protect citizens. RECONNECT therefore suggests to launch a broad-based process in order to consider adding new rights, freedoms and principles to the Charter that align with modern developments and needs. As part of that process, existing provisions of the Charter – including the aforementioned Articles 47 and 51 – could also be revisited.

While it would be proper – also in light of Article 48(3) TEU – to organise the process for amending the Charter through a new **Convention**, it is important to take stock of the experience of the COFOE, in the sense that citizens should be centrally involved in this process, which in the view of RECONNECT should therefore become at least **partially citizen-driven**. In this respect, the advantages of digital tools as experienced in European Citizens' Panels can be built upon. We propose that the process includes elements of the recommendations regarding a **Citizens' Assembly** indicated earlier in this report (see above, Section II.4). Indeed, both RECONNECT surveys and responses from learners of the RECONNECT MOOC have made clear that citizens would like to be more involved in EU decision-making on issues close to them and that they care deeply about their fundamental rights.[185]

In terms of **possible new substantive rights**, freedoms and/or principles to be added, RECONNECT does not want to prejudge the aforementioned broad-based process. This being said, interesting suggestions can be drawn from other recent initiatives.[186] These may inter alia relate to the possible inclusion of (i) a right to **digital self-determination** without digital manipulation or profiling; (ii) a provision regarding the use of **artificial intelligence** and algorithms, ensuring that major decisions will always be taken by a human being; and (iii) a right to trust that statements made by the holders of public office are true.

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[183] Koen Lenaerts, 'Respect for Fundamental Rights as a Constitutional Principle of the European Union' (2000) 6 CJEL 21; Allard Knook, 'The Court, the Charter, and the vertical division of powers in the European Union' (2005) 42(2) CML 367–398.

[184] On further possible avenues which the Charter may open for tackling rule of law violations, see Dimitry Kochenov and John Morijn, 'Augmenting the Charter's Role in the Fight for the Rule of Law in the European Union: The Cases of Judicial Independence and Party Financing' (2020) <https://reconnect-europe.eu/wp-content/uploads/2020/10/RECONNECT_WP11_Kochenov_Morijn.pdf> accessed 31 March 2022.

[185] Constantin Schäfer, Bernd Schlipphak, Oliver Treib, 'The ideal setting of the EU in the mind of European citizens' (2021) <https://reconnect-europe.eu/wp-content/uploads/2021/04/D9.2.pdf> accessed 31 March 2022; additional reference forthcoming in RECONNECT Final Conference on the Panel 'RECONNECT Legacy: Info Sheets, MOOC' (April 2022) which will be made available at <https://reconnect-europe.eu/> accessed 31 March 2022 .

[186] Stiftung Jeder Mensch, 'The 6 European Fundamental Rights' <https://www.jeder-mensch.eu/informationen/?lang=en> accessed 31 March 2022.

V. Transparency and Access to Documents

The Union's progressive elaboration and operationalisation of the principle of transparency since the 1990s has been a fascinating process. At the level of the EU Treaties, we now find evidence of this commitment to a Union 'in which decisions are taken as openly as possible' in Article 1 TEU. This commitment is highlighted as well in Article 10(3) TEU, which confirms the right of every citizen to participate in the democratic life of the Union, and in Article 15(1) TFEU, pursuant to which, '[i]n order to promote good governance and ensure the participation of civil society, the Union's institutions, bodies, offices and agencies shall conduct their work as openly as possible.' The latter article adds in its third paragraph that '[a]ny citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, shall have a right of access to documents of the Union's institutions, bodies, offices and agencies, whatever their medium, subject to the principles and the conditions to be defined in accordance with this paragraph'. On the basis of the precursor of this provision, Article 255(2) of the EC Treaty, the EU's 'Transparency Regulation' (Regulation 1049/2001) was adopted in 2001.[187] As stated in the preamble of this Regulation,

> *'[o]penness enables citizens to participate more closely in the decision-making process and guarantees that the administration enjoys greater legitimacy and is more effective and more accountable to the citizen in a democratic system. Openness contributes to strengthening the principles of democracy and respect for fundamental rights as laid down in Article 6 of the EU Treaty and in the Charter of Fundamental Rights of the European Union.'*

In this spirit, RECONNECT makes **four concrete (series of) recommendations** on how openness can be improved and extended further, and how public access to EU documents and decisions can be strengthened, in order to guarantee a stronger accountability, public participation and legitimacy.

V.1. Update Transparency Regulation 1049/2001

The EU has come a long way since the adoption of its public access legislation with Regulation 1049/2001 in 2001. As indicated above, the EU Treaties in their post-Lisbon version identify transparency not merely as a tool for ensuring accountability, but also as a vital prerequisite for public participation and for a stronger legitimacy of EU decisions. A lack of transparency is also one of the breeding grounds for misinformation campaigns and conspiracy theories, reducing the public to recipients of rumours and falsified information designed to sway emotions. Functioning transparency arrangements, instead, offer reliable information sources and contribute to accountability through public debate, democratic participation and effective judicial review.

RECONNECT has come to the conclusion that the **current implementation of the EU's transparency regime does not live up to the ambitions of the Treaty of Lisbon**. Too often, the institutional reaction has been to focus on ways to restrict transparency as a bureaucratic nuisance. Slowly but surely, the EU transparency standards have been eroding, instead of advancing in step with societal needs, technical possibilities and the urgency to maintain and deepen the EU as a viable and legitimate policy forum for decision-making. Transparency is often selective: it is a privilege for the chosen few, by means of access to leaks (which happen frequently). Access to documents requests made in the context of RECONNECT research and subsequent appeals of RECONNECT researchers to the EU courts demonstrate that CJEU redress is slow in arriving and only addresses problems of access to a limited extent.

[187] Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents (2001) OJ L 145/43.

Still, RECONNECT considers that Treaty reforms are not necessarily needed at this stage. As indicated above, the Treaty of Lisbon already aimed to further strengthen transparency and access to official documents. In addition, the Treaty of Lisbon expanded the scope of the EU's access rules to cover all EU institutions, bodies and agencies. Unfortunately, these **Treaty commitments remain largely unfulfilled**. This needs to be addressed as a **first priority for EU legislation.** Despite two legislative proposals (2007 and 2011), Regulation 1049/2001 has not been updated to reflect the Treaty framework after the Treaty of Lisbon. For instance, EU agencies today harbour a great deal of valuable information and manage this often with fairly limited legal guidance for dealing with the balancing of interests they are called upon to determine. However, despite a clear Treaty mandate, the **scope of Regulation 1049/2001 has not been formally expanded to cover other institutions, bodies and agencies** beyond the EP, the Council and the Commission. Such important updates are urgently needed.

V.2. Improve Legislative Transparency: Proactively Publicise Reports of Trilogue Meetings

The current institutional practice to allow only limited access to legislative documents while making access to non-legislative documents increasingly difficult or impossible, contravenes both the wording and the spirit of the principle of transparency enshrined in the Treaties and in the CJEU's case-law. RECONNECT research demonstrates how legislative documents continue to be difficult to access especially while procedures are pending, despite the obligation of the institutions to make them proactively accessible and limit access only in highly exceptional cases. In many instances, EU institutions continue to be reluctant to deliver even upon the most basic demands imposed on them by the Treaties and the CJEU. For example, it remains excruciatingly difficult to obtain trilogue-related documents, legal advice and Council working party documents, Commission documents relating to legislative procedures, or documents relating to the EP's shadow meetings or decision-making within political groups. Access is highly limited as regards documents in the context of delegated acts and comitology procedures relevant for the specification of legislative requirements.

One particularly non-transparent area of EU legislative work relates to **trilogues**, i.e. informal tripartite meetings on legislative proposals between representatives of the EP, the Council and the Commission, which have become a vital part of the legislative process behind closed doors.[188] It is generally acknowledged that trilogues lack transparency and do little to engage citizens. This practice is therefore at odds with the push towards more transparency, which has featured prominently among initiatives to enhance the EU's democratic legitimacy[189], and which is seeing ever more cases before the EU courts and the European Ombudsman.[190] While it recognises the specific nature of trilogues compared to the formal steps of the legislative process, RECONNECT urges the institutions to **make the reports of trilogue meetings (four-column documents) proactively available** and respect the case-law of the General Court and the recent recommendations of the European Ombudsman on this matter. The same requirements concerning the broad transparency required for legislative documents should also apply to legal advice given in legislative procedures, Council working party documents, Commission documents relating to

[188] Camille Kelbel and Julien Navarro (eds.) 'Working Paper on the Interinstitutional Relations in the EU'(2020), <https://reconnect-europe.eu/publications/deliverables/> accessed 31 March 2022; D. Curtin and P. Leino-Sandberg, 'In search of transparency for EU law-making: Trilogues on the cusp of dawn', (2017) 54(6) Common Market Law Review 1673-1712 <https://kluwerlawonline.com/Journals/Common+Market+Law+Review/2> accessed 31 March 2022.

[189] Camille Kelbel, Julien Navarro and Axel Marx 'Editorial: Access or Excess? Redefining the Boundaries of Transparency in the EU's Decision-Making' (2021) 9(1) Politics and Governance 221-225.

[190] Most recently, see T-540/15, *De Capitani v Parliament* (2018) ECLI:EU:T:2018:167 and Proposal by the European Ombudsman in case 360/2021/TE on the Council's refusal to provide full public access to documents related to trilogue negotiations on motor vehicle emissions.

legislative procedures, and documents relating to the EP's shadow meetings or decision-making within political groups when they concern the adoption of EU legislation.

While the present recommendation does not require a modification of the Treaties, it presupposes a change in paragraph 38 of the Interinstitutional Agreement of 13 April 2016 on Better Law-Making[191], to be appropriately reflected in the Rules of Procedure of each institution.

V.3. Update the Legislative Framework

In addition to appropriately reflecting the provisions of the Treaty of Lisbon as discussed above, Regulation 1049/2001 would require certain modifications that are possible without Treaty reform.

In many respects much has changed since the adoption of the Regulation. The new forms of **digital** governance are not properly reflected in the EU's transparency regime. To our knowledge, the only legal basis in the Treaty of Lisbon that has not yet been used is **Article 298 TFEU on an open, efficient and independent European administration**, which would enable the adoption of an EU regulation on administrative procedures, something that the EP has repeatedly (in 2001, 2013 and 2016) called for. Currently, provisions on good administration in EU institutions are scattered in policy-specific sectoral legislation and do not regulate EU administrative functions in a comprehensive manner. RECONNECT considers that the structural complexity of decision-making procedures within the multi-level legal system and the new threats to transparency within the legal system require a fundamental rethinking of approaches. Transparency problems are inherent and systemic, and will continue to haunt EU law as long as each Union act builds on specific procedural decision-making provisions. Much could be gained from the EU's adoption of a highly visible and broadly accessible **set of procedural rights and principles** that would be **applicable across all EU policy areas**. A **simplification of the legislative framework** would bring clarity as to individual rights and duties in various steps of decision-making procedures, including the components of the right to good administration that are already included in Article 41 of the Charter.

A fundamental prerequisite for access to documents is a **well-kept document registry** that spans EU institutions, offices, bodies and agencies in all areas of EU action, and where documents are pro-actively placed on-line. This obligation is included in Regulation 1049/2001 and the Interinstitutional Agreement on Better Law-Making, but the institutions and other bodies have still not set up such registers, which would make the application of the Regulation easier for both themselves and citizens. Being proactive is unlikely to result in fewer requests from citizens. For the EU, this is good news, as it relies on the critical engagement of its citizens. Greater transparency is likely to result in greater interest in the Union.

Since the entry into force of Regulation 1049/2001, the EU courts have given numerous rulings. Many of them highlight legislative transparency, while others have enabled the institutions to continue overly restrictive practices, e.g. in the areas of infringement proceedings, budgetary transparency and data protection in cases where disclosure would be in the public interest and causes no harm to privacy. Therefore, **legislative reform should not be restricted to a codification of existing case-law, but also engage with its merits and the Union's general obligation to always operate 'as openly as possible'**.

One highly problematic area in this respect are the fields today covered by **'general presumptions' of secrecy**. The Commission has successfully carved these out with the approval of the CJEU for nearly all areas of Commission investigations, even for highly political matters such as infringement procedures against Member States violating EU law.[192] These general presumptions have not only proven impossible for individuals to rebut, but they also reach to areas that are vital to democratic processes within the Union and are detrimental to accountability. They are also one of the reasons as to why the EU's access to documents regime does not live up to the Union's international obligations under the UNECE

[191] Interinstitutional Agreement between the European Parliament, the Council of the European Union and the European Commission on Better Law-Making (2016) OJ L123/1.
[192] C-612/13 *P Client Earth* (2015) ECLI:EU:C:2015:486 para 77.

Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (the so-called Aarhus Convention).

Regulation 1049/2001 is also particularly outdated as regards the Union's **external relations**, where no public interest test is currently applied. The deep and comprehensive international agreements concluded by the Union today have far-reaching implications that affect the EU's legislative agenda. The Union's public access regime should be updated to reflect the fact that external relations no longer constitute a diplomatic domain with absolute confidentiality requirements, but require broad public information and debate.

In addition, the transparency regimes of the **European Court of Justice** and the **European Central Bank** – both of which benefit from an exception under Article 15(3), fourth subparagraph TFEU – should be developed to live up to the general Treaty requirement of always operating 'as openly as possible'.

A lack of transparency in the decision-making process by **'informal' EU bodies** is another area of concern. For example, attempts to justify the secrecy of the **Eurogroup's** activities with technical excuses, such as that it is not a formal institution or decision-making body of the Union, or the opaque nature of its procedures, are simply indefensible. Transparency in the acts of a body whose decisions have far-reaching consequences for people's lives is the very first condition of its legitimacy. Explaining what the Eurogroup is, what it does, and on what political grounds or legal basis, would go a long way toward instilling trust in the EMU among the EU's citizenry (see also above, Sections II.2.4 and II.2.5).[193]

V.4. Make Trade Policy More Transparent

The importance of increasing transparency to strengthen democratic control also plays out in a policy area such as the EU's common commercial policy, or trade policy. Former Commissioner for Trade Phil Hogan made a strong commitment to increase transparency in trade policy and proposed a 'transparency package' for the von der Leyen Commission, which includes inter alia the broadening of the reporting of committees established under the EU's free trade agreements (EU FTAs)[194]. A commitment to transparency in EU trade policy was also emphasised very recently in the Versailles Declaration adopted by the EU's Heads of State and Government on 11 March 2022, which notes that '*the process leading to trade agreements should be transparent and inclusive so as to ensure successful outcomes*.'[195]

The EU needs to negotiate trade agreements which carry a broad support by citizens, either directly (responding to concerns or protests) or through the EP, which needs to be 'immediately and fully informed' at all stages of the treaty-making procedure (Article 218(10) TFEU). As the EP's consent is required for the conclusion of EU FTAs, it is crucial that its position and concerns are known – and addressed – during the negotiations, to avoid that the agreement is rejected at the final stages of the

[193] See Herwig Hofmann and Päivi Leino-Sandberg 'An agenda for transparency in the EU' (*European Law Blog*, 23 October 2019) <https://europeanlawblog.eu/2019/10/23/an-agenda-for-transparency-in-the-eu/> accessed 31 March 2022; Päivi Leino-Sandberg and Maarten Hillebrandt 'Challenging the EU Institutions on Transparency – What role for academics?' (*EU Law Live*, 2021) <https://issuu.com/eulawlive/docs/weekend_edition_no_51_final> accessed 31 March 2022; Axel Marx and Guillaume Van der Loo, 'Transparency In EU Trade Policy: A Comprehensive Assessment of Current Achievements' (2021) <https://www.cogitatiopress.com/politicsandgovernance/article/view/3771> accessed 31 March 2022.

[194] Introductory Remarks By Commissioner Phil Hogan at Civil Society Dialogue (18 October 2020) <https://ec.europa.eu/commission/commissioners/2019-2024/hogan/announcements/introductory-remarks-commissioner-phil-hogan-civil-society-dialogue_en> accessed 31 March 2022.

[195] Versailles Declaration (11 March 2022) <https://www.consilium.europa.eu/media/54773/20220311-versailles-declaration-en.pdf> accessed 31 March 2022.

process. For these reasons, RECONNECT has thoroughly analysed transparency as applied to the Union's trade policy and the negotiation of EU FTAs.[196]

In the trade policy area, RECONNECT has operationalised the concept of transparency along two dimensions, i.e. the regulatory dimension (negotiation phase and implementation phase), and the institutional dimension (internal, i.e. between EU institutions, and external, i.e. with other stakeholders). RECONNECT has applied this framework to EU FTAs. After analysing transparency in relation to FTAs from the perspective of the *internal actors* (i.e. Commission, Council and EP), we explored the different instruments and policies that grant the *external actors* (i.e. civil society and citizens) information and documents about EU FTAs by discussing the practice under Regulation 1049/2001, the role of the European Ombudsman, and civil society involvement in FTAs.

We found that the EU has made significant progress in fostering **transparency in the negotiation phase** of FTAs, but less so in the implementation phase. However, in both phases transparency can be strengthened. Concerning the implementation phase, the aforementioned 'transparency package' promises to broaden the reporting efforts of EU FTAs committees. However, concrete initiatives have not yet been launched. Concerning strengthening transparency in the negotiation phase of EU FTAs, RECONNECT takes the view that additional initiatives should be taken. The EP has secured its right to be informed during the negotiation phase through the Framework Agreement with the Commission.[197] As a result, the Commission has been increasingly supportive and cooperative with regard to the EP's quest for more access to FTA negotiation documents. However, the EP's relation with the Council on this issue remains difficult, as evidenced by the stalled negotiations on practical arrangements for cooperation and information-sharing in the context of international agreements under the Better Law-Making Agreement.[198]

Moreover, the EP's involvement – and access to documents – remains limited in relation to the **implementation of EU FTAs**. In particular in relation to decisions adopted by joint EU FTA committees, the EP's access to documents – and therefore oversight – is very limited. Considering the increasing importance of such joint bodies in EU FTAs, it will be crucial that structural interinstitutional procedures are established to keep the EP sufficiently in the loop. The **renegotiation of the Framework Agreement** and the relaunching of the negotiations with the Council on practical arrangements for cooperation and information sharing in the context of international agreements could provide opportunities for further increasing transparency in EU trade policy.

VI. Discussion

For the successful implementation of the Treaty changes and policy recommendations proposed above, some legal, political and societal barriers have to be taken into consideration. This section is dedicated to addressing the challenges that our RECONNECT recommendations entail and to discuss how to overcome these obstacles.

A first consideration that needs to be made when assessing the proposals above is the fact that the current prevailing political and legal context renders the **making of Treaty changes very difficult**. As discussed before (see above, Section II.2.5.2.), Treaty changes require the unanimity of all EUMS as per Article 48 TEU. However, as a result of the EU's enlargement and the growing number of veto actors,

[196] See Axel Marx and Guillaume Van der Loo, 'Democratic Legitimacy in EU Trade Policy: Assessing the achievements and challenges of increased transparency in EU trade policy' (2020) <https://reconnect-europe.eu/wp-content/uploads/2020/06/D12.1.pdf> accessed 31 March 2022.

[197] Framework Agreement on relations between the European Parliament and the European Commission (2010) OJ L304/47.

[198] Interinstitutional Agreement between the European Parliament, the Council of the European Union and the European Commission on Better Law-Making (2016) OJ L123/1.

Treaty revision has become ever more difficult and riskier. To overcome this, RECONNECT proposed to amend Article 48 TEU.

Second, not only political leaders need to be convinced of the necessity of Treaty reform. This applies at least as much for citizens. As indicated in the introduction, a large RECONNECT online citizens survey (12.000 respondents), conducted in six Member States (Denmark, France, Germany, Hungary, Poland and Spain), found that the current distribution of authority between the EU and its Member States is preferred.[199] This is why an earlier RECONNECT document[200] recommended to refrain from major shifts of power, since this would likely be met with public opposition. Instead of moving towards further integration it was suggested that approval of the EU could be boosted by increasing direct citizen participation, transparency, and distributive fairness. Another main finding of the citizens survey was that many citizens prefer the Union to prioritise policy fields with a clear transnational character; policy areas related to perceptions of global threats are also favoured by citizens. This means that EU action could be successfully framed as actions that protect the EU and its citizens from external perils. Last but not least, the survey also showed that citizens are ambivalent towards EU solidarity in terms of redistributing wealth from richer to poorer EUMS. While at first glance these survey results stand in contrast to some of the proposed Treaty changes in the present report, it is important to underline that these changes do not necessarily imply an increase of authority at the European level, but often are about adjusting, completing, correcting and updating the Treaties. Indeed, it is RECONNECT's mission to strengthen the democratic fabric of the EU, for which a number of Treaty changes appear appropriate. In that sense it is of crucial important to engage in debates with citizens and argue convincingly why certain changes to the status quo are beneficial and in their interest.

VII. Conclusion

This report has put forward RECONNECT's policy recommendations and proposed amendments to the EU Treaties, as well as to the EU Charter of Fundamental Rights. Our proposals aim to strengthen the rule of law and democracy in the EU, recognising the Union's potential to tap into its fundamental values to reconnect with citizens and bolster its legitimacy. As previously indicated, this report is to be read together with RECONNECT's new narrative for European integration, which lays down the importance of fundamental values such as democracy and the rule of law in the everyday life of citizens.

The recommendations in this report are based on four years of RECONNECT research, which can be read in full detail in RECONNECT working papers[201] and policy briefs.[202] For a summary of project findings, which compile policy recommendations put forth in the course of the four years that RECONNECT was running, a report on key messages for a communications strategy supplements the present report.[203] While the RECONNECT project officially ends with this report, it leaves behind a legacy not only of academic papers, but also of information material designed for young European citizens in the form of info sheets[204], as well as a Massive Open Online Course entitled 'Democracy and the Rule of Law in Europe'[205] for the wider public.

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[199] Constantin Schäfer, Bernd Schlipphak and Oliver Treib, 'The ideal setting of the EU in the mind of European citizens' (2021) <https://reconnect-europe.eu/wp-content/uploads/2021/04/D9.2.pdf> accessed 31 March 2021.
[200] Id.
[201] RECONNECT Deliverables <https://reconnect-europe.eu/publications/deliverables/> accessed 31 March 2022.
[202] RECONNECT Policy Briefs <https://reconnect-europe.eu/publications/policy-briefs/> accessed 31 March 2022.
[203] Viktor Kazai and Petra Bárd (eds.), 'Communication Strategy of the EU for best practice and policy recommendation' (2021) <https://reconnect-europe.eu/wp-content/uploads/2021/10/D15.1_web.pdf> accessed 31 March 2022.
[204] RECONNECT Youth Resource Centre <https://reconnect-europe.eu/youthresourcecentre/> accessed 31 March 2022.
[205] RECONNECT MOOC <https://reconnect-europe.eu/mooc/> accessed 31 March 2022.