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Rule of law or rule of thumb?
A New Copenhagen Mechanism for the EU

Sergio Carrera, Elspeth Guild and Nicholas Hernanz

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Policy Conclusions: In Brief

1. The EU should establish a new EU supervisory Copenhagen mechanism assessing member states' compliance with rule of law, fundamental rights and democracy. The mechanism should be a monitoring arm, complementing the current preventive and corrective ones of Article 7 TEU. It would consist of a periodic evaluation or scoreboard of member states' compliance with Article 2 TEU. No Treaty change would be required. The Commission should coordinate the process. European Council Conclusions should be adopted offering an EU inter-institutional agreement on its features and operability.

2. The Copenhagen Mechanism should be nurtured by independent academic expertise to ensure impartiality and scientific quality backing up EU level evaluation. This would lead to qualitative comparative assessments of member states with due consideration to their domestic constitutional traditions, and the findings from other non-EU bodies assessing rule of law in Europe such as the UN and the Council of Europe.

3. In a longer-term perspective, other steps could be taken yet requiring Treaty change. The activation phase of the Copenhagen mechanism could be improved by liberalising the current in threshold Article 7 TEU. The margin of manoeuvre by the Council should be more balanced with increasing Parliament accountability. The Court of Justice of the EU should also be involved both in the preventive and penalty dimensions.

This Policy Brief synthesises the main findings and policy recommendations put forward in the CEPS e-book "The Triangular Relationship between Fundamental Rights, Democracy and Rule of Law: Towards an EU Copenhagen Mechanism" (http://www.ceps.eu/book/triangular-relationship-between-fundamental-rights-democracy-and-rule-law-eu-towards-eu-copenha), which examines the ways in which the European Union could strengthen its competences in the assessment of member states' fundamental rights, democracy and rule of law commitments. This Policy Brief also aims at summarising CEPS' contribution to the upcoming Conference "Assises de la Justice: Shaping Justice Policies in Europe for the Years to Come" organised by the European Commission in Brussels, 21-22 November 2013 (http://ec.europa.eu/justice/events/assises-justice-2013/index_en.htm).

Sergio Carrera is Senior Research Fellow and Head of the Justice and Home Affairs section at CEPS; Elspeth Guild is Senior Associate Research Fellow, Justice and Home Affairs, CEPS, and Jean Monnet Professor ad personam of European Migration Law at the Radboud University Nijmegen, the Netherlands, and Queen Mary, University of London, United Kingdom; and Nicholas Hernanz is Research Assistant, Justice and Home Affairs section, CEPS.

Introduction: The Copenhagen dilemma

The European Union, and its Area of Freedom, Security and Justice (AFSJ), is founded on a set of common principles of rule of law, democracy and human rights. This has been officially enshrined in the body of Article 2 of the Treaty on European Union (TEU) which lists "*respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities*" as the shared values on which the Union is rooted. One of the current modalities of action to ensure that all member states of the EU respect Article 2 TEU is to filter their compliance with these values *before* they accede to the Union. The so-called 'Copenhagen criteria' have been established in 1993 to ensure that all new EU member states are in line with the Union's common principles before crossing the bridge towards membership.

That notwithstanding, no similar method or instrument exists to supervise the respect of these same principles *after* accession. This has been referred to by Vice-President of the European Commission Viviane Reding as the "*Copenhagen dilemma*", which she describes as follows: "O*nce this Member State has joined the European Union, we appear not to have any instrument to see whether the rule of law and the independence of the judiciary still command respect*".[1] This dilemma was reaffirmed by President of the European Commission José Manuel Barroso, in his latest State of the Union, when he confirmed the need to better safeguard the EU's rule of law values[2] and called for a robust European mechanism to influence the equation when basic common principles are at stake.

Recent events in Europe have indeed underlined the fundamental gap affecting the 'Copenhagen filtering' after accession. The Roma crises in France in 2010-13, the constitutional controversies in Hungary from the end of 2011 and in Romania in the summer of 2012 are only few examples of incidents illustrating systemic rule of law deficiencies in the Union. More recently, the alleged mass surveillance of EU citizens by the British GCHQ intelligence service in collaboration with the United States NSA, or the destruction by The Guardian of evidence on request of the British government, have also been regarded to be in fundamental tension with democratic rule of law and fundamental rights.

> ***All these rule of law crises have revealed that the respect of fundamental rights by Member States cannot be taken for granted.***

1. Mapping treaty provisions and EU policy instruments protecting rule of law, fundamental rights and democracy

The CEPS e-book *The Triangular Relationship* shows that the EU is already a rule-of-law actor relying on a set of policy and legal instruments assessing (to varying degrees) member states' compliance with rule of law, fundamental rights and democracy under the current treaty configurations.

There is in fact a multi-level and multi-actor European framework of existing legal and policy instruments dealing – directly or indirectly – with these issues. They constitute a scattered and patchy setting of member states' EU surveillance systems as regards their obligations enshrined in Article 2 TEU and the EU Charter of Fundamental Rights. These instruments also show variable degrees of proximity to the treaties. Some are expressly stipulated in treaty provisions and others only present indirect linkages with EU primary law. There are also instruments that have no strong legal foundation but fall in the field of soft methods of 'experimental' governance.

> ***...the EU is already a rule of law actor equipped with a set of policy and legal instruments assessing member states' compliance with rule of law under the current Treaties.***

The only Treaty-based supervisory instrument in the hands of European institutions to monitor member states' rule of law compliance has never been used in practice. Article 7 TEU states that if there is a serious and persistent breach by a member state of the values referred to in Article 2, this member state might be sanctioned and be suspended from voting at Council level.

[1] European Parliament (2012), Plenary debate on the political situation in Romania, statement by V. Reding, 12 September 2012. See also V. Reding, "The EU and the Rule of Law: What Next?", speech delivered at CEPS, 4 September 2013.

[2] J. M. Durão Barroso, State of the Union 2013, 11 September 2013 (http://europa.eu/rapid/press-release_SPEECH-13-684_en.htm).

This provision confers powers on the European Commission to monitor fundamental rights in the EU and identify potential risks. Article 7 consists of a preventive arm (determining a clear risk of a breach) and a corrective arm (determining a serious and persistent breach).[3] A central point here is that the scope of application is not only limited to member states' actions when implementing EU law, but also covers breaches in areas where they act autonomously.

Article 7, which has been misleadingly labelled 'the nuclear option', has never been activated in practice. Several reasons have played a role here, most importantly the lack of EU inter-institutional consensus on the conditions for its practical operability as well as its inherently political nature and the large room of discretion left to the Council in determining that there is a clear risk or in determining that there is a serious or persistent breach, as well as on the application of penalties.

> ***Article 7 TEU has not been applied effectively in practice due to a number of political and legal obstacles.***

There are other EU-level instruments evaluating and monitoring (yet not directly supervising) Article 2-related principles at member-state levels. These include for instance the Cooperation and Verification Mechanism (CVM) for Bulgaria and Romania,[4] the recently adopted EU Justice Scoreboard,[5] the upcoming EU Anti-Corruption Report[6] as well as the Annual Reports on Fundamental Rights published periodically by the European Commission, the European Parliament and the Fundamental Rights Agency (FRA).[7]

These mechanisms, however, present a number of methodological challenges affecting their effectiveness. First they are experimental governance techniques which constitute soft-policy (non-legally binding) tools or coordination methods making use of benchmarking techniques, exchange of 'good practices' and mutual learning processes between member states. They are affected by politicisation and make use of non-neutral and subjective evaluation methodologies. Some of them even defy the EU inter-institutional balance and challenge the ways in which EU decision-making is supposed to take place following the wording of the EU treaties. Particular issues of concern include f democratic accountability and judicial control gaps, with a limited or non-existent role for the European Parliament and the Court of Justice of the European Union, and a lack of coherency with other existing EU legislative and policy frameworks in the same fields.[8]

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[3] See also European Commission (2003), Communication on Article 7 of the Treaty on European Union - Respect for and promotion of the values on which the Union is based, COM(2003) 606 final, 15 October 2003.

[4] See contribution by Ivanova in CEPS e-book. See also European Commission (2006) Decision establishing a mechanism for cooperation and verification of progress in Bulgaria to address specific benchmarks in the areas of judicial reform and the fight against corruption and organised crime, C(2006) 6570 final, Brussels, 13 December 2006; as well as European Commission (2006) Decision establishing a mechanism for cooperation and verification of progress in Romania to address specific benchmarks in the areas of judicial reform and the fight against corruption and organised crime, C(2006) 6569 final, Brussels, 13 December 2006 (refer to http://ec.europa.eu/cvm/progress_reports_en.htm)

[5] European Commission (2013), The EU Justice Scoreboard – A tool to promote effective justice and growth, COM(2013) 160 final, Brussels, 27 March.

[6] European Commission (2011), Decision establishing an EU Anti-corruption reporting mechanism for periodic assessment ("EU Anti-corruption Report"), C(2011) 3673 final, Brussels, 6 June 2011. Refer also to European Commission, Communication on Fighting Corruption in the EU, COM(2011) 308 final, 6.6.2011, Brussels.

[7] For a detailed overview of the scope and components of each of these instruments, refer to chapter 2 of the CEPS e-book and Annex 1 on Mapping of current instruments at EU level evaluating or monitoring fundamental rights and rule of law aspects.

[8] Similar concerns have been raised in the field of EU economic policy coordination. See J. Mortensen (2013), "Economic Policy Coordination in the Economic and Monetary Union: From Maastricht via the SGP to the Fiscal Pact", CEPS Working Document No. 381, Centre for European Policy Studies, Brussels, August; and to the contribution by Cinzia Alcidi and Matthias Busse in the Annex to the CEPS e-book.

2. What does rule of law mean?

A second challenge facing any rule-of-law debate at EU level relates to its conceptual vagueness. *What exactly does rule of law mean?* The notion of rule of law is an elusive and controversial one. The European Commission for Democracy through Law (the Venice Commission) of the Council of Europe has provided one of the few widely accepted conceptual frameworks for rule of law in Europe, and it represents a helpful starting point.[9] According to the latter, rule of law is first and foremost directed at state authorities – those who make and apply the law.

The thematic contributions composing the CEPS e-book have revealed that there is an 'embeddedness' of this term with specific national historical diversities of a political, institutional, legal and imaginary nature. Concepts such as for instance *Rechtsstaat* in Germany, *état de droit* in France, rule of law in the UK or *pravova darjava* in Bulgaria are far from being synonymous and present distinctive features, including their relations with the other notions of democracy and fundamental rights. The material scoping of rule of law in member states' arenas, and its linkages with the other two criteria, remain also ever-shifting and are therefore difficult to capture from a normative viewpoint.

However, while acknowledging these conceptual divergences, the CEPS e-book argues that any future rule of law-related policy discussion in the EU should start from an understanding of the triangular relationship between these dimensions from the perspective of 'democratic rule of law with fundamental rights', i.e. the legally based rule of a democratic state that delivers fundamental rights. The relationship among the rule of law, fundamental rights and democracy is co-constitutive. Like the three legs of a stool, if one is missing the whole is not fit for purpose. States can comply with rule of law without actually being democracies, i.e. anchored on the principles of an association of self-governing free and equal citizens and upholding fundamental human rights protection. The three criteria are in this way inherently and indivisibly interconnected, and interdependent on each of the others, and they cannot be separated without inflicting profound damage to the whole and changing its essential shape and configuration.

> ***Any debate at EU level on how to strengthen member states' compliance with Article 2 TEU should start from the perspective of democratic rule of law with fundamental rights.***

3. Who should be responsible for protecting rule of law in the EU?

The full content of the concept of rule of law remains therefore largely unresolved. Yet, in the current state of affairs in the EU, much of the contestation around rule of law is a form of displaced state-sovereignty struggles. When bringing the EU into the intersection between rule of law, democracy and fundamental rights, profound sovereignty struggles emerge, which lie at the basis of the 'Copenhagen dilemma'.

While European institutions continue stressing the importance of the primacy of EU law and hence call upon member states to comply with their obligations and loyal cooperation in the scope of the EU Treaties and Article 2 TEU, member state governments in turn counter this version of 'rule of law' with principles of subsidiarity and national sovereignty. An additional controversial question affecting these debates has been therefore whether these are issues 'within the remits' of EU intervention under the current Treaties.

> ***The actual challenge behind 'the Copenhagen dilemma' is one related to the struggles over competence and sovereignty between the EU and national governments.***

As stated above, the Union is already a rule-of-law actor. All three principles – fundamental rights, rule of law and democracy – are inherent to the EU through the treaties and the EU Charter of Fundamental Rights. The development of the European legal system and its evolving fundamental rights *acquis* have transformed the traditional venues of accountability which used to reside within the exclusive remit of the nation-liberal democratic

[9] European Commission for Democracy through the Law (Venice Commission), Report on the Rule of Law, Strasbourg, 4 April 2011, Study No. 512/2009, Council of Europe (see www.venice.coe.int/WebForms/pages/?p=01_Presentation for more information on the Venice Commission).

member states of the Union. It has added a supra-national constellation of rule of law.

The EU Charter of Fundamental Rights is now a constitutive component of the national constitutional traditions of EU member states, with national judges increasingly using it in domestic rulings in matters showing no direct correlation with EU law. The national constitutional traditions covered by our research show a surprising 'degree of convergence' that has emerged at the member state level, and the 'processes of constitutionalisation' of the EU Charter and European human rights framework in the member states' domestic legal systems. This calls for a strengthened role for the EU in monitoring, evaluating and/or supervising the triangular relationship between rule of law, democracy and fundamental rights by its member states.

> ***The EU Charter of Fundamental Rights is now a constitutive component of the national constitutional traditions of member states.***

4. Conclusions: A New Copenhagen Mechanism for the EU

The EU should therefore establish a new all-encompassing EU supervisory mechanism in order to address the dilemmas characterising the relationship between fundamental rights, democracy and rule of law in the EU, which could be named the 'Copenhagen Mechanism'. If legal principles such as democracy, rule of law and fundamental rights are so important as to be listed in Article 2 of the Treaty on European Union, *how is it possible that no EU monitoring tool exists to safeguard their observance?* The European Commission currently has at its disposal several instruments that could be more effectively brought to bear against a member state even when they act outside the scope of EU law or 'autonomously', without the need of any Treaty change.

In light of the above, the following **policy recommendations** are put forward:

1. The new Copenhagen Mechanism should be a monitoring arm, complementing the preventive and corrective arms of the Article 7 TEU instrument.[10] This monitoring arm would consist of a periodic evaluation or scoreboard of member states' compliance with Article 2 TEU principles. No treaty change would be required to develop this EU mechanism. As guardian of the treaties, the European Commission (DG Justice) would be the perfect candidate to lead the process of evaluation of democracy, rule of law and fundamental rights at member-state level.

2. A new Commission Communication should carefully outline and develop these conditions and procedures to ensure a more effective operability of this important mechanism. The Communication should be the basis for European Council Conclusions and an EU inter-institutional agreement on European guidelines for improving Article 7 TEU operability and effectiveness.

3. Methodologically, the Copenhagen Mechanism and the scoreboard should be mainly based on external independent academic expertise so as to ensure impartiality in the evaluation of politically sensitive matters, leading to qualitative comparative assessments of EU member states taking due consideration of their domestic specificities and constitutional traditions and practices. The use of benchmarking should be limited and taken with caution as this methodology is affected by unresolved methodological dilemmas related to politicisation, lack of neutrality and accountability deficits. Parliamentary accountability of this new mechanism should be better guaranteed. The European Parliament would need to be given an important role in the debates on the results of the monitoring and in the recommendations stemming from it.

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[10] See D. Bigo, S. Carrera and E. Guild (2009), "The Challenge Project: Final Recommendations on the Changing Landscape of European Liberty and Security", CHALLENGE Research Paper No. 16, CEPS, Brussels. See also S. Carrera, E. Guild, J. Soares da Silva and A. Wiesbrock (2012), "The Results of Inquiries into the CIA's Programme of Extraordinary Rendition and Secret Prisons in European States in light of the New Legal Framework following the Lisbon Treaty", DG IPOL, European Parliament, Brussels.

In examining the existence of a "threat or a risk of serious breach" by a member state of Article 2 TEU principles, the Commission should establish institutionalised cooperation and formalised partnerships with non-EU bodies such as the United Nations; the Council of Europe, in particular its Venice Commission on the rule of law and its Commissioner for Human Rights. Better cooperation with existing networks of national, regional and local practitioners and authorities, such as those currently under the coordination of the European Ombudsman and the European Agency for Fundamental Rights, should be also encouraged and activated.

4. The EU should launch a 'rule of law, democracy and fundamental rights Copenhagen Policy Cycle', as recommended in the European Parliament's 2012 Report on the situation of fundamental rights,[11] which would ensure inter-institutional coordination between the currently ongoing reporting processes related to the EU Charter and fundamental rights by European institutions and agencies. The Copenhagen Policy Cycle should be linked to the European Semester Cycle in order to ensure the exchange of information and cross-linkages between both processes. It should be inter-institutional in nature and involve all the relevant national actors, human rights bodies, national ombudsmen, data protection authorities and other relevant civil society actors.

5. In a longer-term perspective, other measures could be taken that would require an amendment of the current normative configurations delineating the EU treaties. The activation phase of the Copenhagen Mechanism in cases of alleged risk or existence of serious/persistent breach of Article 2 TEU could be improved by liberalising its current form and threshold, which remain too burdensome in practice. The margin of manoeuvre by the Council should be more balanced with increasing accountability by the European Parliament in all stages of the new supervisory process. The Court of Justice of the European Union should be involved both in the preventive and penalty dimensions of Article 7 TEU.

In conclusion, the Copenhagen Mechanism is only one of the possible policy options available to EU policy-makers, but its features are essential in addressing the current rule of law gaps. Maintaining the current status quo means continuing to assess rule of law by rule of thumb. Only by having a solid, independent and knowledge-based monitoring tool will it be possible for the EU to assess whether the common principles such as democracy, rule of law and fundamental rights are still respected by its member states.

[11] European Parliament (2012), Resolution on the situation of fundamental rights in the EU (2010-2011), P7_TA(2012)0500, Rapporteur: Monika Flašíková Beňová, 22 November.

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