NÉZŐPONT INTÉZET

REPORT ON THE RULE OF LAW 2019 – 2024

THE RULE OF LAW SITUATION IN THE INSTITUTIONS OF THE EU

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Contents

List of Abbreviations

ALDE – Alliance of Liberals and Democrats for Europe

CJEU – Court of Justice of the European Union

EC – European Commission

ECR – European Conservatives and Reformists

ECtHR – European Court of Human Rights

EP – European Parliament

EPP – European People's Party

EPPO – European Public Prosecutor's Office

EU – European Union

ID – Identity and Democracy

LGBTIQ – Lesbian, Gay, Bisexual, Transgender, Intersex and Queer

OBT – National Judicial Council

PEGA – The Committee of Inquiry of the European Parliament investigating the use of Pegasus and equivalent surveillance spyware

PiS – Law and Justice

RRF – Recovery and Resilience Facility

RRP – Recovery and Resilience Plan

S&D – Progressive Alliance of Socialists and Democrats

TASZ – Hungarian Civil Liberties Union

TEU – Treaty on European Union

TFEU – Treaty on the Functioning of the European Union

TI – Transparency International

Introduction

The frequently quoted Article 2 of the Treaty on European Union (hereinafter referred to as the Treaty, or TEU) emphasises that *"The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities."*[1] Recently the issue of the rule of law – one of the founding values of the European Union, with importance equal to the others – has been the subject of increased attention, especially in relation to Member States. So far less has been said about the fact that the rule of law must also be the basis for the institutional system and the functioning of the Union itself, even though throughout the historical development of the European Union the very purpose of the inclusion of the rule of law criteria in the Treaties has been to ensure that fundamental legal guarantees could also be applied in the functioning of the Union's institutions.[2] Just as the Commission – as Guardian of the Treaties – acts as a monitor of the rule of law in the Member States,[3] the Member States and civil society have a responsibility to raise awareness of the situation related to the rule of law in the Union, thus contributing to the EU remaining a community based on the rule of law.[4]

In recent years European political discourse has been dominated by the debate on the situation related to the rule of law in the Member States. This has become a topic that is liable to be revived at any time, due to the lack of a universally accepted definition of the concept of "rule of law". As the Venice Commission's much quoted 2011 study pointed out, the rule of law is *"indefinable"*.[5] Therefore, instead of giving a precise definition, that study sought to identify the fundamental pillars of the rule of law: legality, legal certainty, prevention of the abuse of power, equality before the law and non-discrimination, and access to justice (which includes the right to a fair trial and an independent and impartial judiciary).

Despite the voices in European public life calling for the correct model of the rule of law, there is no uniformly accepted list of criteria for the rule of law that can be followed and cited as a prescription. Although there is an increasingly visible political will to make its meaning more concrete by means of a catalogue of values, the rule of law does not in fact have a single, uniform, accepted form of practice, and its application is therefore only manifest in specific cases, on the basis of common sense rather than a political checklist. Nevertheless, from the above pillars it follows that, in a state under the rule of law, ideological bias must not be allowed to translate into unlawful practices, institutions must not arbitrarily confer new powers on themselves, and they must ensure that the law is enforced in a uniform and impartial manner. Although in recent years ideologically driven political actors have made great efforts to shape the concept of the rule of law to conform to their own set of values, it is important that at least evaluation of the rule of law is not couched in political opinions presented as fact, but rather in statements of reality based on facts.

It is with these requirements in mind that the Research Study on the Functioning of the Rule of Law in the European Union has set out to analyse the institutions of the European Union in terms of the rule of law. The aim of this research is to draw lessons from consultations with researchers and experts[1] who are familiar with the functioning of the EU institutions, and to draw attention to the risk of serious and persistent breaches of the rule of law in some of these EU institutions. The research was based on the above-mentioned five pillars of the rule of law, which were examined between 2019 and 2024 in the institutional activities of the following bodies: the Council of the European Union, the European Commission (EC), the European Parliament (EP), and the Court of Justice of the European Union (CJEU). The institutions studied best define the essence of the EU, and so an examination of their day-to-day functioning and the rules

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governing them provides an insight into the state of the rule of law in the European Union from the point of view of compliance with rule of law conditions.[6]

The results of the research are discussed institution by institution. They show that the risk of serious violations of the rule of law is present in all institutions, with the highest risk being in the European Parliament. Having also demonstrated that the highest number of rule of law violations are linked to EU institutions' attempts to arbitrarily and stealthily extend their competences in contravention of the Treaties, it is now more timely than ever to establish a European court of competences, in order to decide which issues fall within the competence of EU institutions and which do not. At present it is not clear what tools are available to the contracting parties to enable them to limit the arbitrary extension of the EU's competences, and who would have the authority to scrutinise it. This uncertainty could be resolved by a Court of Competences of the European Union.

In the light of the findings of the report, the Research Study into the Functioning of the Rule of Law in the European Union recommends that the European Union and its Member States should:

- establish a European Union court for the determination of competences in order to investigate instances in which the EU exceeds its powers, and sanction where appropriate;
- limit the discretionary powers of the European Commission, in particular as regards infringement procedures; prohibit the launch of infringement procedures which challenge the decisions of Member States' constitutional courts;
- ensure a broader range of opportunities and a more appropriate institutional framework for the parliaments of the Member States to monitor the work of the European Parliament and scrutinise the creation of EU legislation;
- strengthen the equality of Member States before the Treaties, together with the principle of unanimity on issues for which the Treaties require it;
- limit the level of financial sanctions that can be imposed by the Court of Justice of the European Union;
- and prohibit the EU institutions from making proposals to amend the Treaties – this competence shall be reserved to the Member States.

Summary

European Parliament

- According to the Treaties, the European Parliament does not nominate the President of the Commission, but the EP is seeking to do this by promoting the so-called "Spitzenkandidat" system.
- TFEU Article 346(1) states that *"...no Member State shall be obliged to supply information the disclosure of which it considers contrary to the essential interests of its security"*, yet several committees of the European Parliament have occupied themselves with national security issues, similar to the Defence of Democracy package.
- The Rules of Procedure of the European Parliament, entering into force in 2024, significantly increases the possibilities for committees of inquiry, empowering them to organise fact-finding missions, conduct hearings of officials, and seek the cooperation of both national authorities and the parliaments of relevant Member States.
- Although the Treaty formally provides national parliaments the opportunity to scrutinise proposed legislation from the point of view of subsidiarity, the fact that yellow and orange card procedures are rarely launched and their high failure rate demonstrates that in reality national parliaments with direct legitimacy have negligible influence over the EU legislation.
- During the COVID pandemic, the remote operation of the European Parliament ignored a number of rules of procedure, thus necessitating retroactive declaration of the legality of the EP's operation.
- The long list of corruption scandals affecting the European Parliament demonstrates the shortcomings of the EP's anti-corruption rules.

European Commission

- The Legal Service of the Council of the European Union has expressed concerns about the Commission's Rule of Law Framework, saying that *"a breach of the values of the Union, including the rule of law, may be invoked against a Member State only if it acts in an area for which the Union has competence based on specific competence-setting Treaty provisions*".
- The Commission's discretionary powers in infringement procedures jeopardise legal certainty.
- By invoking the right of free movement, the Commission would seek to circumvent the competence of Member States in the area of family law.
- The failure of both the Conference on the Future of Europe series and the European Citizens' Initiatives demonstrates that the Commission and the institutions of the European Union cannot be held to account.
- The Commission has breached the Treaties' requirement for the equal treatment of Member States by treating the group of countries using the euro "more equally" and allocating resources to them from the Recovery and Resilience Facility more quickly than to countries using national currencies.
- The "Pfizergate" affair and other cases of suspected corruption involving the Commission highlight the existence of abuses of power within the Commission.

Court of Justice of the European Union

- Several Member States' constitutional courts have challenged the supremacy of European law and the EU's unilateral extension of its powers.
- The Court of Justice's method for allocation of cases – it is the President who assigns judges to cases – is liable to bias.
- Despite Treaty provisions, several members of the Court cannot be considered to be independent, as their careers indicate their party affiliation, and hence political bias.
- The EU process for selecting the members of the Court is opaque.

Council of the European Union

- TEU Article 4(3) states that *"Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties."* Therefore, the Union's institutions have a duty to support the Member States in the performance of their tasks. This

provision has clearly been breached by the Union's institutions and leaders, as demonstrated by their attitude towards Hungary's rotating presidency of the Council of the EU.

- Certain issues require unanimity in the European Council – for example, joint foreign and security policy. In recent times, however, EU institutions have made increasing efforts to limit Member States' opportunity to exercise their veto right.

1. The European Parliament

1.1 It is in breach of the Treaties for the EP to seek to nominate the President of the Commission

According to the Treaty on European Union Article 17(7),[7] *"Taking into account the elections to the European Parliament and after having held the appropriate consultations, the European Council, acting by a qualified majority, shall propose to the European Parliament a candidate for President of the Commission. This candidate shall be elected by the European Parliament by a majority of its component members."* So, in accordance with the Treaties, nominating the President-designate of the Commission is the task of the European Council. Nevertheless, in order to increase its own competences and influence, the EP has long called for the use of the so-called *Spitzenkandidat* ("lead candidate") system. Under this system, during the EP election campaign political groups in the EP nominate lead candidates for the post of President of the Commission. The lead candidate of the political group that wins the most votes in the EP elections will thus be the quasi-automatic nominee for the new President of the Commission. But under the Treaties the EP has no right to nominate candidates, and so its intention to usurp this power reduces the role of the European Council, the body which brings together the representatives of legitimate national governments. The EP's intention thus challenges the role of the Member States.

The attempt to introduce a *Spitzenkandidat* system goes back more than five years. In the run-up to the 2014 EP elections, the parties' lead candidates visited 246 European cities; during his campaign Jean-Claude Juncker, the lead candidate of the European Peoples Party (EPP), visited roughly half of the Member States.[8] But this attempt at extending the EP's competences cannot be seen as a step forward in the development of European democracy. According to a post-election opinion poll, 72 percent of respondents could not name the EPP's candidate Jean-Claude Juncker at all, while a further 9 percent incorrectly identified him.[9] Therefore it can be concluded that the debates and tours of the countries, which were accompanied by media coverage, failed to give the candidates legitimacy in the eyes of the electorates of Member States. Political groups in the European Parliament also named their lead candidates in 2019 – in most cases not through elections, but through internal bargaining processes among party elites. The conclusion from the post-election survey that year was that European voters did not know the identity of the lead candidates: 69–78 percent of respondents did not know who the lead candidates were for the EPP, the Progressive Alliance of Socialists and Democrats (S&D) and the Alliance of Liberals and Democrats for Europe (ALDE); the figures for respondents incorrectly naming the lead candidates of the EPP, the S&D and ALDE were 14, 17 and 14 percent respectively.[10]

In 2019 the *Spitzenkandidat* system was a failure not only because it did not boost democratic legitimacy, but also because although the lead candidate of the largest party was Manfred Weber, the person ultimately elected as Commission President was Ursula von der Leyen. The *Spitzenkandidat* system has failed to achieve any of the hoped-for results: in 2014 or 2019 the candidates did not become widely recognised, thus failing to contribute to the EP's popular legitimacy; and in 2019 the lead candidates were even ignored when the Commission President was elected. Nevertheless, the European Parliament continued to push for the selection of lead candidates in 2024 – in a self-serving and illegal quest to expand its powers at the expense of the role of Member State governments. In 2024 a debate was organised in the run-up to the EP elections in which the European Broadcasting Union invited the political groups' lead candidates (*Spitzenkandidaten*) to participate. Two right-wing groups – Identity and Democracy (ID) and the European Conservatives and Reformists (ECR) – were not given the opportunity to participate in the debate, as they rejected the legitimacy of the *Spitzenkandidat* system and had not nominated a lead candidate during the campaign. In short, over the last decade the *Spitzenkandidat* system has been used not only to illegitimately expand the powers of the EP, but also to maintain the *cordon sanitaire* that characterises European politics.[11]

While in pushing for a *Spitzenkandidat* system the European Parliament insists that the Commission's leadership should reflect the results of democratic elections, the EP overlooks the importance of legitimacy when electing its own leaders. In the elections for vice-presidents and quaestors after the 2019 elections, the right-wing Identity and Democracy (ID) political group – which did well in the elections – was squeezed

out of important positions in the EP. ID, which won 7 percent of the seats in parliament, did not gain a single vice-president or quaestor post in the EP after the elections, while the EPP – which won 25 percent of the seats – received 37 percent of the posts for vice-presidents and quaestors. Like ID five years earlier, after the 2024 elections another right-wing force, the Patriots for Europe, was also disadvantaged in the allocation of posts. As the third largest political group in the EP, the Patriots hold 12 percent of the seats, yet they have not received a single post for vice-president or quaestor in the Parliament. By contrast, the under-performing left-wing S&D, which has only 19 percent of seats, is providing 6 out of 19 vice-presidents and quaestors, or 32 percent of the EP's senior leaders. So, while the EP is pushing the Commission to take account of the election results, when it comes to determining its own leadership what matters is not the will of the electorate, but political bargaining. However, the discrimination against right-wing parties marginalised by the *cordon sanitaire* highlights not only the disingenuous shallowness of the arguments put forward in favour of the *Spitzenkandidat* system, but also a rule of law problem. Making it more difficult for parties with significant societal support to participate in political life also breaches the prohibition on discrimination and the principle of equal rights.

		EPP	S&D	Patriots	Renew	Greens/EFA	ECR	Left
2024	Number of vice-presidents and quaestors[12]	5	6	0	3	1	3	1
	Proportion of vice-presidents and quaestors	26%	32%	0%	16%	5%	16%	5%
	Proportion of MEPs	26%	19%	12%	11%	7%	11%	6%
	Number of MEPs[13]	188	136	84	77	53	78	46
		EPP	S&D	ID	Renew	Greens/EFA	ECR	Left
2019	Number of vice-presidents and quaestors	7	4	0	3	2	1	1
	Proportion of vice-presidents and quaestors	37%	21%	0%	16%	11%	5%	5%
	Proportion of MEPs	25%	20%	7%	14%	10%	10%	5%
	Number of MEPs[14]	179	138	49	98	70	69	37

Note: The vice-presidents and quaestors for the 2019–22 period included one leader not attached to any political group.

1.2 It is in breach of the Treaties for the EP to interfere in the national security affairs of Member States

The European Union has no competence in matters concerning the national security of the Member States, which have not given it such authority. TEU Article 4(2)[15] explicitly states that the EU *"shall respect [Member States'] essential State functions, including [...] safeguarding national security."* The Treaty also states that *"In particular, national security remains the sole responsibility of each Member State."* Article 346(1) of the Treaty on the Functioning

of the European Union (TFEU) states that *"no Member State shall be obliged to supply information the disclosure of which it considers contrary to the essential interests of its security".*[16] It is therefore clear from the Treaties that national security is a Member State competence.

Despite all this, on 19 April 2022 the European Parliament set up its Committee of Inquiry into Pegasus and similar spyware (PEGA Committee),[17] and in May 2023 the EP adopted the report of the so-called PEGA Committee.[18] This sought to set standards for the regulation of national security operations – and even related procurement – in the Member States.[19] The resolution stated, *inter alia*, that the European Parliament *"considers, therefore, that it is necessary for 'national security' to be clearly defined; underlines that regardless of the precise demarcation, the domain of national security must be subject to independent, binding and effective oversight in its entirety",* and also *"Stresses that, in a future amendment of the Dual-Use Regulation, the exception to the requirement to provide information to the Commission on grounds of commercial sensitivity, defence and foreign policy or national security reasons must be abolished".* With its statements, the European Parliament has also adopted a stance which opposes the exclusivity of Member States' competences for national security and the clauses in the Treaties on the provision of information.

The PEGA Committee of Inquiry has also carried out fact-finding visits to Hungary, Poland, Greece and Cyprus, despite the fact that officials interviewed in the Member States have repeatedly expressed their opposition to the Committee of Inquiry dealing with issues of national security. In Greece, for example, Christos Rammos, President of the Hellenic Authority for Communication Security and Privacy, was accused by a member of the Commission of Inquiry of *"patent refusal to cooperate"*, after he gave evasive answers and refused to answer other questions. Mr. Rammos explained that *"National security is a competence of Member States."*[20] During its visit to Poland, the Committee of Inquiry ran into similar obstacles, with the Polish ministers concerned not attending a meeting with the PEGA Committee. Although the motives of the Polish ministers were not described, PEGA's fact-finders on the Polish mission – who condemned the country's use of spy software – noted with satisfaction that they did have the opportunity to meet members of the Sejm, including twelve who were then in opposition.[21]

According to the report on the visit to Hungary, when welcoming representatives from the Hungarian Helsinki Committee, Amnesty International Hungary and the Hungarian Civil Liberties Union (TASZ), the head of the EP delegation (Jeroen Lenaers, from the Dutch party Christian Democratic Appeal) noted that during their investigation they had not had the opportunity to meet government ministers (just as they did not meet Polish ministers), as the Hungarian government had refused their request. The reason given for this refusal was that the matter under discussion was a matter of national security, and therefore not within the competence of the European Union.[22] The head of the Committee of Inquiry's delegation to Hungary challenged the Hungarian government's position, however, saying that he disagreed with the Hungarian standpoint. He argued that the EU considered the Pegasus scandal to be not a matter of national security, but of the rule of law – which is within the EU's competence. On the one hand, it is questionable whether the EU institutions do indeed have competence in matters relating to the rule of law in general,[23] as the Legal Analysis of the Legal Service of the Council of the European Union [24] has also stressed that *"a violation of the values of the Union, including the rule of law, may be invoked against a Member State only when it acts in a subject matter for which the Union has competence based on specific competence-setting Treaty provisions."* Furthermore, if this were a rule of law issue and not a national security issue, one may ask why the EP's Committee of Inquiry felt it necessary to question the Chairman of the National Security Committee of the National Assembly of Hungary (Zoltán Sas) and former Defence Minister of Hungary István Simicskó. As can be seen from the extract from the TFEU quoted above (*"no Member State shall be obliged to supply information the disclosure of which it considers contrary to the essential interests of its security"*), it is for each Member State to decide what information falls within its essential security interests. Therefore, the question of competence as defined in the Treaties cannot be countervailed by the fact that the EU considers the matter in question to be one relating to the rule of law and not to national security.

It was not only the PEGA Committee of Inquiry into spyware that strayed into the realm of national security, but also the INGE and ING2 EP special committees on foreign influence – thus further undermining the EU's Treaty relationship with the Member States. The motion[25], and the EP resolution[26] resulting from the

work of these committees highlighted the dangers of foreign influence in the functioning of the Union and in relation to elections. Their proposals included setting up a permanent body within the EP to continuously monitor foreign interference in the EU, and limiting at European level the takeover of media markets by third country operators. In relation to critical infrastructure, they highlighted the potential risk posed by the Chinese-owned TikTok platform and proposed that national governments ban its use at all levels. In addition to the detailed proposals on national competences, the motion also *"Calls on the Member States to acknowledge the fact that foreign interference, including disinformation, is a national and cross-border security threat"*. This demonstrates that these committees were also aware that the foreign influence they were examining is a national security issue. This raises the question of why the Union is addressing this issue, when its options are limited by the principle of conferral of competences and, under the Treaties, national security is a national competence.

As with the two European Parliament committees discussed above, the Commission's Defence of Democracy package[27] also addresses the issue of foreign interference and disinformation. Officially the package aims to protect European democracy and the public sphere, an important element of which it identifies as protection against disinformation and foreign interference. The package would make it compulsory to list organisations that carry out advocacy activities on behalf of third countries, and to register their activities on a publicly accessible platform.[28] The clear aim of the package is to make foreign funding and influence – specifically Chinese and Russian – more transparent. [29] According to the Protocols*, "Draft legislative acts shall be justified with regard to the principles of subsidiarity and proportionality"*. Therefore, the Commission's democracy package also includes an Explanatory Memorandum referring to subsidiarity. The Explanatory Memorandum refers to TFEU Article 114 as the relevant Treaty provision establishing the legal basis and the Union's powers to act. TFEU Article 114 is about the establishment and functioning of the internal market and the harmonisation measures necessary to achieve it. The Commission uses this Article to explain the need for a democracy package, arguing that harmonising and making more transparent the rules applicable to organisations representing third country interests will help the internal market to function properly. The Commission's Explanatory Memorandum to the Article explains that *"It is the appropriate legal basis for an intervention covering service providers in the internal market and addressing differences between Member States' provisions which obstruct the fundamental freedoms and have a direct effect on the functioning of the internal market."*[30] The document also explains that the democracy package is a shared competence (TFEU Article 4), whereby Member States can only exercise their competences if the EU does not (as opposed to, for example, supporting competences, whereby the EU only complements and coordinates Member States' measures).[31]

It is questionable, however, whether the EU is right to consider the regulation of foreign influence and of entities representing third country interests as an internal market issue, i.e. economic, or whether this should be understood as a matter of national security – which is the exclusive competence of nation states. Prior to the EU's package, many countries had taken steps to protect themselves against foreign influence – and international examples suggest that countries are treating foreign influence as a national security issue rather than an economic issue. In March 2024 France's National Assembly adopted legislation to extend algorithm-led surveillance for identifying terrorists to foreign interference investigations; the French law that would add foreign interference investigations, created in response to the 2015 Charlie Hebdo terrorist attack, is called the Intelligence Act.[32] Hungary's Act on the Protection of National Sovereignty, which also deals with foreign influence, argues that *"Political power falling into the hands of persons and organisations who are dependent on a foreign power, organisation or person damages Hungary's sovereignty and, at the same time, poses a major national security risk."* [33] These international examples show that the examination and regulation of foreign influence is a matter of national security, and that the EU cannot usurp this competence by arguing that harmonisation of national laws on foreign influence in the EU would help the internal market to function better. Reinterpreting Member States' exclusive competence for national security as an EU competence in this way raises rule of law problems related to the functioning of the Union.

1.3 It is in breach of the Treaties for the EP to seek to have scrutiny over national parliaments

The 2024 Rules of Procedure reform,[34] submitted by the Italian People's Party politician Salvatore De Meo and supported by the left-wing parties, has been heralded as a strengthening of the Parliament's internal working methods, institutional role and capacity to act.[35] The Parliament's new Rules of Procedure, however, contain a number of points that deliberately undermine the role of national parliaments. In its new Rules of Procedure, which entered into force on 16 July 2024, Parliament created the possibility for it to scrutinise the functioning of national parliaments as regards EU law and the implementation of EU policies. Right up until the adoption of the amendments, Rule 150(3) of the European Parliament's Rules of Procedure stated that *"A committee may directly engage in dialogue with national parliaments at committee level within the limits of the budgetary appropriations set aside for that purpose. This may include appropriate forms of pre-legislative and post-legislative cooperation."* The amended rules replace the full stop in that second sentence with a comma, and the provision continues thus: *"including scrutiny of the implementation of Union law and Union policies."*[36] The amendment extends the EP's scope for oversight of national parliaments. This violates the principle of subsidiarity governing the EU's competences, invoking "dialogue" while exercising supranational scrutiny over national parliaments, which are the source of Member States' democratic legitimacy.

The new Rules of Procedure also significantly increase the EP's powers on several other points, extending its possibilities at the expense of the principle of subsidiarity. According to Rule 208(10) of the European Parliament's Rules of Procedure on committees of inquiry, *"Where alleged contraventions or maladministration in the implementation of Union law suggest that a body or authority of a Member State could be responsible, the committee of inquiry may ask the parliament of the Member State concerned to cooperate in the investigation."*[37] With the new Rules of Procedure the European Parliament has significantly extended this power, which previously only covered requests for cooperation.[38] Under the amendments adopted, committees of inquiry convened by the European Parliament may, *inter alia*, organise fact-finding missions to Member States, invite witnesses, interview EU or national officials and other servants, and request the cooperation of national parliaments in investigations. The text of the amendment states that the President may call witnesses to testify under oath, and that although no one can be obliged to testify under oath, if a witness refuses to do so a formal note must be made. The broad extension of its competence gives the EP the power to gain even greater influence over nation states, in defiance of both the principle of subsidiarity and the prohibition of the transfer of powers.

The amendment on committees of inquiry discussed above also states that another new element of the amendment to the Rules of Procedure,[39] Rule 123a, *"shall apply in case of a refusal of a request for documents or for a witness to provide testimony without sufficient justification."* The new element reads thus: *"A representative of a Union institution or body and any other person shall be expected to cooperate in case of requests to attend meetings of committees and special scrutiny hearings as well as to supply relevant documents to the committees and for such hearings. In the case of lack of cooperation, […] the President […] shall decide on whether to apply one or more of the following measures"*. These measures include the writing of *"a formal statement expressing Parliament's dissatisfaction"* and a request that the organisation concerned *"send a representative to a meeting of the Conference of Presidents to explain its refusal"*. The European Parliament can therefore also exert punitive pressure on all those who are unwilling to cooperate with its committees of inquiry.

The PEGA Committee mentioned above was also the EP's committee of inquiry, the powers and capacities of which would be extended by the amendments to the Rules of Procedure. While it is not yet known how the new rules will be applied in practice, they open up the possibility for the EP to intervene more actively in the political life of Member States by condemning and expressing dissatisfaction with Member State representatives who do not contribute to or give sworn testimony before EP committees of inquiry. This practice would put pressure on Member State officials, possibly in unprecedented ways. While the EP is seeking to expand its instruments of control and influence, *inter alia*, the parliaments of the nation states have no such influence over the EP. This is despite the important role TEU Article 12[40] reserved for national parliaments in monitoring the activities of the Union from the point of view of the principle of subsidiarity.

1.4 Limits on the ability to democratically hold the EP to account are a violation of democratic principles

While the EP seeks to limit and monitor nation states and their parliaments, democratically elected national parliaments have only a limited role – and no national parliament has a real say – in the work of the EP. This is despite TEU Article 12.[41] Since the Treaty of Lisbon, national parliaments have been able to review EU draft legislation from the perspective of subsidiarity. Under the so-called "yellow and orange card" procedures, each Member State has two votes. If the number of votes from national parliaments giving a reasoned opinion objecting to a draft proposal reaches one third of the total number of votes, the procedure is classified as a "yellow card". If those objecting are in the majority, the procedure is an "orange card". In both cases the Commission is obliged to review the draft contested by the national parliaments on the basis of the principle of subsidiarity. This procedure is controversial in several respects, however. Firstly, it allows very little time (only eight weeks) for Member States to submit their objections with reasoned opinions. For example, a publication on the UK Parliament's website reported that the UK Parliament had started work on a reasoned opinion on the proposal for a European Public Prosecutor's Office (one of the few proposals to have been subject to a yellow card procedure), but that the debate on the matter had failed to meet the eight-week deadline due to the timetable of parliamentary sessions.[42]. Another questionable aspect of subsidiarity procedures is that there is no "red card" procedure, which would, for example, allow a draft law to be blocked completely by the unanimous will of national parliaments.[43]

The main objection to subsidiarity procedures, however, is that since the Treaty of Lisbon entered into force 15 years ago, there have been only three yellow card procedures, and not a single orange card procedure. Moreover, even those three cases have not led to results: in all three, the Commission decided to retain its proposal, despite the objections of national parliaments. Of the three procedures, the Commission dropped only one proposal, relating to the right to collective action by employees. But even in that case it was not because of Member States' objections, but because the Commission believed that neither the European Parliament nor the Council would support the proposal. Despite the fact that national parliaments regularly submit reasoned opinions, the rare number of yellow and orange card procedures and their failure rates prove that in reality national parliaments with direct legitimacy have a negligible influence on the legislative procedure in the EU.

The number of reasoned opinions sent by Member State parliaments to designated EU institutions[44]		
Year	**to the Commission**	**to the Parliament**
2019	0	0
2020	9	13
2021	16	24
2022	32	34
Total	**57**	**71**

The table above shows that although national parliaments use the reasoned opinion system, with 57 objections to the Commission and 71 to the Parliament in four years, there are not enough votes to trigger a yellow card procedure on any proposal. For example, according to the Commission's annual report,[45] the 32 reasoned opinions received in 2022 covered a range of 24 proposals, and only four Commission proposals received more than one reasoned opinion each, with no proposal receiving more than five reasoned opinions. For example, the Hungarian parliament has adopted reasoned opinions in 14 cases, the Slovak Parliament in 6, the Hellenic Parliament in 3 and the two chambers of the Czech Parliament in 33,[46] on the grounds that some EU draft proposals undermine subsidiarity. So far none of these reasoned opinions have met with success.[47] It can therefore be concluded that, although national parliaments often express their views on proposals from the EU institutions, the system makes it very difficult for them to act in unity, and without this, no yellow card procedures can be launched. Comparing the findings in Point 3, while the EP is ambitiously extending its powers of scrutiny over national parliaments, the latter's Treaty

powers to scrutinise EU legislation from the perspective of subsidiarity are ineffective, and in practice they do not have an as important role as implied by the Treaties.

1.5 The fact that the EP's Rules of Procedure have been repeatedly ignored undermines legal certainty

Extending its competences in violation of the Treaties is not the only way how the European Parliament puts rule of law at risk, its disregard of the Treaties and the rules governing its functioning also undermines legal certainty. TFEU Protocol 6 states that *"The European Parliament shall have its seat in Strasbourg where the 12 periods of monthly plenary sessions, including the budget session, shall be held."*[48] Parliament's Treaty obligation to hold 12 plenary sittings a year at its seat has been confirmed in several decisions by the Court of Justice of the European Union (CJEU). The Parliament did not meet this requirement, however, in the exceptional situation created by the COVID pandemic in 2020.[49] Although Parliament interpreted the provision of the Rules of Procedure on electronic voting in a Bureau decision to ensure teleworking, this also failed to provide an adequate response to questions related to its functioning.

The Rules of Procedure state that for there to be a quorum in the European Parliament, one third of all Members must be physically present. If there is no quorum, any subsequent vote will be invalid. Since an electronic voting system cannot be used to determine a quorum, even with participation extended to Members joining online, under the rules in force during Parliament's remote functioning phase it was not possible to check the quorum. When the Parliament switched to remote functioning similar problems arose in determining thresholds. The uncertainty created by remote functioning led to a situation in which the minutes of the plenary sitting on 26 March 2020 showed that only 75 Members were present in the Chamber and only three other Members were excused (thus calling into question the existence of a quorum), yet the votes which took place that day did so with the participation of more than 600 Members who had not been certified as absent.

Not only did the definition of attendance cause problems for the Parliament functioning remotely, but the Bureau decision to introduce electronic voting also led to anomalies, as it did not respond to all the conditions laid down in the Rules of Procedure. Although the provisions stipulate that no speeches may be given during the voting period, the rather time-consuming nature of remote voting resulted in this rule being broken on several occasions. The provisions on the duration of speeches and political balance were also breached during the Parliament's remote functioning phase. For example, according to Rule 171 of the EP's Rules of Procedure,[50] the first period for speeches must be divided equally between the political groups; but during online sittings there were instances when either only those present online or only those present in person were allowed to speak. In the process, the political balance demanded by the Rules of Procedure was disregarded.[51] The uncertainties described made it necessary to retroactively declare the EP's operation legal. On the one hand, the fact that the pandemic created an exceptional situation for the EU institutions should be acknowledged, but on the other hand the Parliament's questionable functioning violated the principle of legal certainty, as it could provide the basis for a possible action for annulment. The way that Parliament operated during COVID shows that legal certainty is a low-priority issue in the EP, which for months operated with a new *ad hoc* practice, only later realising the need to establish a regulatory framework for the conduct of business adapted to a new context.

1.6 The shortcomings of the EP's anti-corruption rules violate the principle of prevention of the abuse of power

The rule of law pillar opposing arbitrariness is counteracted by the shortcomings of the EP's internal rules, which allow a culture of impunity to prevail in Parliament. On 9 December 2022, 19 property searches were carried out in Italy and Belgium, and eight people were arrested. In the following weeks, €1.5 million were seized by the police;[52] the images of hundreds of thousands of euros packed into suitcases and briefcases was an unprecedented shock for the European public. In the midst of the corruption scandal known as "Qatargate", several current and former MEPs have been accused of corruption and, in the course of their work in the European Parliament, of promoting the interests of the governments of Qatar, Morocco and

Mauritania in return for financial remuneration. The most infamous figures in the case are Greek MEP Eva Kaili and Belgian MEP Marc Tarabella. Although the presumption of innocence is a fundamental principle of European justice, the EP's Rules of Procedure are nevertheless problematic due to their weak anti-corruption provisions, demonstrated by the fact that, despite the corruption allegations, Eva Kaili was allowed out from prison and voted in the EP[53] on a motion to condemn Slovakia and its Prime Minister Robert Fico, entitled *"Planned dissolution of key anti-corruption structures in Slovakia and its implications on the Rule of Law".*[54] In that vote in January 2024 Eva Kaili condemned Slovakia for its alleged dismantling of anti-corruption structures. A few weeks after the vote Parliament stripped Eva Kaili of her immunity, opening the way for a fraud investigation against her.[55] Less than a month after he returned to Parliament, the other well-known key player in the Qatargate scandal, Marc Tarabella,[56] voted for a resolution condemning Hungary,[57] *"Resolution on the breaches of the Rule of Law and fundamental rights in Hungary and frozen EU funds".* And then in January this year he voted alongside Eva Kaili to adopt the resolution on "the dissolution of Slovakia's anti-corruption structures". All this is problematic in terms of the rule of law because it highlights the EP's very weak rules on ethics, which allow Members who have been exposed in corruption cases to remain active members of the EP – taking part, for example, in votes condemning Member States. As the adopted resolutions illustrated, the EP is extremely energetic in holding Member States to account – but it is less strict with itself.

This corruption scandal and its rapid disappearance from the agenda seriously undermines the integrity and authority of the European institutions. In January 2023, at a hearing of the Parliament's Special Committee on Foreign Interference (ING2), Nick Aiossa, Deputy Director of Transparency International's (TI) European Affairs Office, said the following: *"I urge you to take a look at how the decisions when it comes to transparency, integrity and ethics and anti-corruption are taken in this House. And they're taken primarily through the Bureau."* He spoke of a *"culture of impunity"* among MEPs – a phenomenon that contributed greatly to the Qatargate scandal, which has shaken the institution to its foundations.[58] TI has also made it clear that the EP's sanctions in corruption cases are extremely weak, and its actions lack seriousness and commitment. According to the annual reports of the Advisory Committee on the Conduct of Members of the European Parliament, since 2020 the President has referred only seven cases of possible breaches of the Code of Conduct to the Advisory Committee. Of these seven cases, only one resulted in a sanction.

Year	**Number of possible breaches of the Code of Conduct**	**The nature of the potential breach of the Code of Conduct and the Advisory Committee's conclusion, recommendation or sanction**
2020[59]	2	1. The Member failed to disclose an unremunerated position in an association – considered to be a breach leading to a conflict of interest (no sanction mentioned). 2. The Member failed to comply with the obligation to disclose shareholdings in a company
2021[60]	2	1. Closure of case 2020 2): although the Member had breached the Code of Conduct, no further action was taken because the Member concerned had promptly submitted an updated declaration. 2. The Member failed to comply with the obligation to disclose third-party funding for political activities **– the Member was deemed to have infringed, and was sanctioned.**
2022[61]	1	1. Member's external activities and vote on a parliamentary resolution – no breach of the Code of Conduct found in the case.
2023[62]	2	1. Possible breach of the disclosure obligations contained in the declaration of financial interests – the Advisory Committee, having received written information from the Member concerned, concluded that, on the basis of the information available, no breach of the Code of Conduct could be established in the case in question.

		2. Possible breach of disclosure obligations concerning participation in events organised by third parties – in its recommendation to the President, the Advisory Committee concluded that there had been a breach of the Code of Conduct, which was remedied by late submission of the declaration in question.
Total	**7**	**Since 2020 sanctions mentioned in only one case in the annual report of the Advisory Committee**

Note: The Advisory Committee will investigate the breach at the request of the EP President.

The low number of investigations into possible breaches of the Code of Conduct is surprising – not only because of the EP corruption scandal revealing Qatari influence, but also because of the many other scandals involving MEPs since 2020. During the COVID pandemic, MEP Monika Hohlmeier (CSU, Germany) was accused[63] of using her personal network in order to provide a lobbyist, Andrea Tandler, with the opportunity of meeting the German health minister. After the meeting, the Ministry purchased masks from the Swiss company (Emix) whose interests Tandler represented. Despite her involvement in a dubious affair involving the purchase of masks, Monika Hohlmeier submitted questions to the Commission about allegedly unfair mask purchases made by Italy and Spain.[64] In a debate she also expressed concern about Spain's mask purchases, and called on the national government to drop all resistance and cooperate with the European Public Prosecutor's Office investigation.[65] Although the accusation against Hohlmeier involved around €800 million of taxpayers' money, the scandal did not result in any negative consequences for her: Hohlmeier is still an MEP, having been re-elected in 2024.

Similarly, an alleged romantic relationship between two EPP MEPs – Pernille Weiss (Det Konservative Folkeparti, Denmark) and Christian Ehler (CDU, Germany) – has raised similar suspicions of a breach of the Code of Conduct. Weiss was a member of the Parliament's Panel for the Future of Science and Technology (STOA), while Ehler was the chair of the same panel. The relationship came to light when a study published by STOA – which made recommendations unfavourable to the interests of large healthcare companies – was removed from the body's online page three days after publication. According to Politico,[66] Weiss has close ties to healthcare corporations, and removal of the study from the site is an indication that the panel's chair acted to suppress it at her request while he was romantically linked to her. As the allegations were not addressed publicly, Christian Ehler was re-elected in 2024, while Pernille Weiss's nomination was withdrawn only after an internal audit revealed harassment in her office, with former subordinates of Weiss accusing her of regularly humiliating colleagues.[67] It is not only corruption scandals but also office harassment that may fall foul of the EP's Rules of Procedure (Article 10(6)). According to an anonymous survey by MeTooEP, 49.6 percent of staff interviewed in the European Parliament had experienced psychological harassment, 15.5 percent sexual harassment, and 8.1 percent physical harassment in the course of their office work.[68] Monica Semedo MEP (Renew, Luxembourg) has been regularly in the spotlight for her harassing behaviour, having been sanctioned twice during her mandate.[69]

Drawing attention to possible abuses resulting from the shortcomings in the rules, Transparency International Deputy Director Nick Aiossa said that *"The ability and right to impose sanctions on Members falls directly with the President of the Parliament, and for a variety of reasons, including political considerations [...] they haven't been put forward."*[70] Although the European Parliament has finally tightened its ethics rules in response to the biggest corruption scandal in its history, the problem mentioned by the Transparency International representative – that the President of the Parliament decides on the imposition of sanctions – has not been remedied.[71] The rule of law problem with this practice is clearly illustrated by an investigative article by Politico[72] on the lobbying activities of the husband of the President of the European Parliament, Roberta Metsola.

Roberta Metsola's husband, Ukko Metsola, is a lobbyist for Royal Caribbean Group, one of the world's largest cruise ship companies. His name was registered in the EU's Transparency Register, a database of lobbying activity, as the "person responsible for EU relations". According to the stricter code of conduct, *"A conflict of interest exists where the exercise of the mandate of a Member of the European Parliament in the public interest may be improperly influenced for reasons involving his or her family, emotional life, economic interest or any other direct or*

indirect private interest". In light of this, a conflict of interest can be considered to exist between Roberta Metsola's role as President of the EP and the lobbying activities of her husband. Despite the tightened rules, one of the reasons that Roberta Metsola's husband's lobbying activities were not disclosed to the public is that, according to the new Code of Conduct adopted during Metsola's presidency, a Member is required to submit a declaration *"indicating whether or not he or she is aware of having a conflict of interest"* only before taking up the office of rapporteur, shadow rapporteur, *"Vice-President, Quaestor, Chair or Vice-Chair of a committee or delegation"*.[73] In other words, the requirement does not apply to the President. According to Politico, the lack of such a requirement opened up the opportunity for Ukko Metsola to lobby for European taxpayers' money to fund his corporation.

President Roberta Metsola's conflict of interest – as defined by the Code of Conduct – between her family ties and her political work is also highlighted by the fact that in two speeches during her presidency (at European Maritime Day 2024 and at a shipping conference in Malta in 2022) she has highlighted the importance for Europe of the success of the shipping industry. And while the conflict of interest certainly exists, the President's silence on her husband's lobbying activities is unlikely to result in any consequences. As mentioned above, despite the tightening of the EP's rules of conduct, it is still up to the President to decide whether a Member should be sanctioned for misconduct: according to Article 11(3) of Annex I to the Rules of Procedure,[74] *"If [...] the President concludes that the Member concerned has breached this Code of Conduct, he or she shall adopt a reasoned decision imposing a penalty."* So, even if the Advisory Committee were to find that Roberta Metsola's family relationship constitutes a breach of the Code of Conduct, the Rules of Procedure allow her to decide whether or not she should be subject to a sanction. Naturally from a rule of law perspective the question arises as to whether this rule is appropriate in this circumstance.

Not only are the conflict of interest and lobbying rules problematic, but also the EP's rules on private interests and declaration of assets. When making a declaration of private interests and assets, the EP does not expect MEPs to declare the assets of their spouses or dependent children. By contrast, 11 national parliaments require their members to make declarations on spouses and 9 have that requirement for dependent children. For example, Bulgaria, Greece, Croatia, Hungary and Slovakia require information on both spouses and dependent children.[75]. According to Articles 4 and 5 of Annex I to the EP's Rules of Procedure,[76] only the declaration of private interests of Members of Parliament must be made public, while their declaration of assets *"shall be submitted to the President and shall be accessible only to the relevant authorities, without prejudice to national law"*. By contrast, the vast majority of Member States – 19 in total – provide extensive online access to the declarations of national MPs;[77] the remaining 8 Member States provide only partial access. The declarations required by the EP are primarily aimed at achieving transparency of MEPs' external activities, with little possibility for the public to learn about MEPs' questionable sudden acquisitions of wealth. In summary, the Code of Conduct, the conflict of interest rules and the EP's asset declaration system are seriously flawed, and the resulting abuses highlight the EP's rule of law problems, with the current rules not providing adequate barriers against arbitrary conduct and corruption.

2. The European Commission

2.1 The Commission's so-called "rule of law framework" is in breach of the Treaties

One of the foundations of the rule of law is the obligation imposed on the EU institutions to operate in accordance with the Treaties. Therefore, rule of law problems are raised by the fact that the Commission has ignored warnings from within other EU institutions about exceeding its powers. In 2014 the Commission established its Rule of Law Framework, which sets out the steps to be taken before activating Article 7. The document introducing the framework highlighted, in a legally questionable way, that it's *"scope is not confined to areas covered by EU law, but empowers the EU to intervene with the purpose of protecting the rule of law also in areas where Member States act autonomously."*[78] Since the EU's competences are governed by the principle of conferral, the Commission's statement quoted above is in contravention of the Treaty – as has been confirmed by the Legal Service of the Council of the European Union itself. The Legal Service[79] has stated the following with regard to the Commission's Rule of Law Framework: *"a violation of the values of the Union, including the rule of law, may be invoked against a Member State only when it acts in a subject matter for which the Union has competence based on specific competence-setting Treaty provisions. [...] The Council Legal Service is of the opinion that the new EU Framework for the Rule of Law as set out in the Commission's communication is not compatible with the principle of conferral which governs the competences of the institutions of the Union."* Despite its rigorous reasoning, the Legal Service's opinion was subsequently ignored, calling into question the Commission's standing in relation to the rule of law.

The fact that the Rule of Law Framework is on legally questionable ground casts a shadow over all the rule of law mechanisms put in place by the Commission.[80] As stated in the above-mentioned Legal Service's expert opinion: *"Respect of the rule of law by the Member States cannot be, under the Treaties, the subject matter of an action by the institutions of the Union irrespective of the existence of a specific material competence to frame this action, with the sole exception of the procedure described at Article 7 TEU."* The EU's rule of law mechanisms use the pretext of the rule of law to legitimise the *ultra vires* activities of EU institutions which far exceed the EU's actual competences. In this way these procedures play a key role in enabling EU policymaking to circumvent Treaty provisions that limit its powers. It can be argued that the establishment of any framework and rules that do not follow from the text of the Treaties (e.g. the Rule of Law Report) is an arbitrary action by the EU.

Although the Commission tries to use the argument that some of its material – such as the Rule of Law Report – has no legal effect, practice shows this claim to be both politically and legally questionable. The implementing decision on the recovery and resilience plan for Hungary contains a reference to the 2022 Rule of Law Report,[81] and the related briefing paper to the European Parliament explicitly identifies the Rule of Law Reports as the basis for the "super milestones" formulated for Poland and Hungary.[82] The appendix to the briefing explicitly discusses what the "basis" was for the 27 super milestones imposed on Hungary; and rule of law reports are explicitly mentioned as the basis for four of these super milestones.[83] As the fulfilment of the super milestones was a condition for the drawdown of €10 billion,[84] the Rule of Law Report can hardly be called inconsequential.

Not only was the Rule of Law Report the basis for the super milestones, but the Council's implementing decision[85] on measures to safeguard the EU budget against breaches of the rule of law in Hungary also refers to the Rule of Law Report in numerous ways. Whilst the conclusions of this draft decision are not as closely linked to the findings of the Rule of Law Report as the Parliament's briefing (which explicitly cites the report as the basis for the super milestones), the Commission's report is an important source of information for the decision to suspend more than half of the commitments to Hungary under certain programmes within the general conditionality for the protection of the EU budget. The amount suspended under the conditionality regulation is equivalent to roughly €6.3 billion,[86] so once again the Rule of Law Report – which has been regularly cited as the source of the content of the decision – can hardly be called inconsequential.

Weaponising the issue of the rule of law for political purposes can also be observed in Article 7 procedures. An Article 7 procedure may be initiated for violation of the values of the Union (including the rule of law) and may even result in the suspension of a Member State's rights. As Article 7 does not give clear instructions as to when there is a *"clear risk of a serious breach by a Member State of the values referred to in Article 2",* it is entirely at the discretion of the EP or the Commission to decide when to make a *"reasoned proposal"* to trigger an Article 7 procedure. This discretionary power to initiate and terminate the procedure, without any specific limits, could result in a politically motivated exploitation of the Article. The political room for manoeuvre resulting from the broadness of the rules may have led to the rapid termination of the Article 7 procedure against Poland when the left-wing Tusk government was elected, replacing the right-wing government of the Law and Justice (PiS) party. Termination of the procedure, which had been launched in 2017, was announced by the Commission in May 2024, shortly after the new Polish government took office in December 2023. In its press release announcing the decision to terminate the procedure,[87] the Commission highlighted Poland's plan to join the European Public Prosecutor's Office and the new Polish government's action plan of February 2024. The Commission itself noted that Poland had taken the "*first* concrete steps" and that it had shown a commitment to tackling the rule of law problems. Therefore, the Commission itself acknowledged that the new government had done little – and could not have done more in such a short time – to actually change the contested legislations.

The Commission's press release stresses that Poland *"has recognised the primacy of EU law and is committed to implementing all the judgments of the Court of Justice of the European Union"*. Nevertheless, an application by the Commission (Case C-448/23) made against the Polish Constitutional Court's ruling (Case K 3/21) that the CJEU's interpretation of the law is incompatible with the Polish Constitution is still pending before the Court of Justice of the European Union. In its application related to Case K 3/21, the Commission *"claims that the Court should [...] declare that [...] the Republic of Poland has failed to fulfil its obligations under the general principles of autonomy, primacy, effectiveness and uniform application of EU law and the principle of the binding effect of judgments of the Court of Justice"* So although there is still an action before the Court of Justice related to the Polish Constitutional Court's failure to recognise the primacy of EU law, the Commission has already terminated the Article 7 procedure on the grounds that Poland does indeed recognise the primacy of EU law. The fact that, after seven years of rule of law investigations, the presentation of an action plan with no deadlines attached was sufficient to avert the EU's so-called "nuclear option" – despite the fact that the Member State remains under litigation – illustrates that behind the Article 7 procedure there are political considerations which can be acted on as a result of discretionary powers.

The use of vague rules for political purposes is not only demonstrated by the fact that the procedure against Poland was terminated without any substantive government action, but also by the fact that the procedure was terminated while the Member State was committing violations of the rule of law. Human Rights Watch is among those who have warned that closure of the procedure was premature – especially in view of the fact that while the Commission was closing the procedure the Tusk government dismissed a large number of judges and public media staff without any guarantees.[88] The Polish Constitutional Court also condemned the way in which the incoming Polish government dismissed the management of the companies running the public media, to which the Government responded by declaring the Constitutional Court's decision illegitimate.[89] Furthermore, the Government ignored the Constitutional Court's condemnatory ruling on the dismissal of the former public prosecutor and the appointment of a new one. It also ignored a letter from the President of the Republic of Poland, Andrzej Duda, in which he pointed out that the new public prosecutor could only be appointed after consultation with him and gaining his written approval as head of state, but that the Government had failed to do this.[90] In addition to the illegal restructuring of public media and the irregular appointment of a new public prosecutor, in the same period two right-wing MPs – Mariusz Kamiński and Maciej Wąsik – were arrested for abuse of office in an unprecedented manner. Although the two MPs were granted a presidential pardon in 2015, the pardon was declared invalid by the new government after the 2024 elections, and the MPs were stripped of their mandates. After his arrest Mariusz Kamiński announced that he was starting a hunger strike, after which a Polish court ordered him to be force-fed.[91] The MP, who was hospitalised due to his deteriorating health, later took his case to the European Court of Human Rights, alleging torture.[92] All of this demonstrates that the European Commission's decision to

close the Article 7 procedure is explained by its wide discretionary powers, which it is using for political ends, and not by the fact that the Tusk government's actions raise no doubts about the rule of law.

2.2 The European Commission's discretionary powers in relation to infringement procedures breach the prohibition on the abuse of power and jeopardise legal certainty

The risk of politically motivated action stemming from the Commission's discretionary powers arises not only in relation to Article 7 procedures, but also in relation to infringement procedures. The nature of infringement procedures, which can be launched when Member States fail to comply with their obligations under EU law, is set out in TFEU Articles 258–260. There are two types of infringement procedure: infringement procedures launched for substantive breaches; and "non-notification" infringement procedures for failure to transpose adopted directives into national legislation.[93] Although Member States may also bring infringement procedures against one another, in the vast majority of cases the Commission is the initiator. A procedure starts with a request for information, known as a letter of formal notice. If the Commission considers the reply from the Member State to be insufficient, it may issue a reasoned opinion requiring the Member State to comply with EU law. If, after receiving a reply to the reasoned opinion, the Commission still considers that EU law is not complied with, it can refer the matter to the Court of Justice of the European Union (CJEU). If after the Court's judgment the Member State fails to comply with its obligations, the Commission can refer the matter to the CJEU again, even after a single letter of formal notice, and then seek the imposition of financial sanctions against the Member State (if the case concerns a non-transposed directive, the Court can be asked to impose a financial penalty in the first instance).

The Commission has wide discretionary powers in relation to infringement procedures, which violates the rule of law's requirements of calculability and foreseeability. At its discretion the Commission may decide to initiate a procedure, to waive the requirement for one, or to close one at any stage. In addition, the Commission may initiate a procedure even if the infringement has already ceased to exist,[94] or irrespective of whether the infringement has caused damage. If several Member States are accused of the same alleged infringement, the Commission also has discretion not only on whether to initiate infringement procedures, but also on whether to initiate infringement procedures against all the Member States or only against the Member State(s) it selects.[95] One of the few factors on which the judgments of the CJEU emphasise the need for reasonableness on the part of the Commission is the timeframe for infringement procedures. Nevertheless, despite an objection by the Netherlands that more than five years had elapsed between the first letter of formal notice and the start of an infringement procedure against it, the CJEU considered this timeframe to be a reasonable one. In one instance the Commission gave Austria deadlines of only one week in a letter of formal notice and two weeks in a reasoned opinion to remedy the infringement it had complained of. Setting aside Austria's objections, the Court also found these time limits to be acceptable.[96] It can be concluded that it is entirely up to the Commission to decide whether to initiate a procedure – and, if so, on what grounds; furthermore, the lack of precise rules prevents legal oversight of infringement procedures.

If dialogue between the Commission and the Member State does not lead to resolution of the infringement procedure, the Commission may refer the matter to the Court of Justice of the European Union. In some cases, at the outset the Commission may be able to propose that financial penalties be imposed on a Member State. According to the Treaty (see TFEU Article 260), the Commission has full discretionary powers to determine the amount of a lump sum or periodic penalty payment. Although the Commission has developed a methodology for determining the amounts, part of the calculation is a so-called "seriousness coefficient", a multiplicative factor between 1 and 20, which is determined on the basis of two parameters: *"the importance of the Union rules breached or not transposed and the effects of the infringement on general and particular interests."* [97] The amount proposed is therefore significantly influenced by the Commission's discretion as to how "serious" it considers the infringement to be – a coefficient which continues to give the Commission a very wide margin of discretion in determining the amount proposed. The discretionary power to impose fines – as well as the lack of justification for them – can be seen as a negative aspect of the Commission's functioning. According to a 2021 decision of the CJEU, *"As regards whether [...] the Commission must state reasons, on a case-by-case basis, for its decision to request a financial penalty under TFEU Article 260(3) or whether it may take such a decision*

without stating reasons [...] it must be borne in mind that [...] the Commission enjoys a discretion to take such a decision" .[98] In its judgment, the Court of Justice later emphasised that the Commission need only justify the nature and amount of the penalty, and need not itself justify why it proposes the financial penalty.

The Commission, the so-called "executive branch of the Union", demonstrates its lack of alignment with the law through its almost unlimited discretionary power in infringement procedures. A fundamental principle of the rule of law is restricting and limiting the exercise of executive power, and power in general. In the institutions of the European Union, ill-defined rules allowing the politically motivated exploitation of infringement procedures represent a fundamental breach of the rule of law. The Commission's broad discretionary powers are on the one hand a breach of the principle of preventing the abuse of power and competence, and on the other hand an impediment to legal certainty. This is because Member States cannot know in advance whether or not an infringement procedure will be brought against them, when it will be brought, and if the case is brought before the Court of Justice whether or not the Commission will propose a penalty – and if so, what the exact amount will be.

2.3 The Commission's selective approach to the protection of minorities is in breach of the Treaties

On 11 March 2021 the European Parliament declared the European Union an "LGBTIQ Freedom Zone".[99] One of the justifications for the adopted resolution was expressed as follows: *"the backlash against LGBTIQ people is often coupled with a broader deterioration in the situation of democracy, the rule of law and fundamental rights"*. Thus standing up for LGBTIQ people is deemed to be a necessary position that is essential to the rule of law. The European Parliament also referred to a speech by Ursula von der Leyen, in which she stated the following: *"LGBTQI-free zones are humanity-free zones. And they have no place in our Union."*[100] These two statements marked the launch of the Commission's strategy aimed at strengthening the rights of LGBTIQ people.

One element of the Commission's strategy is to ensure the rights of LGBTIQ people in cross-border contexts. Although in the document the Commission recognises that family law is a matter for Member States[101], it argues that so-called "rainbow families" should also be guaranteed equal rights when exercising their freedom of movement. The Commission expresses it in this way: *"EU legislation on family law applies in cross-border cases or in cases with cross border implications and it covers LGBTIQ people. This includes rules to facilitate Member States' recognition of each other's judgments on divorce, parental responsibilities and rights (including child custody and visiting rights), maintenance (for couples and children), property owned in the context of marriage and registered partnerships, and succession matters (for couples and children)."*[102] This position was also upheld by the Court of Justice of the European Union, which made it clear that *"the term 'spouse' as used in the Free Movement Directive also applies to same-sex partners"*. This would allow[103] same-sex couples who have married in a country that accepts same-sex marriage to use their freedom of movement to move to an EU Member State that does not accept same-sex marriage, and remain "spouses", while also enjoying such rights in those Member States too which do not recognise same-sex marriage.

Welcoming the Commission's strategy, the European Parliament recalled in its resolution[104] that *"EU law prevails over any type of national law, including over conflicting constitutional provisions, and that therefore Member States cannot invoke any constitutional ban on same-sex marriage or constitutional protection of 'morals' or 'public policy' in order to obstruct the fundamental right to free movement of persons within the EU in violation of the rights of rainbow families that move to their territory."* In this text, the Parliament *"Insists that the EU needs to take a common approach to the recognition of same-sex marriages and partnerships; calls on the Member States specifically to introduce relevant legislation to ensure full respect for the right to private and family life without discrimination and free movement of all families, including measures to facilitate the recognition of the legal gender of transgender parents."* In summary, it can be said that this contradicts Article 9 of the Charter of Fundamental Rights of the European Union, which states that *"The right to marry and the right to found a family shall be guaranteed in accordance with the national laws governing the exercise of these rights.*[105] While family law is a national competence, using the freedom of movement as a pretext the European Union institutions are using collective force to smuggle family law into the area of EU competence.

The Commission's conduct on family law is not only a clear circumvention of the principle of conferral, but also evidence that the manner in which the European Union and the Commission represent LGBTIQ interests is disproportionate and lacks neutrality. According to the Commission, there is *"the need to integrate a LGBTIQ equality perspective into all EU policies as well as into EU funding programmes."* [106] The Commission has set out five strategies for equality and inclusion up to 2025, promoting the following: equality for LGBTIQ people; equality between the sexes; equality for people living with disabilities; equality for Roma people; an action plan against racism. By contrast, none of these strategies addresses all the national, ethnic and linguistic minorities living in the EU.[107]

While the EU has sought to extend and regulate the protection of LGBTIQ rights in a fundamentalist manner, other minority rights receive less attention – or none. The often cited TEU Article 2 highlights that *"The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities."*[108] Although the rights of all persons belonging to minorities in the EU should be of equal importance, the Commission's political orientation is such that it selects among different minority groups; for example, it conspicuously keeps issues such as the protection of the rights of linguistic and ethnic minorities off the agenda. A good example of this is the failure to take up the issue of linguistic, national and ethnic minorities, despite the specific call for this from 1,123,422 European citizens: the *Minority SafePack* initiative has been removed from the agenda. In 2013 the Minority SafePack European Citizens' Initiative, which aims to protect national, ethnic and linguistic minorities, was not even registered by the Commission, and the intervention of the General Court was needed to enable its registration. Following the Court's ruling, in 2017 the initiative was finally able to start collecting signatures, and by the April 2018 deadline had successfully collected the required 1,000,000 signatures, reaching the required number of signatures in 11 Member States. The initiative has also received support from the Bundestag,[109] the Basque Parliament[110] and the Parliament of the Belgian German-speaking community.[111] After evaluating the initiative's proposals, however, the Commission decided not to proceed with the adoption of new legislation.[112] The case of the Minority SafePack also demonstrates EU institutions' selective sensitivity when it comes to protecting minorities.

2.4 The Commission's limits on the functioning of directly elected democratic institutions are contrary to the principle of preventing the abuse of power

The TEU's provisions on democratic principles stress that the Union respects the principle of equality among its citizens, and that every citizen has the right to participate in the democratic life of the Union. Article 11(1) also stresses that *"The institutions shall, by appropriate means, give citizens and representative associations the opportunity to make known and publicly exchange their views in all areas of Union action."* The Treaty also notes the need for the institutions to maintain open, transparent and regular dialogue, including with civil society. Although the Treaties require meaningful consultation with citizens and the provision of appropriate means to ensure this, like the yellow and orange card procedures discussed above, European Citizens' Initiatives are doomed to failure because of the strictness and inappropriateness of the rules.

The first European citizens' initiatives were lodged in 2012. They are designed to invite the Commission to come forward with proposals for new EU legislation. To be considered by the Commission, an initiative must collect signatures from at least one million citizens and a set minimum number of signatures must be collected from each of at least seven Member States. For example, for Slovenia to count as one of these seven Member States, the current rules require a minimum of 5,640 signatures from Slovenia.[113] The exacting nature of this provision is further illustrated by the fact that Slovenians only need 5,000 signatures to ask their national parliament to amend a law.[114] Furthermore, European citizens' initiatives have just 12 months within which to collect more than one million signatures.

Success of European citizens' initiatives[115]				
Total number of registered initiatives	112	Registration phase	Unsuccessful initiatives	62
		Signature collection phase	Initiatives withdrawn	25
			Initiatives in preverification stage, ongoing collection, or starting collection	13
		More than 1,000,000 signatures collected	Initiatives in verification stage	2
			Answered initiatives	10

Given the exacting rules, it is not surprising that so far only 12 citizens' initiatives have managed to collect the required 1,000,000 signatures. If we exclude the last four initiatives, which are currently either in the verification or are negotiating with the Commission, there have been only eight citizens' initiatives to which the Commission has given some form of definitive response. Of these initiatives, only three were followed up by legislative action – the rest were either rejected or resulted in the Commission holding academic conferences, or publishing statistics or studies. So, over the course of 12 years, out of a total of 112 initiatives submitted, only three have led to the result for which they were created: encouraging the Commission to legislate. It should be noted that the initiative with the highest ever number of signatures (1,721,626, for the "One of Us" campaign on embryo protection)[116] also failed to spur the Commission to legislative action. In summary, in both national parliaments' and citizens' initiatives there is only the semblance of the right to have one's voice heard – in fact, the EU imposes conditions that are unjustifiably difficult to meet. Furthermore, the EU is not obliged to take successful initiatives from citizens or national parliaments into account.

Not only have citizens seen the Commission's failure to listen sufficiently to their concerns in the citizens' initiatives and, contrary to the Treaties, it does not provide adequate means for dialogue with citizens, but also abuses were experienced during the Conference on the Future of Europe series – including by citizens of the Central European Member States. This event series was an opportunity for European citizens to have their say on the future of the EU. But the Joint Secretariat of the Conference refused to acknowledge the resolutions of Hungary's national citizens' discussion groups, and failed to give an adequate justification for its refusal, merely citing "methodology" as the reason it did not take into account their opinions.[117] The filtering of opinions meant that at the Conference the federalist position was more prominent; this showed that, according to the double standard applied by Brussels, the opinion of citizens who support the strengthening of nation states' sovereignty does not carry the same weight as that of those who support federalism.

Speaking about the Conference, MEP Kinga Gál pointed out that although the overall contribution from Hungary ranked the country second in the whole EU, the official evaluation documents do not include the most popular Hungarian opinions.[118] And although the 300 events held in Hungary demonstrated the interest of voters in the future of Europe, the opinions coming from Hungary *"were deleted from the digital platforms"*[119] which reported on the results of the Conference. Thus overall, *"The Conference on the Future of Europe was a spectacle of an intolerant and violent hegemony of opinion, and not of collective free thinking"*[120] Similar criticisms were made by the European Conservatives and Reformists (ECR) group in the European Parliament. The ECR also drew attention to the biased selection of the opinions received and the fact that the conclusions were clearly intending to limit nation states.[121] The ECR also pointed out that the Conference's final conclusions were very similar to the objectives of the federalist Spinelli Group, which were formulated long before the idea of the Conference was mooted.[122]

The ECR also made a detailed technical critique of the organisation of the Conference,[123] criticising the biased selection of participating citizens (pro-integrationists were more likely to participate in the discussion groups) and the fact that 33 percent of participants were aged between 16 and 24 – despite the fact that only 11 percent of the total European population is in this age group. They also criticised the fact that the majority

of participating NGOs were funded by the EU and that the popularity of the conclusions drawn by the discussion groups was not tested in opinion polls of the population as a whole; according to the ECR, fewer than 5 percent of Europeans had even heard of the conference series, and so its conclusions were not representative of all EU citizens. They also criticised the unclear and biased way in which the proposals from the discussion groups were selected. Citing these reasons in its detailed censure the ECR Future of Europe delegation eventually withdrew from the organisation of the conference.

2.5 The Commission's arbitrary selectiveness when allocating EU financial resources violates the principle of the equality of Member States before the Treaties

The Commission is violating the principle of the equality of Member States provided for in the Treaties (TEU Article 4 (2)) by treating the group of countries using the euro "more equally" when allocating financial resources. If we look at the allocation of money from the Recovery and Resilience Facility (RRF), it is clear that the southern eurozone Member States were the first to receive money, the intention being to save the eurozone from the effects of the economic crisis caused by the COVID pandemic. On average, it took 132 days from submission to the Commission for the Council to approve the plans of the nation states (RRP). If only the non-euro area Member States are considered, the average is more than 100 days longer: 242 days.[124] By contrast, for the southern eurozone Member States (Portugal, Spain, Italy, Greece, Malta and Cyprus), plans were approved within an average of 77 days.

Not only are there significant disparities in the time between the submission and approval of plans for countries using the euro compared with those using their national currencies, but there is also a great deal of variation in the time periods between the submission of plans and the first payments. Excluding Ireland, the Netherlands and Sweden (which by the time of the European Parliament elections in 2024 had still not received payments), the first payment or pre-financing was received on average 214 days after submission. If we look only at non-eurozone Member States, the average is almost double that, at 418 days. By contrast, the southern eurozone Member States received money much faster than the average for all Member States: the six southern Member States received their first payment from the Commission on average 116 days after submission.

	Average number of days between submission and approval	**Average number of days between submission and disbursement of first payment**
All Member States	**132**	**214**
Non-eurozone Member States	242	418
All eurozone Member States	86	131
Southern eurozone Member States	77	116

Plan approval date[125]	Date of submission of plan[126]	Days passed between submission and approval	Date of pre-financing or first payment	Time elapsed between submission and receipt of first payment	Country name (if in bold: **eurozone**)
13.07.2021	30.04.2021	74 days	28.09.2021[127]	151 days	**Austria**
	30.04.2021	74 days	03.08.2021[128]	95 days	**Belgium**
	30.04.2021	74 days	02.09.2021[129]	125 days	Denmark
	28.04.2021	76 days	19.08.2021[130]	113 days	**France**
	28.04.2021	76 days	26.08.2021[131]	120 days	**Germany**
	27.04.2021	77 days	09.08.2021[132]	104 days	**Greece**
	30.04.2021	74 days	13.08.2021[133]	105 days	**Italy**
	30.04.2021	74 days	10.09.2021[134]	133 days	**Latvia**
	30.04.2021	74 days	03.08.2021[135]	95 days	**Luxembourg**
	22.04.2021	82 days	03.08.2021[136]	103 days	**Portugal**
	29.04.2021	75 days	13.10.2021[137]	167 days	**Slovakia**
	30.04.2021	74 days	17.08.2021[138]	109 days	**Spain**
28.07.2021	14.05.2021.	75 days	28.09.2021[139]	137 days	Croatia
	17.05.2021.	72 days	09.09.2021[140]	115 days	**Cyprus**
	14.05.2021.	75 days	17.08.2021[141]	95 days	**Lithuania**
	30.04.2021	89 days	17.09.2021[142]	140 days	**Slovenia**
08.09.2021	01.06.2021	99 days	28.09.2021[143]	119 days	Czechia
	28.05.2021	103 days	No payments made yet (application submitted on 08.09.2023)[144]	N/A	**Ireland**
05.10.2021	13.07.2021	84 days	17.12.2021[145]	157 days	**Malta**
29.10.2021	18.06.2021	133 days	17.12.2021[146]	182 days	**Estonia**
	27.05.2021	155 days	21.01.2022[147]	239 days	**Finland**
	31.05.2021	151 days	02.12.2021[148]	185 days	Romania
03.05.2022	15.10.2021	200 days	16.12.2022[149] (application date: 31.08.2022[150])	427 days (107 days from date of application)	Bulgaria
	28.05.2021	340 days	No payments have been made yet	N/A	Sweden
17.06.2022	03.05.2021	410 days	28.12.2023[151] (date of application: 15.12.2023)[152]	969 days (13 days from the date of application)	Poland
04.10.2022	08.07.2022	88 days	No payments have been made yet	N/A	**Netherlands**
16.12.2022	11.05.2021	584 days	28.12.2023[153]	961 days	Hungary

Note: data collection for this table was completed during the week of the European Parliament elections.

Arbitrary political double standards were particularly evident in the allocation of Polish resources from the Recovery and Resilience Facility. Poland waited a total of 969 days (from the date of submission of its RRP plan) for its recovery funds. But Warsaw received its first transfer 15 days after the inauguration of a new

government in December 2023 and only 13 days after the new government requested the funds. This was despite the fact that within such a short period it had not – and could not have – done much to "restore the rule of law" in Poland. What the right-wing PiS government could not achieve in more than 950 days, Donald Tusk's government achieved in two weeks, simply by promising to restore the rule of law in Poland. This was despite the new government's unprecedented arrests of two right-wing MPs, Mariusz Kamiński and Maciej Wąsik, and its subversion of the law in its restructuring of public media.

The withholding of funds in the Erasmus+ case is further evidence that EU funds are being used for arbitrary political ends. Academic freedom and the right to education are values of the European Union. Article 13 of the Charter of Fundamental Rights of the European Union enshrines, among other things, the freedom of academic life, while Article 14(1) of the Charter emphasises that *"Everyone has the right to education and to have access to vocational and continuing training"*.[154] Thus the rule of law conditionality regulation can hardly be said to be a legitimate instrument with which to restrict the academic and educational freedom of Hungarian researchers and students. Referring to the Rule of Law Conditionality Regulation (the instrument for protection of the EU budget and the EU's financial interests), in December 2022 the EU suspended around €6.3 billion in budget commitments, withdrawing Erasmus+ and Horizon Europe funding from 21 Hungarian universities. In relation to 10 of Hungary's 21 foundation-run universities, the Commission objected to politicians being on their boards of trustees, on the grounds of incompatibility.[155] Despite the Commission's statement that *"Erasmus students, researchers or civil society organisations, cannot be considered responsible for such breaches"*,[156] the Commission's decision was most damaging for them, affecting their opportunities and access to EU funding. And although in response to the EU's action the politicians concerned resigned their positions, the EU's decision still prevented many researchers and students from participating in international higher education in 2024.[157]

In an attempt to resolve the situation, an amendment drafted by the European Parliament in 2024 called for *"fair, lawful and transparent procedures to be agreed on with the Commission to ensure that Hungarian students, teachers and researchers can fully benefit from the Erasmus+ programme and contribute to the broader goals of European educational and research cooperation"* [158] Finally, however, the text adopted by the EP stated that the EP *"Calls on the Hungarian Government to comply immediately with the rule of law and EU values and to put in place the necessary reforms so that Hungarian students, teachers and researchers may benefit from the Erasmus+ programme and contribute to the broader goals of European educational and research cooperation."* [159] Overall, it can therefore be concluded that, despite the freedoms enshrined at Charter level, for many months the EU prevented 200,000 Hungarian students and 20,000 Hungarian teachers from participating in the Erasmus+ programme, while justifying this action on rule of law grounds.[160] From a rule of law perspective, the long-term curtailment of such a fundamental freedom on the grounds of protecting the budget is questionable.

The Commission's allocation of funds is not only politically motivated, with unequal treatment of Member States, their governments and citizens, in violation of the rule of law, but also opaque. Although through the Financial Transparency System the Commission makes public the allocation of funds managed directly and indirectly under its control, in several respects this system's functioning is questionable. According to the system, since 2019 the Commission has committed to disbursing a total of €409,353 million, of which €30,350 million – or roughly 7.4 percent of all reported funding – has been awarded to NGOs. Considering both the size of the amounts and their proportion of total funding, one would expect the Commission to be transparent in its approach to the organisations falling into the "NGO" category. Contrary to expectations, some Directorates General of the Commission do not use a uniform definition with which to identify "NGOs", and mostly accept such organisations' self-characterisation. Thus, in many cases, the Commission's categorisation of NGOs is by no means reliable.[161] Another problem undermining the transparency of the Financial Transparency System is the commission of systematic errors when recording the names of organisations.[162] Many organisations are registered under misspelt names or appear with a different name from one year to the next, thus making automated analysis of the system almost impossible.

It is only natural that those who are interested in the amount of funding that certain organisations have received should also be interested in the lobbying activities of those organisations. The amounts awarded by the Commission are recorded in the Financial Transparency System,[163] while the lobbying activities of

organisations are recorded in the Transparency Register.[164] Of course these two systems are not interoperable, so there is no transparency whatsoever with regard to which lobbying organisations receive what sums from the Commission, in return for what activities. A closely related criticism is that the "group affiliation" of organisations is not clearly indicated in any of the search engines, rendering them non-transparent. For example, the regional branches of the Open Society Foundations (e.g. the Open Society Foundations Armenia or Open Society Foundations North Macedonia) are listed separately in the Financial Transparency System, so that it is possible to separately search how much money each of them has received. By contrast, in the Transparency Register the Open Society Foundations are recorded as one organisation: the "Open Society European Policy Institute".[165] This central body, the Open Society European Policy Institute, has lobbied the Commission on issues related to Hungary, the Western Balkans, Ukraine and France. Since the Financial Transparency System and the Transparency Register record these organisations differently and do not indicate their group affiliation, it is almost impossible to determine what influence these organisations have on a particular country and how much funding they receive in this respect.

The same can be said of Transparency International. TI has more than 100 different local organisations, [166] so if one wanted to analyse all the amounts paid to all TI organisations as a whole, one would have to research each of the 100 organisations individually in the Commission's search engine. By contrast, in the Commission's Transparency Register only the "Transparency International Liaison Office to the European Union" and "Transparency International Nederland" can be found. The fact that only these two organisations are recorded does not mean that Transparency International does not also lobby on local issues (for which the amounts received are recorded under the names of the local TI organisations in the Commission's other search engine). Looking at the lobbying activities of the Transparency International Liaison Office to the European Union since 2019,[167] it can be seen that it negotiated with the Commission not only on the rule of law in Hungary, but also on the situation in Georgia. Thus, although the grants awarded to Transparency International are registered as going to local organisations, at the level of lobbying activity we are aware of the activities of the centre. This also renders opaque what funds the organisation – Transparency International – receives, and what lobbying activities it carries out hand in glove with the Commission in any particular country. The politically motivated allocation of resources, the unequal treatment of Member States and lack of transparency all raise rule of law issues in relation to the functioning of the Commission

2.6 The fact that the "Pfizergate" affair – which is linked to the Commission – is still unresolved after three years is a violation of the principle of anti-corruption, which relates to the rule of law

The Commission's silence on the corruption allegations against itself runs counter to the anti-corruption aspect of the rule of law. Since April 2021 it has been suspected that a personal exchange of messages between Ursula von der Leyen and Pfizer Inc. CEO Albert Bourla led to an increase in the quantity of vaccines ordered by the EU from the pharmaceutical giant, and a 25 percent increase in the price per dose.[168] The Commission's refusal to disclose information on the case led to a lawsuit against the Commission by a number of MEPs and The New York Times, which sought to expose the case.[169] The General Court of the European Union ruled on the action brought by MEPs just one day before the President of the Commission was re-elected; in this decision, the Commission was found to have acted wrongly. The plaintiffs in the access to documents case (T-689/21)[170] included the MEPs Margrete Auken, Tilly Metz, Jutta Paulus and Kimberly van Sparrentak. These are all members of the Greens/European Free Alliance Group, which – aware of the Court's judgment – officially supported von der Leyen's re-election.[171] Because the ballot was secret, we only know of the vote of Tilly Metz, who proudly informed her followers on X[172], that she supported the politician whose work she had objected to when launching the lawsuit.

The Pfizer affair has not only caused public outrage, but has also triggered reactions from other European institutions. The European Ombudsman also launched an investigation, describing the Commission's handling of the messages as *"maladministration"*.[173] Commenting on the case, the Ombudsman Emily O'Reilly said the following: *"The Commission's response to my findings neither answered the basic question of whether the text*

messages in question exist nor provided any clarity on how the Commission would respond to a specific request for other text messages." In her response to the Ombudsman's condemnatory statements,[174] Věra Jourová, Vice-President of the Commission responsible for values and transparency, acknowledged that text messages relating to work could be EU documents, but said that, according to the Commission's internal policy, they did not need to be registered. So after the Ombudsman's action the European public is no closer to gaining an insight into the controversial exchange of messages between the Commission President and Pfizer. Despite the fact that in May 2024 the European Public Prosecutor's Office (EPPO) threatened the Commission with legal action in the Pfizer case,[175] Ursula von der Leyen has remained silent on the matter. According to Politico,[176] in the run-up to the President's re-election there was a political battle to cover up the dubious affairs in which she had been involved. Politico obtained a letter written by European Chief Prosecutor Laura Codruţa Kövesi, in which she voiced her suspicions that the Commission was putting financial pressure on her organisation – the European Public Prosecutor's Office – by cutting its budget in an attempt to prevent it from continuing its investigation into the Commission's activities. According to the report in Politico, the Commission had sought to withhold approximately €5 million in funding from the Prosecutor's Office. Although not clear evidence of the veracity of the allegations, the budget of the Prosecutor's Office was indeed eventually cut – a decision in late 2023 set the budget of the Prosecutor's Office for 2024 at EUR 71,888,321,[177] which at the beginning of 2024 was increased by EUR 7,835,000[178] (total: EUR 79,723,321). In the summer of 2024, the EPPO budget was reduced (mainly in relation to IT costs, as mentioned by Politico) to EUR 75,488,321.[179] It can therefore be suspected that the Commission has failed to comply with an important element of the rule of law, the prohibition of arbitrariness.

The Pfizergate affair highlights not only the risk of corruption in the Commission, but also violation of the right of access to documents – an accusation which is frequently levelled against the Commission. TFEU Article 15(3) provides *"Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State"* with right of access to EU documents, as well as the principles and conditions of access. In 2023, the EU institutions gave full access to requested documents at the first stage of an application in 36 percent of cases and partial access in 48 percent of cases, while in 16 percent of cases the application was refused.[180] According to the European Ombudsman's analysis, between 2021 and 2022, up to the writing of the report, the Commission had received 8,420 requests for access to documents and 355 appeals against refusals of requests. The Ombudsman found that in 16 percent of requests and 86 percent of appeals, the Commission's decision arrived after the deadline.[181] The Commission has 15 working days to reply to requests and appeals, which it can extend by a further 15 working days. This 30-working day deadline was exceeded for 1,332 requests (out of 8,420) and 305 appeals (out of 355). The Ombudsman considered this to be clear evidence of maladministration, as the significant overrunning of deadlines (the Commission could take up to 9 or 15 months to reply) obscures transparency in public life. Maladministration in access to documents has resulted in this being the source of 26 percent of the inquiries opened by the Ombudsman in the last three years.[182] The fact that the Commission does not keep to the deadlines imposed on it in its handling of access to documents can be considered a problem of the rule of law.

While the Pfizergate affair is arguably the Commission's most high-profile corruption scandal, there are a number of other cases that raise concerns about the Commission's work. One of these relates to Gert Jan Koopman, Director-General for European Neighbourhood Policy and Accession Negotiations (NEAR). In 2009 Mr. Koopman bought what was then only a 5-room hotel in Bali: the Munduk Moding Plantation Nature Resort & Spa. This has since grown into an eco-luxury resort. Although the Commissioners must declare conflicts of interest, the Commission says that ownership – including the ownership of this Bali hotel complex – does not constitute a reportable outside "activity", as ownership is not an "activity"; this, at least, was the argument of the Commission spokesperson.[183] And Henrik Hololei, who was then Director-General for Mobility and Transport, did not consider the free airline tickets he received from Qatar Airways to be a conflict of interest to be declared, despite the fact that while he was receiving gifts his Directorate-General was negotiating an air transport agreement with Qatar. At least four of Henrik Hololei's free tickets were paid for by the Qatari state, while in 2023 the Commission also publicly admitted that Mr. Hololei's hotel stays in Qatar were also paid for by third parties.[184] Such rule of law anomalies are accentuated by the fact that, as with Roberta Metsola, it is the Directors-General themselves who decide what constitutes a

conflict of interest, and so Mr. Hololei was free to choose not to condemn his own activities. In addition to the Pfizergate affair, these two cases clearly highlight the weaknesses in the Commission's anti-corruption and anti-abuse rules – and a lack of constraints on arbitrariness is a rule of law issue.

3. The Court of Justice of the European Union

3.1 The Court of Justice's misuse of its powers when interpreting the Treaties is contrary to the principle of the prevention of the abuse of powers

TEU Article 4 (2)[185] states the following: *"The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government."* Although the Treaty requires respect for Member States' legal systems and specific historical constitutional development, in practice the European Court of Justice abuses the power of its supremacy over European law – to the extent that several national constitutional courts and national assemblies have criticised the Court and questioned the primacy of EU law over their own constitutional rules.

Since the 1970s, Germany's Federal Constitutional Court has dealt with the compatibility between the German Constitution and case law of the European Court of Justice (see the "Solange I" verdict).[186] In its Maastricht Decision on the Treaty establishing the European Union, the Federal Constitutional Court ruled that the European institutions do not have the power to confer new competences on themselves (Kompetenz–Kompetenz).[187] Building on its previous rulings, in its decision of 5 May 2020 the Federal Constitutional Court ruled[188] that an earlier decision by the Court of Justice on the European Central Bank's economic recovery programme was *ultra vires*, and therefore not applicable in Germany. In the Federal Constitutional Court's opinion, the Court of Justice's interpretation of the law was arbitrary and exceeded its competence; the Federal Constitutional Court questioned the supremacy of EU law, even though the German Constitution states that public bodies are responsible for European integration.[189] Tensions between the Federal Constitutional Court and the Court of Justice reached the point at which the German President of the Commission, Ursula von der Leyen, launched infringement proceedings against her own country.[190] In order to resolve the conflict, the German government was eventually forced to assure the Commission that Germany recognises the supremacy of EU law.[191] Although the Government's response was sufficient to bring the infringement procedure to an end, there is some doubt over the basis on which the German government can speak on behalf of the Federal Constitutional Court, which is independent of it.

In addition to Germany's Federal Constitutional Court, Poland's Constitutional Tribunal has also questioned the absolute primacy of EU law over national law. In Poland, a decision of the Constitutional Court of 7 October 2021[192] (Case K 3/21) ruled that certain provisions of the Treaty on European Union and their interpretation by the CJEU were not in conformity with the national constitution, and that for the legislation in question the ultimate authority was not the EU but the national constitution.[193] In its decision, Poland's Constitutional Tribunal argued that integration had entered a new phase, in which the EU institutions had exceeded the competences conferred upon them when Poland acceded to the EU. The Constitutional Tribunal also objected to the Court of Justice's interpretation of TEU Article 19, which could allow national courts to disregard constitutional provisions.[194] It considered this to be contrary to the Polish Constitution. Thus, the Polish Constitutional Court ruled that the overriding of the national constitution by EU law and the CJEU's interpretation of the law is itself unlawful.

Although on the issue of the supremacy of nation-state constitutions and EU law the Polish and German constitutional court rulings are the most widely discussed, several other national courts in EU countries have also taken a position in this debate. In relation to the Treaty of Maastricht, Denmark's Supreme Court ruled that it had the power to examine whether the EU institutions had exceeded the powers conferred on them.[195] In 2020 Finland's Constitutional Committee concluded that the EU's economic measures during the COVID pandemic reinterpreted TFEU Article 310[196] (which states that *"All items of revenue and expenditure of the Union shall be included in estimates to be drawn up for each financial year",* and that *"The revenue and expenditure shown in the budget shall be in balance"*), thus creating an extraordinary situation that was not foreseen when the country ratified the Treaties. Therefore, it argued, since the EU's actions have created financial obligations for the country that will limit its fiscal sovereignty for decades to come, the country's government does not have to accept the EU's actions.[197] In a 2006 judgment, the Constitutional Court of the Czech Republic

"refused to recognize the ECJ doctrine to the extent that it required absolute precedence of Community law", stating that *"the delegation of a part of the powers of national organs may persist only so long as these powers are exercised in a manner that is compatible with the preservation of the foundations of state sovereignty of the Czech Republic, and in a manner which does not threaten the very essence of the substantive law-based state."*[198] In a 2012 ruling, the Supreme Court of Estonia stressed that the country's independence and sovereignty are timeless and inalienable and that, while in principle this is not an obstacle to the country's entry into international conventions, it does not imply or allow the unlimited transfer of powers to the European Union.[199] The Hungarian Constitutional Court's Decision 22/2016 (XII. 5.) AB[200] mentions the existence of provisions on limits to the exercise of shared competences in the Danish, Estonian, French, Irish, Italian, Latvian, Polish, Spanish and Czech constitutions. Thus it can be noted that several constitutional courts have expressed caution about EU law.

Although not at the level of the Constitutional Court, a similar view was expressed in 2019 in a criticism by the French National Assembly, which, citing the position of French economic operators, criticised the Court of Justice for not exercising effective control over the EU administration in competition matters.[201] More recently, in the spirit of the French National Assembly's criticism, Michel Barnier,[202] formerly Vice-president of the People's Party and the EU's chief negotiator on Brexit, who was appointed Prime Minister of France in September 2024, began campaigning for France to regain its legal sovereignty over the Court of Justice. So the Court's excesses have led not only to criticism at the level of nation-state constitutional courts and national assemblies, but also pro-integration critics.

While criticism of the Court's supremacy is growing, the CJEU does not recognise any control over itself. TEU Article 6(2)[203] states that *"The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms"*, a convention which the European Court of Human Rights (ECtHR) was set up to implement. The Treaty thus clearly expresses the will of the Member States for the Union (and not just the Member States) to accede to the ECtHR. Although the Member States set conditions for the precise terms of accession, the Council authorised the opening of accession negotiations as early as 2010.[204] In the light of this, the CJEU's resolution against accession to the ECtHR can therefore be interpreted as undermining or obstructing the will of the Member States. In its Opinion 2/13 of December 2014[205] on the accession plan, the CJEU objected to the fact that, in the event of accession to the Convention, the European Court of Human Rights would have binding jurisdiction over it.[206] The Opinion also argued that this would be a violation of the autonomy of EU law, and that accession to the ECtHR would in certain cases confer certain judicial review powers to a non-EU body. Briefly put, while the CJEU actively uses its supremacy against the Member States, it seeks to prevent the ECtHR from exercising control over it that is expected by the national will.

And although there has been growing criticism of the Court of Justice and the supremacy of EU law from Member States and their constitutional courts, during the process of integration the Court of Justice has been endowed with a strong toolkit of sanctions in order to maintain its supremacy. Although the Court of Justice has been in existence since 1952, it has only been able to impose lump sum fines or periodic penalty payments on Member States since the Maastricht Treaty of 1992 – and these are governed by TFEU Article 260.[207] Under Article 260(3), if a Member State *"has failed to fulfil its obligation to notify measures transposing a directive adopted under a legislative procedure",* the Commission may set a lump sum or penalty payment which it considers appropriate. If the Court finds that there has been an infringement, the amount of the imposed fine may not exceed the amount determined by the Commission. However, where proceedings are brought (Paragraph 2) because *"the Member State concerned has not taken the necessary measures to comply with the judgment of the Court",* the Court is not constrained to set a maximum penalty in the amount of the lump sum or penalty payment recommended by the Commission. And while the Commission has at least outlined[208] the basis on which it calculates the level of penalties to be imposed, the Court has not published any such methodological guidance. This raises the question of whether defendants' rights are not seriously infringed, in particular with regard to the principle that proceedings must only be based on the accusation. Since the Court is in no way bound by an applicant's application, the defendant cannot know in advance the magnitude of the sentence to be expected until the judgment is made. The fact that, when its own judgments are not complied with, the Court of Justice can increase the amount of the penalty without any limit and without any oversight

shows the excessive power of the Court and the need to amend the current rules which allow for abuse. Hungarian taxpayers have experienced first-hand that, if there is a failure to comply with its judgments, the Court of Justice can increase the amount of fines imposed indefinitely. In a court case concerning the migration crisis, the Court of Justice punished Hungary with both a lump sum fine and a daily penalty payment for *"an unprecedented and extremely serious infringement of EU law"*.[209] While in its application the Commission asked the Court of Justice to set the lump sum fine at €1 million and the daily penalty at €16,000,[210] in its judgment the Court of Justice increased the lump sum fine to €200 million and the daily penalty to €1 million. This daily penalty of €1 million is to be applied for each day of delay until Hungary complies with the Court's 2020 judgment.[211] Such an increase in the penalty imposed, which was not foreseeable until the judgment was delivered, raises the question of whether it does not seriously infringe European norms protecting the rights of defendants and the rule of law functioning of the Court of Justice. A Polish example – also in 2024 – showed that it is not an option for nation states to refuse to pay fines for non-compliance with the Court's judgment. Poland was also fined a daily penalty payment for non-compliance with a Court of Justice judgment on 20 September 2021 which had required the closure of a mine. Poland refused to pay this fine, and then on 3 February 2022 reached an agreement with the Czech Republic (which had contested the operation of the mine in question). Despite the settlement of the case, this year the Court of Justice maintained that the daily fine for non-compliance with its judgment (which had amounted to €68.5 million by the time of the Czech–Polish settlement)[212] had to be paid by Poland to the Commission.

Not only Hungarian and Polish taxpayers, but also citizens of several other Member States have seen the Court's use of fines become ever more frequent and severe in recent years. For decades the Court was not even able to impose a lump sum fine or penalty payment; and for a while after this possibility was created, the Court was cautious in the use of its powers. This has now changed, however. The increasing frequency of fines imposed by the Court, as shown in the next paragraph, cannot simply be explained by the increase in the number of Member States after 2004: while the Court of Justice fined Member States only three times in the 13 years between 1992 and 2005, it imposed four fines in a single year: in 2021. Moreover, it is not only the frequency of fines that has increased, but also their size. In addition to the increase in size and frequency of fines, the nature of the cases judged has also changed. While the first fines were imposed by the Court of Justice in relation to waste treatment and bathing water quality, the Court has now decided to impose fines on issues that can be used to exert political pressure (see the Hungarian case for breaches of EU law on migration rules and the Polish case on judicial reform for failure to comply with its obligations under the principle of the primacy of EU law). All this demonstrates the increasing activism of the CJEU in the cause of integration.

Between 1992 and 2003 the Court of Justice imposed fines in only two cases: in 2000 a fine of €20,000 per day on Greece for a breach of obligations related to the management of toxic and dangerous waste; and in 2003 it fined Spain for a breach of obligations related to the quality of coastal bathing waters. Since the text of the Treaties states that the Court *"may impose a lump sum **or** a penalty payment on the Member State concerned"*, the next major step in the EU's sanctions policy occurred in 2005, when the Court sentenced France to pay a lump sum **and** a penalty payment (related to fisheries).[213] While between 1992 and 2005 the Court of Justice imposed fines in only three cases, the number of fines imposed has increased in recent years: in 2019 it imposed a daily penalty payment on Belgium[214]; in 2020 it imposed a daily penalty payment and a lump sum fine on Italy[215]; in 2021 it imposed a daily penalty payment and a lump sum fine on Spain [216]; a lump sum on Slovenia[217] and it imposed daily penalty payments on Poland on two occasions.[218] One of the two fines imposed on Poland, which exceeded all previously imposed amounts (€1 million per day) was in connection with Polish judicial reform, because Poland had not fulfilled its obligations arising from *"the principle of the primacy of EU law"* (C-204/21).[219] Thus, in those three years alone (2019–21), the Court of Justice imposed fines in more cases than it had between 1992 and 2005. Up until September 2024 the CJEU had already fined two countries: Hungary and the Republic of Latvia.[220] It can be concluded that while the Court of Justice considers its own legal interpretation practice to be superior to national constitutions, and it is even willing to stand by this position with an increasing number of sanctions, the growing number of

resolutions against the Court of Justice from Member States' constitutional courts shows that the latter continue to insist on respect for their political and constitutional arrangements.

3.2 The Court's organisation and its allocation of cases are open to abuse, therefore infringing the principle of the right to a fair trial

The right to a fair trial, which can be considered one of the fundamental pillars of the rule of law, is also negatively affected by the Court's operating order and case allocation. The Commission itself has also recognised the importance of case allocation when investigating application of the rule of law: the country chapter for Hungary in the Commission's 2022 Rule of Law Report, for example, described the case allocation system of the Curia of Hungary (*Kúria*, or Supreme Court) as having "raised concerns", with the President of the Curia deciding to whom each incoming case should be allocated.[221] The report stated that *"the Kúria's case allocation scheme does not allow the parties to verify on the basis of which criteria the composition of the bench has been determined. European standards require that the allocation of cases within a court follow objective, pre-established criteria in order to safeguard the right to an independent and impartial judge."* In accordance with the criticisms of the rule of law, and as part of the conditions for the distribution of Recovery and Resilience Facility funds, milestone 214[222] obliged Hungary to amend the Curia's case allocation scheme. Under pressure from the Commission, Hungary changed the case allocation scheme, and now software distributes cases among judges through an automated system.[223] Like Hungary, Portugal has been criticised in the Commission's Rule of Law Reports for the allocation of cases in its courts. Although Portugal uses an electronic system to allocate cases, it was possible to override the software-based allocation of cases. For several years the Commission expressed concern about this, and stressed its suspicion that there were irregularities in the allocation of cases in Portugal. In response, the country's High Council for the Judiciary launched a procedure.[224] Although Portugal eventually decided to improve the system, the Commission's 2023 Rule of Law Report still made recommendations on the Portuguese case allocation system.[225] Although the previous system of case allocation in Hungary was deemed to have "raised concerns" in terms the rule of law, the European Court of Justice is still not expected to comply with the "European norms" demanded of Hungary and Portugal: to this day, the President of the Court of Justice decides on who will be the Judge-Rapporteur for each case.[226] This makes the biased allocation of cases possible, yet there is a lack of criticism of the Court, which highlights the use of a double standard in relation to the Member States and EU institutions: it can be seen that the case allocation of the European Court of Justice does not meet the standards expected of the Member States.

In addition to this double standard, the allocation of cases in the European Court also creates opportunities for abuse, undermining the right to a fair trial – which is the cornerstone of the rule of law. Koen Lenaerts has been the President of the Court since 2015, and has worked at the Court since 2003. The fact that members of the Court have been working there for several decades is not unprecedented (currently, in addition to the President, five members have been working there since the 2000s). Therefore, the President of the Court must be well aware of the opinions of the judges in relation to certain cases. On the one hand this provides the President with the opportunity to selectively allocate cases, choosing as Judge-Rapporteurs those people who share his view on the case in question; and on the other hand he can also influence the decisions of judges, who will be inclined to rule in a manner that is approved by the President, thus ensuring that similar cases will be assigned to them in the future.[227]

The uneven allocation of cases by Koen Lenaerts has also been proven by research. Christoph Krenn's analysis of the case allocation of the Court concluded that case allocation is uneven, and that there is also an "elite group of judges" within the Court who handle the body's more important cases.[228] According to the study, this is most evident in the work of the Grand Chamber, which comprises fifteen judges and which sits when a Member State or EU institution specifically requests it, or when a case is particularly complex or of high importance. As the Grand Chamber deals only with extremely important cases, it judges only about 60 cases per year, which is less than 10 percent of the cases that come to the Court. Examining the cases handled by the Grand Chamber between 2003 and 2019, Krenn's study came to the conclusion that Judge-Rapporteurs' posts in the Grand Chamber are not distributed evenly among the judges, with some serving in a remarkably high number of Grand Chamber cases, and others rarely holding such posts. Most

of the time the President himself – Koen Lenaerts – holds the position of Judge-Rapporteur in the Grand Chamber, regardless of the subject of the case (Lenaerts has been a Judge-Rapporteur in the Grand Chamber on a variety of legal issues, including fundamental rights, taxation and EU citizenship cases).[229]

The 2022 Rule of Law Report also criticised the rules for the election of the President of the Curia in Hungary,[230] and in line with this, the Recovery and Resilience Plan's milestone 214 made three demands related to the rules. These had to be addressed before the release of funds.[231] During selection of the President of the Curia, Hungary's National Judicial Council (OBT) gives a mandatory opinion on the compliance of the person applying for the position with the legal requirements;[232] then the President of the Curia is elected by Parliament after nomination by the President of the Republic.[233] Since the reform introduced in compliance with milestone 214, the President of the Curia cannot be re-elected.[234] This demonstrates that the Hungarian judicial system criticised by the EU imposes requirements for the procedure for electing the President of the Curia that are stricter than those imposed on the Court of Justice of the European Union itself: the President of the European Court cannot only be re-elected (since 2015 the Belgian Koen Lenaerts has been President,[235] being re-elected in 2018[236] and 2021[237]), but the judges themselves can choose the President of the Court.[238] In Hungary a parliament with a democratic mandate, the President of the Republic and the National Judicial Council all play roles in the appointment of the President of the Curia, acting as checks and balances on one another, in the spirit of democracy. Meanwhile the Court of Justice of the European Union, the absolutist arbiter of EU law at the summit of the Union's legal hierarchy, elects its President – who has the sole power to decide on the allocation of cases – without any external checks or oversight. This not only points to the double standards applied to the functioning of the Member States and the EU institutions, but also to the excessive power of the Court of Justice of the European Union and the lack of oversight related to it. This can have a negative effect on one of the fundamental pillars of the rule of law, the right to a fair trial.

3.3 The Court of Justice's integrity and independence is open to question

In light of the importance of the European Court of Justice, its members would be expected to be free from bias. This is the expectation of the TFEU Article 253 states that *"The Judges and Advocates-General of the Court of Justice shall be chosen from persons whose independence is beyond doubt and who possess the qualifications required for appointment to the highest judicial offices in their respective countries or who are jurisconsults of recognised competence"*. Despite this provision in the Treaty, the CVs of several Court of Justice judges suggest that they cannot be considered independent. Among the judges and advocates-general who are still in office, the Bulgarian judge Alexander Arabadjiev, the Luxembourgish judge François Biltgen and the Polish advocate-general Maciej Szpunar have displayed blatant political bias; and the political bias of the members of the Court threatens the integrity of the EU judiciary.

Alexander Arabadjiev, President of the First Chamber, sat in his country's parliament between 2001 and 2006 as a member of the left-wing coalition party BSP for Bulgaria.[239] He assumed his position as a judge in Luxembourg in January 2007, and since this was his reason for leaving his political position, he cannot be considered independent in any way. In the Court of Justice the so-called "Judge-Rapporteur" have a significant impact on the final outcome of judgments, as other judges discuss cases based on the draft decisions prepared by them. It is therefore extremely significant that Alexander Arabadjiev – a judge with left-wing ties – was the Judge-Rapporteur in the cases of both Poland[240], and Hungary,[241] countries led by governments of the Right, in relation to annulment of the general regime of conditionality for the protection of the European Union budget. In the case of both Member States, the claim was rejected by the Court; and the Judge-Rapporteur of the panel that ruled against the Member States was Alexander Arabadjiev. By rejecting the Member States' claims, the EU was given the opportunity to suspend payments to member states by citing breaches of the rule of law in order to protect its budget.

Based on his background, the political bias of the President of the Seventh Chamber – François Biltgen from Luxembourg – is even clearer than that of the President of the First Chamber. For six years, from 2003 to 2009, Biltgen was the President of his country's Christian Social People's Party.[242] Cross Europe the most well-known figure from the Christian Social People's Party is Jean-Claude Juncker, former

President of the European Commission. Up until April 2013 Juncker gave Biltgen – the politician-turned-judge – ministerial positions: he was minister of justice, civic service and administrative reform, higher education and research, communication and media, and of religious affairs in the second Juncker-Asselborn government.[243] Jean-Claude Juncker, who served as Prime Minister until December 2013, appointed François Biltgen to the European Court of Justice in autumn 2013. This was approximately one year before Juncker himself became President of the Commission. Trust in the Court and in its independence is significantly undermined by the fact that a judge serving in the European Court of Justice could have a close political relationship with the President of the Commission, and be a member of the same party as him: Juncker's political Commission could bring nation states before a court in which one of his party colleagues sat in judgment.

It is not only the former President of the Commission who can boast of getting a colleague into the Court but also the former President of the European Council, Donald Tusk. In autumn 2013, not long before becoming President of the Council in December 2014, Prime Minister Tusk arranged for Maciej Szpunar to become a member of the Court. Before his appointment to the Court, Maciej Szpunar – who became First Advocate-General of the Court in October 2018 – worked as a deputy state secretary at the Ministry of Foreign Affairs in the leftist Tusk government.[244] As First Advocate-General, Maciej Szpunar's duties include deciding which advocates-general to assign to the cases that come before the Court. Although the advocates-general do not have the right to vote in court decisions, the opinions prepared by them fundamentally determine the content of the Court's decisions – in part because the reporting judges can only start preparing draft decisions after the advocate-general opinions have been prepared and submitted.

By assigning advocates-general to cases, first advocates-general have considerable influence in the Court;[245] this is why it is important to stress that Maciej Szpunar's predecessor as First Advocate-General also had a political bias. The Belgian Melchior Wathelet (who served at the Court from 2012, and was First Advocate-General from 2014–18)[246] was a member of the Humanist Democratic Centre (now *Les Engagés*), and also served as a deputy minister in his country's ministries of justice and national defence. Between 2009 and 2012 (until his appointment as First Advocate-General) he was a minister of state of Belgium.[247] In 2014, when Wathelet was already serving as the First Advocate-General, his son – also a member of the Humanist Democratic Centre – was Deputy Prime Minister of Belgium and Interior Minister[248] under the Socialist Prime Minister Elio Di Rupo. So two successive first advocates-general have had strong political connections: Maciej Szpunar was in the service of Tusk's government (the political opponent of the PiS government, which was brought before the Court on more than one occasion); and Melchior Wathelet was linked to the Humanist Democratic Centre. These examples prove that judges with a left-wing political bias – who are neither impartial nor independent – sit and judge nation states and their democratically elected governments. This undermines the integrity of the EU judiciary, one of the foundations of the rule of law.

The independence of the judiciary is not limited to the fact that those working in the judiciary must be independent – there is an institutional aspect to this rule of law criterion, namely that independence must also extend to the judiciary's institutions. In addition to the questionable independence of the members of the Court of Justice, there are also concerns about the CJEU's institutional independence and impartiality. One element of institutional independence is the principle of *nemo iudex in causa sua*: that no one may be the judge in his own case. The CJEU can, however, adjudicate on its own cases: Case K 3/21, discussed in detail above, the Polish Constitutional Court's decision (which ruled that the CJEU's interpretation of the law was incompatible with the Polish Constitution) is the subject of an action brought by the Commission before the CJEU. This could mean that ultimately the CJEU could itself decide on which body has final jurisdiction on *ultra vires* issues; this is an area in which the Court itself, in its decision, is accused of having exceeded its powers. A similar problem could have arisen with the German Federal Constitutional Court's decision of 5 May 2020 (which ruled an earlier CJEU decision on the European Central Bank's recovery programme to be *ultra vires*), after the Commission had launched an infringement procedure against the country. In the German case, the Commission resolved the matter by terminating the infringement procedure before the case was brought before the Court. As long as the CJEU itself can give the final ruling on CJEU decisions

deemed *ultra vires* by national constitutional courts, the CJEU is the judge in its own case – in violation of the rule of law's requirement of judicial impartiality.

Violation of the principle of *nemo iudex in causa sua* was also a rule of law argument used during the Brexit campaign in relation to the operation of the EU and the Court of Justice. In 2010, in the midst of the global economic crisis, national governments sought to increase the salaries of EU officials by only 1.85 per cent, instead of the 3.7 per cent recommended by the Commission.[249] In the case brought before the Court, however, the CJEU argued in favour of a pay rise, stressing that Member States could not reduce the rate of pay increases to 1.85 per cent. According to the principle of *nemo iudex in causa sua*, a court must have no interest – other than the application of the law – in the outcome of a case brought before it. But in this case the judges and staff of the CJEU clearly had a personal financial interest in the 3.7 percent salary increase, since they themselves would receive it, dependent on the Court's ruling. As regards the concerns raised about the personal interest of the members of the CJEU, Francis Jacobs, a former advocate-general of the Court, simply said that *"A legal dispute of this kind, if submitted to the Court, has to be resolved by the Court, since there is no other means available [...] The Court [...] must be trusted to disregard any personal interest of its members."*[250] But the independence and impartiality of the judiciary will not be respected unless the principle of *nemo iudex in causa sua* is guaranteed. Thus it can be concluded that the independence and impartiality of the CJEU is questionable not only from a personal point of view, but also from an institutional point of view – which in turn results in a violation of the rule of law.

3.4 There is a risk of arbitrariness in the selection process for judges and advocates-general

The language of the Court of Justice of the European Union is French, which is not as widely spoken within the Union as English is; this can therefore be considered a limiting condition that makes it difficult for Member States to nominate judicial candidates. According to the results of research conducted by *Eurobarometer* in autumn 2023, 11 percent of European citizens are non-native speakers of French.[251] The highest percentage speaking French as a foreign language (77 percent) was among the non-native French speakers of Luxembourg. In 11 EU Member States (including Hungary),[252] however, the proportion of (non-native) French speakers was under 5 percent. According to data from the 2022 census in Hungary, only 147,000 people in the country speak French.[253] It can be stated that the percentage of European citizens speaking French is not only low, but that this trend will not change in the near future. According to *Eurostat*,[254] in 2020 fewer than 10 percent of secondary school students were studying French in 12 Member States: Lithuania, Portugal, Croatia, Greece, Estonia, Latvia, Slovenia, Denmark, Hungary, Finland, Slovakia and Bulgaria.[255] The low proportion of both speakers of French as a foreign language and students of French proves that when it comes to appointing qualified judicial candidates, Member States do not enjoy equal opportunities.

Depending on the language of the Member States, not only do the nation states have unequal chances when nominating qualified candidates, but the EU can also overrule Member States' nominations. Since 2010, the judges (and advocates-general) nominated by the Member States have been examined by a panel whose tasks are set out in TFEU Article 255.[256] On the one hand, the *raison d'être* of this panel is open to question: on what basis does a supranational body give a negative opinion on the candidates for judges and advocates-general delegated by the democratically elected governments of nation states? In addition to questions regarding the panel's right to exist, its operation can also be criticised: one of its tasks is to examine the independence of judges and advocates-general, but as was stated in the previous section, this panel has not filtered out candidates with clear political ties.

In contrast to independence, the panel places such strict conditions on the examination of candidates' knowledge that in many cases a candidate coming from the constitutional court of his or her country has to prove "fitness" for the position through motivational letters and a number of written studies.[257] Among the six conditions according to which the panel examines candidates are the examination of candidates' legal skills, professional experience, language skills, and independence.[258] Although the panel's decisions on the suitability of candidates from nation states are not publicly accessible, the identities of two unsuccessful

Maltese candidates are known: both Silvio Camilleri[259] and Joseph Filletti[260] were rejected by the panel on the grounds that their experience and knowledge of EU law was inadequate. According to press reports, Dr. habil. Rafał Wojciechowski's nomination as a judge on the Court was also given a negative opinion by the panel, and Poland withdrew its nomination. The Polish judge had previously been involved in the drafting of the 2021 Polish Constitutional Court judgment referred to above, which questioned the primacy of EU law.[261] One might take exception to the fact that the grounds for rejection of candidates are not made known to the public, as it may be important for the public to know on what grounds a supranational panel has rejected candidates for the posts of judges and advocates-general who have been nominated by their governments. Furthermore, the panel could certainly be encouraged to more seriously consider involving the public in its decisions, in the name of transparency and accountability.

The rejection of the candidacy of the Maltese and Polish jurists mentioned above is by no means a unique case. According to its 2022 report, the panel – which has been operating since 2010 – has issued a total of 28 negative opinions.[262] For candidates wishing to extend their mandate, the panel's opinion has always been positive, while the panel has rejected 28 of the 130 new candidates since 2010. So, when examining new candidates, 21.5 percent were rejected by the panel. Although the Member States do not necessarily have to withdraw a nomination after a negative opinion from the panel, in practice Member States have acted according to the panel's opinion in every case, and when an opinion has been negative, they have withdrawn the nomination.

4. Council of the European Union

4.1 Challenging the validity of Hungary's rotating Presidency of the Council runs counter to the principle of sincere cooperation and EU law

TEU Article 4(3) states that *"Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties."*[263] In relation to this Article, decisions of the CJEU have emphasised the principle of mutual respect – a principle which is binding not only on the Member States, but also on the EU institutions.[264] As set out in the Treaty of Lisbon, the rotating presidencies of the Member States take place within a system based on equal rights (TEU Article 16 (9)).[265] Thus the Union can be expected to respect and assist the Member States in the implementation of these tasks derived from the Treaties. Despite all this, in two resolutions on Hungary's rotating presidency, the European Parliament has argued[266] [267] that Hungary's failure to comply with EU law and its violation of the values enshrined in TEU Article 2 raise the question of whether the Hungarian government will be able to credibly fulfil the tasks of the rotating presidency.

In a resolution adopted in January 2024, the EP issued the "warning" that *"the President of the European Council could be replaced by the member of the European Council representing the Member State holding the six-monthly Presidency of the Council."* Then, in relation to the Hungarian Presidency, it asked the Council *"to find proper solutions to mitigate these risks"* as soon as possible, stressing that if no such solution is found the EP *"can take appropriate measures"*. The EP has thus warned against the possibility of the Hungarian prime minister, as the representative of the Member State holding the six-monthly Presidency, replacing the President of the European Council. A total of 478 MEPs voted on the resolution, 345 of whom voted in favour (i.e. 72 percent of those voting condemned Hungary).[268] All 56 Greens/European Free Alliance MEPs present voted to adopt the declaration, and all Luxembourgish MEPs (six) voted against Hungary. The EP text adopted on 1 June 2023 also contains provisions similar to those in the January 2024 text, and reiterates that *"Parliament could take appropriate measures if such a solution is not found"*.[269] 619 MEPs voted in favour of this resolution, with 71 percent of them – 442 MEPs in total – voting for its adoption.[270] Marc Tarabella, who was involved in the "Qatargate" corruption scandal, voted in favour of both resolutions. With reference to these two resolutions, it can be concluded that the EP intends to restrict a nation state government's exercise of its Treaty responsibilities, even making a statement confirming that it is undermining the principle of sincere cooperation.

Both the European Parliament and the Commission have tried to limit the success of the Hungarian Presidency not only through resolutions, but also with specific actions. At the start of each new rotating Presidency it is traditional for the College of Commissioners to visit the Member State holding the Presidency. The Belgian Presidency – which preceded Hungary's – was visited by the College on 5 January, five days after the start of its term of office.[271] In a dramatic departure from the usual practice, at the beginning of the Hungarian Presidency in mid-July 2024 the Commission's Chief Spokesperson Eric Mamer reported[272] that, due to the Hungarian government's actions during the first weeks of the Hungarian Presidency, Ursula von der Leyen had decided that at informal Council meetings the Commission would only be represented by senior civil servants. Furthermore, there would be no College visit to the Presidency. This move was clearly intended to undermine the fulfilment of Hungary's responsibilities during its Presidency, and it also undermines the principle of sincere cooperation.[273] A similar boycott of the Hungarian Presidency was announced by the EU High Representative for Foreign Affairs Josep Borrell when he announced[274] that, as a large majority of the Member States were critical of Hungary, the Foreign Affairs Council meeting would be held in Brussels instead of Budapest. Even if such criticisms were voiced, however, it is not clear why this should give the High Representative for Foreign Affairs the authority to move the venue of the meeting from Budapest, thereby hampering Hungary's ability to fulfil its Treaty obligations. When briefing the press, Josep Borrell only mentioned Slovakia as a Member State supporting the Hungarian leadership's position, but Luxembourg's foreign minister Xavier Bettel told journalists that he would attend the Budapest meeting, and that the boycott of Hungary was "nonsense".[275] According to later press reports, 13 Member States would have attended a meeting in Hungary, 8 wanted to leave the

decision to Borrell, and only 5 were against a meeting in Budapest[276] – so an absolute majority of Member States were not at all in favour of Josep Borrell's proposal. It can be concluded that the behaviour and statements of the High Representative, the Commission and the European Parliament clearly undermine the principle of sincere cooperation, as they are trying to act as a barrier to Hungary's fulfilment of its Treaty obligation: the holding of the rotating Presidency.

4.2 Negating the rules on unanimous decision-making is in breach of the Treaties

Certain issues – including joint foreign and security policy, EU citizenship and EU membership – require unanimity when voted on in the European Council. Despite the fact that TEU Article 24(1) states that common foreign and security policy requires unanimity (unless otherwise provided for in the Treaties), the EU institutions have recently been working to reduce the scope for unanimous decision-making by the Member States, and are trying to introduce majority voting on some issues which require unanimity. For example, in order to circumvent the need for unanimity on foreign affairs related to the war in Ukraine, there was an open attempt to reframe the issue and slip it into the realm of foreign trade – a subject where unanimous agreement of the Member States is not required. This plan to circumvent EU law, called the EU's "Plan B", was designed to allow up to €20 billion to be sent to Ukraine, in the event that Hungary would insist on a different position.[277] Under the EU's plan, Ukraine would have access to preferential loans – and thus funds – even if there was no agreement in the Council. In order to facilitate the interpretation of foreign and security policy issues as external trade issues, since 2023 the EU has also had the "Anti-Coercion Instrument". This instrument ostensibly seeks to help the EU respond to coercive economic measures from third countries by responding with economic instruments (tariffs and other trade restrictions, restrictions on foreign investment and access to public procurement). But this instrument also makes unanimous decision-making by Member States impossible, since it takes an issue that has hitherto required unanimous agreement as part of common foreign and security policy and reinterprets it as a trade issue, for which qualified majority voting is sufficient to adopt proposals.[278]

A similar situation occurred in June 2024, when, despite the objections of Hungary's foreign minister, a legal loophole was used to circumvent unanimous decision-making[279] on the allocation to Ukraine of €1.4 billion from the European Peace Facility. Although TEU Article 31(1) gives Member States the possibility of constructive abstention (instead of a veto), there was only one example of this before the war in Ukraine – in 2008.[280] Since the beginning of the war in Ukraine, several Member States – including Hungary – have made use of the possibility of constructive abstention. Hungary's constructive abstention in a vote on the war in Ukraine was later used as grounds to disregard its opinion on how to use frozen Russian assets to help Ukraine financially.[281] This created a new type of circumvention of the rules on unanimity. Both the disregard of Member States' opinions with the help of loopholes and the above-mentioned reinterpretation of the contentious issues clearly show that Brussels is actively working to circumvent the unanimity of Member States – even at the cost of evading EU law, and thus undermining the rule of law.

Unanimity can be circumvented not only by recategorising an issue from one area to another or through loopholes, but also by determining which institution will vote on the issue. Right up until the migration crisis, the Council of the European Union sought consensus on migration issues – despite the fact that in essence the institution decides on these issues by qualified majority voting.[282] As no agreement could be reached in 2015, in questionable disregard of previous practice the Council of the European Union adopted the proposals for the distribution of migrants by a qualified majority rather than unanimity. This was despite the fact that the European Council stated in 2016,[283] 2018[284] and 2019[285] – and confirmed in 2023[286] – that migration and asylum policy is an issue on which Member States must decide by consensus. Several Member State governments objected to the fact that the issue was decided at ministerial level rather than at the level of Heads of State and Government, while Slovakia (C-643/15)[287] and Hungary (C-647/15)[288] also brought actions for annulment – including on the grounds that the vote was by qualified majority. In both cases, the European Court of Justice dismissed the actions, holding, *inter alia*, that the Council was permitted to vote by qualified majority, including on the cases in question. As Poland, Hungary and the Czech Republic subsequently failed to comply with their migrant transfer obligations, which had been adopted in this

questionable manner, the Commission referred the matter to the European Court of Justice. In 2019 the latter condemned all three countries.[289]

Unanimous voting is being undermined despite the fact that Member States can hardly be accused of using dissenting opinions frequently with the purpose of undermining consensus: between 2016 and 2022, only 30 decisions were vetoed.[290] But EU institutions' failure to seek compromise – or the expectation of this merely from Member States – can have a negative impact on how Brussels is perceived. While in its 2018 Communication[291] the Commission argued against the need for unanimity in the Council and for a culture in which Member States are expected to compromise, Brussels does not show the same readiness to compromise in its dealings with Member States. In the case of the UK, for example, one may ask to what extent British citizens' distrust of the EU was a result of EU institutions' failure to seek compromise. From 2010 until its withdrawal from the Union in January 2020, the UK was one of the Member States whose viewpoint was most frequently in minority in the Council (outvoted 174 times); this number was almost three times the corresponding figure for Germany (outvoted 59 times).[292]

Notes

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[2] Gát Ákos Bence: Napirendre kerülhet az EU intézményei feletti jogállamisági ellenőrzés, 2023. 06. 22. https://www.ludovika.hu/blogok/ot-perc-europa-blog/2023/06/22/napirendre-kerulhet-az-eu-intezmenyei-feletti-jogallamisagi-ellenorzes/

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[4] https://curia.europa.eu/juris/document/document.jsf?docid=47107&doclang=EN

[5] https://www.venice.coe.int/WebForms/pages/?p=02_Rule_of_law&lang=EN. The rule of law criteria formulated in 2011 was further elaborated on by the Venice Commission in its later study (https://www.venice.coe.int/images/SITE%20IMAGES/Publications/Rule_of_Law_Check_List.pdf).

[6] The research was completed on 17 October.

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[18] https://www.euractiv.com/section/digital/news/eu-parliament-adopts-calls-for-de-facto-moratorium-on-spyware/

[19] https://www.europarl.europa.eu/doceo/document/TA-9-2023-0244_EN.html

[20] https://www.europarl.europa.eu/doceo/document/PEGA-CR-746698_EN.pdf, p.17

[21] https://www.europarl.europa.eu/doceo/document/PEGA-CR-736647_EN.pdf, pp.4-5

[22] https://www.europarl.europa.eu/doceo/document/PEGA-CR-746829_EN.pdf, p.26

[23] For more details see the 'The Commission's so-called "rule of law framework" is in breach of the Treaties' subchapter.

[24] https://data.consilium.europa.eu/doc/document/ST-10296-2014-INIT/hu/pdf, 5.o.

[25] https://www.europarl.europa.eu/doceo/document/A-9-2023-0187_HU.html

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[39] https://www.europarl.europa.eu/doceo/document/TA-9-2024-0176_EN.html

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[42] https://publications.parliament.uk/pa/ld201314/ldselect/ldeucom/151/15107.htm

[43] https://corvinak.hu/velemeny/2024/01/08/szubszidiaritaskontroll-a-sarga-es-narancssarga-lapos-eljarasok

[44] The European Commission and the Parliament have different systems for registering the number of reasoned opinions. According to the Commission, a reasoned opinion responding to several Commission proposals at the same time is considered only one reasoned opinion for statistical purposes; on the other hand, in relation to the threshold required in the yellow card and orange card procedures, the number of Commission proposals responded to determines the number of reasoned opinions. Meanwhile the European Parliament determines the number of reasoned opinions according to the number of Commission proposals responded to. 2019: https://commission.europa.eu/document/download/d9feb1a5-b6e4-4e65-a87d-db0d8100614a_en?filename=com-2020-272-en.pdf; 2020: https://commission.europa.eu/document/download/3791b788-b86f-4c3d-99f6-3946c5081ead_en?filename=2020-annual-report-subsidiarity-proportionality-national-parliaments_en.pdf

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[49] Petri Bernadett, Bernadett Petri, *Az Európai Parlament működése a koronavírus-járvány idején: valódi megoldás-e a távmegoldás?* ("The operation of the European Parliament during the coronavirus pandemic: is remote working a real solution?")

[50] https://www.europarl.europa.eu/doceo/document/RULES-9-2019-07-02_HU.pdf, p.94

[51] Petri Bernadett, Az Európai Parlament működése a koronavírus-járvány idején: valódi megoldás-e a távmegoldás?, https://folyoirat.ludovika.hu/index.php/eumirror/article/view/4905/4349, p.86

[52] https://www.dw.com/en/qatargate-one-year-on-eu-cash-for-influence-scandal-still-far-from-over/a-67670541

[53] https://howtheyvote.eu/votes/163314

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[102] https://eur-lex.europa.eu/legal-content/HU/TXT/?uri=CELEX%3A52020DC0698
[103] The collective effort of the EU institutions has not yet fully been converted into practice. When moving from one EU country to another, same-sex spouses have the right of residence, and the host country must respect this even if the host country does not recognise same-sex marriage (https://europa.eu/youreurope/citizens/residence/family-residence-rights/non-eu-wife-husband-children/index_en.htm). With regard to other rights related to family law, however, countries that do not recognise same-sex marriage will in practice not necessarily afford those right to same-sex couples. For example, Italy considers same-sex couples married in other Member States to be in registered partnerships rather than in marriages.
(https://europa.eu/youreurope/citizens/family/couple/marriage/index_hu.htm).
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[162] For example, CROSSKOVÁCSI Sport és Környezetvédő Egyesület (CROSSKOVÁCSI Sport and Environmental Association) appears in the Financial Transparency system as follows: "CROSSKOVÁCSI SPORT ES KOMYEZETVEDOEGYESELUET" – the omission of the accents is of course understandable given the language of the system, but the merging of the last two words as one, and the omission of a few letters in the word "environmental" shows how errors make searching difficult, rendering the system opaque. This is not the only organisation with an incorrectly entered name. For example, in 2021 *Magyar Jeti* (which operates the news portal 444.hu) is listed in the Commission's system as follows: "MAGYAR JETI ZARTKORUEN MUKODORESZVENYTARSASAG" (so the words for "operating" and "stock company" are merged into one), although in 2022 it received funding under the name "MAGYAR JETI ZARTKORUEN MUKODO RESZVENYTARSASAG". In 2019, Political Capital was listed as "POLITICAL CAPITAL SZOLGALTATO KFT*POLITICAL CAPITAL SERVICE LIMITED LIABILIY COMPANY", then from 2022 as "POLITICAL CAPITAL SZOLGALTATO KORLATOLT FELELOSSEGU TARSASAG". The list of inconsistently or incorrectly written names extends to many other organisations as well. Although the errors may appear to be small differences, such differences make automated analysis of the system nearly impossible.
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[168] https://www.politico.eu/article/5-things-to-know-about-ursula-von-der-leyens-pfizergate-court-cases/

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