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How to Ensure the EU's Rule-of-Law Monitoring Does Not Legitimize Autocracies in the Making

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Developments in recent years in countries like Hungary, Poland, or Bulgaria show that the track record of the EU institutions in dealing with autocratization in member states is hardly a success story. However, the European Commission's commitment to conducting an annual comprehensive rule-of-law monitoring exercise until September has led to some hope for a breakthrough. This could enable a deep, systemic analysis of concerns about the situation in all member states.

A public consultation conducted between March and May helped channel the experiences of civil society organizations and other institutional stakeholders into the evaluation and monitoring process.

The monitoring exercise contains also great risks, however. If it does not effectively capture existing patterns of autocratization in areas such as the independence of the judiciary, media pluralism, and organized corruption, the European Commission will do more harm with its action than it could have done with its idleness. This is because a superficial or wrongly focused monitoring can inadvertently disguise the real political dynamics related to the rule of law and thus legitimize authoritarian practices.

To date very little is known about the methodology the commission will use. Therefore, it is important to take a critical look at key issues that can influence whether the monitoring generates important added value or potentially makes the worse.

Below are five recommendation for ensuring that the monitoring exercise makes a substantial contribution to safeguarding the rule of law in EU member states.

Supplement comparative monitoring with detailed country reports

The credibility and legitimacy of the European Commission's role as the guardian of the EU treaties has suffered as a result of its often inconsistent and irresolute approach to enforcing observance of the rule of law in member states. For example, its assessment that the situation in Hungary still does not threaten a serious breach of European values and does not warrant sanctioning the country under Article 7 procedure demonstrates a significant deviation from the broad consensus among experts. If it comes to the commission deciding whether the Article 7 procedure must be triggered against the government of a member state, the legitimacy of its decision one way or the other will be heavily affected if it is not supported by convincing and transparent facts and arguments.

The comprehensive rule-of-law monitoring mechanism should not only rely on a comparative scorecard and an EU-level report, like the EU's Justice Scoreboard. It should be supplemented by a detailed analysis of the situation in each member state. Summarized in country reports, this can then serve as a transparent explanation and justification for the European Commission's scoring. Not only could the country reports be reviewed or verified by independent experts, they could also foster an open and transparent dialogue between the commission and critical civil society, academic, and policy stakeholders engaged in this field.

The country reports should include specific recommendations, identifying critical elements of the national legislative frameworks and enhancing the resilience of democratic constitutional systems and their compliance with European values.

Pay special attention to the constitutional judiciary and the quality of checks and balances over a long period

The broad spectrum of topics brought up during the public consultation and the fact that the issues of corruption and media pluralism might be integral parts of the monitoring mechanism is highly welcome. This shows that the European Commission might be ready to adopt a broader interpretation of the concept of rule of law than it has to date. Nevertheless, besides the questions of the independence, quality, and efficiency of justice systems in member states, special attention should be paid to the quality of the constitutional judiciary.

The powers of constitutional courts or supreme courts with constitutional competences vary considerably throughout the EU, depending on the constitutional order and traditions of each country. However, this cannot impair the principle that all must act as independent safeguards of constitutionality and serve as the highest judicial organs in the system of checks and balances. The Hungarian and Polish examples demonstrate that the excessive power of the legislative and executive branches as well as the authoritarian transformation of the constitutional reality develop nearly unopposed once constitutional courts are captured.

Against this background, the rule-of-law monitoring mechanism has to go beyond the analysis of legal texts. It should also scrutinize how the election or appointment procedures for members of constitutional courts (or higher courts, in case of the ordinary judiciary) work in practice. It needs to establish whether they allowed court packing by a single ruling party or party coalition, resulting in the political homogenization and capture of courts.

Furthermore, the monitoring should cover a significant period of time. If the European Commission intends to restrict the timeframe of the exercise to one or two years, this may do significantly more harm than good, rubber stamping as "independent" courts that might have been already captured several years ago. Hungary's Constitutional Court was effectively captured in 2013, while Poland's Constitutional Tribunal lost its independence in 2016. Considering the years-long process of Hungary's autocratization, the first monitoring exercise should cover nearly a decade to establish the facts, which can then serve as an appropriate baseline for further annual reports.

The monitoring mechanism also needs to scrutinize whether constitutional courts make use of their control power. Whether they are able to decide against the legislative majority and the executive in politically important and sensitive cases needs to be established. Such an exercise again requires the analysis of judgments over a longer period than one or two years.

The rule-of-law crisis in the EU and the democratic demise of member states have not emerged overnight. If the European Commission is not ready to cover the whole timeframe for these developments with its exercise, there is a high likelihood that the results will be seriously biased, hiding rather than revealing the systemic challenges to the rule of law in several member states.

Pay special attention to the potential political bias of criminal justice and prosecution authorities

The politically neutral and effective functioning of criminal justice is an important cornerstone of the rule of law. Establishing political control over the prosecution authorities is a tool frequently used by political circles entangled in organized corruption. The election or appointment mechanisms for prosecutor generals vary extensively among EU member states, thus the politicization of the office varies as well. The main problem is if the politicization of the prosecutor general's office undermines the neutrality of criminal justice and results in politically biased investigations, or simply in the lack of investigations for political reasons. The European Commission's monitoring exercise therefore has to put a special emphasis on politicization dynamics regarding the recruitment and operation of the prosecution authorities.

The monitoring exercise has to pay special attention to the investigation of corruption cases and whether there is political bias in the prosecution of "politically exposed persons" (officials in public positions that offer possibilities of corruption). The inclusion of an anti-corruption chapter in the monitoring exercise effectively allows the commission to bring back to life its anti-corruption monitoring, which was discontinued after 2014 mostly due to the resistance of member states to it.

The monitoring mechanism should also scrutinize whether the anti-corruption standards of member states guarantee not only the efficient, but also the transparent and ethical utilization of financial resources provided by EU funds. The European Commission should gather information about cases in which member states refused to follow the recommendations of the European Anti-Fraud Office (OLAF) and failed to launch a prosecution. Regarding these cases involving large sums, a special focus should be put on potential political links that might have influenced the decisions of the national investigative authorities.

The political context of media concentration, and not just media ownership, should be scrutinized

The transparency of media ownership is a key aspect of safeguarding media pluralism. The concentration of ownership not only seriously limits media pluralism, it can also hamper citizens' access to unbiased information and balanced reporting. Nevertheless, important as it is, the issue of ownership and concentration by itself does not cover the complex nature of threats to a free and pluralistic media environment. The protection of media pluralism requires a broader view.

Regarding state-owned media and news agencies, special attention should be paid to whether they actually comply with the obligation of neutral and balanced coverage stipulated by the respective national media laws, as well as whether editorial freedom is guaranteed. The pricing policy of state-owned news agencies should be scrutinized to determine whether it distort news markets. At issue is whether these agencies supplying news to media outlets for free should be considered a dumping measure in breach of EU competition law, intended to undermine independent and critical media, especially if the quality of agency news objectively falls short of the requirements of neutral and balanced coverage

For many observers, media pluralism and rule of law appear to be distant and largely unrelated issues. But they are undeniably connected when it comes to the independence and neutrality of national media-supervision authorities. When it comes to these, the European Commission's monitoring mechanism should pay the same attention to their independence, potential capture, and track record of balance or bias as it does with the higher judiciary. With this move the commission would enter unchartered waters (and an area barely covered by other media- or democracy-monitoring organizations) but it could provide a unique and important contribution to the monitoring of media freedom and media pluralism in the EU.

The monitoring mechanism should be broad in scope and not constrained by restrictive and sovereignist interpretations of EU law

In a rather restrained and conservative reading of the EU treaties, there is a wide gap between the scope of European values and the actual competences of EU institutions, conferred by the member states, to safeguard them. Over the past ten years, the European Commission has been unwilling and unable to bridge this gap with an audacious, progressive interpretation of EU law. It should be bold enough today to adjust the scope of the monitoring mechanism to fit a broader view of the complex and multifaceted nature of the rule of law, which is interlinked with rather than separate from other European values such as democracy or fundamental rights. As the exercise is not designed to create legal effects, the European Commission should disregard the potential constraints constituted by the narrow scope of its legal competencies.

The European Commission sometimes has been unable to counter the autocratization of member states due to the lack relevant provisions in the EU treaties and secondary EU law. Its rule-of-law monitoring mechanism should be used to underline that it has tools to draw attention to member states' deviation from the common understanding of European values, even if legal or political actions are closed. Monitoring the observance of European values with a scope not limited by a restrictive, sovereignist reading of the EU treaties could be a breakthrough and the first step in the direction of a more progressive and bold interpretation of EU law that may promise a new, more effective approach to safeguarding European values.

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