



Defence of the Rule of Law after the European Union Summit: Compromise and What Next

Commentary

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The compromise made at the European Union summit in December 2020 does not end the battle to protect the rule of law in the EU. The mechanism adopted for protecting the budget and the accompanying political decisions only open a new chapter. In the coming months, civil society organisations, EU institutions, European parties and member states must ensure that the new and old instruments are fully utilised. We present the key areas of action demanding their political engagement.

In December 2020, an important stage in the dispute over protection of the rule of law in the European Union came to an end. The European Council's decision of 10–11 December paved the way for an agreement on the EU budget and adoption of the regulation establishing a mechanism for the withholding of payments to countries whose governments violate European law in

a way endangering the Union's finances.¹ Poland and Hungary opposed the conditionality mechanism for a long time, threatening to block the EU budget and Reconstruction Fund, supposedly in response to the attempt to force the regulation through against their will. As a result of the summit, the EU Council and Parliament formally accepted the regulation, which on 1 January 2021

1 Conclusions from the European Council meeting of 10-11 December: <https://www.consilium.europa.eu/media/47296/1011-12-20-euco-conclusions-en.pdf>. See also the following commentaries: P. Buras, „Chocholy i potwory. Jaki jest bilans unijnego szczytu?“, *Polityka*, 11 December 2020, <https://www.polityka.pl/tygodnikpolityka/swiat/1982634,1,chocholy-i-potwory-jaki-jest-bilans-unijnego-szczytu.read>; K. Bachmann, „To nie kompromis ani remis. Polska i Węgry sromotnie przegrały w Brukseli 25:2“, *Gazeta Wyborcza*, 12 December 2020, <https://wyborcza.pl/7,75968,26600310,to-nie-kompromis-ani-remis-polska-i-wegry-sromotnie-przegraly.html>. All articles accessed on 18 December 2020.

entered into force as a legal act of the EU.² It is not without reason that there have been diverse interpretations and reactions to the outcome of the EU summit regarding the rule of law.³ On the one hand, the compromise meant that the new conditionality mechanism could be passed in a form unchanged from the version negotiated by the Parliament and EU Council. The mechanism provides the Commission with unprecedented power to recommend, in specific circumstances, sanctioning a member state by suspending part or all its budget funds. The EU Council then decides by qualified majority voting (55% of states representing 65% of the EU population), a lower threshold than with the Article 7 procedure, where the approval of four fifths of all member states is required. This is a very significant step in dismantling the EU's machinery, often criticised for lacking adequate means to react to rule-of-law crises in its member states.

On the other hand, the European Council's conclusions contain a number of political decisions that, according to critics, create a risk of reducing the effectiveness of the mechanism.⁴ The Commission – in agreement with the member states – is to work out “guidelines” to clarify the criteria for application of the new mechanism. These will be solidified only after a ruling of the Court of Justice of the European Union (CJEU) on the mechanism's compliance with EU law.⁵ Until the

ruling is announced, the Commission is to delay “proposing measures”, i.e. potential penalties on the basis of the regulation. Its full implementation could therefore be postponed even for two years (the CJEU needs an average of 19 months to issue a ruling).

No matter how we assess these decisions, one thing is certain: the question of protection of the rule of law in the European Union remains above all a political challenge, and not a legal or technocratic one. It was never meant to be the subject of adjudications of the Commission or Court, operating on the basis of laws that entirely exclude political arguments. For the mechanism to be triggered, a Commission decision is needed, and for a sanction to be levelled, the EU Council's agreement is required – in both cases, the margin of discretion in making decisions will be mostly determined by political concerns.⁶ It is impossible to say today yet whether the December European Council's decisions will indeed restrict this margin, as critics claim. This will depend on many factors, including the interpretation of the text of the regulation and conclusions of the Council, EU institutions' approach to them, the role of the question of the rule of law in political debate in member states, and the state of the rule of law in the EU.

It is also difficult to foresee how long this “transition period” will last. Both the European Parliament and Commission should apply for an expedited procedure at the CJEU for the ruling to be issued within months, not years. Ultimately, however, it is the sole decision of the Court and its president.⁷ Delaying full implementation of the regulation until the CJEU ruling cannot become a pretext for inactivity, especially as the December decisions – despite certain limitations

2 Text of the regulation: “Regulation of the European parliament and of the Council on a General Regime of Conditionality for the Protection of the Union Budget”, <https://data.consilium.europa.eu/doc/document/PE-64-2020-INIT/en/pdf>.

3 For a concise summary, see T. Nguyen, “The EU's new rule of law mechanism: How it works and why the ‘deal’ did not weaken it”, https://hertieschool-f4e6.kxcdn.com/fileadmin/2_Research/1_About_our_research/2_Research_centres/6_Jacques_Delors_Centre/Publications/20201217_Rule_of_law_Nguyen.pdf.

4 G. Soros, “The costs of Merkel's surrender to Hungarian and Polish extortion”, <https://ecfr.eu/article/the-costs-of-merkels-surrender-to-hungarian-and-polish-extortion/>.

5 Poland and Hungary vowed to appeal against the regulation, for which they have two months from the moment when it entered into force, i.e. until the end of February 2021.

6 See P. Buras, S. Ananicz, „Na ostatniej prostej. Unijny mechanizm ochrony rządów prawa”, 5 October 2020, <https://archiwumosiatynskiego.pl/wpis-w-debacie/na-ostatniej-prostej-unijny-mechanizm-ochrony-rzadow-prawa/>.

7 There is also a possible scenario whereby no expedited procedure is formally put into place, but a decision of the CJEU will in effect give the case priority.

– create new opportunities that should be taken. The debate that will affect the direction and effectiveness of initiatives to defend the rule of law will cover the provisions of the regulation and its subsequent fate as well as EU institutions' use of other mechanisms available to them. Member states, the European Parliament and social organisations should take part in this debate. Below we present the key issues that will decide on the outcome of these efforts.

Before the CJEU ruling: monitoring and political communication

It will be crucial in the coming months that the transition period for initiating the mechanism (until the CJEU ruling) agreed at the EU summit does not become an alibi for neglecting any of the actions facilitated by the new regulation.

On 1 January 2021, the regulation became binding EU law. The Commission's delayed full implementation of its provisions is only a political undertaking without legal force. According to some lawyers, this commitment is unlawful, as it might be seen as the Commission shirking its treaty commitments (upholding EU law), which the new mechanism is supposed to implement.⁸ Yet the regulation does not contain any provisions compelling the Commission to institute the procedures it foresees; the Commission has discretion to decide whether it will act and in which circumstances. We can therefore assume that the Commission will respect the agreement it has become party to, as to violate it could fuel a further heated political dispute.

Yet this is not to say that the Commission can wait idly for the Court of Justice ruling. Above all, it must immediately start work on the "guidelines" it undertook to develop at the summit in December 2020. Although their content is supposed to

be consulted with the EU Council, the Commission cannot allow these consultations to turn into political negotiations, let alone to lead to a real change or weakening in the provisions of the regulation. The Commission will be fully responsible for ensuring that the "guidelines" do not vary from its letter and spirit at any point. Work on the "guidelines" should be carried out with respect for the principle of transparency and participation of representatives of the European Parliament and in consultation with civil society organisations.

This is not all. The European Council conclusions oblige the Commission to delay "proposing measures" (penalties) until the CJEU ruling is announced. According to the provisions of the regulation, however, "proposing measures" is only the last stage of the procedure, preceded by several others: dialogue with the member state, explanations etc. After 1 January 2021, the Commission should base its actions on the fact that the regulation is formally binding and act in accordance with its provisions in all areas concerning protection of the EU's financial interests and the rule of law. Since the beginning of January 2021, the Commission should henceforth monitor the situation in member states in accordance with the terms of the regulation and identify the forms of violations of the law that it recognises as potential foundations for triggering the new mechanism as soon as this is politically possible (i.e. after the CJEU ruling is announced). It should also clearly communicate its opinion in these matters. Such steps would also serve to develop a working model for the Commission which would be formally expressed by the "guidelines". To this end, the Commission should make use of the annual review on the rule of law in EU member states, established in 2020. The next report, whose publication is expected in autumn 2021, should also contain conclusions from monitoring in terms of possible application of the budget protection mechanism.

What makes such actions from the Commission even more important is the fact that after the

⁸ A. Alemanno, M. Chamon, "To Save the Rule of Law you Must Apparently Break It", <https://verfassungsblog.de/to-save-the-rule-of-law-you-must-apparently-break-it/>.

CJEU ruling, penalties imposed on the basis of the budget protection mechanism will also apply to breaches that took place in the “transition period” (as long as they had or could have an impact on expenditure of funds from the 2021–2027 budget). Monitoring and clear warning signals can therefore have a preventive effect towards possible breaches and avoid any future surprise from member states. Such actions will act as a sword of Damocles, in this case understood as ex post application of the budget protection mechanism.

Commission representatives, including Vice-President Věra Jourová, have given public assurances that the Commission would not be passive despite the deferment of application of the mechanism.⁹ The European Parliament adopted a similar position in a resolution passed on 17 December, stating that it: “expects the Commission, as the guardian of the Treaties, to ensure that the Regulation is fully applicable from the date agreed by the co-legislators”.¹⁰ Member states and non-governmental organisations should also insist on this, reminding the Commission of its treaty obligations.

Judicial independence – a key criterion

It will also be especially important in the coming months to guarantee that the new mechanism is applied in the full scope envisaged in the regulation. This particularly concerns the definition of breaches of the rule of law upon which it can be triggered. The question of independence of the courts is one that merits particular attention.

9 Michael Peel, Sam Fleming, “Brussels warns on corruption threat to taxpayer trust”, *Financial Times*, 15 December 2020, <https://www.ft.com/content/179c4786-8b16-4b63-ae58-53befb43aca7>.

10 Text of the resolution: “European Parliament Resolution of 17 December 2020 on the Multiannual Financial Framework 2021–2027, the Interinstitutional Agreement, the EU Recovery Instrument and the Rule of Law Regulation”, https://www.europarl.europa.eu/doceo/document/TA-9-2020-0360_EN.html.

The Polish and Hungarian governments based their opposition to the regulation on the supposedly excessively broad and imprecise definition of these breaches. In particular, Warsaw and Budapest protested against the possibility of “generalised deficiencies as regards the rule of law” being used to suspend payment of EU funds, favouring the option of penalties being enforced only in cases of corruption or fraud. While this argument might have seemed apt in reference to the original draft regulation presented by the Commission in 2018, the final adopted version leaves no doubt that the regulation is meant to serve “protection of the budget”, and not protection of the rule of law as such.¹¹ In this context, it is crucial that breaches (or the risk thereof) that triggering the mechanism could be based on are required to have a “sufficiently direct influence” on EU finances. In other words, when initiating the procedure, the Commission must demonstrate that a direct link exists, or could exist, between the identified deficits in the rule of law and the possibility of wasting EU funds.

The Polish government, however, presents the main success of the EU summit as being the provision that “the Regulation does not relate to generalised deficiencies” (subparagraph 2f of the Council Conclusions) and that “the mere finding that a breach of the rule of law has taken place does not suffice to trigger the mechanism” (2e).¹² Yet this sentence does not in fact add anything new, as the principle in question refers directly to the content of the regulation. Underlining the political importance of this “assurance” is no doubt motivated by the desire to avoid a situation in which this mechanism is triggered in response to the undermining of systemic guarantees of judicial independence already exercised in Poland

11 Cf. S. Ananicz, P. Buras, *Five Polish government claims about the EU budget debunked*, December 2020, <https://notesfrompoland.com/2020/12/02/five-polish-government-claims-about-the-eu-budget-debunked/>.

12 „Szymański: Konkluzje szczytu UE ochronią Polskę. To gwarancje stosowania rozporządzenia – dokładnie to czego chcieliśmy”, <https://wpolityce.pl/polityka/530376-szymanski-konkluzje-szczytu-ue-ochronia-polske>.

(such as the justice minister's control of the disciplinary system exacted on judges).¹³ But such an interpretation of the provisions of the regulation would not be in accordance with its letter and the intention of the legislator (the Council and the Parliament). The text of the regulation makes explicit references to judicial independence as a key and essential guarantee of lawful spending of EU funds in member states. Article 3 clearly cites "endangering the independence of the judiciary" as something that "may be indicative of breaches of the principles of the rule of law". In Article 4(2d), breaches of "the effective judicial review by independent courts" are explicitly mentioned as one of the criteria justifying imposition of penalties.

It is to be expected that the governments of the countries that have the most to fear from the use of the mechanism in response to violations of judicial independence will push for an interpretation of the European Council's conclusions excluding such a possibility. It is therefore extremely important that both EU institutions and member states leave no doubt regarding the objective scope of the breaches upon which the budget protection mechanism can be triggered – in accordance with the provisions of the text of the regulation. The risk of a collapse in independence of courts has a direct influence on the way EU funds are administered, as it removes the guarantee that judges will rule impartially, especially in situations when the government, other state organs or state-controlled enterprises are party in the dispute. The Commission must therefore be firm in ensuring that judicial independence is explicitly and unambiguously mentioned in the "guidelines" as an essential condition of effective protection of the EU budget.

Member states and the Article 259 procedure

Poland and Hungary's budgetary blackmail for the first time brought the issue of rule of law into

the centre of the EU political debate, fully engaging member states. As a negative image of the United Right government in Poland and Fidesz government in Hungary has been reinforced and in the light of an increased awareness of the seriousness of the problems resulting from their rule-of-law breaches, the EU countries' direct involvement in the question of upholding the rule of law is becoming a realistic scenario.

Previously, the dominant practice had been to leave this task for the EU institutions: the European Commission, the Council (within the Article 7 TEU procedure), the Court of Justice of the EU and OLAF, the European Anti-Fraud Office. The customary "non-aggression pact" between states has now become much weaker.¹⁴ On 1 December 2020, the lower house of the Dutch parliament called upon the government to assume the leading role in ensuring abidance by the law in the EU and to check whether on the basis of Article 259 of the Treaty on the Functioning of the European Union it could apply to the CJEU concerning the independence of the Polish judiciary. It was also recommended that the government, where possible, act in a coalition with other like-minded states. Article 259 of the Treaty on the Functioning of the EU allows a member state to take an action to the CJEU if it deems another country to have infringed its treaty commitments. To date, there have only been a few such cases, and none of them concerned a dispute concerning internal systemic issues. Where there have been disputes, the states have generally made efforts behind the scenes to get the Commission to act based on Article 258 (the "traditional" anti-infringement procedure). Cases of actions taken against governments have mainly concerned political questions about thorny national issues, e.g. the case of the dispute over Gibraltar between Spain and the United Kingdom and the diplomatic conflict between Slovakia and Hungary.

13 P. Buras, J. Dalhuisen, G. Knaus, M. Milenkovska, „Pogłębiający się kryzys w Polsce. Kiedy w Europie umiera praworządność”, <https://www.batory.org.pl/upload/files/Programy%20operacyjne/Forum%20Idei/Poglebiajacy%20sie%20kryzys%20w%20Polsce.pdf>.

14 G. Íñiguez, "The enemy within? Article 259 and the Union's intergovernmentalism", *The New Federalist*, December 2020, <https://www.thenewfederalist.eu/the-enemy-within-article-259-and-the-union-s-intergovernmentalism?lang=fr>.

The Dutch offensive is not the only such case: in early December 2020, Belgium, Denmark, the Netherlands, Finland and Sweden supported a European Commission application to the CJEU to extend the provisional measure concerning the disciplinary system regarding Polish judges. For the first time, the governments of these countries publicly spoke out to the CJEU on the condition of the rule of law and judicial independence in Poland.¹⁵ The removal of the possibility to use the veto for the budget means that there could be more similar initiatives. Activation of member states' governments would strengthen the legitimisation of the European Commission and other institutions in their efforts to defend the rule of law. The consequences of this awakening therefore seem to be visible. The Commission has decided to expand the range of charges against Poland as part of the anti-infringement procedure regarding the disciplinary system for judges (after eight months of inactivity),¹⁶ as well as to refer the country to the CJEU concerning violation of the birds and habitats directives.¹⁷ The latter case, seemingly not related to the subject of the rule of law, in fact concerns it as one of the main charges against Poland is the lack of access to the justice system and lack of effective judicial control, including in reference to the actions of state authorities.

15 A. Wójcik, „Belgia, Dania, Holandia, Szwecja i Finlandia w TSUE jednym głosem przeciw Izbie Dyscyplinarnej”, OKO.press, 3 December 2020, <https://oko.press/belgia-dania-holandia-szwecja-i-finlandia-w-tsue-jednym-glosem-przeciw-izbie-dyscyplinarnej/>.

16 T. Bielecki, „Bruksela znów bierze się za Izbę Dyscyplinarną”, DW.com, 3 December 2020, <https://www.dw.com/pl/bruksela-znow-bierze-sie-za-izbedyscyplinarna/a-55810502>.

17 K. Szymańska-Borginon, „KE pozywa Polskę do TSUE. Chodzi m.in. o brak ochrony siedlisk leśnych”, RMF24, 3 December 2020, <https://www.rmf24.pl/fakty/polska/news-ke-pozywa-polske-do-tsue-chodzi-m-in-obrak-ochrony-siedlisk,nId,4893335>.

Time to act, Commission!

Another reason why the Commission need not delay more decisive actions until the budget protection mechanism comes into force is the fact that it has numerous other instruments available that it has hitherto used too sparingly. The wider political consensus regarding defence of the rule of law ought to embolden the Commission to use these instruments more often in justified cases.

The main instrument of defence of the rule of law that the Commission can call upon is bringing an action to the Court of Justice of the European Union. With regard to Poland, this instrument is not utilised sufficiently. The result would be better if the Commission were more energetic in going to the Court of Justice in response to Poland's successive violations of Article 19 of the Treaty on European Union, which obliges member states to assure EU citizens effective judicial control (i.e. independence of courts and judges), as well as for breaching the obligation of loyal cooperation and making all efforts to fulfil the treaty obligations, as mentioned in Article 4.3 TEU. The actions should be followed by applications for the case to be considered in an expedited procedure, as well as for a safeguard (a so-called interim measure) to prevent further attacks on the justice system from further extending the almost irreversible damage to the Polish and European legal system.

Finally, failure to abide by the CJEU's rulings should entail unavoidable sanctions. In the short term, the priority should be to bring a halt to disciplinary proceedings against judges. The first step would be to impose penalties for failure to comply with the safeguard imposed by the CJEU in April 2020, which ordered suspension of such proceedings. The Commission should also bring an immediate action against the so-called “muzle law” and simultaneously apply for an interim measure. It should then seek a final adjudication on the (in)validity of the “neo-KRS” (National Council of the Judiciary), the Disciplinary Chamber of the Supreme Court, the Extraordinary Control and Public Affairs Chamber of the Supreme

Court, and also the Constitutional Tribunal.¹⁸ These proceedings should be coordinated, and ideally, they should form a “package” responding to the systemic violation of the principle of the rule of law.¹⁹

The next, less well-known instrument in the Commission’s arsenal is the so-called “Common Provisions Regulation” (CPR) concerning EU funds.²⁰ This provides for the possibility of suspending payments from the main EU funds (regional funds, European Social Fund, rural development as well as maritime and fisheries funds) in a situation when there are “serious deficiencies in the effective functioning of the management and control system of the operational programme concerned”. An essential element of “effective functioning of the management and control system” is an independent judiciary and suitable judicial control. The European Commission is obliged to evaluate the compliance of national law and the operation of domestic institutions with the requirements enshrined in this regulation. Lack of such compliance may result in payments from the EU budget being withheld even before triggering of the conditionality mechanism adopted

in such dramatic circumstances at the last European summit.²¹

Furthermore, the necessity of compliance of national law and specific decisions with EU law is already a condition for obtaining support from most of the EU’s financial instruments, even if it does not have direct consequences for the Union’s financial interests or budget (an essential requirement for triggering the new conditionality mechanism). In some cases, these requirements are formulated more strongly than in the case of the horizontal regulation in the conditionality mechanism. They also encompass the obligation to prevent all forms of discrimination and gender mainstreaming as well as the requirement for public consultations when issuing administrative and investment (e.g. environmental) decisions and to provide effective judicial control of the decisions of bodies participating in an investment process, which in turn makes it necessary to ensure judicial independence. To date, the European Commission has only used its right to suspend payments relatively rarely, on the basis of the conditionality mechanisms contained in the general regulation or in individual financial instruments (in sectoral regulations) – unofficially, owing to the sense of a lack of a sufficiently strong political mandate to take such a radical step as withholding payment of funds for a member state. Using this instrument within a legally defined framework would be an important signal of the Commission’s determination, also in the context of its future application of the new budget protection mechanism.

18 See the open letter from lawyers to the European Commission, “Before It’s Too Late Open Letter to the President of the European Commission regarding the Rule of Law Breakdown in Poland”, September 2020, <https://ruleoflaw.pl/letter-to-ursula-von-der-leyen-rule-of-law-poland/>.

19 B. Grabowska-Moroz, „Metoda ‘małych kroków’ nie przyniosła skutku. Niech KE skarży do TSUE za systemowe naruszanie wartości”, OKO.press, October 2020, <https://oko.press/niech-ke-skarzy-do-tsue-za-systemowe-naruszanie-wartosci/>.

20 See R. D. Kelemen, K. L. Scheppele, “How to Stop Funding Autocracy in the EU”, *Verfassungblog*, 10 September 2018, <https://verfassungblog.de/how-to-stop-funding-autocracy-in-the-eu/>, DOI: 10.17176/20180910-094901-0, I. Butler, “Two proposals to promote and protect European values through Multiannual Financial Framework: Conditionality of EU funds and a financial instrument to support NGOs”, 2018, <https://drive.google.com/file/d/1UG4PIg7tObjUoK9tBKq3IdqCT-eB5iM9/view>.

21 This was the case in the past when Poland and other countries tried to “cut corners” and passed regulations not giving sufficient guarantees of transparency and equal access concerning public procurements and environmental concerns. In Poland, this led to withholding of funds for building roads and motorways for 2007–2008 (as a result of failure to meet requirements concerning the Natura 2000 network) and 2013 owing to contractors’ price fixing. The funds were withheld until Poland showed that its legal mechanisms were sufficient. In Czechia, meanwhile, a long-term problem was dysfunctions of the civil service, and the country therefore did not receive state administration payments.

The Commission should also undertake the European Parliament initiative (the so-called Michal Šimečka report²²) showing the way for integrating various mechanisms and instruments for rule-of-law protection to allow them to strengthen each other. These tools have previously usually been applied in an uncoordinated and inconsistent manner, entirely as if the proceeding against Poland and Hungary within Article 7, the Commission's monitoring of the rule of law in the EU and anti-infringement proceedings were separate, unrelated processes. The Polish and Hungarian governments are exploiting the lack of a systematic approach from the EU, making it relatively easy for them to dodge the EU's sporadic, individual actions. The European Commission and then the Council should make the most of their strengthened legitimacy in acting to defend the rule of law resulting from the adoption of the conditionality regulation and the rule-of-law debate.

Conclusions

The resolutions of the EU's December summit, coming as a response to the crisis caused by the threat of the Polish and Hungarian veto, resulted in major controversy and contrasting assessments. Their actual significance for the way in which the Union will tackle the question of defending the rule of law in the coming months and years is limited, however, and certainly lesser than the emotions of the weeks preceding the summit would suggest. The conclusions of the summit in no way changed the legal provisions, and the regulation on the budget protection mechanism enters into force only on 1 January 2021. The interpretative declarations contained in all these documents do not create a new political reality, but reflect the political status quo: the priority that most countries have of economic

22 "European Parliament resolution of 7 October 2020 on the establishment of an EU Mechanism on Democracy, the Rule of Law and Fundamental Rights", https://www.europarl.europa.eu/doceo/document/TA-9-2020-0251_EN.html.

reconstruction after the COVID-19 pandemic and avoidance of a lasting division of the Union. The compromise made at the summit may, but by no means must, prove to be a failure for the EU. Its ultimate consequences and the result of the EU's efforts in defence of the rule of law will not be decided by the provisions of the conclusions, but by whether the member states and EU institutions demonstrate sufficient determination in the coming months to make use of the tools available to them. In this fundamental respect, nothing has changed. Although the decisions made at the summit might create an atmosphere more favourable to Warsaw or Budapest, it is important to note that elevating the rule-of-law question to the status of a key political issue (paradoxically as a result of Warsaw and Budapest's blackmail) broke some of the taboos that had previously stopped the main actors from taking action.

Three questions will be particularly important in the coming months.

First, regardless of the use the Commission and EU Council makes of the new budget protection mechanism, the most important function in the entire rule-of-law protection system will still be played by the Court of Justice of the European Union. It is the CJEU which will rule on the compliance of the regulation with EU law and that will consider the almost inevitable complaints of member states on any decisions to withhold funds that might be lodged in the future. The entire system of protection of the rule of law (but also of the Union itself) depends on whether CJEU rulings will be respected and immediately put into place by member states. If this principle is undermined (Poland's failure to conform to interim measures on the Disciplinary Chamber is a dangerous precedent), the effectiveness of all other measures will be zero or minimal. This is a fundamental problem which should be the subject of the utmost care from member states, social organisations and EU institutions. Abidance by CJEU rulings should be treated as a political "red line", not to be crossed without far-reaching legal, financial and political consequences. The

future of practically the entire Union, an agreement based on law, depends on this.

Second, for the same reason, it is essential for all instruments and initiatives aiming to protect the EU's financial interests, and the rule of law more broadly, to attach particular attention to the question of judicial independence. Without courts independent from the executive, the emergence of corruption and fraud is inevitable since the temptations of power combined with the awareness of the possibility of avoiding sanctions are difficult to stop. As long as the judicial system in member states is independent and functioning well ("effective legal protection" from Article 19 of the Treaty on EU), it is not necessary to pass any detailed regulations on protection of specific rights or social groups at EU level, as their guarantees at state level are sufficiently strong. After 1 January 2021, every government in the European Union must be aware that violations of the independence of the courts can result in financial penalties based on the new regulation. The Commission and the EU Council must make sure that this threat does not remain only in paper.

Third, civil society has a fundamental role to play in promoting and defending democratic values and the rule of law. This was why the reform to the way the EU supports social organisations was so crucial, reflected in the revised regulation on the Rights and Values programme and increased funds for this programme in 2021–2027 to 1.5 billion euro. It is now essential for this instrument to be fully utilised. The new Union Values financial line that is part of the programme should be launched as soon as possible, in the first months of 2021. This is to be the main source of support for grassroots organisations fighting for democracy, rule of law and human rights at the local and domestic level. The European Commission should take the opportunity given by the financial regulation to make EU funds for civil society

more readily available to diverse actors, including smaller, local organisations.²³

But this is not all. Support for NGOs fighting for human rights, independent courts and other European values is not only the role of EU institutions. Member states can also do much more. Especially for countries from the Frugal Five, this would be a chance to redefine their role in the European Union – from advocates of a mostly frugal course towards a power transforming the EU based on defence of the rule of law, values and combating corruption.²⁴ An example is the aforementioned Dutch parliament initiative. Moreover, they should take the example of non-EU-member Norway and set up a fund to support values of fundamental importance to the Union.²⁵

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23 S. Ananicz, „Przełom w unijnym wsparciu dla społeczeństwa obywatelskiego”, Blog Idei, November 2020, https://www.batory.org.pl/blog_wpis/przelom-w-unijnym-wsparciu-dla-spoleczenstwa-obywatelskiego/.

24 S. Dennison, P. Zerka, “The transformative five: A new role for the frugal states after the EU recovery deal”, 25 November 2020, <https://ecfr.eu/publication/the-transformative-five-a-new-role-for-the-frugal-states-after-the-eu-recovery-deal/>.

25 Such a proposal was made by Gerald Knaus, head of the European Stability Initiative think tank, at the Stefan Batory Foundation and ECFR joint debate “A breaking point? What’s in store for Europe after the summit?”, 14 December 2020, https://www.youtube.com/watch?v=bSH_l_4KgPM&t=4s&ab_channel=FundacjaBatorego.

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