

HANDBOOK

How to Use EU Law to Protect Civic Space

Second Edition





European Center for
Not-for-Profit Law

Philea

Philanthropy Europe Association

European Center for Not-for-Profit Law (ECNL)

ECNL's mission is to create legal and policy environments that enable individuals, movements and organisations to exercise and protect their civic freedoms and to put into action transformational ideas that address national and global challenges. We envision a space in which everyone can exercise their rights freely, work in solidarity and shape their societies.

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**Co-funded by
the European Union**

The update of this Handbook is co-funded by the European Union and Civitates. Views and opinions expressed are however those of the author(s) only and do not necessarily reflect those of the European Union, the European Education and Culture Executive Agency (EACEA), NEF, or the Partner Foundations. Neither the European Union, the granting authority, NEF nor the Partner Foundations can be held responsible for them.

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Acknowledgements

The content and structure of the First Edition of this Handbook was jointly developed by Francesca Fanucci, Senior Legal Advisor at ECNL, and Hanna Surmatz, Enabling Environment Manager at the EFC and co-lead of the joint DAFNE & EFC Philanthropy Advocacy initiative.

ECNL, the EFC and DAFNE¹ would also like to acknowledge the invaluable contribution of Dr. Linda Maria Ravo, Legal and Policy Consultant (PhD, EU law and human rights) and of Wino van Veen, Law Professor at the Vrije Universiteit Amsterdam and Senior Counsel at Baker & McKenzie Amsterdam N.V.

Mr van Veen's peer review was essential to improving the draft version of the Handbook. Dr. Ravo provided substantial contributions regarding the Handbook's content and structure, and worked extensively to ensure that the arguments included in the Handbook are solid, clear and easy-to-understand, even for non-legally-trained readers.

The Second Edition of this Handbook was jointly developed by ECNL and Philanthropy Europe Association (Philea) – formerly known as DAFNE & EFC Philanthropy Advocacy initiative. The new Chapter V (“EU and the Rule of Law: How Does It Strengthen Civic Space”) has also benefited from feedback provided by CSOs who participated in ECNL-Philea Workshop on 26-27 September 2023 and includes selected recommendations developed with the meaningful contribution of Civil Society Europe (“CSE”) Working Group on Civic Space and by Civil Liberties Union for Europe (“Liberties”).²

¹ DAFNE and the EFC have merged to become Philanthropy Europe Association - Philea.

² See Liberties, European Commissions Rule of Law Report: <https://www.liberties.eu/en/campaigns/rule-of-law-report-2023/158>.

Foreword to the Second Edition

Civil society organisations and human rights defenders are crucial for the democratic functioning of our societies and for ensuring that people can access their rights. Yet, as data and analysis by the EU Fundamental Rights Agency has shown repeatedly, they can face numerous obstacles when carrying out their work and may even become the targets of threats and attacks. EU law can support civil society to play its role in assisting rights holders, holding authorities to account, and protecting the civic space in the EU. However, relevant EU law and existing tools are not sufficiently known and therefore remain under-used. This second edition of the Handbook on How to Use EU Law to Protect Civic Space closes an important gap, by showcasing how EU law and the EU Charter of Fundamental Rights can be used in practice to protect civic space and, importantly, by highlighting information on the EU's rule of law mechanism. I am confident that the updated Handbook will be of great use to human rights defenders across the EU.

***Michael O Flaherty** is Director of the EU Agency for Fundamental Rights. Previously, Michael O'Flaherty was Established Professor of Human Rights Law and Director of the Irish Centre for Human Rights at the National University of Ireland, Galway. He has served as Chief Commissioner of the Northern Ireland Human Rights Commission, Member of the UN Human Rights Committee and head of a number of UN Human Rights Field Operations.*

Foreword to the First Edition

This Handbook on “How to Use EU Law to Protect Civic Space” is finalized at a particularly propitious time. Twenty years ago, when the Charter of Fundamental Rights was initially proclaimed – initially as a non-binding document, with the status of a political declaration, published in the “C” pages of the *Official Journal*³ –, it was understood as a welcome recapitulation of the *acquis* of fundamental rights in the European Union, but also as largely redundant: the Court of Justice of the European Union, after all, had developed a tradition of protecting fundamental rights in the EU legal order since the 1970s, and the safeguards established at the domestic level of the individual Member States, together with the supervisory role of Council of Europe monitoring bodies, were considered amply sufficient to ensure compliance with fundamental rights outside the scope of application of Union law.

Similarly, when, in 1997, the Treaty of Amsterdam established for the first time a mechanism to ensure that the EU Member States would comply the values on which the Union is founded,⁴ few observers in fact believed such a mechanism would ever be triggered. Article 7 of the Treaty on European Union establishing this mechanism was understood to be primarily of symbolic value. The intention at the time was both to send a clear message to the eight countries of central and Eastern Europe that were to join the Union in 2004 that they were joining more than an economic integration project, and that the Union was also about rights and values; and to ensure that fundamental rights would be fully taken into account in the construction of the area of freedom, security and justice, in which the powers of the Union were rapidly expanding. But the emergence of a serious threat to democracy, the rule of law, or fundamental rights in the EU Member States was perceived as a remote and highly unlikely possibility. Indeed, despite the warning sign that resulted from the so-called “Austrian crisis” of 1999–2000, when the extreme-right party Freiheit Partei Österreich (FPÖ) joined a coalition led by the conservative Chancellor Wolfgang Schüssel, the European Parliament still insisted in a resolution of 20 April 2004 that the establishment of a permanent monitoring mechanism at EU level⁵ was redundant, since the implementation of Article 7 TEU should be based on the “principle of confidence”, according to which “as a matter of principle” the Union “has confidence in the democratic and constitutional order of all Member States and in the ability and determination of their institutions to avert risks to fundamental freedoms and common principles, [as well as in] the authority of the European Court of Justice and of the European Court of Human Rights”.⁶

3 OJ C 364 of 18.12.2000, p. 1.

4 At the same time, the Treaty of Amsterdam clarified the content of these values, amending Article F, § 1, of the Treaty on the European Union to include a provision stating: “The Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States”. The original version of this clause, as it appears in the Treaty on the European Union signed in Maastricht on 7 February 1992 (in force on 1 November 1993), stated that “The Union shall respect the national identities of its Member States, whose systems of government are founded on the principles of democracy”.

5 As proposed by the Commission in its Communication to the Council and the European Parliament on Article 7 of the Treaty on European Union: Respect for and promotion of the values on which the Union is based, COM(2003) 606 final of 15.10.2003.

6 European Parliament legislative resolution on the Commission communication on Article 7 of the Treaty on European Union:

The evolution since then has been remarkable, and it has been disquieting. Self-proclaimed “illiberal democracies” have now emerged in the European Union, based on what has been called “constitutional capture” strategies. These are strategies pursued by political parties victorious at parliamentary elections which then “aim to systematically weaken national checks and balances in order to entrench their power”.⁷ They include attempts to weaken civil society, to capture the media, to circumvent parliamentary checks, and to control the Judiciary. As documented by the Fundamental Rights Agency in its 2018 report on *Challenges facing civil society organisations working on human rights in the EU*, the shrinking of civic space – one component of this overall assault on democracy, the rule of law and fundamental rights – is the result of the imposition on non-governmental organisations of burdensome and often untransparent procedures to obtain funding – funding which, moreover, is increasingly project-based rather than structural –; of unfavourable and discriminatory tax treatment; and of media campaigns against non-governmental organisations that receive funding from abroad, sometimes combined with the requirement that they present themselves as foreign-funded organisations in any external communication.

The EU institutions have sought to react, of course. In order to strengthen the credibility of the threat to trigger Article 7 TEU proceedings, the Commission issued on 11 March 2014 a Communication on a new “EU Framework to strengthen the Rule of law”.⁸ It activated this new procedure for the first time on 13 January 2016 with respect to Poland: the initial dispute was about the composition and the powers of the Constitutional Tribunal after the newly elected Polish government refused to appoint three members of the Tribunal elected under the former majority and shortened the mandate of its sitting president and vice-president, but it then expanded far beyond that particular reform. Since the dialogue with Poland, conducted under the shadow of the threat to trigger Article 7 TEU proceedings, proved unsuccessful, the Commission more recently adopted a communication titled “Strengthening the rule of law within the Union: A blueprint for action”.⁹ The proposal, presented in July 2019, is centred around the preparation by the Commission of an annual *Rule of Law Report*, as part of a *Rule of Law Review Cycle* vaguely inspired by the European Semester for the socio-economic governance of the EU.

The European Parliament too has aimed to activate Article 7 TEU. On 12 September 2018, it approved a resolution¹⁰ stating that developments in Hungary

Respect for and promotion of the values on which the Union is based (COM(2003) 606 – C5-0594/2003 – 2003/2249(INI)), adopted on 20 April 2004, para. 12.

⁷ *An EU mechanism on democracy, the rule of law and fundamental rights*. Study prepared by Laurent Pech, Erik Wennerström, Vanessa Leigh, Agnieszka Markowska, Linda De Keyser, Ana Gomez Rojo and Hana Spanikova at the request of the Impact Assessment Unit of the Directorate for Impact Assessment and European Added Value, within the Directorate General for Parliamentary Research Services (DG EPRS of the General Secretariat of the European Parliament, March 2016, p. 7).

⁸ COM(2014) 158 final.

⁹ COM(2019) 343 final, of 17.7.2019. The communication was preceded by a consultation document: Communication from the Commission to the European Parliament, the European Council and the Council, Further strengthening the Rule of Law within the Union. State of play and possible next steps, COM(2019) 163 final, of 3.4.2019.

¹⁰ European Parliament resolution of 12 September 2018 on a proposal calling on the Council to determine, pursuant to Article 7(1) of the Treaty on European Union, the existence of a clear risk of a serious breach by Hungary of the values on which the Union is founded (2017/2131(INL)). The resolution was approved by 448 votes to 197, with 48 abstentions, on the basis of a report prepared by the Dutch Green MEP Judith Sargentini.

“represent a systemic threat to the values of Article 2 TEU and constitute a clear risk of a serious breach thereof”,¹¹ and invited the Council “to determine whether there is a clear risk of a serious breach by Hungary of the values referred to in Article 2 TEU and to address appropriate recommendations to Hungary in this regard”.¹² Although the European Parliament had in the past already expressed its concerns at the developments in Hungary,¹³ this was the first time the Parliament took the step to present the Council of the EU with such a reasoned proposal on the basis of Article 7(1) TEU.

These attempts however present major weaknesses. First, for action to be taken, procedural hurdles need to be overcome, including special majorities within the Council of the EU (or even, for sanctions to be applied, unanimity within the European Council), making it unlikely that, in fact, recommendations or sanctions shall be adopted toward the Member States concerned. Secondly, these procedures remain in the hands of the institutions, without individuals or NGOs being able to trigger them.

This is why this Handbook is so important. The European Center for Not-for-Profit Law, working with the European Foundations Centre (EFC) and the Donors and Foundations Network in Europe (DAFNE)¹⁴, present a guide that should empower civil society groups across the European Union to make the best use possible of the resources of EU law to protect the civic space. This fills a gap. And, unfortunately, it responds to a real need. The main message is that EU law offers a number of tools that can be used more systematically, to improve the protection of fundamental rights in the EU, and to allow civil society to effectively exercise its function as a watchdog for civil liberties in the EU. It is my hope that it shall be widely read, and used, in order to resist the worrying trends, we have seen develop in recent years in Europe.

***Olivier De Schutter** is the UN Special Rapporteur on extreme poverty and human rights. He was the coordinator of the EU Network of Independent Experts on Fundamental Rights (2002-2007) and a member of the Scientific Committee of the EU Fundamental Rights Agency between 2012 and 2017.*

11 Id., para. 2.

12 Id., para. 3.

13 Report on the situation of fundamental rights: standards and practices in Hungary (pursuant to the European Parliament resolution of 16 February 2012) (2012/2130(INI)); European Parliament resolution of 10 June 2015 on the situation in Hungary, (2015/2700(RSP)); European Parliament resolution of 16 December 2015 on the situation in Hungary (2015/2935(RSP)).

14 EFC and DAFNE are now merged and known as Philanthropy Europe Association – Philea.

“Civil society organisations and human rights defenders play a crucial role for the democratic functioning of our societies. EU law can support them notably in assisting rights holders and holding authorities to account. However, relevant EU law and notably the EU Charter of Fundamental Rights are still not sufficiently known and therefore remain under-used, as the work of the EU Fundamental Rights Agency has shown repeatedly. This handbook closes an important gap, by showcasing how EU law and the Charter can be used in practice to protect civic space. It has the potential to help human rights defenders enforce their rights and their space to operate. I am sure it will find good use.”

Michael O’Flaherty, Director, EU Agency for Fundamental Rights

“A vibrant civil society is key to our European democracy, enabling political participation and civic education, strengthening social cohesion, contributing to community-building and to the creation of a common identity. Also during the COVID-19 pandemic, civil society organisations have once more proven their capacity to react to challenging situations and operate as watchdogs for democracy. Shrinking civic space, biases introduced by misinformation, new forms of illiberalism and growing challenges to EU values are clear threats to our democracies. Civil society organisations and their activities must therefore be encouraged and protected. I thus welcome these reflections on how to use EU law to protect civic space.”

Luca Jahier, President of the European Economic and Social Committee

Introduction

Why a Handbook on EU law and civic space

On 12th November 2019, the European Union celebrated the 10th anniversary of the EU Charter of Fundamental Rights (“CFR”) becoming legally binding and having the same value as the EU Treaties.¹⁵ The extensive catalogue of civic, political, socio-economic and cultural rights enshrined in the CFR apply to EU institutions and bodies in the exercise of all their competences and to EU Member States when the latter are acting within the scope of EU law.¹⁶

Since the entry into force of the CFR, civil society organisations (“CSOs”) have been cooperating with the EU institutions and Member States’ policymakers to promote and protect the rights enshrined in the CFR. CSOs have also been instrumental in assisting victims of fundamental rights’ violations, helping them identify the legal avenues available and supporting litigation at national and EU level. But what happens when CSOs themselves become the actual targets and victims and their fundamental rights to associate, operate, express views, seek and provide information, receive funding and campaign are significantly restricted? How can EU law – including the CFR – be concretely used to protect fundamental civic freedoms – such as freedom of association, assembly and expression – as well as the right to privacy, protection of personal data and non-discrimination – and last but not least, the right to participation in policy-making thanks to which civil society exists and democracies thrive?

These are the issues that the European Center for Not-for-Profit Law and Philea are exploring and promoting in their joint Handbook “How to Use EU Law to Protect Civic Space” (“Handbook”).

The Handbook aims to be a user-friendly guide for CSOs who want to know:

- what EU law is and how it affects individuals and organisations;
- when and how CSOs can challenge national provisions or measures that impact their mission, activities and operations on the basis of EU law, including the CFR;
- which legal avenues and resources are available for CSOs to defend their civic space within the EU law framework;
- how the EU is using and developing tools for civil society to meaningfully participate in EU policy-making.

We hope that the Handbook will serve as a resource for CSOs and their partners

¹⁵ The EU Charter of Fundamental Rights, adopted on 7th December 2000 by the European Parliament, the Council of Ministers of the EU and the European Commission, became legally binding on 1st December 2009 when the Treaty on the Functioning of the European Union (“Treaty of Lisbon”) entered into force. Its official text is available at: https://www.europarl.europa.eu/charter/pdf/text_en.pdf.

¹⁶ Article 51(1), CFR.

when strategising and taking action before national and EU institutions and courts, and that it will contribute to a broader litigation strategy on defending civic space within the EU. We also hope that it will promote meaningful and effective civil dialogue within the EU.

Definitions used in the Handbook

For the purposes of this Handbook, we use the following terms as defined below:

Civic space: an environment where individuals and civil society organisations are enabled to exercise their fundamental civic freedoms to associate, operate, assemble peacefully, express their views and participate in public decision-making, which are instrumental to the exercise of all the other civic, political, socio-economic and cultural rights;

Civil Society Organisations (“CSOs”): national and international voluntary self-governing bodies or organisations, established either by individual natural/legal persons or groups of people, with or without legal personality, which pursue not-for-profit-making objectives. They include what are also commonly defined as “NGOs” but exclude political parties;¹⁷

EU law: where not otherwise specified, the expression “EU law” is used to encompass EU “primary law” (in particular, the Treaties and the Charter of Fundamental Rights) and EU “secondary law” (legislative acts that the EU institutions have the power to adopt, e.g., directives, regulations, decisions), interpreted in the light of the case-law generated by the judgments of the Court of Justice of the EU (“CJEU”);

Scope of EU law: areas in which the EU has competence conferred by the EU Treaties (i.e. by the Member States), which can include the competence to legislate at EU level;

National law: all kinds of measures with a regulatory purpose taken by EU Member State authorities – either at central or local level – (i.e. legislative acts, regulations, executive acts from administrative bodies, etc.). As we will see, *only a national law that directly or indirectly comes within the scope of EU law must be compatible with it*. National laws that have no connection with obligations under EU law cannot be brought to justice based on their incompatibility with EU provisions, including fundamental rights enshrined in the CFR.¹⁸

Rule of law: a system of legal checks and balances, which ensures that all persons and authorities are equally subject to the law.

¹⁷ See definition in Recommendation CM/Rec(2007)14 of the Council of Europe Committee of Ministers to member states on the legal status of non-governmental organisations in Europe. At EU level, the European Social and Economic Committee has also defined CSOs as “non-governmental, non-profitmaking organisations independent of public institutions and commercial interests, whose activities contribute to the objectives of the Charter of Fundamental Rights, such as social inclusion, active participation of citizens, sustainable development in all its forms, education, health, employment, consumer rights, support to migrants and refugees, and fundamental rights.”: EESC, Financing the CSOs by the EU, 2017/SOC/563, p. 5.

¹⁸ Article 51 of the CFR.

Using EU law to defend CSOs' rights and freedoms

A long-established, successful way of defending the fundamental rights of individuals and organisations in Europe where national authorities fail to protect or respect them is to file a case against the national governments to the European Court of Human Rights (“ECtHR”) for violation of the rights protected by the European Convention of Human Rights (“ECHR”). The ECtHR is the judicial body operating within the Council of Europe, which we remind, is a separate international organisation which comprises 47 Member States in wider Europe, including all EU Member States. However, addressing the ECtHR is only possible after having previously exhausted all the available national remedies (e.g., after having addressed all the different grades of judicial examination existing before courts at the national level). This often entails lengthy and expensive proceedings before being able to bring a case to the ECtHR. Besides, a judgement of the ECtHR acknowledging a violation of human rights does not automatically dis-apply the national law incompatible with the ECHR provisions, and the ECtHR does not have competence to examine violations deriving from EU law itself.

An alternative option for CSOs and individuals to protect their rights and freedoms is to examine national law in the light of pertinent EU law and address the relevant EU institutions, governments or national courts if they have indications that national provisions are not compatible with Member States' obligations under EU law, including where they violate fundamental rights enshrined in the CFR.

Using EU law as a means to protect their rights and freedoms can be a powerful tool for the following reasons:

- It unveils the untapped potential of EU law and the CFR in protecting the fundamental rights of organisations and individuals, promoting the development of jurisprudence and contributing to the effective enforcement of EU law and the CFR at national level;
- Raising EU law arguments allows to frame the issues in objective terms of respect of international obligations Member States have signed to, which can be beneficial especially in national contexts where the climate may be unfavourable to a debate on certain rights of individuals and CSOs;
- EU law arguments can also be raised to successfully contest or comment on a draft national law before it is adopted, to ensure its compliance with EU law provisions;
- The CFR contains an expanded catalogue of fundamental rights compared to other regional instruments, including the ECHR, and it also codifies explicitly relevant case-law developed over time by national and regional courts such as the CJEU and the ECtHR. For example, Article 8, CFR, adds the specific right to the protection of personal data; Article 11(2), CFR, explicitly acknowledges the obligation to respect media freedom and pluralism; Articles 39 – 46 CFR, include EU-specific citizens' rights, including the right to petition, the right of access to documents, to good administration.¹⁹

¹⁹ For an exhaustive comparison between the rights included in the CFR and those established by the ECHR, see European

Framing violations of CSOs' fundamental rights in EU law terms also has some procedural advantages, namely:

- There is no need to previously exhaust all the remedies available at national level: e.g., a CSO can signal directly to the European Commission a problem asking to start infringement proceedings against a government as soon as a problematic national law is adopted;
- EU law arguments can be used already in national court proceedings to ask the judges to directly dis-apply the national law incompatible with EU law²⁰;
- CSOs can ask the judges in a national court proceeding to refer questions on the interpretation and validity of the relevant EU provisions directly to the CJEU, as a means to clarify whether national and EU provisions must be deemed incompatible with it.

(For an overview of opportunities and challenges regarding various legal avenues to defend a CSO's rights, also see ANNEX I.)

Content, structure and acknowledgments

The focus of this handbook is to provide you with guidance on the use of EU law to contest measures affecting CSOs' fundamental rights and freedoms. To that effect, it will briefly illustrate the basic features of EU law and its relevance to CSOs' rights and freedoms and will provide you with guidance on what to do to challenge national and EU measures deemed incompatible with relevant EU provisions. It will also provide a non-exhaustive list of practical examples of national measures affecting CSOs' fundamental rights and freedoms and potential EU law arguments to challenge such measures.

Following the adoption and development of the annual EU Rule of Law Review Cycle, a final part is dedicated to explaining what is the rule of law is, why it is important to strengthen civic space and the various rule-of-law related procedures available in the EU to date.

The Handbook consists of five main parts:

Part I – EU law: basic features and relevance to CSOs' rights and freedoms

Part II – When can EU law be invoked to challenge national laws?

Part III – How to enforce your CSOs' EU rights and freedoms against national measures

Part IV – Useful resources

Part V – EU and the Rule of Law: How Does It Strengthen Civic Space?

The Handbook draws extensively on guidance of the European Union Agency for Fundamental Rights ("FRA") on how to ensure compliance with the CFR when

Union Agency for Fundamental Rights ("FRA"), *Applying the Charter of Fundamental Rights of the European Union in law and policymaking at national level*, Guidance, 2018, page 27.

²⁰ The ECtHR case law can be quoted as well in national courts to argue that the national law provisions violate the ECHR. However, this does not generally allow a judge to directly dis-apply the national law provisions incompatible with the ECHR but only to interpret its concrete application to the individual case in line with the ECtHR jurisprudence.

drafting national laws. The Handbook also complements the Briefing on “The Use of EU Law To Protect Civic Space²¹” published by The Open Society Justice Initiative, whose examples and legal arguments have been included in some sections. The Handbook also draws extensively on guidance of the European Union Agency for Fundamental Rights (“FRA”) on how to ensure compliance with the CFR when drafting national laws.

The practical examples outlined throughout the Handbook are based on real experiences as well as potential scenarios. Some of the examples have already been the object of scrutiny by national courts and EU institutions in terms of compliance of national laws with EU law. Other examples are yet to be tested but are potentially just as powerful in helping secure compliance of national laws with EU law on issues affecting CSOs’ activities. Ultimately, this Handbook is aimed to be a “living” document that will be periodically updated with new practical examples and developments of those previously mentioned as they emerge in case law, practice and research. For this purpose, we welcome all suggestions from CSOs, EU law practitioners and EU institutions on how to improve its content and practical usage by sending feedback to Francesca Fanucci (francesca@ecn1.org) or Eszter Hartay (eszter@ecn1.org) for ECNL or Hanna Surmatz for Philea (hanna.surmatz@philea.eu).

²¹ Open Society Justice Initiative, *The Use of EU Law To Protect Civic Space*, 2019, (<https://www.justiceinitiative.org/publications/the-use-of-eu-law-to-protect-civic-space>).

PART I – EU law: basic features and relevance to CSOs’ rights and freedoms

I.1. EU law giving rights and obligations in the fields of EU competence

The European Union is a political and economic union of Member States bound together by a special international agreement, set out in the EU founding Treaties.²² EU law (i.e., the EU founding Treaties and the acts adopted by the EU institutions on the basis of these Treaties) defines the relationship between the EU institutions and the Member States, acknowledges and defines their respective competences and powers, gives rights and imposes obligations. EU law provisions also directly affect citizens and the organisations they create.

Understanding the **distribution of competences** between the EU and its Member States is very important in order to fully grasp the potential and limitations of EU law as a means to defend CSOs’ rights and freedoms. The Treaties²³ establish that the EU can only act within the limits of the competences that EU Member States agreed to confer upon (so-called “**principle of conferral**”).²⁴ These competences can be divided into three categories:

- **Exclusive competences:** areas in which only the EU can adopt binding laws, Member States can legislate in those areas only if explicitly authorised by the EU.²⁵ The area of exclusive EU competences include, e.g., the negotiation of international agreements, competition rules for the functioning of the internal market and the special competence on EU common foreign and security policy;
- **Shared competences:** areas where both the EU and its Member States can adopt binding laws. In this case, EU Member States can exercise their competence whenever the EU has not exercised it first.²⁶ Areas of shared competence include, e.g., environment, consumer protection, internal market, development cooperation and humanitarian aid, freedom, security and justice;
- **Supporting competences:** these are areas when the EU can only intervene to complement or coordinate actions undertaken by EU Member States.²⁷ Examples of these areas include the protection and improvement of public health, tourism, culture and education.²⁸

22 Basic information about the EU can be found on its institutional website: https://europa.eu/european-union/about-eu_en.

23 This is known as principle of conferral, which is enshrined in Article 5 of the Treaty on the European Union (TEU).

24 Articles 4 -5, Treaty of the European Union (“TEU”).

25 Article 3, TFEU.

26 Article 4, TFEU.

27 Article 6, TFEU.

28 For more information on the division of competences within the EU, see <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=LEGISSUM%3Aai0020>.

A variety of areas falling under the EU exclusive, shared and supporting competences, and the related EU law regulating them, can be relevant to CSOs' functioning and activities, including their formation, registration, reporting, receiving funding, employing or working with volunteers, providing services or engaging in advocacy or other activities.

The exercise of the EU of its conferred competence also has to respect certain general principles. In particular, in all areas that do not fall under its exclusive competence, the EU can only intervene and legislate if the objective of the national law proposed or adopted by one Member State is better achieved at EU level by reason of its scale and effects (so-called “**principle of subsidiarity**”).²⁹ Furthermore, every action undertaken by the EU must be strictly necessary to achieve the objective laid down in the EU Treaties (so-called “**principle of proportionality**”).³⁰

According to the so-called “**principle of sincere co-operation**”, the EU and its Member States must assist each other in carrying out tasks and complying with obligations arising from EU law. Member States must take all appropriate measures to ensure fulfilment of the obligations arising from EU treaties or resulting from action taken by the institutions of the EU.³¹ In turn, they shall not exercise their own competences in a way which is liable to jeopardize the achievements of the objectives pursued by the EU or deprive EU law of its effectiveness.³² According to a well-established principle recognised by the CJEU, Member States are accountable to the citizens of the EU for any harm caused by violations of EU law.³³

Article 4, para 3, of the Treaty on the European Union (TEU) – Member States' duty of cooperation

“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. The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union. The Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives.”

²⁹ Article 5, TFEU.

³⁰ Article 5, TFEU.

³¹ Article 4, Treaty of the Functioning of the EU (“TFEU”).

³² See for example CJEU case C-61/11 PPU *El Drid*, where the CJEU found that national law adopted as part of the national competence to regulate criminal matters in the area of illegal immigration and illegal stays, providing for a prison sentence to be imposed on an illegally staying third-country national on the sole ground that he remains, without valid grounds, on the territory of that State, was incompatible with the objective of the EU Return Directive to the establishment of an effective policy of removal and repatriation of illegally staying third-country nationals.

³³ CJEU landmark case C-6/90 *Francovich*.

I.2. The effects of EU law: basic features

The effects of EU law on national law are governed by the “**primacy**” or “**precedence principle**”, which has long been established by the CJEU.³⁴ This principle implies that provisions of EU law – be it primary law or secondary law adopted by the EU institutions in the exercise of their competences, as described above – are superior to the national laws of Member States. This principle is absolute: it concerns all EU provisions with a binding force and applies to all national acts, irrespective of their nature. This includes all national law including the constitution as well as non-legislative acts and other measures adopted by the authorities at any level, including the judiciary.

The effect of primacy is that Member States’ authorities, including the courts, **may not apply a national rule which contradicts EU law**. This ensures that citizens are uniformly protected by EU law across all EU Member States.

The other basic general principle established by the CJEU³⁵ and constituting another main feature of EU law is the **principle of direct effect**. Direct effect implies that the given provision of EU law is **directly applicable and immediately enforceable**. This principle **enables individuals and organisations to directly invoke an EU provision** before a national court (even in the absence of national implementing laws) and/or before the CJEU. This principle can concern both EU primary and secondary legislation and ensures the immediate application and effectiveness of EU provisions engendering rights for individuals.

Direct effect is, however, subject to several conditions. In particular, an EU provision can only have direct effect if it has binding force and is sufficiently **precise, clear and unconditional and does not call for additional measures**, either national or European.³⁶ In line with this approach, the CJEU has for example established that provisions of EU directives (which are by nature acts addressed to EU Member States that must be transposed by them into their national laws) can only produce direct effect when the deadline for transposition has elapsed and the given EU Member State has not transposed or did not transpose correctly the provision in question.³⁷

In addition, direct effect may only relate to relations between an individual and an EU country (vertical direct effect) or be extended to relations between individuals (horizontal direct effect), depending on the type of EU act concerned. For example, the CJEU has established that, while provisions of EU regulations can always have full direct effect (both vertical and horizontal), subject to the conditions mentioned above,³⁸ provisions of EU directives can only have vertical direct effect.³⁹

34 See CJEU, case 6/64, *Costa v. ENEL*; CJEU, C -106/77, *Simmenthal v. Commission*; CJEU, C - 106/89, *Marleasing v. La Comercial Internacional de Alimentacion SA*. The primacy of EU law over national laws has not been explicitly laid down in the Treaties, but is reaffirmed in a declaration annexed to the Treaty of Lisbon (Declarations annexed to the Final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon: 17. Declaration concerning primacy).

35 See landmark CJEU ruling in case 26/62 *Van Gend en Loos*.

36 See CJEU case 8/81, *Becker*, where the CJEU rejected direct effect with regards to an EU provision for the implementation of which EU Member States had a margin of discretion, however minimal.

37 CJEU case C-41/74, *Van Duyn v Home Office*.

38 See Article 288 TFEU and CJEU case 43/71, *Politi s.a.s. v Ministry for Finance of the Italian Republic*.

39 CJEU case 148/78, *Ratti*.

I.3. The EU legal framework and its relevance to CSOs' rights and freedoms

The EU legal framework is composed by **three fundamental sources of law**: primary law, secondary law and supplementary law.

In this section, we will provide a **general overview** of each of these sources of EU law and we will, in doing so, **provide examples** of provisions or acts which can potentially be relevant to the space and activities of CSOs across the EU.

I.3.1. Primary law: the EU Treaties

The treaties establishing the EU (“EU Treaties” or “founding Treaties”) are legally binding international agreements created directly and unanimously by the Member States. They are the main sources of **primary EU law**.⁴⁰

The EU Treaties are the **Treaty of the EU (TEU)** and the **Treaty of the Functioning of the EU (TFEU)**, which have equal legal standing. The TEU sets out the EU values and objectives, the main principles governing EU institutions' structure and functioning, the relationship between the EU and its Member States and their respective competences. The TFEU provides the organisational and functional details governing EU institutions' powers and their implementation and enshrines basic rules applicable to areas of EU competence as well as rules of horizontal application, including a number of directly enforceable provisions.

Both Treaties contain provisions which can be relied on, in different ways, with a view to claim from the EU and its Member States respect of CSOs' rights and freedoms and civic space safeguards.

⁴⁰ Links to the text of the EU Treaties as currently in force can be found at <https://eur-lex.europa.eu/collection/eu-law/treaties/treaties-force.html>.

EU horizontal principles and CSOs' enabling environment

EU fundamental values

Article 2 TEU acknowledges the fundamental values on which the EU is established:

"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. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail".

The core principles underlying democracy, the rule of law and pluralism within the meaning of Article 2 TEU include enhancing participation and enabling civic space. When there is a "clear risk" of a "serious breach" of Article 2 values by one Member State, the European Commission, the European Parliament or one third of the EU Member States can trigger a special procedure (provided for in Article 7 TEU and therefore known as "Article 7 Procedure") to determine the existence of a "serious and persistent breach" of such values by that Member States and suspend certain rights of the Member States within the EU.⁴¹

EU dialogue with civil society and right to participation in policy-making at EU level

Article 11 TEU is the legal basis outlining the obligation for the EU institutions to enable participation and engage in a regular and meaningful dialogue of with citizens and CSOs. It also outlines the criteria for public participation of citizens and CSOs in the EU decision-making procedure, including the possibility to invite the European Commission to submit a legislative proposal on areas covered by EU competence (known as "European Citizens Initiative").

Text of Article 11 TEU:

"1. 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."

This paragraph also means that the citizens and CSOs will have **suitable mechanisms for raising their voices on the relevant issues and topics they are interested in.**

"2. The institutions shall maintain an open, transparent and regular dialogue with representative associations and civil society."

The TEU does not provide a definition of "EU civil dialogue" and rules on its functioning for the purpose of the implementation of Article 11(2). However, key standards can be derived from an interpretation of the concept of civil dialogue anchored on EU fundamental rights and values, as enshrined in Article 2 and in the EU Charter of Fundamental Rights (CFR), interpreted in light of relevant regional and international standards. For example, civil dialogue must be consistent with the principles of equality and non-discrimination enshrined in the Articles 20 and 21 of the CFR. This translates into an obligation to ensure inclusiveness and equal participation in dialogue of CSOs representing and channelling the voices of all diverse groups within society. Also, attention must be paid to ensuring equality between women and men (Art 23 CFR) and non-discrimination of groups of people who have been historically marginalised and systematically excluded from decision making processes (Article 21 CFR). The dialogue must also respect

⁴¹ See infra, Part V – 2.: EU Rule of Law Framework – Article 7 (TEU) procedure

cultural, religious and linguistic diversity (art 22 CFR) and ensure reasonable accommodation for the needs of persons with disabilities. (Art 26 CFR/ UNCRPD).⁴²

“3. The European Commission shall carry out broad consultations with parties concerned in order to ensure that the Union’s actions are coherent and transparent.”

While Article 11 TEU includes within this framework the well-established tradition of “consultations”, it also calls for a **shift to a more advanced model of participation**⁴³ by imposing an obligation upon EU institutions to maintain “an open, transparent and regular dialogue with representative associations and civil society” (para 2).

“4. Not less than one million citizens who are nationals of a significant number of Member States may take the initiative of inviting the European Commission, within the framework of its powers, to submit any appropriate proposal on matters where citizens consider that a legal act of the Union is required for the purpose of implementing the Treaties. The procedures and conditions required for such a citizens’ initiative shall be determined in accordance with the first paragraph of Article 24 of the Treaty on the Functioning of the European Union.”

Para 4 is not self-executing: this means that its implementation requires the adoption of an additional legal instrument, in connection with Article 24(1) and Article 227 TFEU. Therefore, the EU adopted a Regulation (211/2011) establishing the European Citizen Initiative (“ECI”).⁴⁴

Although Article 11 TEU overall is not a provision conferring enforceable rights to individuals and CSOs, as its realisation requires implementing measures by EU institutions, it can be a powerful advocacy tool for CSOs to make EU institutions accountable and advocate for a comprehensive legal and policy framework to guarantee an effective dialogue with CSOs at all levels, more participatory and transparent policy making and adequate guarantees and safeguards for a thriving EU civic space. **Member States’ legal and policy measures could also be contested where they have the effect of hampering CSOs from engaging in a dialogue with EU institutions** as provided for in Article 11 TEU, contrary to the principle of sincere cooperation.

42 Furthermore, the European Commission closely aligns its consultation practices with international standards and guidelines, such as the United Nations Convention on the Rights of Persons with Disabilities (UNCRPD) and the Web Accessibility Directive (Directive (EU) 2016/2102). These standards emphasise the importance of accessibility, non-discrimination, and inclusive participation in decision-making processes. Policies such as the EU Action Plan on Integration and Inclusion 2021-2027, the Gender Equality Strategy 2020-2025, the EU Anti-Racism Action Plan 2020-2025, the EU Roma Strategic Framework for Equality, Inclusion, and Participation, the LGBTIQ Equality Strategy, and the forthcoming Strategy on the Rights of Persons with Disabilities, should be considered when striving for meaningful participation of civil society and the individuals they represent..

43 For more see ECNL’s research on “New Dimensions for Public Participation” : <https://ecnl.org/publications/new-dimensions-public-participation>.

44 However, this Regulation was replaced with a new one - Regulation 2019/788 and the initiatives that were registered until 31 December 2019 are still partly governed by the old rules. The new Regulation requires a review by 1 January 2024 and every three years thereafter. In the review process, the Commission presents a report on the implementation of the ECI regulation with a view to its possible revision, to which the European Parliament reacts in a report with further recommendations. Also see <https://europa.eu/citizens-initiative/en>

Deriving individuals' and CSOs' rights from EU rules of general application

Effective judicial protection

Article 19(1) TEU codifies a general principle of EU law providing for the obligation upon EU Member States to ensure **effective judicial protection in fields covered by EU law**:

"Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law."

According to the CJEU case law, this duty requires EU Member States to designate the competent courts and to determine the procedural conditions governing actions at law intended to ensure the protection of the rights which citizens derive from EU law.⁴⁵ In doing so, they have to make sure that national remedies adhere to the standards underlying the fundamental right to an effective remedy and to a fair trial (also enshrined in the CFR, Article 47).

Article 19(1) TEU, read in the light of the fundamental right to an effective remedy enshrined in the CFR, is a key provision to challenge **any restrictions to access to justice, the exercise of the right to an effective remedy and to fair trial standards** affecting the enjoyment by individuals and organisations of their rights and freedoms under EU law, including the CFR. It can also be instrumental to tackle **general deficiencies** in the functioning of national justice systems. For example, applying this provision, the CJEU held that the duty to ensure effective judicial protection includes the guarantee of independence of the judges, including in the way they are appointed and the way the courts carry out their work, as this "forms part of the essence of [...] the fundamental right to a fair trial" and is a "guarantee that all the rights which individuals derive from EU law will be protected" as well the EU fundamental values such as the rule of law.⁴⁶

EU treaty-based enforceable rights that can be relevant for CSOs

Citizenship of the EU

Article 20 TFEU confers on every individual who is a national of a Member State citizenship of the EU, which is intended to be the fundamental status of nationals of EU Member States. The CJEU has held that a violation of Article 20 TFEU may arise if citizens of the EU who are nationals of one Member State only are deprived of their nationality and faced with losing the status conferred by Article 20 TFEU. Considerations related to the proportionality of the national measures depriving the person of nationality and respect of fundamental rights enshrined in the CFR play a role in the CJEU assessment.⁴⁷

⁴⁵ See landmark CJEU ruling in case 33/76, *Rewe Zentralfinanz eG v Landwirtschaftskammer für das Saarland*.

⁴⁶ See CJEU case C-619/18, *Commission v Poland*.

⁴⁷ See for example CJEU case C- 221/17 *Press and Information Tjebbes and Others*.

Free movement of persons, goods, services and capital

The European Single (or Internal) Market is defined by the EU Treaties as an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured (Article 26 TFEU). Four basic freedoms underpinning the Single Market are set out in the TFEU:

- free movement of persons, including workers (Article 21, 45-48, TFEU), which also entails a right of establishment for individuals as well as economic organisations (Article 49-55, TFEU)
- free movement of goods (Articles 28-37, TFEU),
- freedom to provide services (Articles 56-62, TFEU),
- free movement of capital (Articles 63-66, TFEU).

The rules governing these freedoms are based on two key general principles:

- **non-discrimination on grounds of nationality**, prohibiting restrictions to the basic freedoms directly or indirectly based on nationality⁴⁸;
- **mutual recognition** of rules and standards impacting on the circulation of persons, goods, services and capital.

The basic rule is that any national measure discriminating on grounds of nationality and/or introducing restrictions to one of the four freedoms is prohibited unless it can be justified by serious public interest considerations. Some of these considerations – such as public policy, public security or public health – are explicitly set in the relevant TFEU provisions, whereas others developed in the case-law of the CJEU. In any case, though, such restrictions are always subject to the principles of necessity and proportionality. Restrictions can also include measures having the effect of dissuading individuals or organisations from exercising these freedoms.

TFEU provisions enshrining the basic freedoms have direct effect (see above). Acts of EU secondary law have also been adopted providing for the approximation of national laws to implement these general principles and ensure the effective functioning of the internal market. When national law constitutes a restriction of an internal market freedom (or otherwise falls within the scope of EU rules on internal market), it may also be examined in terms of its impact on fundamental rights as enshrined in the CFR.⁴⁹

All four market freedoms could affect CSOs' activities as well as those of their members, staff or volunteers. CSOs are, in particular, likely to provide or receive cross-border services which can fall within the freedom to provide services; to establish offices or branches in different EU Member States thus exercising the right of establishment⁵⁰; to provide to or receive from entities established

⁴⁸ The prohibition of discrimination on grounds of nationality is explicitly set out as integral part of each of the basic freedoms and is also reaffirmed as a general principle in Article 18 TFEU.

⁴⁹ See recent CJEU case C235/17, *Commission v Hungary*.

⁵⁰ Although TFEU provisions on the right to establishment exclude from their scope non-profit making entities (Article 54 TFEU), it can be derived from the case-law of the CJEU that any organisations (including CSOs) involved in some form of economic activities, regardless whether generating profit is a primary aim of the economic activity, can be regarded as exercising their

in other EU Member States funding whose movements will be governed by rule on the free movement of capital; their staff and volunteers will often need to travel in different EU Member States thus falling within the scope of EU rules on free of movement of persons. Indeed, a variety of national measures impacting on CSOs' functioning and activities may qualify as restrictions to or otherwise come within the scope of EU internal market freedoms. For example, the CJEU has examined national measures concerning the tax treatment of public benefit entities and their donors in cross-border EU scenarios, holding that EU Member States are under an obligation to ensure equal treatment for domestic philanthropic organisations/donors and foreign EU-based philanthropic organisations/their donors pursuant to EU rule on free movement of capital.⁵¹ A case is also currently pending before the CJEU concerning a national law on the transparency of organisations that receive financial support from abroad: in this case, the CJEU Advocate General has argued that the burden on “foreign funding” deriving upon CSOs from the provisions of this law (heavy reporting and publicity requirements) violate the free movement of capital.⁵²

1.3.2. The Charter of Fundamental Rights as primary EU law

The Charter of Fundamental Rights of the EU is a **key legally binding source and part of primary EU law**⁵³ since 1st December 2009.⁵⁴

The CFR encompasses a **catalogue of 50 fundamental rights and principles** – including civil and political rights, such as freedom of association, freedom of expression and equal treatment/non-discrimination, as well as a number of social and economic rights and fundamental rights specific to the EU framework such as the right to free movement.⁵⁵

Examples of rights in the Charter that are relevant for CSOs

Article 7 (right to private and family life)

“Everyone has the right to respect for his or her private and family life, home and communications.”

Article 8 (protection of personal data)

“1. Everyone has the right to the protection of personal data concerning him or her.

2. Such data must be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law. Everyone has the right of access to data which has been collected concerning him or her, and the right to have it rectified.

3. Compliance with these rules shall be subject to control by an independent authority.”

right of establishment: see CJEU case C-212/97 Centros (especially para. 27).

51 CJEU case C-318/07 *Hein Persche v Finanzamt Lüdenscheid*.

52 CJEU, Advocate General's Opinion on C-78/18 *Commission v Hungary*, 14 January 2020: <https://curia.europa.eu/jcms/upload/docs/application/pdf/2020-01/cp200002en.pdf>.

53 Article 6, par. 1, TEU, which establishes that the CFR is granted same legal value as the EU Treaties.

54 Date of the entry into force of the Lisbon Treaty, the last Treaty amending the EU founding Treaties.

55 The full text of the CFR can be consulted at <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A12012P%2FTXT>

Article 10 (freedom of thought, conscience and religion)

"1. Everyone has the right to freedom of thought, conscience and religion. This right includes freedom to change religion or belief and freedom, either alone or in community with others and in public or in private, to manifest religion or belief, in worship, teaching, practice and observance.

2. The right to conscientious objection is recognised, in accordance with the national laws governing the exercise of this right."

Article 11 (freedom of expression and information)

"1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.

2. The freedom and pluralism of the media shall be respected."

Article 12 (freedom of assembly and association)

"1. Everyone has the right to freedom of peaceful assembly and to freedom of association at all levels, in particular in political, trade union and civic matters, which implies the right of everyone to form and to join trade unions for the protection of his or her interests.

2. Political parties at Union level contribute to expressing the political will of the citizens of the Union."

Article 13 (artistic, scientific and academic freedom)

"The arts and scientific research shall be free of constraint. Academic freedom shall be respected."

Article 15 (freedom to choose an occupation and right to engage in work)

"1. Everyone has the right to engage in work and to pursue a freely chosen or accepted occupation.

2. Every citizen of the Union has the freedom to seek employment, to work, to exercise the right of establishment and to provide services in any Member State.

3. Nationals of third countries who are authorised to work in the territories of the Member States are entitled to working conditions equivalent to those of citizens of the Union."

Article 21 (non-discrimination)

"1. Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited.

2. Within the scope of application of the Treaties and without prejudice to any of their specific provisions, any discrimination on grounds of nationality shall be prohibited."

Article 39 (right to vote in a free and secret ballot and stand as candidate in EP elections)

"1. Every citizen of the Union has the right to vote and to stand as a candidate at elections to the European Parliament in the Member State in which he or she resides, under the same conditions as nationals of that State.

2. Members of the European Parliament shall be elected by direct universal suffrage in a free and secret ballot."

Article 41 (right to good administration)

"1. Every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions, bodies, offices and agencies of the Union.

2. This right includes:

(a) the right of every person to be heard, before any individual measure which would affect him or her adversely is taken;

(b) the right of every person to have access to his or her file, while respecting the legitimate interests of confidentiality and of professional and business secrecy;

(c) the obligation of the administration to give reasons for its decisions.

3. Every person has the right to have the Union make good any damage caused by its institutions or by its servants in the performance of their duties, in accordance with the general principles common to the laws of the Member States.

4. Every person may write to the institutions of the Union in one of the languages of the Treaties and must have an answer in the same language."

Article 45 (freedom of movement and residence)

"1. Every citizen of the Union has the right to move and reside freely within the territory of the Member States.

2. Freedom of movement and residence may be granted, in accordance with the Treaties, to nationals of third countries legally resident in the territory of a Member State."

Article 47 (right to a fair trial and an effective remedy)

"Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.

Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented.

Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice."

Article 49 (legality and proportionality of criminal offences and penalties).

"1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national law or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed. If, subsequent to the commission of a criminal offence, the law provides for a lighter penalty, that penalty shall be applicable.

2. This Article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles recognised by the community of nations.

3. The severity of penalties must not be disproportionate to the criminal offence."

As stated in its preamble, the rights and freedoms enshrined in the CFR are derived from a variety of sources, including the constitutional traditions and international obligations common to the Member States. All these sources impact on the **interpretation of the provisions of the CFR**.⁵⁶ In this context, a **special importance is recognised to the ECHR and to the case-law of the ECtHR**: the CFR incorporates all rights recognised in the ECHR, and these shall be interpreted as having the same meaning and scope set out in the ECHR⁵⁷; the EU shall be free to provide more extensive protection but no provision of the CFR shall be interpreted as restricting human rights and freedoms recognised by international law and international agreements, including the ECHR.⁵⁸ In other words, the provisions of the ECHR can be seen as minimum protection.⁵⁹

As an instrument of EU law, the **scope of application of the CFR is limited to areas where the EU has competence**.⁶⁰ This means that the CFR is applicable:

- to acts of EU institutions, bodies, offices and agencies of the EU;
- to acts of EU Member States insofar as “they are implementing EU law”.⁶¹

The applicability of the CFR to **EU institutions, bodies, offices and agencies** reflects the general obligation upon the EU to respect fundamental rights and has been interpreted broadly by the CJEU. Any act by an EU institution, body, office or agency may be challenged on the basis that it constitutes a violation of a fundamental right or freedom enshrined in the CFR⁶².

As regards the applicability of the CFR to **EU Member States**, which is more relevant for the purpose of this Handbook, extensive case-law of the CJEU exists as to **what is meant, in practice, by “implementing EU law”**. In a landmark case, the CJEU put it clearly by stating that “fundamental rights guaranteed in the legal order of the EU are applicable in **all situations governed by EU law**”.⁶³ In such case, the CJEU held the CFR applicable to national tax penalties and criminal proceedings for tax evasion related to VAT fraud, considering that, although national rules were not meant to implement a specific EU act, they contributed to implement a general obligation imposed on the Member States by the EU treaties to ensure effective penalties for conduct prejudicial to the financial interests of the EU.

Where a given situation is regarded as governed by EU law, the CFR can, essentially, be relied on in order to:

56 Official explanations annexed to the CFR exist, which are a useful tool clarifying the scope and meaning of the provisions of the CFR: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32007X1214%2801%29>.

57 Article 52(3) CFR.

58 Article 53 CFR.

59 Cornelia R.M. Versteegh in *Civil Society in Europe*, page 56.

60 Consequently, the CFR cannot be relied on to extend the competences of the EU or to establish new powers or tasks for the EU other than those defined in the Treaties – see Article 6(1) TEU and Article 51(2) of the CFR.

61 Article 51(1) CFR.

62 See for example the well-known CJEU ruling in *Joined Cases C-293/12 and C-594/12 Digital Rights Ireland* where the CJEU declared the EU Data Retention Directive to be invalid stating that it constituted a violation of the fundamental rights to respect for private life and to the protection of personal data (Articles 7 and 8 CFR).

63 CJEU case C-617/10 *Fransson*, para.16

- argue that a national measure which infringes EU primary or secondary law *also constitutes* a violation of a fundamental right or freedom enshrined in the CFR⁶⁴;
- argue that a national measure infringes EU primary or secondary law *because it constitutes* a violation of a fundamental right or freedom enshrined in the CFR⁶⁵;
- argue that a national measure derogating from a provision of EU primary or secondary law *is justified by the need to protect* a fundamental right or freedom enshrined in the CFR⁶⁶;
- argue that a provision of EU primary or secondary law *has to be interpreted in the light of* a fundamental right or freedom enshrined in the CFR⁶⁷.

Concrete examples of such scenarios related to national and EU measures which could potentially affect CSOs will be examined in Part II.

64 See for example case C-235/17 Commission v Hungary, where the CJEU found that a national measure cancelling the rights of usufruct over agricultural land infringed the free movement of capital as well as the fundamental right to property (Article 17 CFR).

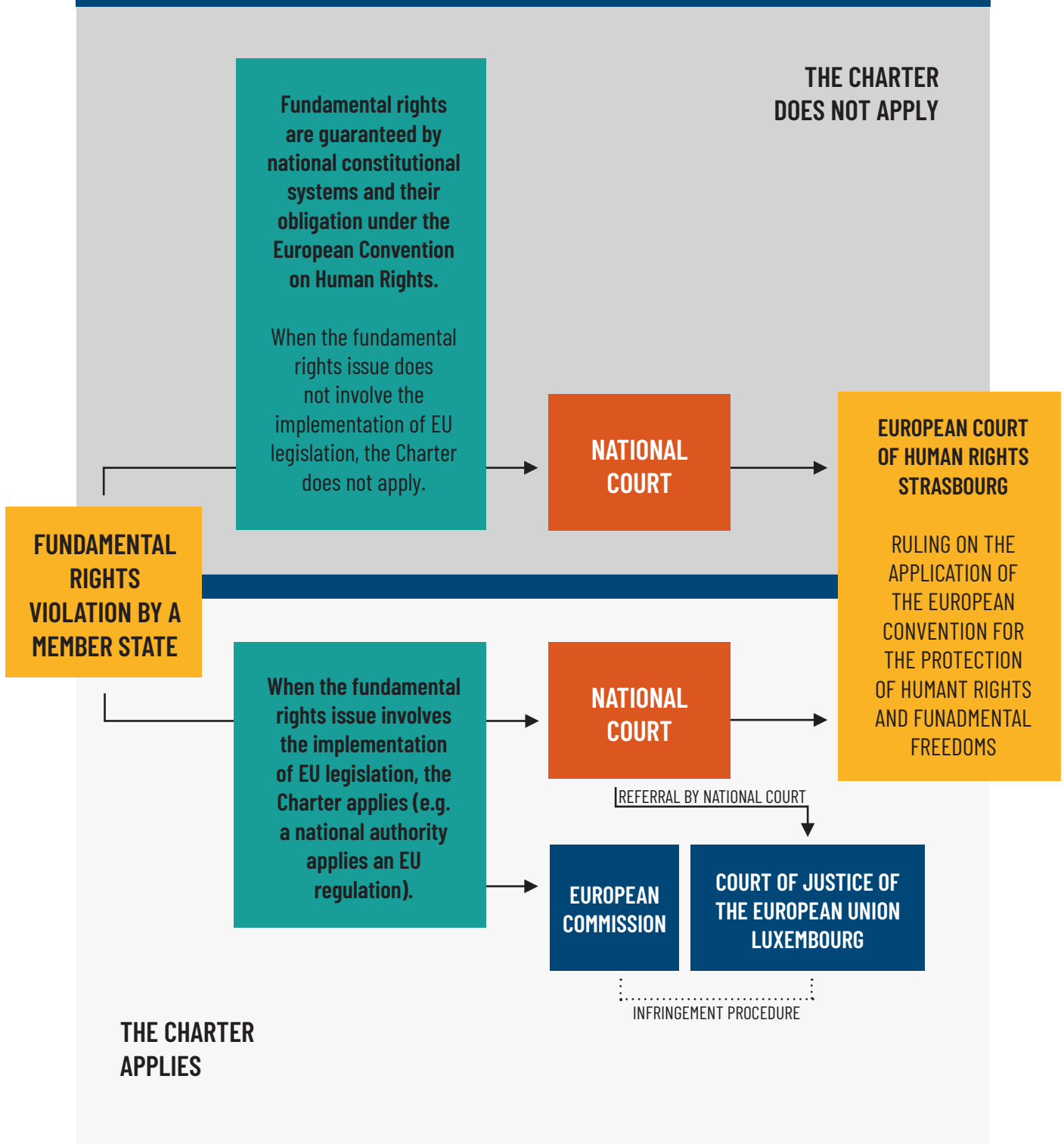
65 See the AG Opinion in case C-78/18 Commission v Hungary, cited above, where the AG argues that the national law on the transparency of organisations receiving funding from abroad violated the free movement of capital because it introduced restrictions incompatible with the right to freedom of association and the right to privacy and protection of personal data (Articles 12, 7 and 8 CFR).

66 See for example the landmark CJEU case C-112/00 Schmidberger, where the CJEU accepted a national measure resulting in a restriction to the free movement of goods (a decision not to ban a public demonstration disrupting transports) because it was justified by the protection of freedom of assembly and freedom of expression.

67 See CJEU case C-619/19 Commission v Poland where the CJEU used the right to a fair hearing (Article 47 CFR) to interpret the scope of Article 19(2) TEU establishing that the obligation of ensuring effective judicial protection also includes an obligation to guarantee the independence and impartiality of the courts.

EU CHARTER OF FUNDAMENTAL RIGHTS

When does it apply, and where to go if the Charter is violated?



Source: European Commission https://commission.europa.eu/aid-development-cooperation-fundamental-rights/your-rights-eu/eu-charter-fundamental-rights/when-does-charter-apply_en#when-does-the-charter-apply

I.1.3. Secondary EU Law

Secondary EU law indicates the legal instruments adopted by the EU on the basis of the principles and with a view to the objectives set out in the EU treaties. It comprises:

- Binding legal acts (unilateral: regulations, directives, decisions, and multilateral – i.e. international agreements)
- Non-binding legal acts (opinions, recommendations)

Other (non-legal) instruments can be adopted by EU institutions and bodies with a view to the implementation of Treaty objectives, such as communications, inter-institutional agreement, resolutions, declarations, action programmes, white and green papers.⁶⁸

EU secondary law has to be in line with relevant provisions of EU primary law, including the CFR. In order to ensure compliance of new EU legislative proposals with general principles of EU law and fundamental rights enshrined in the CFR, the European Commission performs **impact assessments**, including through the use of a fundamental rights checklist.⁶⁹ Once EU legislation is adopted which is deemed not to be in compliance with EU primary law, including the CFR, the **scrutiny of the CJEU** can be triggered through the avenues foreseen in the EU Treaties (see below) in order to assess the compatibility of EU binding legal acts of secondary law with EU primary law. Non-binding legal acts are not subject to the possibility of undergoing judicial scrutiny in terms of their compatibility with EU provisions and the CFR, except where an action for compensation for damages is filed⁷⁰.

In turn, **national measures adopted to implement acts of EU secondary law can also be challenged** with regards to their (in)compatibility with EU primary law, including the CFR.

The following paragraphs will provide a description and examples of unilateral EU binding acts (regulations, directives, decisions) and a brief definition of recommendations and opinions.

Regulations

Regulations lay down the same law throughout the EU and apply in full in all Member States. They have direct effect (i.e., are directly applicable and immediately enforceable, see above). Regulations can confer rights or impose obligations on individuals in the same way as national law. Member States and their governing institutions and courts are bound directly by provisions of EU Regulations and have to comply with it in the same way as with national law. Regulations generally do not need to be transposed into national law: this implies

68 More information and further references are listed for example in the publication *The ABC of EU law*, which can be found on the internet at <http://bookshop.europa.eu/en/home>.

69 See the Commission's operational guidance on taking account of fundamental rights in impact assessment, available at https://ec.europa.eu/info/files/operational-guidance-taking-account-fundamental-rights-commission-impact-assessments_en, and the related fundamental rights checklist: http://ec.europa.eu/smart-regulation/guidelines/tool_24_en.htm.

70 Article 340 TFEU.

that, normally, there will not be national measures to be challenged in case of a violation of rights and freedoms deriving from EU Regulations – but provisions of the EU Regulation itself should be contested instead in such case, where possible.

Examples of EU Regulations that can be relevant for CSOs:

EU General Data Protection Regulation 2016/679 (“EU GDPR”) (which regulates the processing, including by state authorities, of personal data relating to individuals in the EU – as may be CSOs’ staff, volunteers or donors)⁷¹

EU Regulation 1304/2013 on the European Social Fund (which lays down provisions under which Member States may decide to allocate or not specific EU funds to CSOs)⁷²

EU Schengen Regulation 2016/399 on a Union Code on the rules governing the movement of persons across borders (which contains rules on the crossing of the EU external border, including regulating access for anyone having a legitimate interest to enter into the EU – which may include activists and right defenders)⁷³

Directives

Directives are the most common EU legislative instrument alongside regulations. The directive aims not for the unification of all national laws, which is the regulation’s purpose, but its harmonisation with a view to the achievement of a certain result. A directive leaves it to the national authorities to decide how the agreed objectives, set out in the text of directive, are to be realised and on the measures to incorporate (transpose) them into their domestic legal systems. Transposition into national law must take place by the deadline set in the directive: national authorities communicate these measures to the European Commission, which examines whether the directive has been fully and correctly transposed. Directives do not as a rule directly confer rights or impose obligations on individuals. They are expressly addressed to the Member States alone. Rights and obligations for individuals and organisations will, in principle, be set out in the measures enacted by the authorities of the Member States to implement the directive.⁷⁴

Both the provisions of the directives and the national measures transposing them can be challenged where they are deemed incompatible with EU primary law, including the CFR.

As regards national measures, one interesting issue is whether this scrutiny is also possible in the case of “goldplating”, i.e. where **national measures go beyond the obligations imposed by an EU directive, resulting in more restrictive measures** than what required. The question is: should the stricter national

71 <https://gdpr-info.eu/>.

72 <https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX%3A32013R1304>.

73 <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32016R0399>.

74 We have seen above, however, that provisions of Directives can produce direct effect under certain conditions, where the Member States failed to transpose the directive into national law by the deadline.

measure be regarded as an implementation of the EU directive? In fact, some EU directives require Member States to adopt minimum standards for prohibiting undesirable behaviour, such as money laundering, employment discrimination or facilitating irregular migration. When, in transposing an EU directive, the national legislator decides to impose stricter or more severe rules than those required, one could argue that these must still be in line with EU primary law and the CFR. CJEU case-law, however, does not offer clear guidance in this respect: the CJEU reached different conclusions in the following cases without setting forth tests or criteria that could justify the varied results.

Examples of EU Directives that can be relevant for CSOs:

EU Directive 2000/43 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (which lays down directly enforceable rules to challenge discriminatory measures, including harassment and instructions to discriminate, on grounds of racial or ethnic origin in a variety of fields including access to goods and services available for the public)⁷⁵

EU Directive 2004/38 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States (which lays down directly enforceable provisions regulating the right of EU citizens and their family members to move and reside freely across the EU)⁷⁶

EU Directive 2015/849 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing (which provides for minimum rules Member States have to implement to fight against money laundering and terrorist financing – including transparency requirements for organisations and companies subject to certain conditions)⁷⁷

Decisions

A distinction can be made between two categories of decisions: decisions which specify those to whom they are addressed, and general decisions which do not have any specific addressees. Either way, a decision is binding only on those to whom it is addressed without the need for national implementing measures.⁷⁸

Decisions addressed to individuals may be challenged for their (in)compatibility with EU primary law and the CFR, as illustrated, for example, by the extensive CJEU case-law on the compatibility with the right to an effective remedy and to a fair trial (Article 47 CFR) of EU decisions on restrictive measures against individuals and organisations within the framework of the fight against terrorism.⁷⁹

Recommendations and opinions

A last category of legal acts explicitly provided for in the treaties is recommendations and opinions. They enable the Union institutions to express a view and/or suggest a line of action to Member States, and in some cases to

75 <https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX%3A32000L0043>.

76 <https://eur-lex.europa.eu/legal-content/GA/TXT/?uri=CELEX:32004L0038>.

77 <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32015L0849>.

78 Article 288(4) TFEU. Also see <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=LEGISSUM%3Aai0036>.

79 See landmark CJEU case C- C-402/05 *Kadi*.

individual citizens, which is not binding and does not place any legal obligation on the addressee.

While these non-binding acts cannot be subject to judicial scrutiny or relied on to defend rights and freedoms, they can be instrumental to advocate for increased civic space guarantees.

Examples of EU Recommendations and Opinion that can be relevant for CSOs:

Country-specific recommendations adopted in the context of the European Semester, which can include recommendations in areas such as civic participation, access to public information, judicial protection, equality and non-discrimination⁸⁰

Own initiative opinion of the EESC on “Resilient Democracy through a strong and diverse civil society”⁸¹

1.3.4. Supplementary sources of EU law

Supplementary sources are elements of EU law not specifically mentioned in the treaties.⁸² This category includes:

- **CJEU case-law** ;
- **general principles of EU law** recognised in the case-law of the CJEU, such as fundamental rights⁸³, good administration, proportionality, legal certainty, equality before the law;
- **international law**, including international agreements, custom and usage.

Supplementary sources are used to define and interpret the scope and meaning of provisions of primary and secondary law. They can therefore be key to support a certain interpretation of an EU law provision with a view to protect CSOs’ rights and freedoms under EU law.

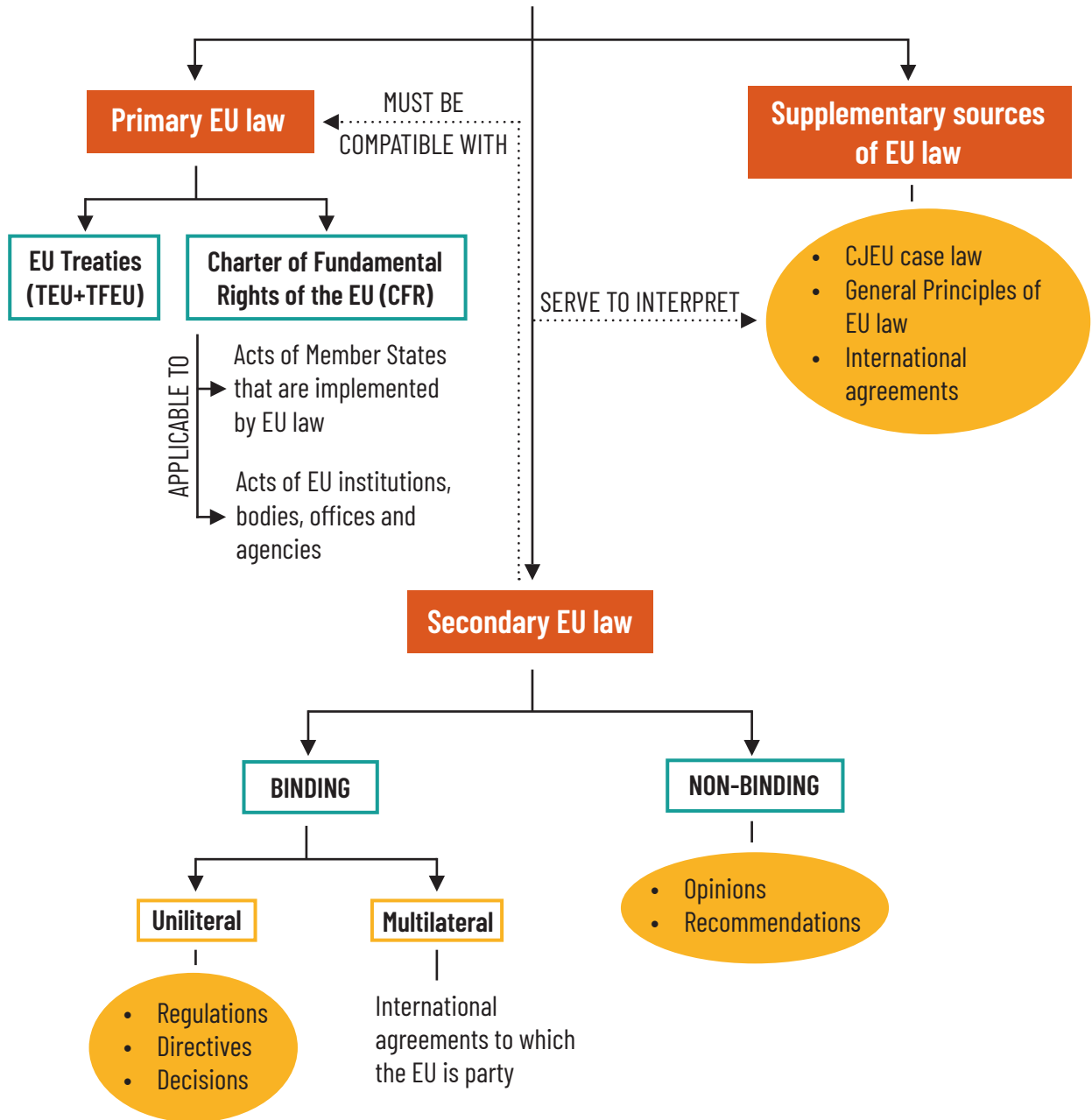
80 https://ec.europa.eu/info/business-economy-euro/economic-and-fiscal-policy-coordination/eu-economic-governance-monitoring-prevention-correction/european-semester/european-semester-timeline/eu-country-specific-recommendations_en.

81 <https://www.eesc.europa.eu/en/our-work/opinions-information-reports/opinions/resilient-democracy-through-strong-and-diverse-civil-society-own-initiative-opinion>.

82 <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=LEGISSUM:l14533&from=EN>.

83 The recognition of fundamental rights as general principles of EU law (now explicitly reaffirmed in Article 6(3) TEU) allowed the CJEU to interpret and apply EU law provisions in compliance with fundamental rights long before the CFR was declared and became binding: see for example CJEU ruling in case 5/88 *Wachauf*.

EU LEGAL FRAMEWORK



PART II – When can national laws be challenged using EU law?

As already mentioned, the possibility to use EU law, including the CFR, to challenge national laws or measures affecting the rights and freedoms of CSOs, is limited to those **national laws and measures which directly or indirectly come within the scope of EU law**.

This section is meant to provide you with guidance as well as concrete examples of possible situations where national laws and measures affecting CSOs' rights and freedoms are to be regarded as falling within the scope of EU law, and can therefore be challenged in terms of their compatibility with EU law, including the CFR.

II.1. National laws coming within the scope of EU law: general considerations

A national law can be challenged for non-compliance with EU law only if its scope/content:

- falls within an area of competence conferred to the EU by the EU treaties;
AND
- The EU has exercised this competence in practice.

In other words, **a national law can be challenged for its compatibility with EU law only if:**

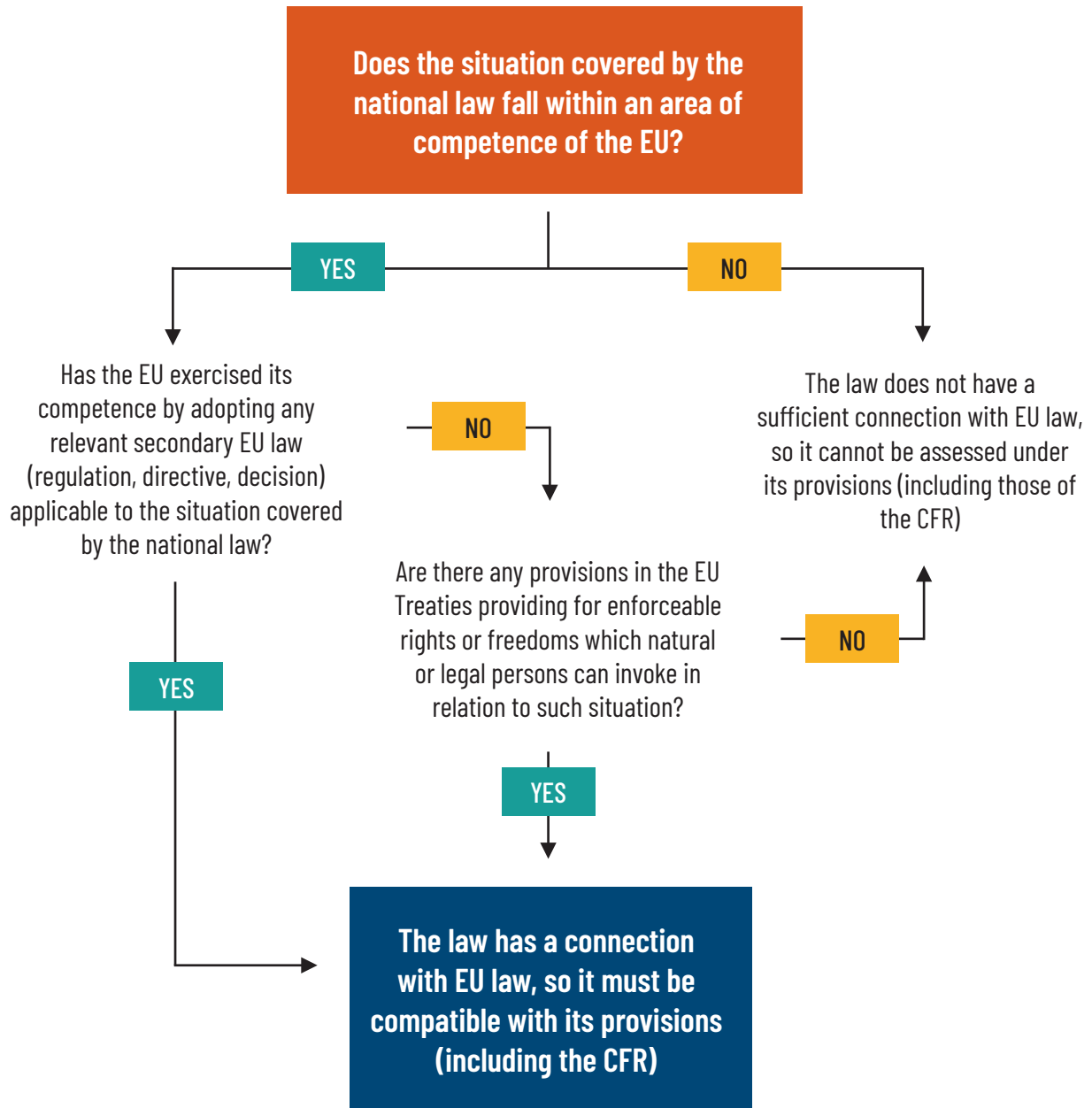
1. The EU is competent in the field covered or affected by such national law;
2. EU treaty rules exist governing such field and/or the EU has exercised its competence by adopting secondary legislation;
3. The provisions of the national law that are challenged fall within the scope of these EU provisions.

When **all** these conditions are fulfilled, we say that the provisions of the national law **have a connection with EU law** and thus **come within its scope**. As a result, such provisions have to comply with relevant EU law provisions. In such cases, national measures have to be regarded as “implementing EU law” for the purpose of the scope of application of the CFR⁸⁴ and are therefore equally **subject to the obligations arising from the CFR**.

On the contrary, **when it cannot be demonstrated that a national law has a connection with EU law, its provisions cannot be assessed on the basis of their**

⁸⁴ Article 51 (1), CFR, as interpreted by the CJEU (see for example case C-617/10 Fransson, cited above).

NATIONAL LAW: WHEN DOES IT HAVE A CONNECTION WITH EU LAW?



85 See for example CJEU, C – 427/06, *Bartsch*, para 25 and, as it concerns the applicability of the CFR, CJEU, C-206/13, *Cruciano Siragusa v. Regione Sicilia – Soprintendenza Beni Culturali e Ambientali di Palermo*, 6 March 2014 – para 21; CJEU, C-198/13, *Víctor Manuel Julian Hernández and Others v Reino de España (Subdelegación del Gobierno de España en Alicante) and Others*, 10 July 2014, paras. 11-12, 24, 27, 34–36 and 46; CJEU, C-309/96, *Daniele Annibaldi v. Sindaco del Comune di Guidonia and Presidente Regione Lazio*, 18 December 1997, para 13.

II.2. Challenging national laws affecting CSOs' rights and freedoms on the basis of national law: concrete scenarios

So, how can you show that a national law affecting civic space is governed by EU law and as such, must be compatible with it?

In order to show that a national law affecting civic space is governed by EU law, one needs to demonstrate that there is a **sufficient link** between the national law or measure and provisions of EU (primary or secondary) law that regulate one or more aspects of that field.

In this section we will illustrate what this means in practice through a series of concrete examples, based on both real and invented (but still realistic) scenarios.

II.3. An EU Member State proposes or adopts a law specifically to implement, execute or transpose EU law affecting CSOs

When Member States act as “agents” of the EU by specifically implementing, transposing or executing EU law (e.g., specific treaty provisions but especially EU secondary law, such as directives or non-self-executing provisions of regulations or decisions⁷), it is evident they are “implementing EU law” and therefore their national measures are governed by EU law.

There are three main scenarios which may give rise to a violation of CSOs' rights by national law adopted with a view to implement specific provisions of EU law affecting CSOs.

II.3.1. National law failing to properly transpose EU law giving rights to CSOs

Example 1

In order to ensure effective access to justice across the EU, the EU adopts a Directive to harmonise national rules concerning legal aid for legal entities in civil and commercial matters. In transposing this Directive into national law, an EU Member State draws up a definition of “legal entities” which does not clearly include civil society organisations, without providing an objective justification for such exclusion. The compatibility of national law with the objectives and the obligations under the Directive could be questioned by CSOs, having regard to the fact that EU rules are meant to facilitate access to justice, which is a fundamental right under the CFR, and taking into account the principle of equality before the law.

EU law provisions potentially infringed:

- Provisions of an (hypothetical) EU Directive on legal aid for legal persons in civil and commercial matters
- Article 20 CFR (equality before the law)
- Article 47 CFR (Right to an effective remedy)

Example 2

The EU adopts a Directive aimed at harmonising national rules on preventing and sanctioning strategic civil lawsuits against public participation (SLAPP), with a view to ease the burden on and ensure a proper functioning of justice systems while protecting public participation in matters of general interest. In transposing this Directive into national law, an EU Member State decides to exclude from the scope of application of the provisions those proceedings brought against conduct intended to influence public opinion in a way deemed incompatible with the religious identity of the State as enshrined in the national constitution. As a measure adopted to transpose EU law, the national law also has to comply with the CFR, in the light of which EU law must be interpreted and applied. Both secular and faith-based CSOs which do not identify in the religious identity of the State may reasonably argue in such case that the national law transposing the Directive violates freedom of expression and discriminates on grounds of religion or belief.

EU law provisions potentially infringed:

- Provisions of an (hypothetical) EU anti-SLAPP Directive
- Article 11 CFR (Freedom of expression)
- Article 21 CFR (Non-discrimination including on grounds of religion and belief)

II.3.2. National law transposing EU law in a way which violates CSOs' rights under EU law, including the CFR

Example 1

The EU adopts a Directive imposing on Member States to establish a new legal form for "European Cross-Border Associations and Foundations". The Directive leaves it to Member States to define the procedure for the application and recognition of the Status at national level. In adopting these implementing measures, a Member State establishes very high administrative fees for CSOs wishing to apply for the Statute, while much lower fees are applicable to other types or organisations. The compatibility of national law with the objectives and the obligations under the Regulation should be assessed, also having regard to the obligation upon Member States to take into account fundamental rights as enshrined in the CFR when transposing EU law.

EU law provisions potentially infringed:

- Provisions of an (hypothetical) EU Directive creating a new legal form for European Cross-Border Associations and Foundations
- Article 21 CFR (Non-discrimination, including based on political or any other opinion)
- Article 12 CFR (Freedom of association)

Example 2

A Member State law on public procurement excludes CSOs from participating to certain tenders, for example in the area of asylum reception, with no objective justification. This is considered by the European Commission incompatible with rules contained in an EU directive on public procurement. The Member State repeals the law and adopts a new one which enables CSOs to participate to tenders on an equal footing as others. However, in adopting the new law, the Member State provides that all judicial proceedings brought against public administrations by CSOs against decisions on awarding tenders taken on the basis of the old law, are to be automatically terminated without a decision on the merits, since the object of the dispute is no longer relevant. This means that concerned CSOs are left without a possibility to obtain the reopening of contested tenders and without compensation. While the national law is adopted to comply with EU provisions of secondary law in the area of public procurement, it can be contested insofar as it prevent CSOs from enjoying effective judicial protection of their rights under EU law (Article 19(1) TEU), read in light of the fundamental right to access to justice.

EU law provisions potentially infringed:

- Article 19(1) TEU
- Article 47 CFR (Right to an effective remedy)

Example 3

The EU continues reviewing, updating and adopting the provisions of its Directive on combating money laundering and financing of terrorism ("EU AML/CFT Directive"), in order to close existing gaps. In its latest version, the EU AML/CFT Directive allows Member States to extend the scope of the Directive to undertakings others than the ones listed as "obliged entities", although it requires a risk-based approach.

When transposing the Directive, several EU Member States adopt laws that extend the scope of the Directive to foundations, including them in the list of "obliged entities". This means that foundations need to: (1) identify and verify the identity of their customers and of the beneficial owners of their customers (even though in most cases foundations benefit broad groups of people or the general public and do not have "customers" such as companies); and they must monitor the transactions of and the business relationship with their "customers"; (2) report suspicions of money laundering or terrorist financing to the authorities; and (3) undertake additional measures to ensure that their staff and policies will prevent any misuse of the anti-money laundering rules.

In order to comply with these laws, foundations need to secure additional resources – both human and financial. The compliance requirements also add administrative burdens to their operations and foundations are under a threat of being fined if they do not comply with the rules. Moreover, since not all companies are included in the list of "obliged entities" under the law, these obligations increase the perception in the general public and in institutions – including banks – that foundations carry major risks of misuse for money-laundering and terrorism-financing, compared to other organisations.

Although the EU AML/CFT Directive allows Member States to extend the scope of the Directive to other entities than the ones listed as obliged entities under EU law, CSOs may argue that the national

legislation is not compatible with the EU Directive, as it is not based on the risk-based approach that the directive requires. The national laws also unduly discriminate between foundations and companies not included in the national list of “obliged entities”, violating the principle of equality before the law and posing an unnecessary and disproportionate interference with CSOs’ freedom of association and their customers’ right to privacy and protection of personal data, all rights recognised by the CFR.

Even though the EU AML/CFT Directive unequivocally acknowledges that Member States may adopt stricter provisions than those foreseen in the Directive in the exercise of their own competence in criminal matters, foundations may still challenge the national measure based on EU law, in particular EU rules on the protection of personal data (the General Data Protection Regulation and EU Data Protection Law Enforcement Directive), and argue on that basis the violation of the CFR.

EU law provisions potentially infringed:

- Provisions of the EU Directive on combating money laundering and terrorist financing
- Provisions of the EU General Data Protection Regulation and EU Data Protection Law Enforcement Directive

Enforcement Directive

- Article 7 CFR (Right to privacy)
- Article 8 CFR (Right to protection of personal data)
- Article 12 CFR (Freedom of association)
- Article 20 CFR (Equality before the law)

Example 4

A national taxation law applies a lower tax rate to legacies made to not-for-profit organisations only if these organisations have their centre of activity⁸⁶ in the EU Member State that issued the law or in a Member State where the testator lived or worked.

This different treatment of legacies to organisations having their centre of activity in a different Member state, or in a Member State where the testator has not lived or worked, violates EU Law. As a matter of fact, legacies are protected under the free movement of capital and a restriction on tax incentives would be permissible only in the case that the foreign organisation was not comparable to a national one.⁸⁷

The national law may also be regarded as violating the right to freedom of association across the EU.

EU law provisions potentially infringed:

- Article 63 TFEU (Free movement of capital)
- Article 12 CFR (Freedom of assembly and association)

⁸⁶ In ECJ *Missionswerk Werner Heukelbach eV v Etat Belge* (C-25/10, [2011] EUECJ C-25/10), the “centre of activity” of an organisation is identified as its seat, its place of central administration or its principal place of business.

⁸⁷ As clarified in ECJ *Stauffer case* (C-386-04, [2006]), an organisation recognised as having charitable status in one EU Member State is “comparable to one in another EU Member State if also satisfies the requirements imposed for that purpose by the law of the other Member State and its objective is to promote the very same interests of the general public. Comparability is a matter for the national authorities of that other State, including its courts, to determine.

Example 5

Your government adopts a law establishing that NGOs that receive more than 10% of their funding from foreign sources (both from other EU and non-EU countries) and are engaging in “political activities not directly supporting the public benefit purpose of the organisation” are no longer eligible for tax exemption.

The notion of “political activities” is not further clarified in the law, therefore it is susceptible to various interpretations.

As a consequence, the tax authority of an EU Member State sends a notice to a local NGO stating that its public-benefit status in the country has been revoked retroactively to the year 2010. In justifying this decision, the tax authority argues that the organisation pursues activities of political nature beyond its public-benefit purposes prescribed by law and receives more than 10% of their income from non-EU or other EU countries.

As a result, the organisation is no longer authorised to issue receipts for donations, and donors from within and from other EU member States could not deduct donations from their taxes. This in turn deters individuals’ contributions to the organisation. First steps of appeal with the local tax office are rejected, so the organisation files a lawsuit at the local court, arguing that its political activities are a legitimate means to reach its official public benefit objectives.

EU law provisions potentially infringed:

- Article 63 TFEU (Freedom of movement of capital)
- Article 12 CFR (right to freedom of association)
- Article 21(1) CFR (Non discrimination, including on grounds of political or any other opinion)

II.3.3. Gold-plating: national law going beyond the obligations imposed by EU law with an unjustified or disproportionate impact on CSOs’ rights

EU Member States are often allowed to exercise a so-called “margin of appreciation” in the way they implement, adopt or transpose mandatory EU laws. EU directives, for example, require Member States to achieve a specific result but do not dictate the exact means through which the result should be achieved. Sometimes, even EU Regulations, which are directly applicable to Member States, include “non-self-executing” provisions that allow Member States a degree of flexibility in how they should be implemented.

When EU Member States use the margin of appreciation granted by EU to “gold-plate” EU laws – that is, to go beyond the minimum requirements of an EU law by adopting more favourable or more stringent national measures in the same field –, such measures do qualify as “implementing Union law” and they must be compatible with the fundamental rights of the CFR, in the light of which EU provisions of secondary law must be interpreted.⁸⁸

⁸⁸ In C-406/15 Milkova, 9 March 2017, the CJEU noted that, “where EU legislation allows Member States a choice between various methods of implementation, the Member States must exercise their discretion in accordance with general principles of EU law”: para 53.

Example 1

An EU Member State reviews its existing legislation and proposes a new law to adapt it to a new EU Directive on combating terrorism. The EU directive requires Member States to criminalise the intentional distribution of messages, both online and offline, aimed at inciting others to carry out terrorist offences or glorifying previous terrorist offences. Based on this requirement, the new national law establishes the new crimes of “glorification of terrorism”, “humiliation of victims of terrorism” and “denial of acts of terrorism”, with related conducts being formulated in a very vague and broad manner and with the provision of severe penalties, including punishment of up to five years in jail, hefty fines and temporary disqualification from applying for public roles. As a result, the new law may have a chilling effect on human rights campaigners, humanitarian organisations and journalists, who would be afraid of being punished for expressing unpopular views.

Since the national law is unequivocally adopted to comply with EU law, its compatibility with the relevant EU law, including the CFR, must be assessed.

EU law provisions potentially infringed:

- Provisions of the EU Directive on combating terrorism
- Article 11 CFR (Freedom of expression and information)
- Article 12 CFR (Freedom of assembly and association)
- Article 49 CFR (Principles of legality and proportionality of criminal offences and penalties)

Example 2

The EU institutions adopt a Directive which sets minimum standards for Member States to follow when they adopt laws to tackle facilitation of irregular migration. According to the Directive, Member States must impose “appropriate sanctions” on anyone who intentionally assists an undocumented migrant to enter or transit across the EU as well as on those who profit financially by helping undocumented migrants reside in the EU. The Directive does not specifically exempt from this provision individuals or organisations that offer humanitarian assistance to undocumented migrants. As a result, one Member State adopts a law that orders the imprisonment up to six years and seizing of assets of CSO workers or volunteers who use rescue boats to carry undocumented people into territorial waters.

In this case, CSOs may argue that national law transposes EU legislation in a way which is contrary to international law binding the EU and its Member States – in particular the United Nations Convention on the Law of the Sea regulating rescue at sea, interpreted in the light of fundamental rights as enshrined in the CFR. As a result, the national law criminalising humanitarian assistance by rescue boat is not compatible with EU law and the CFR.⁸⁹

EU law provisions potentially infringed:

- Provisions of the EU Facilitation Directive
- Article 2 CFR (Right to life)

⁸⁹ See also legal arguments in FRA reports https://fra.europa.eu/sites/default/files/fra_uploads/fra-2014-criminalisation-of-migrants-1_en.pdf and <https://fra.europa.eu/en/publication/2018/ngos-sar-activities>.

- Article 18 CFR (Right to asylum)
- Article 19 CFR (Prohibition of refoulement)
- Article 49 CFR (Principles of legality and proportionality of criminal offences and penalties).

Example 3

An EU Member State adopts a proposal for a law that requests not-for-profit organisations (NPOs) staff to screen beneficiaries of aid - especially in development and humanitarian contexts - to verify their identity and to check that they are not included in existing sanction lists.

This would cause several problems for organisations providing humanitarian assistance: e.g, many of them work in areas where the majority of the population does not have an ID and the need to control the validity of documents and obtain the informed consent of beneficiaries would significantly delay the provision of aid. This would also end up excluding some persons from receiving humanitarian assistance, breaching the impartiality principle.

NPOs could argue that there is no legal basis for this obligation in international law, or EU law. Not only is there no relevant legal provision in EU law, including the relevant EU AML/CFT Directive, but this measure is neither strictly necessary nor proportionate to the objective of fighting money-laundering and terrorism-financing. Only a risk-based approach and a measured and nuanced application of prevention and mitigation measures can be effective and respectful of the humanitarian principles that guide NGO intervention.

The law proposal also does not comply with the obligations set out in the EU General Data Protection Regulation (GDPR). This is because the law would require identity verification by NPO staff and then a comparison of the identity with the sanction lists, entailing a processing of personal data within the meaning of Article 8 of the GDPR. Moreover, the identity record would be available by default without the consent of the individuals. The lack of clarity on how long the data collected will be retained, leaves the burden on NPOs to determine this period, undermining the rights of the individuals whose data are collected. Moreover, the proposal does not include any information to ensure the effective exercise of the rights of the persons whose data are collected (in particular the right to be forgotten, the right to rectification, etc.). Finally, the conditions under which the data is collected and processed (without access to communication networks, people who are not aware of the guarantees they have, etc.) are not taken into account.

EU law provisions potentially infringed:

- Provisions of the EU AML/CFT Directive (over-implementation)
- Provisions of the EU General Data Protection Regulation (e.g., Article 8)
- Article 7 CFR (Right to privacy)
- Article 8 CFR (Right to protection of personal data)

However, there may be exceptions and careful consideration must be given to the language used by the EU legislator: when EU laws, in some of their provisions, acknowledge that Member States can adopt more favourable or stringent national measures *because they already have this competence under national law* (i.e. in areas where the EU only has a shared or supporting competence), such measures cannot be considered as “implementing Union law”, because they are not *governed* by EU law. Therefore, when Member States use their own existing powers to gold-plate EU laws, they may not be considered as “implementing Union law”. In any case, **stricter or more favourable national measures must not breach any other EU law provisions if they apply.**

Example 4

The EU Directive combatting money laundering and financing of terrorism outlines minimum rules and practices which Member States must adopt but clarifies that such rules are without prejudice of the existing competence of Member States, under their national law, to adopt stricter provisions in the same field. As a result, an EU Member State adopts a new law that imposes very strict transparency requirements on CSOs’ reporting on money flows than on profit-making entities, arguing that CSOs are more frequently and easily used to disguise money laundering activities and funding terrorism. These include the obligation to provide a wide range of data on donors, which are processed by the authorities including for law enforcement purposes.

CSOs may argue that national legislation is not compatible with the EU directive as the transparency requirements provided for by national law are not based on a risk assessment as the Directive provides and violates the CFR insofar as it amounts to unjustified discrimination in violation of the principle of equality before the law and unnecessary and disproportionate interference with CSOs’ freedom of association and their donors’ right to privacy and protection of personal data.

The court – be it the national court or the CJEU – may however take the view that the national legislation does not constitute an implementation of the Directive because the Directive unequivocally acknowledges that Member States may adopt stricter provisions than those foreseen in the Directive in the exercise of their own competence in criminal matters. Nonetheless, even in such case, CSOs may still challenge the national measure based on EU law, in particular EU rules on the protection of personal data (the General Data Protection Regulation and EU Data Protection Law Enforcement Directive), and argue on that basis the violation of the CFR.

EU law provisions potentially infringed:

- Provisions of the EU Directive on combating money laundering and terrorist financing
- Provisions of the EU General Data Protection Regulation and EU Data Protection Law Enforcement Directive
- Article 7 CFR (Right to privacy)
- Article 8 CFR (Right to protection of personal data)
- Article 12 CFR (Freedom of association)
- Article 20 CFR (Equality before the law).

II.3.4. National law applies EU secondary law correctly but the provisions of the EU law itself are incompatible with the CFR and/or other applicable EU law

It is also possible that national laws correctly implement the provisions of EU directives and regulations, but these provisions are incompatible with other applicable EU law and its interpretation in light of the Charter of Fundamental Rights. In such cases, not only the national laws should be disapplied, but the case should be referred to the EU Court of Justice so that this can declare such provisions as invalid.

Example 1

The EU approves a new Directive amending the previous EU Anti-Money Laundering Directive. Amendment provides that EU Member States must ensure that information on the beneficial ownership of companies and other legal entities in their territory, **including registered public-benefit organisations**, is accessible in all cases to any member of the public. In order to comply with this amendment, a Member State establishes a Register of Beneficial Ownership⁹⁰ and provides that a whole series of information on the beneficial owners of registered entities, including registered public-benefit organisations, must be entered and retained in that register – such as the name, month and year of birth, country of residence and nationality of the beneficial owner of registered entities, including registered public-benefit organisations as well as the nature and extent of the beneficial interest held. Some of the information in the Register is accessible to the public even online.

It can be successfully argued that the amendment introduced by the new EU Directive requiring general access to information on beneficial ownership constitutes a serious interference with the fundamental rights to respect for private life and to the protection of personal data enshrined in Articles 7 and 8 of the CFR, respectively.⁹¹ The information disclosed enables a potentially unlimited number of persons to find out about the material and financial situation of a beneficial owner. The potential consequences for the data subjects resulting from possible abuse of their personal data are exacerbated by the fact that, once those data have been made available to the general public, they cannot only be freely consulted, but also retained and disseminated.

Although it may be argued that the restrictions of fundamental rights are justified by the objective of general interest of preventing money laundering and terrorism financing, it appears that the interference entailed by this measure is neither limited to what is strictly necessary nor proportionate to the objective pursued.⁹²

EU law provisions potentially infringed by the new Directive:

- Provisions of the EU General Data Protection Regulation and EU Data Protection Law Enforcement Directive

⁹⁰ Under the AML Directive, a “beneficial owner” is any natural person(s) who ultimately owns or controls the customer (where the customer is an entity) and/or the natural person(s) on whose behalf a transaction or activity is being conducted.

⁹¹ This reasoning was followed by the CJEU in its recent Judgment in Joined Cases C-37/20 | Luxembourg Business Registers and C-601/20 | Sovim: <https://curia.europa.eu/jcms/upload/docs/application/pdf/2022-11/cp220188en.pdf>

⁹² This conclusion was reached by the CJEU in the above stated judgment, where the Court ruled that the provision of the 5th EU Anti-Money Laundering Directive (Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing) – whereby the information on the beneficial ownership of companies incorporated within the territory of the Member States is accessible in all cases to any member of the general public – is invalid.

- Article 7 CFR (Right to privacy)
- Article 8 CFR (Right to protection of personal data)

Example 2

The European Commission is increasingly concerned about covert interference in its democratic sphere by countries outside the EU, whether from outside the EU or using organisations established in the EU which act as proxies for foreign entities.

For this reason, the Commission tables a proposal for a directive to establish “common transparency and accountability standards for interest representation services directed or paid for from outside the EU”. The scope of the Directive includes both profit and non-profit organisations (NPOs), including foundations, associations, consultancies, academic institutions, which will be obliged to disclose any funding coming from non-EU countries as “interest representation”.

In this case, since we are dealing with an EU legislative proposal (i.e., EU law) directly, and not with a national law implementing it, we can assess immediately the EU law’s compatibility with the provisions of the EU Treaties and of the EU Charter of Fundamental Rights (CFR).

Any obligations to disclose funding (in the form of registration, declaration, labelling, publication) imposed on NPOs directly or indirectly constitutes an **interference with the right to freedom of association** protected by Article 12, CFR. Such measures also interfere with the right to privacy and right to be free from discrimination (Article 8, CFR). As such, the interference must be clearly **established by law (provide legal certainty), fulfil a legitimate aim and be strictly necessary and proportionate** in that democratic society it wishes to protect.⁹³

Finally, the proposal, if applied to NPOs, could affect their ability to seek and receive resources (due to possible stigmatisation as “foreign interest representative”), disrupt their lawful activities (funders not wanting negative perception), or unduly restrict the free movement of capital.

EU provisions potentially infringed:

- Article 63, TEU (Free movement of capital)
- Article 8 CFR (Right to privacy and data protection)
- Article 12, CFR (Freedom of association)

II.4. An EU Member State proposes or adopts a national law affecting CSOs which is incompatible with its “duty of cooperation” (Article 4 TEU)

As we have seen, Article 4 (3), TEU imposes on EU Member States the so-called “duty of sincere cooperation” for the fulfilment of their obligations under EU laws and the achievement of the EU objectives. This also implies a duty to **refrain**

⁹³ This was also acknowledged by the ECJ in *Commission v Hungary (Transparency of associations)* (C-78/18).

from adopting national measures within their national sovereign competence that may compromise the full implementation of an EU law, depriving it of its effectiveness.⁹⁴

It follows that national laws which jeopardise the attainment of an objective of the Treaties, or of the EU measures adopted under them, **may still come within the scope of EU Law irrespective of whether they are specifically adopted to transpose, implement or execute EU law into national law or as part of a State national competence, as long as they are used within the context of EU law.**⁹⁵

Example 1

A Member State adopts, during a public health emergency crisis, a law which punishes as a criminal offence, with terms of imprisonment of up to 10 years, anyone who publicizes information that interferes with the “successful protection” of the public. Any information that may alarm or agitate the public is included in this category. Under the new law, the public prosecutor indicts, among others, a CSO which, in providing care for homeless people, gets to know that the medical devices and personal protective equipment provided for by the Health Ministry to counter the health emergency do not follow EU rules on health and safety. CSOs targeted by criminal proceedings may argue that the national law runs counter to the duty of sincere cooperation, given that their disclosure would be protected under the newly adopted EU Directive on the protection of persons who report breaches of EU law (so called Whistleblower Protection Directive). Member States are in fact bound to transpose the Directive and shall refrain from any measures compromising its effectiveness ahead of the transposition deadline. The national law would also appear incompatible with the right to freedom of expression and of information.

EU law provisions potentially infringed:

- Provisions of the EU Whistleblower Protection Directive read in light of Article 4(3) TEU
- Article 11 CFR (Freedom of expression and information)

Example 2

Following a public health emergency, a Member State adopts a law according to which any foreign radio station or television wishing to broadcast content related to public health on its territory may only refer to information provided by a special emergency office under the Prime Minister. The law provides that media outlets shall seek the opinion of the office on whether the content is to be regarded as public health related prior to transmitting any contents. The office has full discretion in its assessment and there is no possibility to contest it. Heavy fines are envisaged for failure to respect these requirements. Activists and journalists may suggest media outlets to challenge the law on the basis of EU rules on audiovisual media (in particular the Audiovisual Media Services Directive), invoking a violation of the principle of sincere cooperation given the lack of notification of the restriction to the European Commission – as provided for in the Directive. They may equally invoke the lack of proportionality of the measure with regards to the objective pursued and a violation of

⁹⁴ CJEU in C-61/11 PPU *El Dridi*, 28 April 2011, para 55.

⁹⁵ CJEU, C-218/15, *Gianpaolo Paoletti and Others v. Procura della Repubblica*, 6 October 2016, para 18; CJEU, C-617-10, *Åkerberg Fransson*, 26 February 2013, para 28.

the fundamental right to an effective remedy and the fundamental right to freedom of expression, freedom of information and media pluralism.

EU law provisions potentially infringed:

- Relevant provisions of the EU Audiovisual Media Services Directive, also read in conjunction with Article 4(3) TEU
- Article 47 CFR (Right to an effective remedy)
- Article 11 CFR (Freedom of expression, media pluralism, freedom of information).

Example 3

A Member State tables an amendment to an existing national Freedom of Information Act. The amendment establishes that from now on, anyone, including CSOs, who submits a request to a public authority to produce information amounting to more than 10 pages of documentation must pay all the administrative costs incurred by public officials – including the amount of hours spent, the cost of photocopies, etc. – to research, collate and produce the relevant documentation. This provision imposes a significant economic burden on CSOs, including CSOs wishing to exercise their rights under the EU Directive on access to information in environmental matters⁹⁶, which establishes obligations upon Member States to make available upon request environmental information held by national authorities. CSOs may argue that national legislation deprives the rules contained in the Directive of their effectiveness, in violation of the duty of cooperation under Article 4, TEU, to cooperate with the EU institutions to achieve the Directive's objective and must refrain from adopting any measure that may jeopardise the exercise by CSOs of their right to information.

EU law provisions potentially infringed:

- Provisions of the EU Directive on access to information in environmental matters read in light of Article 4(3) TEU
- Article 11 CFR (Freedom of expression and information)

Example 4

Ahead of the elections for the representatives at the European Parliament, a Member State adopts a decree imposing on CSOs that monitor and report on the activities of parliamentary candidates to register with the national electoral watchdog as “political parties” and be labelled accordingly during the electoral campaign as their activities may be perceived as aiming to influence people's vote. It may be argued that this situation impairs the effectiveness of the principle of participatory democracy, established in Article 10(3), TEU, and the possibility for citizens and representative associations to make known and publicly exchange their views in all areas of EU action, established in Article 11(1) TEU – on the basis of which the EU has just adopted an Action Plan on Democracy, including recommendations to support CSOs contributing to tackling political hate speech and disinformation in EP elections.

Based on the duty of sincere cooperation established by Article 4, TEU, CSOs may argue that Member

⁹⁶ Directive 2003/4/EC on public access to environmental information.

States cannot adopt a law that restricts CSOs' freedom to provide information and ideas relevant to the European elections by forcing them to present themselves as political parties and interferes disproportionately with their freedom of association.

EU law provisions potentially infringed:

- Articles 10(3) and 11(1) TEU, read in the light of Article 4(3) TEU
- Article 11 CFR (Freedom of expression and information)
- Article 12 CFR (Freedom of assembly and association)

Example 5

A Member State decides to adopt a legislation by which a special tax of 25% is imposed on funding received from CSOs to finance activities "facilitating immigration". The justification is that the amount of public spending required for border protection has increased due to the facilitation of immigration by CSOs. The law contains a very broad and vague definition of what is meant by "facilitating immigration", which includes among others the provision of reception and integration services as well as campaigning activities on these issues. Concerned CSOs, which also receive funding from the EU to carry out projects in the area of reception and integration of asylum seekers and migrants, may argue that this provision is contrary to the Member State's duty of sincere cooperation under Article 4 TEU, as it deprives of its effectiveness EU rules on disbursement of EU funds under direct management, established in an EU Common Provisions Regulation on funding in the area of asylum and migration. The national law would also need to be examined in terms of its impact on the fundamental rights and freedoms of CSOs as enshrined in the CFR, as it poses problems as regards respect of the right to freedom of association and of expression.

EU law provisions potentially infringed:

- Provisions of the EU Common Provisions Regulation read in light of Article 4(3) TEU
- Article 11 CFR (Freedom of expression and information)
- Article 12 CFR (Freedom of assembly and association)

Example 6

In the context of a public health emergency caused by an epidemic disease, a State mandates that any individual suspected of carrying the disease is to be reported to health officials and allows health officials to enter private premises without a warrant to search for contaminated persons. Failure to report a case is punished by a 3 years prison sentence and very heavy fines. The decree includes a presumption that all migrants who have entered the territory in the past 6 months coming from third countries are to be suspected of carrying the disease, ordering health officials to carry out systematic checks in relevant premises and share the information on cases with immigration authorities who shall immediately proceed to their expulsion. CSOs working with migrants may argue that such measure violates the duty of sincere cooperation with respect to EU rules on asylum procedures, in particular as it undermines the rules on provision of information and assistance to asylum seekers by organisations and on effective access to the procedure. In this context, CSOs should also claim the

violation of migrants' fundamental rights (such as right to asylum and non-refoulement), as well as the violation of their rights to privacy, due to the indiscriminate checks on their premises, and of their freedom of association, due to the interference on the exercise of their legitimate activities and the threat of very heavy sanctions.

EU law provisions potentially infringed:

- Relevant provisions of the Asylum Procedures Directive, also read in conjunction with Article 4(3) TEU
- Article 7 CFR (Respect for private life)
- Article 12 CFR (Freedom of association).

Example 7

A Member State adopts a new emergency law that establishes an indefinite state of emergency where the Prime Minister may rule by decree without parliament's oversight and suspend the application of existing laws including laws implementing EU provisions at its discretion. Fearing that the emergency law may be used to crack down on civic space, CSOs may immediately bring the matter to the attention of EU institutions arguing that insofar as the emergency law allows arbitrary suspension of EU provisions by the government, it risks undermining the precedence of EU law in violation of basic rule of law principles, thus violating the duty of sincere cooperation.

EU law provisions potentially infringed:

- Article 2 TEU read in conjunction with Article 4(3) TEU.

Example 8

A In the run up to national elections, the government of an EU country changes the law regulating the status of civil society organisations (CSOs). The new law aims to ensure that public events and consultations are subject to stricter transparency requirements and that they also respect public safety precautions during the election period. The new rules provide, among others, a presumption of legality for the organisation of public events, debates or other types of public mobilisation only where such activities are held by CSOs that apply for and are granted a new, special charitable status. The new charitable status is also a precondition for being able to participate in public consultations, as well as for benefiting from a favourable tax regime.

This new charitable status can be granted by law only to those CSOs that represent and promote a "legitimate public interest". While this notion is not precisely defined in the law, the new provisions are interpreted in practice in a way that excludes CSOs working on issues which are considered political in nature from being eligible for the new charitable status. On this basis, many CSOs working on issues such as the promotion of human rights or the advancement of social or environmental justice are excluded from the new status, which means that they have to undergo a very burdensome and strict authorisation procedure for every activity organised. As a result, they are faced with increasing difficulties in pursuing their public mobilisation and advocacy campaigns, are excluded from important public consultations and start suffering financial instability.

EU law provisions potentially infringed:

- Article 4(3) TEU
- Article 11 TEU
- Article 11, CFR (Freedom of expression and information)
- Article 12, CFR (Freedom of assembly and association)

II.5. The national law adopted by an EU Member State does *not* intend to implement, execute or transpose mandatory EU law *but* the matter regulated still falls within the scope of existing EU law

This is one common scenario: an EU Member State exercise their own power to regulate on a matter left to its exclusive or concurring competence, but the national law or measure impacts on situations governed by existing EU laws, so it can be examined in the light of its compatibility with the latter.

Example 1

One big media outlet active in four different Member States buys shares in several smaller media outlets across the four countries getting the control of the majority of TV and radio channels in that market. The company's policy is to prevent non-profit making companies using its channels to raise awareness about their activities and seek funding so it starts applying disproportionate fees to the sell of advertisement and broadcasting slots. CSOs in one of the Member States complain to the national competition authority, which examines the merger but finds it in line with national competition rules on concentration. CSOs may argue that the concentration is to be examined in the light of the EU Merger Regulation, given its EU-wide impact. In this context, they may also claim the violation of the principle of media pluralism protected under freedom of expression by the CFR.

EU law provisions potentially infringed:

- Provisions of the EU Merger Regulation
- Article 11(2) CFR (media pluralism)

Example 2

A Member State proposes a law requiring all CSOs operating in its territory to publish online every six months an updated list of their donors together with their names, addresses and amount donated. Failure to comply is sanctioned as an economic offence with the payment of an administrative fine and more than one failure to comply leads to cancellation from the register of CSOs and subsequent denial of tax benefits. The law lists among its objectives the need for increased transparency on CSOs' donations in order to highlight in particular which ones receive money from foreign or religious

entities or individuals and therefore may be acting as “foreign agents” or be subject to “undemocratic influences”.

Although the national law does not aim to transpose any specific EU law, national measures that impose processing and disclosure of personal data such as names and addresses fall under the scope of the EU General Data Protection Regulation 2016/679 (“GDPR”), which also governs national measures which impose requirements on processing or free movement of personal data. As a result, the law must also be compliant with the fundamental rights of the CFR, including the CSOs’ freedom of association and the donors’ rights to privacy and protection of personal data.

EU law provisions potentially infringed:

- Provisions of the EU General Data Protection Regulation
- Article 7 CFR (Respect for private and family life)
- Article 8 CFR (Protection of personal data)
- Article 12 (Freedom of assembly and association)
- Article 21(1) (Prohibition of discrimination on grounds of nationality)

Example 3

A Member State adopts a new law which allows registration and subsequent granting of charitable status only to CSOs that “do not contradict the institution of the family enshrined in the Constitution.” As a result, CSOs working for the promotion of LGBTQs rights are denied access to registration. Registration at national level is a prerequisite for organisations and associations to be recognised a European Statute, pursuant to an EU Regulation on a European Statute for Associations and Foundations which has just been adopted. Article 10, TFEU establishes that when the EU defines and adopt its policies, it must combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, sex or sexual orientation. EU Member States under Article 4, TEU have the duty to facilitate the EU’s tasks and refrain from taking any measures that may jeopardise the fulfilment of the achievement of the EU’s objectives. For this reason, it may reasonably be argued that the provision of this national law violate Article 4(3), TEU as they jeopardise the attainment of EU rules on the European Statute for Associations and Foundations, which have to be interpreted and applied in accordance with the general principle of non-discrimination and the CFR.

EU law provisions potentially infringed:

- Provisions of the (hypothetical) EU Regulation creating a European Statute for Associations and Foundations_read in light of Article 4(3) TEU
- Article 12 CFR (Freedom of assembly and association);
- Article 20 CFR (Equality before the law);
- Article 21 (1) CFR (Non-discrimination including on grounds of sexual orientation and gender identity)

Example 4

A Member State decides to review national procedural rules on legal standing of organisations in civil proceedings concerning matters of public interest. Arguing that an increasing number of organisations bring frivolous or abusive legal proceedings against public administrations, bringing unfounded claims in particular concerning alleged human rights violations, the law places severe restrictions on the possibility for CSOs to act before national courts making it virtually impossible for them to show a sufficient interest to act in court and represent victims of alleged human rights violations even when enabled to do so. Relying on recent case-law of the CJEU⁹⁷, CSOs may argue that the consequence of such a national law affecting, in general, the legal standing of organisations in civil proceedings concerning matters of public interest is that effective access to justice is no longer guaranteed, inter alia when such matters concern the interpretation or application of EU law. This would be contrary to the obligation deriving upon Member States from Article 19(1)TEU, which requires Member States to ensure effective judicial protection of rights under EU law in compliance with the standards stemming from the right to an effective remedy.

EU law provisions potentially infringed:

- Article 19(1) TEU
- Article 47 CFR (Right to an effective remedy)

Example 5

The newly elected government of a region in a Member State decides to revise its policy on making available for free spaces in public buildings for sports manifestations organised by non-profit associations and organisations. It establishes with an ordinance that this service will from now be refused to community-based organisations. This measure particularly affects Roma organisations, Roma being a large (and the only) ethnic minority in the region. While such measure does not aim to transpose any specific EU law, CSOs may argue that it falls within the scope of the EU Race Equality Directive, which prohibits any direct or indirect discrimination on grounds of race and ethnic origin in a variety of areas including the supply of goods and services available to the public.

EU law provisions potentially infringed:

- Provisions of the EU Race Equality Directive, which implements the prohibition of discrimination on ground of race also enshrined in Article 21 CFR

Example 6

A Member State decides to ban all audiovisual programmes broadcasted from abroad on its territory, including by broadcasters established in other EU Member States, considered as propaganda intertwined with an alleged rule of law crisis in the country. The measure is justified by the need to prevent an escalation of protests in the country, which could lead to polarisation of society and threaten public order. The law would fall within the scope of EU law on the free circulation of Audiovisual Media Services (the EU Audiovisual Media Services Directive). Besides arguing a

97 CJEU case C-64/16 *Associação Sindical dos Juizes Portugueses* and C619/18 *Commission v Poland*.

violation of the obligations under the Directive, CSOs may also reasonably argue that the national law constitutes a violation of their right to freedom of expression and information enshrined in the CFR.

EU law provisions potentially infringed:

- Provisions of the EU Audiovisual Media Services Directive
- Article 11 CFR (Freedom of expression and of information)

Example 7

In the context of a public health emergency, citizens are required to install a software developed by the Health Ministry that determines whether they should be quarantined or allowed into public places for the risk they pose to public health, based on their personal information and details of recent travel. The software tracks users' location and shares data with the police. The police keeps using these data long after the end of the emergency, to arbitrarily disrupt public gatherings and demonstrations. CSOs may argue that this does not comply with EU rules on data protection (in particular, the General Data Protection Regulation and the Data Protection Law Enforcement Directive), in particular as regards purpose limitation, processing and data retention. A violation of the right to freedom of assembly should also be invoked.

EU law provisions potentially infringed:

- Relevant provision of the General Data Protection Regulation and the Data Protection Law Enforcement Directive
- Article 12 CFR (Freedom of assembly)

Example 8

A State seeking candidate status for accession to the EU tables a draft law on "Transparency of Foreign Influence and Registration of Foreign Agents." The declared aim of the draft law is to defend the country from anti-democratic influence coming from external stakeholders and/or illiberal countries.

Under the draft law, all non-commercial legal entities, broadcasters, owners of print media outlets, owners, or users of internet domains (mass media) that receive funding or any other material support from foreign powers must register as "agents of foreign influence" with the relevant public authorities if such support represents over 20% of their total revenue in the previous year.

The obligation to register is equally imposed on anyone that acts as a "political advisor", providing information on the domestic and foreign policies of the country at the request of a foreign individual, corporation or other entity.

Furthermore, the individuals and entities registered as "agents of foreign influence" need to provide: 1) extensive personal information, including their individual/members' address, ID number, details about the covered activity and their relationship with the "foreign power"; 2) regularly keep this information updated with the relevant authorities, which will publish it on a government website.

The draft law also introduces criminal penalties for violation of these requirements.

Even though the State is not currently a member of the EU, as a future candidate for accession it is bound to comply with the EU accession criteria⁹⁸, which include having to implement existing EU law (acquis⁹⁹). Therefore, in this case the following EU provisions would likely to be infringed:

- Article 63 TFEU (freedom of movement of capital)
- Provisions of the EU General Data Protection Regulation
- (Draft) European Media Freedom Act establishing a common framework for media services in the internal market¹⁰⁰
- Article 7 CFR (right to respect for private and family life)
- Article 8 CFR (right to the protection of personal data)
- Article 12 CFR (right to freedom of association)

Example 9

Following rising crime rates across the country, the government of an EU state decides to submit a draft law amending the Criminal Code, the Criminal Procedural Code and the Law regulating Police Activities to the national parliament. The new law is called "Security For All", as it aims at targeting residential areas plagued by criminals and frequented by groups of people that "gather in certain places in the public space and (whose) behaviour and appearance create insecurity among residents and passers-by in the area."

The new provisions allow the local police to issue a ban on gatherings in a defined area to which there is ordinary access (e.g., an outdoor platform at a train station, a car park or another specific location, e.g., a park or road), on the mere basis of the "existence of a group of persons whose presence and appearance creates a sense of insecurity in the area concerned", for example, when the group wears marks or displays other characteristics "that may give the impression that the group is part of or associated with a gang or criminal group". It is up to the police to make an overall professional assessment of the specific situation in the area in question and decide whether less intrusive measures are sufficient to restore a sense of security in the area. The ban would be imposed by means of a decision by the chief commissioner of police or the person authorised by the chief to do so. It would be published and would contain a statement of reasons and an indication of the defined geographical area to which the decision applies and its duration. The ban may apply even only for certain times of the day, may last for a period of up to 30 days and may be extended by up to 30 days at a time. The ban would be additional to the possibility for the police, which already exists, to issue a ban targeted at specific individuals by reason of their own behaviour.

While a "security-creating assembly ban" would not hinder normal movement in the area, violating the ban would be punished by means of a fine of up to 1300 EUR (unless mitigating circumstances apply) or imprisonment for up to 1 year in case of repeated violation.

98 See https://neighbourhood-enlargement.ec.europa.eu/enlargement-policy/glossary/accesion-criteria_en

99 See https://neighbourhood-enlargement.ec.europa.eu/enlargement-policy/glossary/acquis_en

100 E.g., current Article 4, para 1 of the Act establishes that "Media service providers shall have the right to exercise their economic activities in the internal market without restrictions other than those allowed under Union law."

EU law provisions potentially infringed

- Article 2 (Obligation to refrain from any direct or indirect discrimination based on racial or ethnic origin), EU Directive 2000/43/EC (EU Race Equality Directive)
- Articles 12, CFR (Freedom of assembly)
- Article 21, CFR (Non-discrimination)
- Article 49, CFR (Principles of legality and proportionality of criminal offences and penalties)

Example 10

A government adopts a Children Protection Act, whose stated aim is safeguarding children from paedophiles and from exposure to images considered harmful for their development. The law includes, among others, a prohibition to share images and/or information portraying or promoting homosexuality or gender change in school educational materials, TV shows, films or adverts with children under 18 years old. As a result, all audio-visual material portraying such content can be aired only after the new stricter watershed time established by the law and only individuals and organisations listed in an official register can carry out sex education classes in schools and other youth organisations.

The provisions of this law fall within the scope of EU law regarding harmonised standards for audio-visual content and provision of cross-border audio-visual media services and information society services (EU Audiovisual Media Services Directive and e-Commerce Directive).

CSOs may also argue that the way the national law interprets and implements the obligations under those EU laws constitutes a violation of their right to freedom of expression and information enshrined in the EU Charter of Fundamental Rights. Representatives of the LGBTIQ+ community could also argue that the law discriminates them in the grounds of their sexual orientation and identity.

EU law provisions involved and potentially infringed:

- Relevant provisions of EU Audiovisual Media Services Directive
- Relevant provisions of EU e-Commerce Directive
- Article 2 TEU (EU fundamental values)
- Article 56 TFEU (Freedom to provide cross-border services)
- Article 28, TFEU (Freedom to provide goods)
- Article 11 CFR (Freedom of expression and information and media pluralism)
- Article 21 (1) CFR (Non-discrimination including on grounds of sexual orientation and gender \ identity)

Example 11

An EU Member State adopts a new anti-terrorism law that introduces the new crime of creation, leadership, financing, promotion or support in any other form of a “religiously motivated extremist association” or “religiously motivated extremist acts”. A “religiously motivated extremist association” is defined as one that “continually attempts to replace, in an unlawful manner, the essential elements of the democratic constitutional order of the Republic with a social and state order based exclusively on religion, by preventing the enforcement of laws, ordinances or other state decisions or by arrogating to itself sovereign rights based on religion or attempting to enforce such rights.”

The punishment amounts to up to two years of imprisonment for the founder or leader of such an association – where such a person, or another member of the association, has carried out or contributed to a serious illegal act motivated by religious extremism – and up to one year of imprisonment or a fine for anyone promoting, financing or supporting in any other substantial manner acts motivated by religious extremism.

EU law provisions potentially infringed:

- Directive (EU) 541/2017 on combating terrorism, as regards, in particular, the criminalisation of offences relating to a terrorist group and offences related to terrorist activities, such as public provocation to commit a terrorist offence and terrorist financing
- Directive (EU) 2018/1673 on combating money laundering by criminal law, as explicitly referred to in Article 6 of the TeBG, as regards provisions concerning offences related to money laundering and terrorist financing
- Article 10, CFR (Freedom of thought, conscience and religion)
- Article 11, CFR (Freedom of expression and information)
- Article 12, CFR (Freedom of Assembly and Association)
- Article 49, CFR (Principles of legality and proportionality of criminal offences and penalties)

II.6. The national law adopted by a EU Member State gives rise to a situation that would normally be prohibited under EU law, so it must be justified according to EU law

Even when an EU Member State adopts a law within its sovereign competence, the law may give rise to situations prohibited by EU law. This can happen in many circumstances, e.g., each time national laws qualify as:

- Deprivation of EU citizens’ genuine enjoyment of the substance of the rights that they have as EU citizens (Article 20, TFEU);¹⁰¹

101 CJEU in C34/09, *Zambrano Ruiz v Belgium*, 8 March 2011, para 42.

- Restrictions on the free movement of persons across the EU (Article 21, TFEU), including workers (Article 45, TFEU);
- Restrictions on the right of establishment in a Member State other than their own (Article 49 TFEU);
- Restrictions on the freedom to provide services in a Member State other than their own (Articles 56 TFEU);
- Restrictions on the free movement of capital between EU Member States and between EU Member States and third countries (Article 63, TFEU);
- Quantitative restrictions on imports/exports between EU Member States and all measures having equivalent effect (Articles 34–37, TFEU);

When national measures are potentially in conflict with EU law or EU core freedoms/principles, state policymakers are required to demonstrate that their measures are justified because they fall under an exception specifically provided by EU law or they pursue an objective of general interest. In other words, when adopting national measures in breach of EU laws, Member States must rely on a justified derogation by virtue of EU law. Usually, such derogations are permitted under EU primary and secondary laws if they are necessary and proportionate to pursue a legitimate aim on the grounds of overriding considerations of general interests (for example, for public policy, public security and public health reasons).¹⁰² In this context, it is important to check if such derogations to EU law are compatible with the fundamental rights of the EU enshrined in the CFR: if they are not, they are never justifiable.¹⁰³

Example 1

A Member State introduces a new law on the provision of educational activities by foreign institutions, which requires that the educational curriculum obtains prior approval from the Education Ministry in cases where it relates to “civic education”. The reason behind the law is the need to protect the integrity of the state. The notion of “civic education” is interpreted very broadly, and includes any issues related to cultural and political identity, constitutional principles and values and the functioning of democracy. The Ministry has broad discretion in assessing the curricula, for which the law fails to set out any clear criteria. An international CSO providing public education on human rights, with its main offices in another EU Member State, decides to open a branch in that Member State. However, the lack of approval by the Education Ministry of its educational curriculum prevents it from doing so. The CSO may well argue that national rules on prior approval of the curricula are a discriminatory restriction to its EU freedom of establishment, which are disproportionate in the light of the objective pursued. In this context, it may also invoke the violation of the right to freedom of expression and of the principle of non-discrimination on grounds of political or any other opinion.

102 CJEU, Joined cases C-52/16 and C-113/16 *Horváth*, para. 78; C-318/07 *Persche against Finanzamt Lüdenscheid*, 27 January 2009, para 41.

103 CJEU, *Berlington Hungary Tanácsadó és Szolgáltató kft and Others v. Magyar Állam*, 11 June 2015, para 74; CJEU, *Anonymi Geniki Etairia Tsimenton Iraklis (AGET Iraklis)*.

EU law provisions potentially infringed:

- Article 49 TFEU (Freedom of establishment)
- Article 11 CFR (Freedom of expression and of information)
- Article 21(1) CFR (Non discrimination, including on grounds of political or any other opinion).

Example 2

An EU Member State proposes a law that requires for CSOs to be granted legal personality that at least three fifths of the members of their board must be national citizens. The provisions of this law constitute a discriminatory restriction of the freedom of establishment of foreign EU citizens in that Member States, therefore, they violate Article 49, TFEU. They may also be regarded as violating the right to freedom of association as enshrined in the CFR.¹⁰⁴

EU law provisions potentially infringed:

- Article 49 TFEU (right of establishment)
- Article 12 CFR (Freedom of assembly and association).

Example 3

A national taxation law in an EU Member State allows income tax deductions on donations made to public benefit organisations but the deductions do not apply when the donations are made to foreign organisations, even when such organisations meet all the requirements stipulated in the taxation law. This different treatment of donations to foreign CSOs is justified by the national law as necessary to offset the burden of additional administration for checking donations to CSOs in other Member States. However, this provision violates EU law as it is a discriminatory restriction having the effect of dissuading donations to foreign entities and therefore the free movement of capital within the EU (Article 63 TFEU), which also applies to in-kind as well as monetary donations.¹⁰⁵ The national law may also be regarded as violating the right to freedom of association, which includes the effective ability to seek and use funding.

EU law provisions potentially infringed:

- Article 63 TFEU (free movement of capital)
- Article 12 CFR (Freedom of assembly and association).

Example 4

A Member State proposes or adopts a law whose official purpose is to ensure the transparency of organisations that receive financial support from abroad. The law imposes additional requirements of registration, reporting and disclosure of personal data of donors and beneficiaries only on CSOs that

¹⁰⁴ See, e.g., CJEU, C-172/98, *Commission v Belgium*.

¹⁰⁵ CJEU, *Persche*, para 63.

receive direct or indirect foreign financial support exceeding a certain amount. Failure to comply is sanctioned by penalties. The Member State argues that these additional requirements are justified by overriding reasons of public policy. However, it may be reasonably argued that the provisions of this law are likely to dissuade donations from abroad therefore qualify as a restriction to the free movement of capital under Article 63, TFEU. Such restriction constitutes the medium to infringe fundamental rights enshrined in the CFR, in particular the CSOs' right to freedom of association and the donors right to privacy and protection of personal data.¹⁰⁶

EU law provisions potentially infringed:

- Article 63 TFEU (free movement of capital)
- Article 7 CFR (Respect for Private and Family Life)
- Article 8 CFR (Protection of Personal Data)
- Article 12 CFR (Freedom of Assembly and Association).

Example 5

A Member State adopts a law that criminalises national or international CSOs' activities providing pro bono legal assistance to undocumented migrants wishing to apply for asylum in the country. It may be argued that these provisions are covered by EU law regulating restrictions on freedom of EU nationals to provide services within the EU (Article 56, TFEU). They may also be regarded as coming within the scope of other pieces of EU law, such as the EU Asylum Procedures Directive which establishes a right to legal assistance and representation for asylum seekers at all stages of the procedure and requires Member States to ensure that organisations and persons providing advice and counselling to applicants have effective access to applicants (Article 8(2) and 22 of the Directive). Insofar as it comes within the scope of EU law, such a national law could also be challenged as to its compatibility with the CFR and in particular the CSOs' right to freedom of association, which includes the ability to carry out their legitimate tasks, and the migrants' right to an effective remedy and right to asylum.

EU law provisions potentially infringed:

- Article 56 TFEU (freedom to provide services)
- Provisions of the EU Asylum Procedures Directive
- Article 12 CFR (Freedom of Assembly and Association)
- Article 18 CFR (Right to asylum) Article 47 CFR (Right to an Effective Remedy and to a Fair Trial).

Example 6

A Member State decides to broaden the scope of its criminal offence on the "facilitation of illegal migration", including any provision of material aid and of information to migrants at borders. It also introduces systematic controls near border zones and allow law enforcement authorities to ban with immediate effect any person suspected of facilitating illegal migration as defined by national

¹⁰⁶ C-78/18 *European Commission v. Hungary* (still pending at the time of writing): <http://curia.europa.eu/juris/document/document.jsf?docid=203062&doclang=en> See in this respect the opinion of the Advocate General delivered on 14 January 2020.

law, based on their preliminary assessment, from approaching border zones and crossing points in the whole territory of the country, including borders shared with other EU Member States, until their acquittal of the offence by a judicial authority. CSOs providing humanitarian assistance to migrants may well argue that the preventative restriction provided for by national law is an obstacle to their right of free movement as EU citizens, and it is disproportionate in light of the objective pursued. They may also reasonably claim the violation of fundamental rights under the CFR, in particular to freedom to provide information, the presumption of innocence and the principle of proportionality of criminal offences and penalties.

EU law provisions potentially infringed:

- Article 21 TFEU (free movement of persons) or provisions of the EU Free Movement Directive
- Article 11 CFR (freedom to provide information)
- Article 48(1) CFR (presumption of innocence)
- Article 49(3) CFR (proportionality of criminal offences and penalties).

Example 7

A Member State adopts an emergency and public security decree at a time of nation-wide social protests and anti-government rallies, which imposes obligations on citizens from other EU countries visiting the country to notify the local police authorities of their intention to participate in rallies and marches organised by either national or international activists' organisations. Failure to comply is punished with administrative fines. It may be argued that these provisions fall under the scope of EU law on freedom of movement of EU citizens within the EU (Article 21, TFEU), since this additional burden may have a chilling effect on their decision to go to the country for fear of being caught in the middle of a spontaneous rally/march, being asked for documents and fined for failing to notify their participation. Furthermore, such provisions would unduly discriminate between national and foreign protesters which may be deemed contrary to the prohibition of discrimination on grounds of nationality (Article 18 TFEU) and curtail the exercise of the freedom of peaceful assembly enshrined in the CFR.

EU law provisions potentially infringed:

- Free movement of EU citizens (Article 21 TFEU)
- Non-discrimination on grounds of nationality (Article 18 TFEU)
- Article 12 CFR (Freedom of Assembly and Association).

Example 8

During a state of emergency, a Member State adopts a law which punishes as a criminal offence, with terms of imprisonment of up to 7 years, anyone who publicizes what may be viewed as untrue or distorted information capable of alarming or agitating the public. The formulation of the criminal offence is very vague, leaving prosecutors a wide margin of discretion. In addition, the state of emergency has no cut-off date. Activists, journalist and media outlets may well argue that this has a severe chilling effect on publishing and broadcasting in the State concerned, and thus qualifies as

an obstacle to their freedom to provide services and their right to establishment under EU law. They could invoke that such measure is disproportionate to the public policy aim pursued. In this context, a violation of their fundamental rights should also be invoked, in particular freedom of expression, freedom of information, media pluralism, the need for criminal offences to be clear and unambiguous and the principle of proportionality of criminal offences and penalties.

EU law provisions potentially infringed:

- Freedom to provide services (Article 56 TFEU)
- Freedom of establishment (Article 49 TFEU)
- Article 11 CFR (Freedom of expression, media pluralism, freedom of information)
- Article 49 CFR (principle of legality and proportionality of criminal offences and penalties).

Example 9

In the aftermath of a public health emergency, a Member State adopts a law by which any foreign person willing to enter the country to take up employment in entities working with groups at risk must apply for a special work permit. The decision on authorizing entry belongs to the immigration authorities in consultation with the health ministry, but no specific criteria are set in the law and no possibility to challenge such decision is provided. Groups at risk include homeless people and persons with no fixed abode. CSOs providing assistance and advocating for the rights of groups such as homeless people, undocumented migrants and Roma may argue that such measure is a restriction to free movement of workers, particularly impacting non-profit organisations working on marginalised groups. They may contest the necessity and proportionality of such measure and the absence of an effective remedy, also claiming in that context a restriction on their right to freedom of association.

EU law provisions potentially infringed:

- Relevant provisions of Regulation 492/2011 on freedom of movement for workers or Article 45 TFEU
- Article 11 CFR (Freedom of association)
- Article 47 CFR (Right to an effective remedy).

Example 10

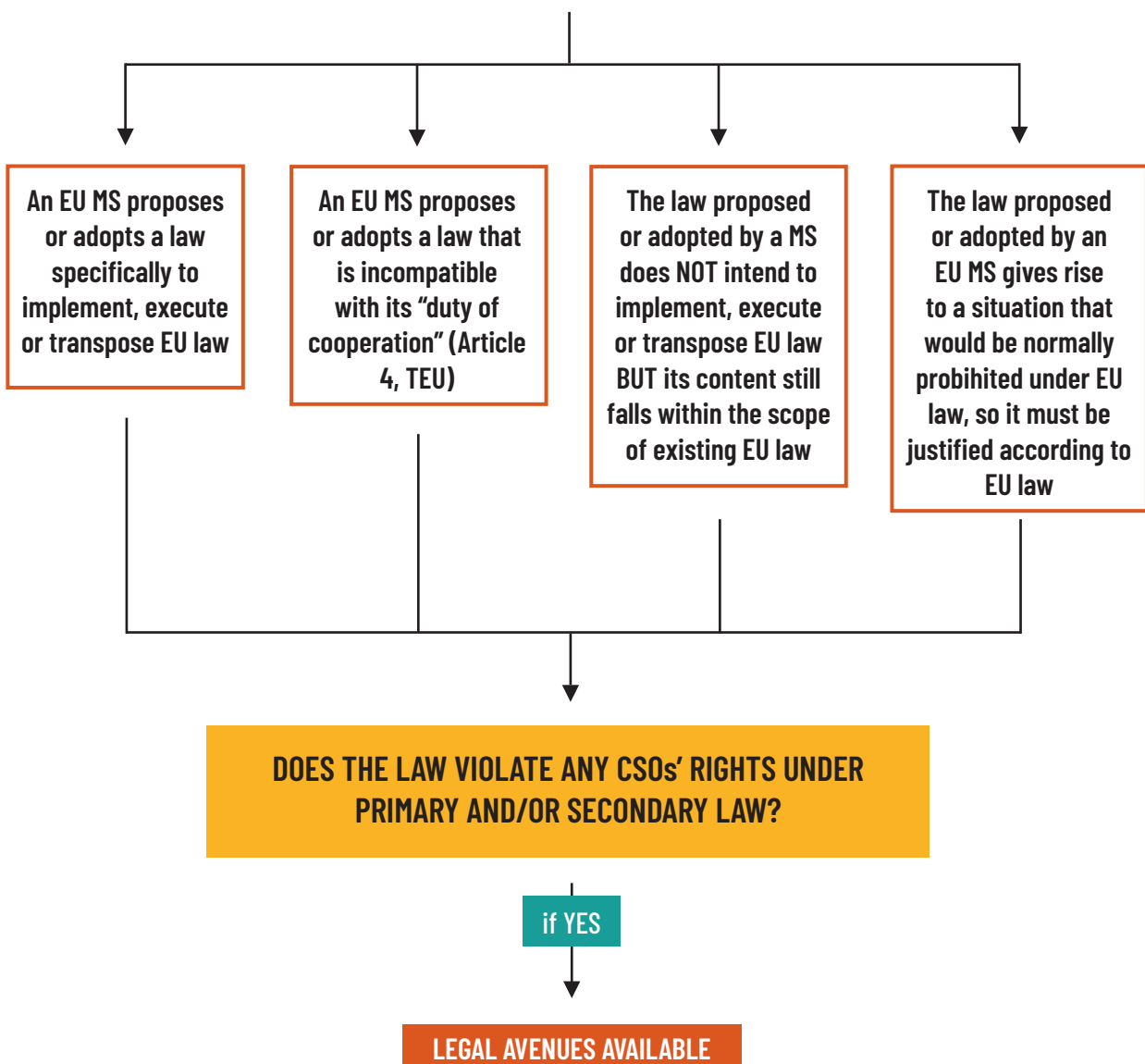
As part of a series of measures adopted in the aftermath of a public health emergency, a Member State provides that anyone returning from abroad after having participated to a public demonstration of more than 10 persons is to be automatically quarantined for up to 40 days. Decision on quarantine is up to the discretion of border officials in consultation with the Health Ministry. There is no possibility to challenge such decision. Failure to declare participation to a public demonstration can be punished with terms of imprisonment of up to 7 years. CSOs and activists may argue that the fear of being quarantined and of being jailed, coupled with the vagueness of the provision and the impossibility to challenge quarantine decisions dissuades EU citizens from exercising their right to free movement in the State concerned; it may also dissuade citizens of that Member State to come back there after having exercised their right to free movement. The necessity and proportionality

of such obstacle to free movement should be contested in this context, given the absence of any risk based assessment. The impact on the fundamental right to freedom of assembly should also be invoked.

EU law provisions potentially infringed:

- Free movement of EU citizens (relevant provisions of the Free Movement Directive or Article 21 TFEU)
- Article 12 CFR (Freedom of assembly)
- Article 47 CFR (Right to an effective remedy)
- Article 49 CFR (principle of legality and proportionality of criminal offences and penalties).

EXAMPLES OF NATIONAL LAWS GOVERNED BY EU LAW



PART III - How to enforce your CSO's EU rights against national measures

If you think that a national law or measure violates CSOs' rights and freedoms under EU law, you have different options to try and challenge it.

III.1 Litigation before national courts

When a national measure is deemed incompatible with EU law, national courts have the main responsibility for the enforcement and protection of rights under EU law, as established by the EU treaties (Article 19(1)TEU). **EU law can be directly invoked before national courts.** On the contrary, **the EU treaties do not provide the possibility for individuals or organisations to file a case to the CJEU to challenge national laws deemed incompatible with EU law.**

The first option you may therefore consider, if you have the resources and capacity to litigate, is to try and enforce your CSO's EU rights and freedoms using the judicial remedies available in the country where your organisation is established and/or exercise activities. While describing existing avenues for redress and remedies existing in each national system falls outside the scope of the present Handbook, in this section we will give you an idea of what litigating EU law means in practice.

III.1.1. Purpose of taking action

The action will have to be brought according to the relevant national rules of procedure, including as regards the competence of courts. National Judges can assess the compatibility of national law with EU law and shall, in the event of an incompatibility, enforce EU law over national law, disapplying national provisions and enforcing EU provisions whose content and scope is sufficiently clear. They also have the power, where appropriate, to order national authorities to compensate individuals for losses they have suffered due to a breach of EU law

In practical terms, taking action before a competent national court is the only way to:

- where possible under national procedural rules, **obtain the modification or repeal of the national law** contrary to EU law;
- obtain the **suspension or annulment of a decision taken by a public authority** contrary to EU law, and obtain that the competent public authority takes a **new decision ensuring compliance with EU law**;
- obtain **compensation for damage**.

III.1.2 Prompting the national court to ask the CJEU for a preliminary ruling (Article 267 TFEU)

All national courts can seek guidance on the interpretation and application of EU law from the CJEU through a mechanism called preliminary ruling procedure¹⁰⁷. Where a national court believes that a matter before it falls within the scope of EU law, it may ask the CJEU for a **preliminary ruling to provide clarification on the interpretation or validity of EU law**. This possibility **becomes an obligation for the national court** where there is no judicial remedy possible against the national court ruling. The preliminary ruling, issued in the form of a court judgement by the CJEU, is directly binding on the referring national court.

As party (or, if national rules allow, as intervenient) in judicial proceedings, **you may prompt the national court to make a request for a preliminary ruling**. In doing so, you will need to provide **indications that EU law should be interpreted in a way that shows that the national law 1) is incompatible with EU law or 2) should not be interpreted or applied in a way harmful to CSOs**.

You should bear in mind that the CJEU only has the competence to interpret EU law and it **has no mandate to interpret national law or assess its compatibility with EU law**. Once the CJEU delivers its preliminary ruling, it will therefore be up to the national court to assess whether the national law is compatible with EU law, as interpreted by the CJEU, and what are the concrete consequences for the case before it.

The purpose of the preliminary ruling procedure is to ensure uniform interpretation of EU law but the procedure is also of importance in **protecting individual rights**. It is argued that the instrument of the preliminary ruling compensates to a certain extent for the impossibility for individuals to directly file actions to challenge the compatibility of national law with EU law before the CJEU and is thus crucial for the effective judicial protection of rights under EU law. However, national judges and courts must also have the appetite to refer your case to the CJEU since you as a party can request, but not oblige, the court to refer a case. In fact, national courts always maintain **quite a broad margin of discretion** as to assessing the need and opportunity to refer a matter to the CJEU for a preliminary ruling. In **very exceptional cases**, a national court which refuses to make a preliminary reference to the CJEU might be regarded as **violating the obligation to provide for effective judicial protection** – a violation which has never been established to date¹⁰⁸ but which may in theory give rise to a right to compensation.¹⁰⁹

107 Article 267 TFEU.

108 See ECtHR case-law on the matter: European Court of Human Rights, judgment of 20 September 2011 in the case of Ullens de Schooten and Rezabek v Belgium (applications nos. 3989/07 and 38353/07) and judgement of 8 April 2014 in the case of *Dhahbi v. Italy* (application no. 17120/09).

109 See CJEU case C-173/03, *Traghetti del Mediterraneo SpA v Repubblica italiana*.

III.2. Getting competent national bodies to take up the matter

If your organisation does not have the capacity or resources to directly litigate the matter, you may consider raising the issue with national bodies, which may take up the matter by approaching national authorities or through litigation, if their mandate allows. Here is a brief overview of national bodies which may be of help.

III.2.1. National Human Rights Institutions

National Human Rights Institutions (NHRIs) are state-mandated bodies, independent of government, with a broad constitutional or legal mandate to promote and protect the full range of human rights – including freedom of association, of assembly and of expression – at the national level. They can take different forms, including ombuds institutions, human rights commissions and institutes.¹¹⁰

While their role, functions and legal basis are defined in national law, NHRIs are accredited with an internationally accepted quality label, on the basis of their compliance with the UN Paris Principles¹¹¹. These principles lay out some of the basic NHRIs' functions.

Many of the functions NHRIs are supposed to carry out can be of great help to CSOs when their rights and freedoms are violated, including:

- Advising on the compliance of national laws and practices with all international human rights norms, including the CFR;
- Advising government, parliament and other public bodies to address core human rights concerns: this may include, for example, concerns over the compatibility with fundamental rights of national legislation, including at its draft stage;
- Providing support for individuals to enforce their rights, including their fundamental rights under the CFR, through legal assistance;
- Reporting to the public, Parliament and international bodies, including at the EU level, on the situation of human rights on the ground – including as regards CSOs' rights and freedoms.

Some NHRIs also provide support for individuals to enforce their rights through complaints handling, and some engage in strategic litigation.

NHRIs are mandated to cooperate and support CSOs and rights defenders and their services are normally free of charge. The European Network of National Human Rights Institutions (ENNHRI) may provide expertise and advice on how to cooperate with NHRIs across Europe.¹¹²

110 You can learn more about National Human Rights Institutions in Europe at <http://ennhri.org/about-nhris/>.

111 <http://ennhri.org/about-nhris/un-paris-principles-and-accreditation/>.

112 <http://ennhri.org>.

III.2.2. National ombudspersons

Ombudsmen are independent and impartial persons, established by constitution or law, who deal with complaints against public authorities of the Member States at national or regional level.

National law established the grounds on which an ombudsman can act. These would normally include: violation of rights, including fundamental rights; other unlawful behaviour, including failure to respect general principles of law; and failure to act in accordance with principles of good administration. Complaints may indeed relate to activities and measures which come within the scope of EU law. You may therefore directly address to your national or regional ombudsman a complaint concerning the national law or measure which amounts in your view to a violation of your rights and freedoms under EU law. Services of ombudsmen are normally free of charge.

The powers and responsibilities of different ombudsmen are also set in national law and vary widely from country to country. In general terms, ombudsmen are mandated to investigate and assess complaints, and take action as appropriate according to what is possible under their mandate. Some may just provide their opinions, others may propose remedies, which may include, for example, prompting public authorities to review a decision, change a certain practice, give an apology, or provide financial compensation. Unlike a court, an ombudsman does not make legally binding decisions, but the public authorities usually follow the ombudsman's recommendations. If they do not, the ombudsman can, for example by notifying Parliament, draw political and public attention to the case.

A network of European Ombudsmen exists¹¹³, which helps ombudsmen to better safeguard the rights and freedoms of individuals and organisations under EU law, including by advising them on the relevant provisions of EU law, including the CFR, and how to interpret them in relation to specific cases.

III.2.3. National equality bodies

Equality bodies are public organisations legally mandated under EU law to assist victims of discrimination, monitoring and reporting on discrimination issues, and contributing to raising awareness of rights and equality. They are required to do so in relation to one, some, or all of the grounds of discrimination covered by EU law – gender, race and ethnicity, age, sexual orientation, religion or belief, and disability.

Equality bodies may receive complaints over cases of discrimination, including situations falling under EU law. You may therefore turn to the national equality body, if you believe that the national legislation or measure affecting CSOs' rights and freedoms is discriminatory.

When taking action on a complaint, equality bodies shall investigate the case

¹¹³ <https://www.ombudsman.europa.eu/en/european-network-of-ombudsmen/members/all-members>. The site also contains an interactive guide which can be used to find out which ombudsman or other body is best placed to deal with a complaint, or to answer a request for information.

and provide information to the potential victim, and in some cases legal support. They may, on the basis of their assessment, engage with public bodies and provide recommendations to foster non-discriminatory practices and ensure awareness and compliance with equal treatment legislation.

Equality bodies cooperate and support CSOs and rights defenders and their services are normally free of charge. The European Network of Equality Bodies (Equinet) may provide expertise and advice on how to cooperate with equality bodies across Europe.¹¹⁴

III.2.4. Other specialised bodies

Depending on the matter concerned by the national law or measure which you deem interfering with CSOs' rights and freedoms under EU law, other bodies at national level may provide you with assistance. These include, among others, national data protection authorities¹¹⁵, national competition authorities¹¹⁶ and national consumer bodies¹¹⁷.

III.3. Triggering action by EU institutions

Complaint tools and legal remedies are also available at EU level to help you enforce your CSOs' EU rights and freedoms over national law and practices.

III.3.1. How to bring an issue to the attention of EU institutions

There are two main ways to bring a possible violation by a Member States of rights and freedoms under EU law to the attention of EU institutions.

Petitions to the European Parliament

Under the EU treaties (Article 227 TFEU), any individual, organisation or association has the right to submit a petition to the European Parliament about a subject which comes within the EU's fields of activity and which affects them directly.

You may therefore consider to submit a petition (by post or online via the European Parliament's website¹¹⁸) to claim the violation of your EU rights and freedoms as a CSO. The petition does not necessarily have to raise or illustrate alleged violations of EU law from a legal point of view: it may simply present a request, a complaint or observation concerning the application of EU law or an appeal to the European Parliament to adopt a position on a specific matter. This tool can be useful also for matters which may affect CSOs' rights and freedoms

114 <https://equineteurope.org>.

115 https://edpb.europa.eu/about-edpb/board/members_en.

116 https://ec.europa.eu/competition/ecn/competition_authorities.html.

117 <https://eba.europa.eu/consumer-corner/national-competent-authorities-for-consumer-protection>.

118 <https://www.europarl.europa.eu/at-your-service/en/be-heard/petitions>.

without necessarily giving rise to clear-cut violations of EU provisions (for example, general restrictions on civic space, including in terms of funding, right to participation, attacks, threats and harassment).

Your petition is examined by a dedicated committee on petitions (PETI) which assesses whether the matter you raise has a connection with EU law. If so, the committee has different ways to call attention to what it considers an infringement of EU rights by a Member State, including by inviting the European Commission to take a position on the matter, and take any necessary follow-up action – including launching an infringement procedure against the Member State in question (see below).

Complaints to the European Commission

You can contact the European Commission about any national measure (law, regulation or administrative action), or absence of measure or practice by a Member State that you think is against EU law.

You may therefore directly submit a complaint to the European Commission (by post or online via a standardised template¹¹⁹), to claim the violation of your EU rights and freedoms as a CSO. This Handbook contains an Annex, which provides you with some practical guidance on how to submit your complaint.

The competent service of the European Commission will assess whether your complaints concerns, *prima facie*, a possible **breach of EU law by authorities of a Member State, deriving from a provision of national law, a regulatory measure of general application or a generalised practice**. Only in such case, the European Commission will follow up on your complaint and open an investigation on the Member State concerned which may lead to the launch of an infringement procedure (see below).

You should, however, bear in mind that, even if it considers that a breach of EU law has occurred, **the European Commission may decide not to launch an infringement procedure**. There can be different reasons why it may decide not to take action. First, it may consider that your case can be better dealt with by other mechanisms at EU and national level. This could happen in particular to individual cases of incorrect application not raising issues of wider principle, where there is insufficient evidence of a general practice, or a problem of compliance of national legislation with EU law or of a systematic failure to comply with EU law. In such cases, if effective legal protection is available, the EC will likely direct complainants to the national level. Secondly, it may be that the matter you raised only involve private individuals or bodies, and do not concern action by public authorities – in that case you will have to try and take it up at the national level.

Under the principle of good administration, the European Commission is under an obligation to provide you with a reply in the language of your complaint explaining the action taken to follow up on your complaint, if any, or the reasons for which it decided not to follow up.

¹¹⁹ https://ec.europa.eu/assets/sg/report-a-breach/complaints_en/

III.3.2. The role of the European Ombudsman

The European Ombudsman is mandated by the EU treaties (Articles 24 and 228 TFEU) to investigate complaints from individuals and organisations about maladministration by the institutions, bodies and agencies of the European Union. Cases of maladministration may concern failure on the part of the EU institution or body to act in accordance with the law or the principles of good administration, or in violation of fundamental rights. Maladministration can include administrative irregularities, unfairness, discrimination or the abuse of power, but also failure to reply, or the refusal or unnecessary delay in granting access to information in the public interest.

You may, for example, contact the European Ombudsman if you approached the European Parliament or the European Commission to claim the violation of your CSO's EU rights and freedoms and consider that they have not dealt with your request properly or in a transparent manner.

Where the Ombudsman establishes an instance of maladministration, she refers the matter to the institution, body, office or agency concerned, which shall have a period of three months in which to inform her of its views. On that basis, the Ombudsman sets out definite findings in a report which is forwarded to the European Parliament and the institution, body, office or agency concerned. The person or organisation lodging the complaint is informed of the outcome of such inquiries.

III.3.3. Infringement proceedings against a Member State which violated EU law

The European Commission is the institution tasked of monitoring and enforcing EU law against Member States. According to the EU treaties, the European Commission may take legal action – an infringement procedure – against an EU country that fails to implement EU law, including the CFR. This procedure may ultimately result in the European Commission referring the matter to the CJEU, which would be called to establish whether there has been an infringement and may, in certain cases, impose financial penalties on the Member State in question.

The European Commission can identify possible infringements of EU law on the basis of its own investigations or following complaints or petitions from individuals and organisations. The European Commission has full discretionary power in deciding which cases to pursue and at which moment: among the factors taken into account, the Commission normally looks at the impact of an infringement on the attainment of important EU policy objectives.¹²⁰

The procedure is structured in different stages (see Annex at the end of the Handbook. After having identified a possible infringement, the Commission will normally start an investigation and may for that purpose enter in a **dialogue with the authorities** of the concerned Member State.

¹²⁰ European Commission Communication "EU law: Better results through better application", 2017, Available at: [https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52017XC0119\(01\)&from=EN](https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52017XC0119(01)&from=EN).

If the investigation confirms a possible infringement and the dialogue is not successful in achieving a solution to the issue, the European Commission may launch a **formal infringement procedure**. The procedure follows a number of steps laid out in the EU treaties, each ending with a formal decision including a request to comply, to which the Member States is required to respond. There is no fixed timeframe for this procedure.

If once the procedure arrives at the last stage, the country still refuses to rectify the violation, the European Commission may decide to **refer the matter to the CJEU**. In doing so, it may request, under certain conditions, **interim measures** to suspend the effect of the national law or measure and/or ask the CJEU to **deal with the case expeditiously** showing objective reasons for urgency.

The CJEU will examine the issue and rule on whether the Member States has breached EU law. The **CJEU ruling** is binding and national authorities must take action to comply with it. If, despite the CJEU judgment, the country still does not rectify the situation, the European Commission may refer the country back to the CJEU and ask for the imposition of **financial penalties**, which can be either a lump sum and/or a daily payment until the breach is remedied.

Most cases are settled before being referred to the CJEU; however, **the phases preceding the referral to the CJEU are protected by a general clause of confidentiality**, so that very little information about the infringement and the Member State's position is made public.

Acting on complaints submitted by a number of CSOs, the European Commission opened infringement proceedings and ultimately referred **Hungary** to the CJEU in relation to two laws affecting CSOs' rights and freedoms: the 2017 law on the transparency of foreign funded organisations¹²¹ and the 2018 law criminalising activities in support of asylum seekers¹²².

The European Commission also referred **Poland** to the CJEU for various breaches of the principle of judicial independence caused by the Polish law on Ordinary Courts, the law on the Supreme Court and the new disciplinary regime for Polish judges.¹²³ In one instance, the Commission asked and obtained from the CJEU the application of interim measures. Measures trying to undermine judicial independence and subject judges to political control hinder any effective judicial protection of EU rights, including CSOs' rights and freedoms.

III.3.4. Effects of a CJEU ruling on a Member State's infringement

There are various factors to take into account in relation to the effects of a CJEU ruling on a Member State's infringement.

121 https://ec.europa.eu/commission/presscorner/detail/en/IP_17_5003.

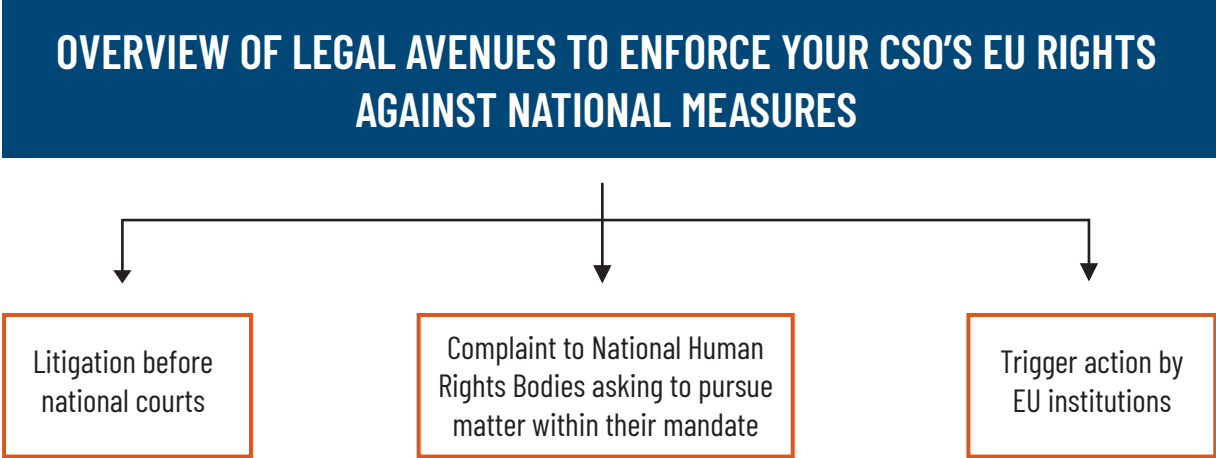
122 https://ec.europa.eu/commission/presscorner/detail/en/IP_19_4260.

123 https://ec.europa.eu/commission/presscorner/detail/en/IP_19_6033.

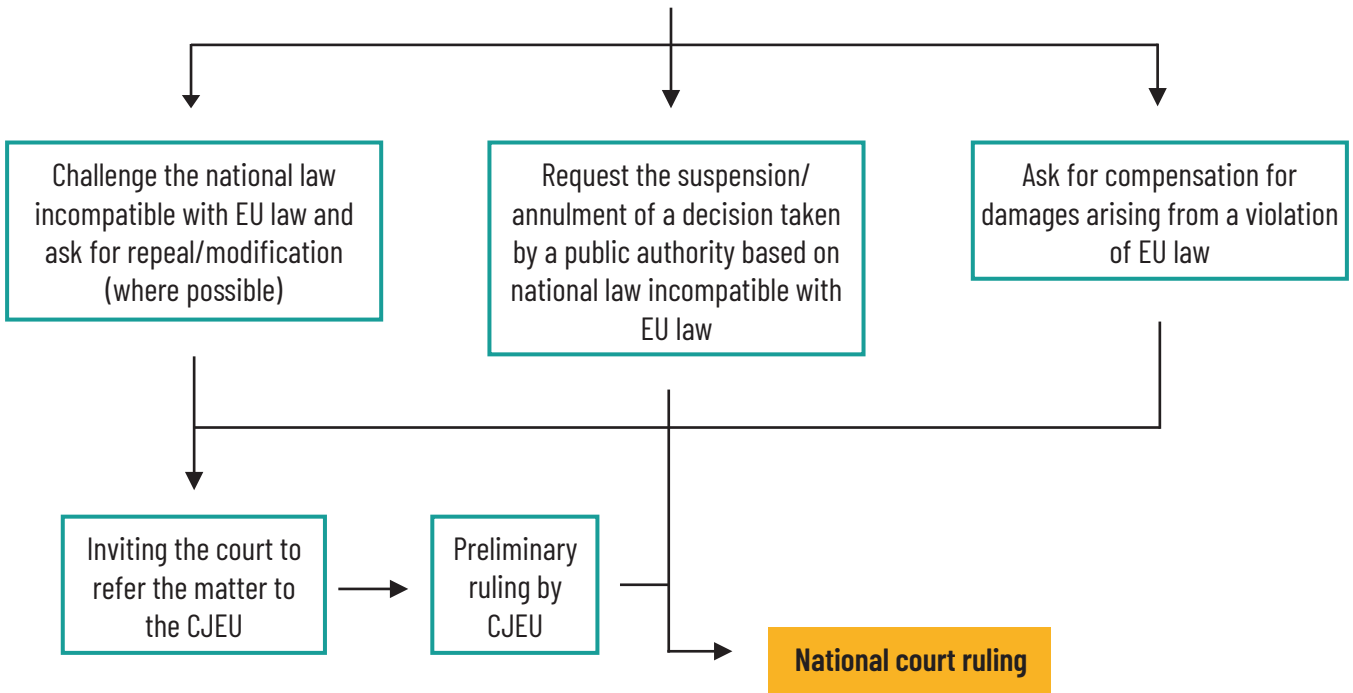
One issue is the length of proceedings: while the process to launch an infringement procedure is straightforward and can be relatively quick, if the case moves to the CJEU it may take several years to be ruled on.

Furthermore, judgments of the CJEU differ from those of national courts. The CJEU judgment states whether there has been an infringement of EU law. **The CJEU cannot annul a national provision** which is incompatible with EU law, nor force a national administration to respond to the request of an individual or organisation, nor order the country to pay damages to an individual or an organisation adversely affected by an infringement of EU law.

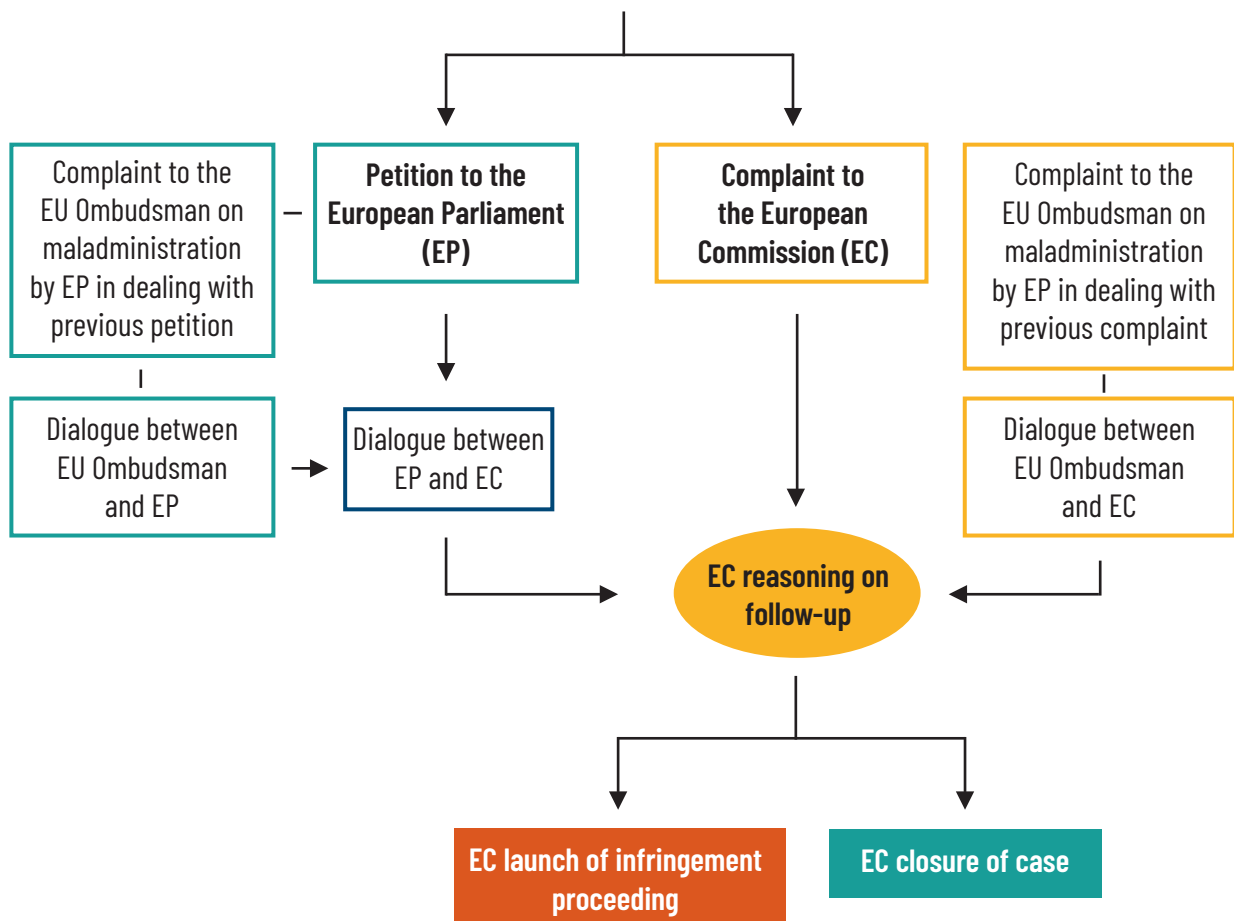
This means that, even if your petition or complaint raising a violation of your CSO's EU rights and freedoms lead to an infringement against the Member State in question, which is ultimately referred to the CJEU which rules against the Member State, **it is the Member State who will have to take the necessary actions to remedy the violation.** This also means that, **to seek compensation, you may rely on the CJEU judgement but you will still have to take a case to the competent national court.**



LITIGATION BEFORE NATIONAL COURTS



TRIGGER ACTION BY EU INSTITUTIONS



PART IV - Useful resources on EU law and standards

IV.1. Getting advice on EU law and how to enforce it

If you are not an expert in EU law, you may find it difficult to find out exactly which EU law may be breached by a certain national measure, and how to best take the issue forward. Besides seeking legal advice from a EU law expert, you may check online services such as Your Europe Advice or SOLVIT for some quick and informal advice and assistance in your own language, or consult the e-Justice portal.

Your Europe Advice can offer legal advice on your EU rights in matters related to EU law. It can clarify how the law applies in your particular case, as well as explain how you can exercise your EU rights: https://europa.eu/youreurope/advice/index_en.htm

SOLVIT is a service provided by the national administration, which deals with cross-border problems related to the misapplication of EU law by national public administrations. It is useful where it appears feasible and opportune to try and find a solution with the responsible authority: https://ec.europa.eu/solvit/index_en.htm

The European e-Justice portal offers links to laws and practices falling within the scope of EU law in all EU Member States. It also provides information on existing legal remedies and includes user-friendly forms for various judicial proceedings: <https://e-justice.europa.eu/home.do?action=home>

IV.2. Accessing EU law

The complete texts of EU treaties, secondary legislation, case law and legislative proposals can be accessed freely via dedicated online databases.

EUR-Lex is a freely accessible online database of EU Law. It provides the official and most comprehensive access to all EU legal documents in all of the EU's 24 official languages and is updated daily. On EUR-Lex you may access:

- the full text of the EU treaties: <https://eur-lex.europa.eu/collection/eu-law/treaties/treaties-force.html>
- the full text of the CFR: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:12016P/TXT>
- EU secondary legislation: <https://eur-lex.europa.eu/collection/eu-law/legislation/recent.html>
- EU case-law: <https://eur-lex.europa.eu/collection/eu-law/eu-case-law.html>
- References to and, for those Member States that agreed, also texts of national transposition measures: <https://eur-lex.europa.eu/collection/n-law/mne.html>
- References to national case-law related to EU law: <https://eur-lex.europa.eu/collection/n-law/n-case-law.html>

CURIA is the website of the CJEU: https://curia.europa.eu/jcms/jcms/Jo1_6308/. It provides daily press-releases on the CJEU's most important rulings and also contains a freely accessible database of the case law of the CJEU: <http://curia.europa.eu/juris/recherche.jsf?language=en>.

IV.3. Understanding EU law

Securing up-to-date information on how EU law is to be interpreted and applied can be very challenging. A few resources can help you navigate this complex legal system.

Reports on monitoring the application of EU law are published annually by the European Commission, containing useful information on inquiries and infringement proceedings launched against the Member States: https://ec.europa.eu/info/publications/annual-reports-monitoring-application-eu-law_en

A number of resources and tools can help **better understanding the CFR** and its impact on EU and national law.

Charterpedia, an online tool developed by the EU Agency for Fundamental Rights (FRA) which provides easy-to-access information about the Charter, its provisions and their interpretation: <https://fra.europa.eu/en/charterpedia>

Country-sheets developed by the FRA illustrating the impact of the CFR at the national level: <https://fra.europa.eu/en/publication/2019/eu-charter-fundamental-rights-use-and-added-value-eu-member-states>

Guidance by the FRA on **applying the CFR in law and policymaking at national level**: https://fra.europa.eu/sites/default/files/fra_uploads/fra-2018-charter-guidance_en.pdf

FRA Opinion on **challenges and opportunities for the implementation of the CFR**: <https://fra.europa.eu/en/publication/2018/challenges-and-opportunities-implementation-charter-fundamental-rights>

Annual reports on challenges and progress on fundamental rights at EU and national level published by the FRA: <https://fra.europa.eu/en/publications-and-resources/publications/annual-reports>

Annual reports on the application of the CFR in EU law and policy making, published by the European Commission: https://ec.europa.eu/info/aid-development-cooperation-fundamental-rights/your-rights-eu/eu-charter-fundamental-rights/application-charter/annual-reports-application-charter_en

Obligations concerning fundamental rights, including CSOs' rights and freedoms, derived from EU law also need to be interpreted in the light of relevant international and regional standards.

The website of the **ECtHR** provides access to the full text of the ECHR and its Protocols in all Council of Europe languages: <https://www.echr.coe.int/Pages/home.aspx?p=basictexts&c=> .

It also provides daily press-releases on all ECtHR's rulings and contains a freely accessible database of the case law of the ECtHR - HUDOC: <https://www.echr.coe.int/Pages/home.aspx?p=caselaw/HUDOC&c=>

FRA's **EU FUNDAMENTAL RIGHTS INFORMATION SYSTEM (EFRIS)** is a gateway bringing together data and information from existing human rights databases, and enabling viewing and analysis of relevant assessments of fundamental rights in the EU: <https://fra.europa.eu/en/databases/efris/>

IV.4. Key policy documents and reports on standards and issues related to CSOs' rights and freedoms in Europe

European Union Agency for Fundamental Rights

Civil society space portal, available at: <https://fra.europa.eu/en/cooperation/civil-society/civil-society-space>

Fundamental Rights Platform, available at: <https://fra.europa.eu/en/cooperation/civil-society>

The EU Charter of Fundamental Rights on its 10th anniversary: views of civil society and national human rights institutions, 2019, Available at: https://fra.europa.eu/sites/default/files/fra_uploads/fra-2019-eu-charter-use-cso-nhri_en.pdf

Protecting civic space in the EU, 2021, available at: <https://fra.europa.eu/en/publication/2021/civic-space-challenges>

Europe's civil society: still under pressure – 2022 update, available at: https://fra.europa.eu/sites/default/files/fra_uploads/fra-2022-protecting-civic-space_en.pdf

European Commission

Annual reports on the application of the Charter of Fundamental Rights, available at: https://commission.europa.eu/aid-development-cooperation-fundamental-rights/your-rights-eu/eu-charter-fundamental-rights/application-charter/annual-reports-application-charter_en

European Economic and Social Committee

The future evolution of civil society in the European Union by 2030, 2017, Available at: <https://www.eesc.europa.eu/sites/default/files/files/qe-04-17-886-en-n.pdf>

Opinion of the European Economic and Social Committee on 'Financing of civil society organisations by the EU' (own-initiative opinion), 2018, Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1540223832664&uri=CELEX:52017IE1953#ntr13-C__2018081EN.01000901-E0013

The implications of the COVID-19 pandemic on fundamental rights and civic space, 2022, available at: <https://www.eesc.europa.eu/en/our-work/publications-other-work/publications/implications-covid-19-pandemic-fundamental-rights-and-civic-space>

European Parliament

Report on the shrinking space for civil society in Europe, 2022, available at: https://www.europarl.europa.eu/doceo/document/A-9-2022-0032_EN.html

Briefing - Protecting the rule of law in the EU Existing mechanisms and possible improvements, 2019, available at: [https://www.europarl.europa.eu/RegData/etudes/BRIE/2019/642280/EPRS_BRI\(2019\)642280_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/BRIE/2019/642280/EPRS_BRI(2019)642280_EN.pdf)

Council of the EU

Council Conclusions on the application of the EU Charter of Fundamental Rights – The role of the civic space in protecting and promoting fundamental rights in the EU, 2023, available at: <https://data.consilium.europa.eu/doc/document/ST-7388-2023-INIT/en/pdf>

Council of Europe

Recommendation CM/Rec (2007)14 of the Council of Europe Committee of Ministers to member states on the legal status of non-governmental organisations in Europe, available at: https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805d534d

Legal standards for Non-Governmental Organisations, available at: <https://www.coe.int/en/web/ingo/legal-standards-for-ngos>

Recommendation CM/Rec(2018)11 of the Committee of Ministers to member States on the need to strengthen the protection and promotion of civil society space in Europe, available at: <https://www.coe.int/en/web/youth/-/recommendation-cm-rec-2018-11-of-the-committee-of-ministers-to-member-states-on-the-need-to-strengthen-the-protection-and-promotion-of-civil-society-s>

Recommendation CM/Rec(2022)6 of the Committee of Ministers to member States on protecting youth civil society and young people, and supporting their participation in democratic processes, available at <https://rm.coe.int/0900001680a5e7f3>

Others

EFC/TGE Taxation of Cross-Border Philanthropy in Europe after Persche and Stauffer : From Landlock to Free Movement?, 2014, available at: <http://efc.issuelab.org/resource/taxation-of-cross-border-philanthropy-in-europe-after-persche-and-stauffer-from-landlock-to-free-movement.html>

EFC, The Shrinking Space for Civil Society. Philanthropic Perspectives from Across the Globe, 2016, available at: <https://efc.issuelab.org/resources/24213/24213.pdf>

Open Society Justice Initiative, The Use of EU Law to Protect Civic Space, 2019, available at: <https://www.justiceinitiative.org/uploads/4dce8ded-49b4-4382-ad45-9d80ab83ef72/briefing-eu-law-civic-space.pdf>

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De Schutter, Olivier, Infringement Proceedings as a Tool for the Enforcement of Fundamental Rights in the European Union, 2017, Open Society European Institute, 2017, available at: <https://www.opensocietyfoundations.org/publications/infringement-proceedings-tool-enforcement-fundamental-rights-european-union>

De Schutter, Olivier, Europe in Search of Its Civil Society (June 6, 2014). European Law Journal, Vol. 8, no. 2, p. 198–217 (2002), available at SSRN: <https://ssrn.com/abstract=2446889>

De Schutter, Olivier, Fundamental Rights in the European Union, Oxford European Union Law Library, available at: <https://global.oup.com/academic/product/fundamental-rights-in-the-european-union-9780199548491?cc=us&lang=en&#>

De Schutter, Olivier, Public Interest Litigation before the European Court of Justice”, Maastricht Journal of International and Comparative Law, vol. 13 (2006), n°1, pp. 9–34, available at: <https://journals.sagepub.com/doi/10.1177/1023263X0601300102?icid=int.sj-abstract.similar-articles.2>

OSCE/ODIHR–Venice Commission, Joint Guidelines on Freedom of Association, 2015. Available at: <https://www.osce.org/odihr/132371?download=true>

ECNL, Registering a Civil Society Organisation – Volume 1 and 2, focusing on 17 countries in Europe, MENA region, Australia and Latin America, 2019, available at: <https://ecnl.org/publications/handbook-registering-civil-society-organization-cso-new-volume-out-now>

ECNL, EU, Emergency Powers and Civic Space, 2021, available at <https://ecnl.org/sites/default/files/2021-12/EU%2C%20Emergency%20Powers%20and%20Civic%20Space%20Paper%281%29.pdf>

Network of National Ombudspersons, <https://www.ombudsman.europa.eu/en/european-network-of-ombudsmen/members/national-ombudsmen>

European Network of National Human Rights Institutions, <http://ennhri.org/our-members/>

Tymen J Van Der Ploeg, Wino J M Van Veen, Cornelia R M Versteegh (eds.) Civil Society in Europe Minimum Norms and Optimum Conditions of its Regulation. Cambridge University Press, 2017.

PART V - EU and the Rule of Law: How Does It Strengthen Civic Space?

V.1. Introduction: what is the “rule of law”?

The “rule of law” is a system of legal checks and balances, which ensures that all persons and authorities are equally subject to the law. Typical guarantees based on the rule of law include, for example:

- Legal certainty (i.e., rules are clear and predictable and cannot be retrospectively changed);
- Institutional separation of the judiciary from other branches of government to ensure its independence;
- Effective access to information and pluralistic media;
- Effective access to judicial review and remedies;
- Clear rules of governance promoting accountability, fundamental rights and equal treatment by the law; and
- Transparent, democratic and inclusive processes for participation in policy making and enacting laws.

How does the rule of law relate to civic space?

A strong rule of law contributes to a favourable environment for civil society.

Civil society is an integral part of the system of checks and balances supporting democratic systems based on the rule of law. Philanthropic and other civil society organisations (“CSOs”) are often among the first actors to inform public opinion, hold governments accountable and advocate for policy developments in national and international fora. CSOs also play an essential role in improving and protecting a free and pluralist media environment through education, training and watchdog functions. Crucially, they also have deep expertise in representing and supporting minorities and vulnerable groups.

Therefore, restrictions of civic space are often a first indicator of rule of law concerns as well. The rule of law is compromised not only when a government directly undermines judicial independence, or when corruption affects decision-making, but also when a government makes it difficult – or in some cases, even impossible – for civil society to scrutinise its actions. This can be done, for example, e.g. by promoting smearing propaganda against CSOs, adopting legislation that stigmatises international and foreign funding to CSOs or criminalising manifestation of political dissent.

Limitations to the rule of law often go hand in hand with restrictions on civic space, erosion of fundamental rights and democratic backsliding. CSOs play an essential role in promoting and safeguarding the rule of law at European, national and local level, and therefore are themselves often one of the first targets of those who aim to undermine the rule of law.

The rule of law in the European Union

The rule of law is part of the European Union's founding values, alongside respect for human dignity, freedom, democracy and equality (Article 2, TEU).

The EU institutions increasingly recognise the role CSOs play in the promotion and protection of the values and rights enshrined in article 2 TEU and in the Charter of Fundamental Rights of the EU, including the rule of law, as demonstrated by the following instruments:

- The European Council Conclusions of 14 March 2023 (“The role of the civic space in protecting and promoting fundamental rights in the EU”), for instance, underline that CSOs are “an indispensable element in the system of checks and balances in a healthy democracy; unjustified restrictions to their operating space can present a threat to the rule of law.”
- The European Commission has further recognised this role in its “2022 Annual report on the application of the EU Charter of Fundamental Rights: A thriving civic space for upholding fundamental rights in the EU”, where it stresses the role of CSOs to “provide their expertise to the policymaking and legislative work of national authorities and EU institutions and help ensure that these bodies are held accountable for respecting fundamental rights and the rule of law.”
- Previously, the EU Fundamental Rights Agency 2022 Report “Protecting civic space in the EU” noted that, “As part of their action to strengthen the application of the EU Charter of Fundamental Rights and the rule of law, EU institutions should regularly monitor civil society space, closely involving civil society actors and other human rights defenders.”

V.2. Three EU participatory tools for CSOs to uphold the rule of law

V.2.1. The EU “Rule of Law Mechanism”

As briefly outlined in this Handbook's Introduction,¹²⁴ in 2019 the European Commission launched a new “Rule of Law Mechanism” to promote and protect the rule of law in EU Member States. The Rule of Law Mechanism consists of an **annual dialogue** between the Commission, the Council and the European Parliament and EU Member States – as well as national parliaments, **civil society** and other stakeholders – to **review the situation of the rule of the law** in order

¹²⁴ See Introduction, page 11.

to identify early challenges and prevent them from getting worse. The dialogue culminates every year in the publication of a **Rule of Law Report**. The first annual Rule of Law Report was published in 2020 and presented a synthesis of the rule of law situation in the EU together with an assessment of the situation in each Member State.¹²⁵

To date, the Annual Rule of Law Report presents an occasion for ongoing dialogue between the Commission, Member States and key stakeholders on both positive and negative developments relating to the rule of law. Therefore, **the structure and content of the report is continuously reviewed and improved by the Commission based on input provided by stakeholders, including CSOs, through the consultation process.** As a result, from 2022, the Rule of Law Report includes useful **country-specific recommendations to each Member State.**¹²⁶ The recommendations are based on an in-depth assessment reflected in the country chapters and encourage the States to pursue positive reform efforts. According to the 2023 Rule of Law Methodology, the recommendations must be “sufficiently specific to allow Member States to give a concrete and actionable follow-up, taking into account the national competences, legal systems and institutional context, as relevant.”¹²⁷ **The subsequent editions of the Rule of Law Report will integrate the follow-up given to the recommendations.** Furthermore, in the 2023 annual Report, additional chapters included a **separate thematic focus section on the “enabling framework for civil society”**.¹²⁸

Structure of 2023 EU Rule of Law Country Reports

Abstract (Overview)

Recommendations

Chapter 1: JUSTICE SYSTEMS

Chapter 2: ANTI-CORRUPTION FRAMEWORK

Chapter 3: MEDIA PLURALISM AND MEDIA FREEDOM

Chapter 4: OTHER INSTITUTIONAL ISSUES RELATED TO CHECKS AND BALANCES:

- Process for preparing and enacting laws
- Independent authorities
- Accessibility, judicial review of administrative decisions
- Enabling framework for civil society

Annex I: Sources

Annex II: List of country visits

¹²⁵ https://commission.europa.eu/strategy-and-policy/policies/justice-and-fundamental-rights/upholding-rule-law/rule-law/rule-law-mechanism/2020-rule-law-report_en

¹²⁶ https://commission.europa.eu/strategy-and-policy/policies/justice-and-fundamental-rights/upholding-rule-law/rule-law/rule-law-mechanism/2022-rule-law-report_en

¹²⁷ https://commission.europa.eu/system/files/2023-07/63_1_52674_rol_methodology_en.pdf

¹²⁸ https://commission.europa.eu/strategy-and-policy/policies/justice-and-fundamental-rights/upholding-rule-law/rule-law/rule-law-mechanism/2023-rule-law-report_en

Follow-Up From 2022 Rule of Law Country Report Recommendations: How the 2023 Rule of Law Country Reports refer to the 2022 report recommendations on “Enabling Framework For Civil Society”, clarifying if they have been followed or not:

Austria - “Civil society continues to operate in a stable environment, with a reform to improve tax rules for non-profit organisations under preparation.”

Croatia - “The preparation of the new National Plan for Creating an Enabling Environment for the Civil Society Development 2021-2027 has not progressed.”

Cyprus - “Administrative and financial burdens raise concerns regarding the environment for civil society.”

Denmark - “[...] the Danish Institute for Human Rights has expressed concern about the impact of advanced surveillance technologies on civic space.”

Estonia - “[...] concerns have been raised as regards the modalities of funding of Civil Society Organisations through Parliament.”

Finland - “Generally, involvement of stakeholders in the legislative process remains meaningful, with some discrepancies reported.”

“Amendments to improve the model of funding of civil society organisations were approved by the Parliament.”

France - “[...] stakeholders raised concerns on the implementation of legislation which conditions access to public funding to respect for the fundamental values of the French Republic.”

Germany - “No progress yet on taking forward the plan to adapt the tax-exempt status for non-profit organisations with a view to address the challenges which the currently applicable rules present for their operation in practice, taking into account European standards on funding for civil society organisations.”

Greece - “Civil society organisations (CSOs) have criticised the practice of adopting omnibus legislation and last-minute amendments. Independent authorities are playing an active role in the system of checks and balances. An initial step has been taken towards amending the regulatory framework governing the registration requirements for civil society organisations. The situation of civil society raises concerns, in particular in relation CSOs working in specific areas.”

Hungary - “No progress on removing obstacles affecting civil society organisations.”

Italy - “Public consultations in the legislative process allow online participation with concerns having been raised by stakeholders regarding their effectiveness and systematic use. Several new decrees that could further narrow the civic space have been introduced. Amendments to the rules of tax and financial concessions for CSOs have been adopted, which introduced several measures simplifying the tax regime applied to CSOs.”

Latvia - “Although state funding for civil society organisations increased, they perceive access to adequate funding through different sources as their main challenge.”

“Fully implemented the recommendation on taking measures to increase the participation of civil society in decision-making at local level.”

Lithuania - “The civic space continues to be considered open, and non-governmental organisations are increasingly recognised as partners in decision-making processes.”

Luxembourg - "No further progress on improving the legislative decision-making process by providing wider possibilities for stakeholders to participate in public consultations."

Malta - "The lack of a formalised process for public participation continues to raise concerns. The Commissioner for Voluntary Organisations continued his efforts to enhance the civil society space."

Netherlands - "[...] some shortcomings have been reported by stakeholders regarding restrictions to the right to demonstrate."

Poland - "The practice of adopting laws through procedures not requiring adequate consultations persists."

"No measures have been taken to improve the framework for the civic space, while civil society remains vibrant."

"[...]no progress on improving the framework in which civil society operates, taking into account European standards on civil society."

Portugal - "There have been some improvements regarding access to financing for civil society organisations, although challenges remain."

Romania - "There have been improvements regarding the legal framework for civil society organisations (CSOs), although they continue to face challenges related to access to public funding and to the lack of predictability in the implementation of the legal framework. Initiatives are ongoing to simplify procedures for recognising and funding associations carrying out activities of general interest."

"No progress on ensuring effective public consultation before the adoption of draft legislation."

Slovenia - "Civil society has seen improvements in the enabling environment, resolving a challenge identified in the 2022 Report."

Slovakia - "The involvement of stakeholders in the law-making process remains a concern, especially in connection with the use of fast-track procedures. Efforts have been made to enhance participation in the creation of public policies, while stakeholders raise concerns over legislative riders."

"Measures are planned to improve the environment, funding framework and status of civil society, but organisations and defenders on gender equality and LGBTIQ rights continue to face a difficult environment."

Spain - "Negotiations in the Parliament on a reform on the Citizen Security Law, aiming to address the concerns from civil society, did not succeed."

Sweden - "Even though Sweden continues to have an open civil society space, recent developments have given rise to some concerns in that regard."

"Some progress on ensuring that on-going reforms to the legal framework for the funding and operation of civil society organisations do not unduly affect civil society engagement."

Examples of 2023 EU Rule of Law Country Report Recommendations on “Enabling Framework For Civil Society”¹²⁹

Cyprus - “Proceed with the adoption of the framework for the effective and timely consultation of stakeholders in the legislative process and ensure its implementation.”

Germany - “Take forward the plan to adapt the tax-exempt status for non-profit organisations with a view to address the challenges which the currently applicable rules present for their operation in practice, taking into account European standards on funding for civil society organisations.”

Greece - “Ensure the effective and timely consultation in practice of stakeholders on draft legislation, including by allowing sufficient time for public consultation.”

“Take further steps to evaluate the current registration system for civil society organisations, including by initiating a structured dialogue with CSOs, and assess whether there is a need to amend it.”

Hungary - “Foster a safe and enabling civic space and remove obstacles affecting civil society organisations, including by repealing legislation that hampers their capacity of working, in particular the immigration tax.”

Ireland - “Take measures to address legal obstacles related to access to funding for civil society organisations, as part of the reform of the Electoral Act.”

Luxembourg - “Improve the legislative decision-making process by providing wider possibilities for stakeholders to participate in public consultations.”

Malta - “Introduce a framework for public participation in the legislative process.”

Poland - “Improve the framework in which civil society operates and continue such efforts regarding the Ombudsperson, taking into account European standards on civil society and Ombuds institutions.”

Romania - “Step up efforts to ensure effective public consultations before the adoption of legislation.”

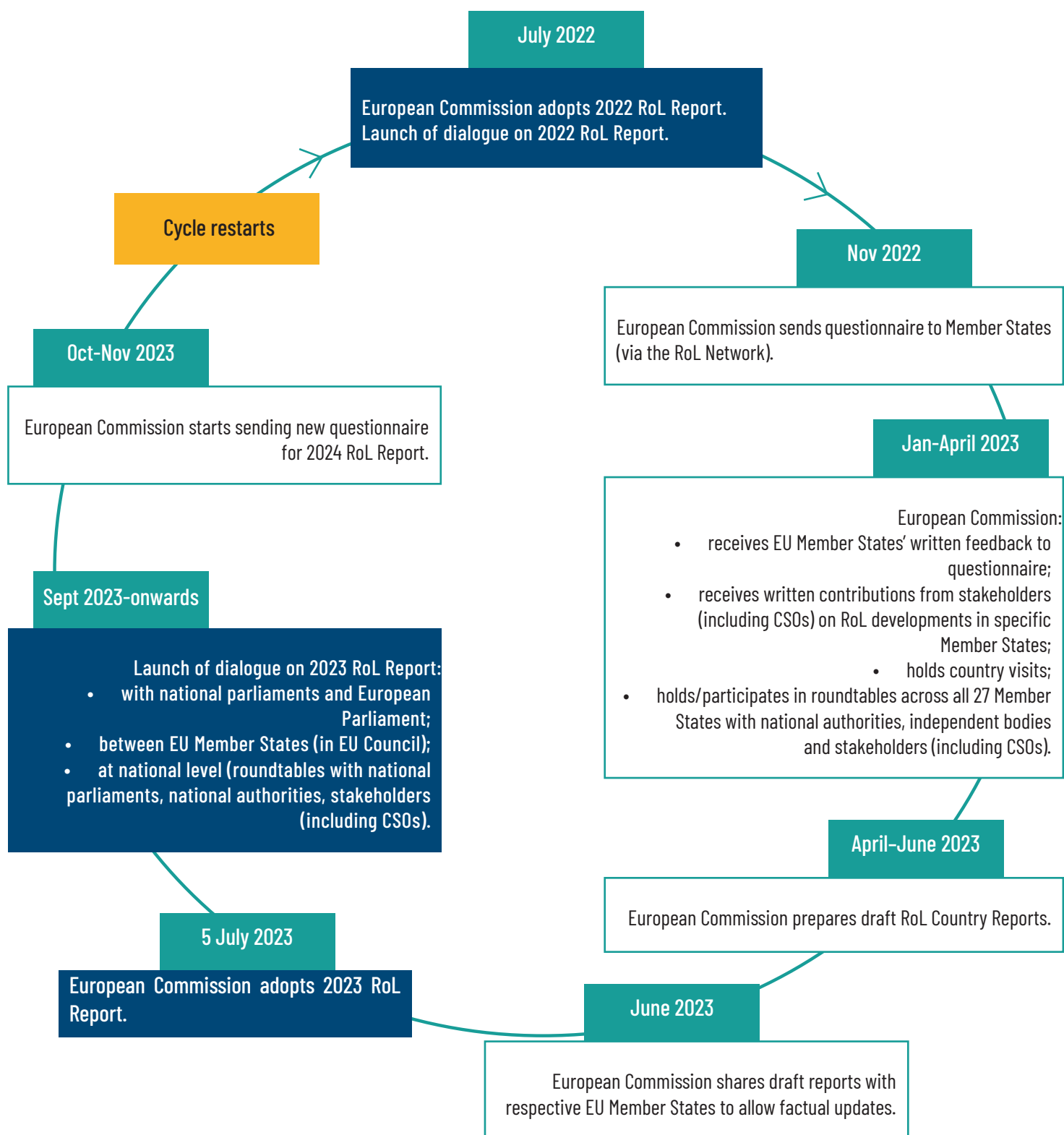
Slovakia - “Ensure effective public consultation and stakeholder involvement in the law-making process.”

Sweden - “Continue efforts to ensure that the on-going reforms to the legal framework for the funding and operation of civil society organisations do not unduly affect civil society engagement.”

During its annual review, the European Commission also engages in **country visits** and organises **roundtables with a variety of stakeholders, including CSOs**. CSOs have actively engaged in such events around the annual cycle to ensure that civil society space is part of the EU analysis and assessment:

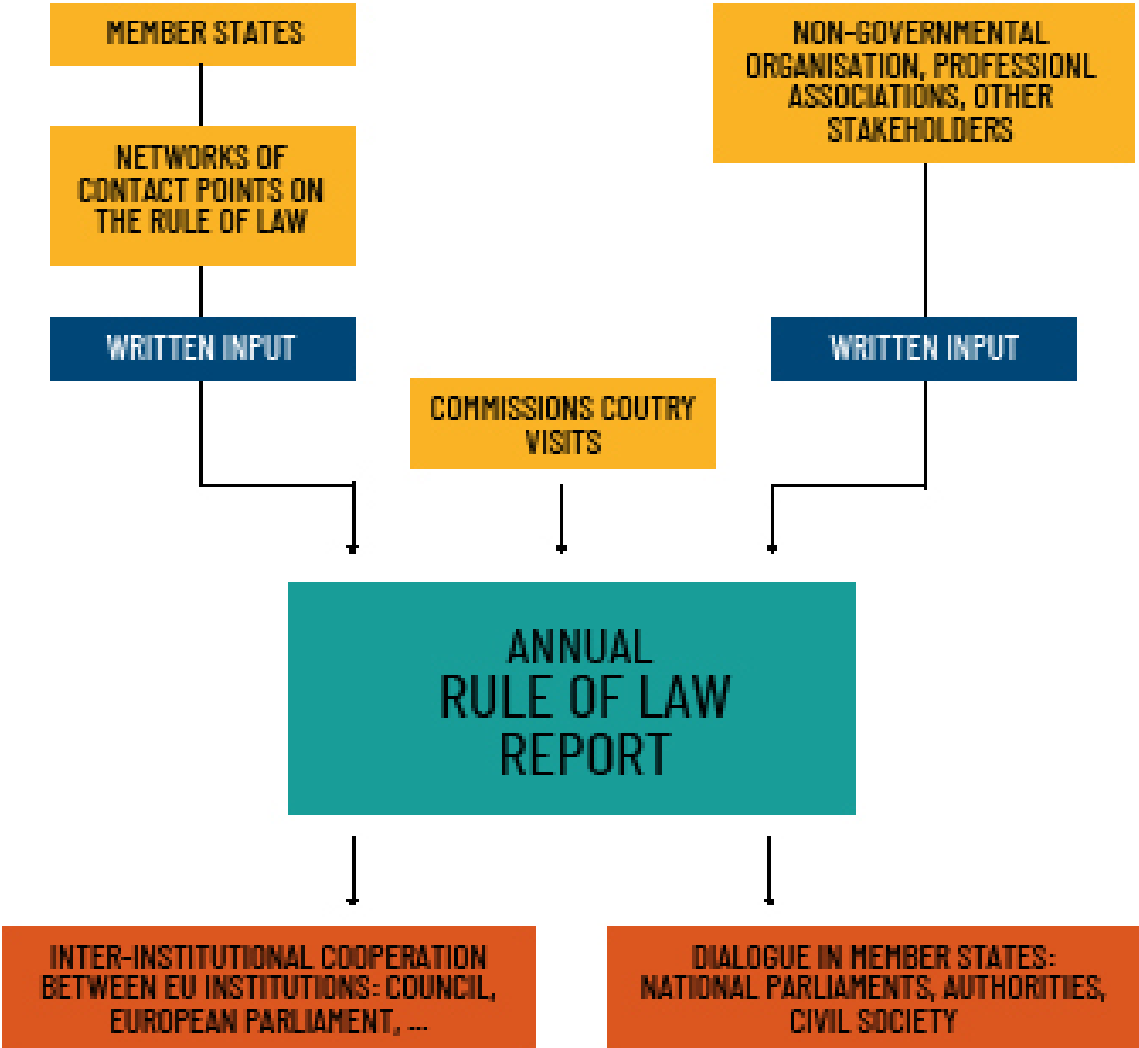
¹²⁹ Here you can find the 2023 Report and Recommendations as well as Country chapters abstracts and Recommendations: https://commission.europa.eu/publications/2023-rule-law-report-communication-and-country-chapters_en

RULE OF LAW (RoL) CYCLE 2022 - 2023



Source: European Commission, Rule of Law Report 2023 – Factsheet https://commission.europa.eu/system/files/2023-07/115_1_52676_roL_cycle_factsheet_en.pdf

Feedback/Input structure:



Source: European Commission https://commission.europa.eu/system/files/2021-07/ruleoflaw2021_toolbox_factsheet_en.pdf

A shrinking and threatened civic space with legal or practical restrictions on freedom of assembly, association and expression and the right to participation is an important indicator of a weak rule of law environment. Therefore, the annual rule of law report consultation is a key transparency instrument contributing to an enabling framework for civil society. Given the important role of civil society, **more can be done to stipulate country-specific recommendations related to the “enabling framework for civil society”**. These recommendations should be mostly based on input provided by CSOs operating in EU Member States. Hence, CSOs should be consulted by the EU Commission but they should also pro-actively reach out to and alert the EU Commission about their concerns.

Examples of proactive successful interventions of CSOs within the EU Rule of Law Review Cycle:

- On 1 October 2020, Civil Society Europe (CSE) together with the European Center for Not-For-Profit Law (ECNL) and Philanthropy Advocacy issued a joint reaction to the 2020 EU Rule of Law.¹³⁰ In the reaction, these CSOs regretted that the 2020 Report did not include concrete recommendations to Member States to address the identified shortcomings. The European Commission took on board this constructive criticism and as of 2022 introduced recommendations to individual Member States on how to tackle their deficiencies in the implementation of the rule of law.
- Following communications received from civil society in Slovenia, the European Commission in its 2022 Rule of Law Report issued a recommendation to the Slovenian government to strengthen the rules and mechanisms to enhance the independent governance and editorial independence of public service media taking into account European standards on public service media.¹³¹ At the time of the publication of the Report, the members of the body overseeing Slovenian public television, RTV Slovenija (RTV SLO) were almost entirely appointed by the Parliament and this significantly undermined its editorial independence. As a result, pressure mounted on the new government to reform the media law to depoliticise the public service media and its oversight body. Civil society strongly advocated for the reform and provided input in the draft of the law, which was finally adopted and entered into force in June 2023. According to the new law, most members of RTD SLO's Board are now elected by RTV SLO staff and civil society.¹³²
- On 21 February 2023, the Civil Liberties Union for Europe (Liberties) released a Shadow Rule of Law Report¹³³ – compiled by 45 human rights organisations in 18 countries across the EU – ahead of the European Commission's publication of the official 2023 EU Rule of Law Report. Following the release of the Commission's official 2023 Report, Liberties released a Statement denouncing the “serious discrepancies” between their shadow report and the Commission's key finding.¹³⁴

130 <https://civilsocietyeurope.eu/rule-of-law-in-europe-whats-next>

131 See https://commission.europa.eu/system/files/2022-07/54_1_194035_coun_chap_slovenia_en.pdf

132 See <https://www.publicmediaalliance.org/pma-welcomes-passage-of-public-media-law-in-slovenia/>

133 See <https://www.liberties.eu/en/stories/rule-of-law-report-2023-press-release-in-the-media/44680>

134 See <https://www.liberties.eu/en/stories/ec-rol-report-44821>

COMING SOON: RULE OF LAW REPORTING CYCLE FOR EU CANDIDATE COUNTRIES

In her 2023 “State of the Union” speech¹³⁵, EU Commission President Ursula van der Leyen announced that those countries with the status of candidates “who get up to speed even faster” in the process leading to full EU membership will be offered the opportunity to engage in the Rule of Law Mechanism.

What does this mean in practice?

In the context of the ongoing EU accession negotiations, only those candidate countries that are deemed to have made good progress – especially on issues related to the four Rule of Law pillars assessed by the EU Commission in its Annual Rule of Law Cycle and Report – will be offered the opportunity to engage in a similar annual cycle, with final reports and specific recommendations for reforms. The EU Commission is currently designing an ad hoc mechanism for a rule of law dialogue and reporting cycle for EU candidates, so that this complements rather than duplicates the accession process.

When is it due to be launched?

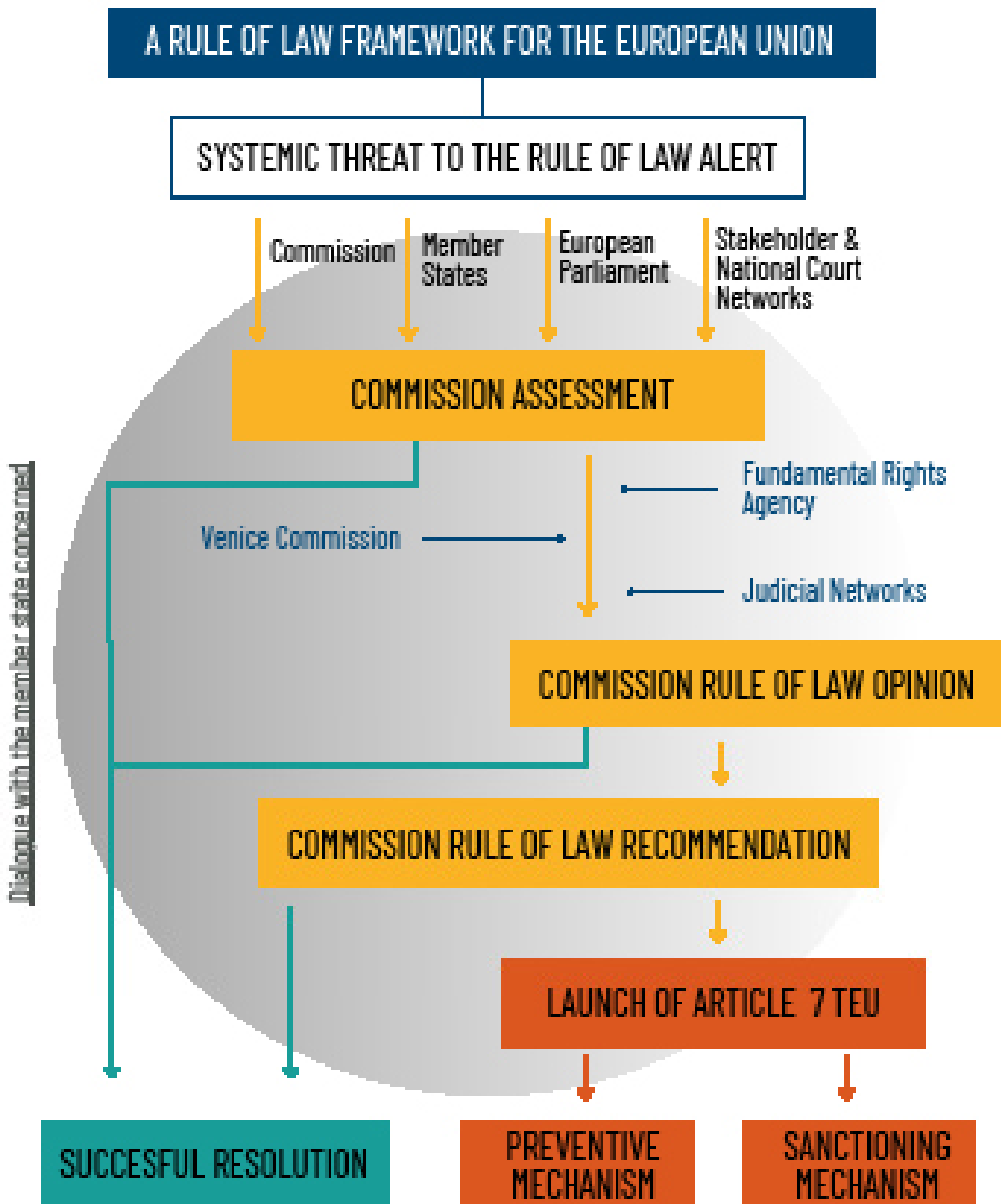
The EU Commission aims to have this ad hoc Rule of Law mechanism for eligible EU candidate countries already available before the end of 2023, following consultation with the other EU Member States and civil society. The findings of this Mechanism as applied to eligible candidate countries would be published in mid-2024, at the same time as the 2024 Annual EU Rule of Law Report.

V.2.2. EU Rule of Law Framework – Article 7 (TEU) procedure

As we have seen above (Chapter III, 3.3), the European Commission can start **infringement proceedings** against an EU country that fails to comply with EU law. Breaches of EU law may also be detected and brought to the attention of the relevant national authorities within the Rule of Law Mechanism, where they affect the EU rule of law. However, in cases of “clear indications of a systemic threat to the rule of law in a Member State” the Commission may even initiate a formal procedure to collect evidence, make an assessment, issue recommendations and eventually activate the Article 7 (TEU) procedure if all else fails. This procedure is called the “**Rule of Law Framework**”:

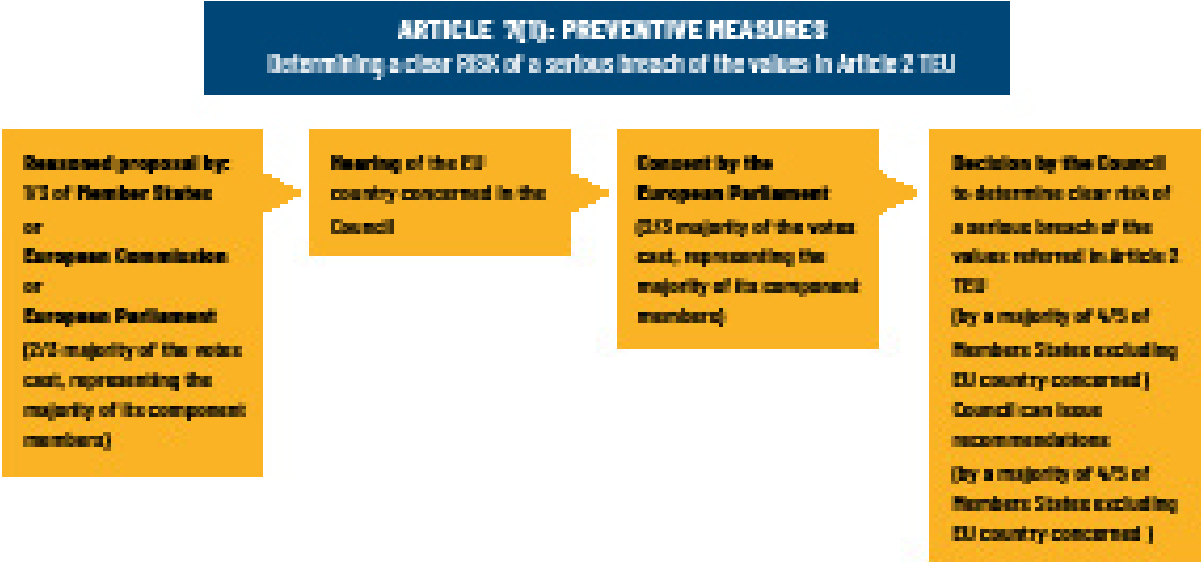
¹³⁵ See https://state-of-the-union.ec.europa.eu/publications/state-union-2023-documents_en

HOW THE RULE OF LAW FRAMEWORK WORKS:



Source: European Commission https://commission.europa.eu/system/files/2021-07/ruleoflaw2021_toolbox_factsheet_en.pdf

The procedure under Article 7(TEU) consists of both preventive measures in case of a clear risk of a breach of the EU values of Article 2(TEU), and sanctions if such a breach has already occurred. Here is an overview of how the Article 7(TEU) is structured:



ARTICLE 7(2-3): SANCTIONS MEASURES
Determining of the EXISTENCE of a serious breach of the values in Article 2 TEU



Source: European Commission https://commission.europa.eu/system/files/2021-07/ruleoflaw2021_toolbox_factsheet_en.pdf

Cases where the EU Commission has initiated the Rule of Law Framework procedure:

Cases where the EU Commission has initiated the Rule of Law Framework procedure:

In 2015, the Commission became aware of legislative reforms in Poland affecting the composition of the Constitutional Tribunal and the mandates of its President and Vice-President, ultimately undermining their independence from the government. As a result, the Commission started a dialogue with the Polish Government under the Rule of Law Framework procedure: a Rule of Law Opinion was issued on 1 June 2016 and a Rule of Law Recommendation followed on 27 July 2016.¹³⁶ The Recommendation gave three months to the Polish government to solve the problems identified in the Recommendation. The Commission adopted complementary Recommendations on 21 December 2016,¹³⁷ following the adoption by the Polish Parliament of other laws reforming the Supreme court, the Ordinary Courts Organisation and other judiciary bodies, whose provisions raised further concerns on judicial independence, the separation of powers and legal certainty.

However, the Polish authorities failed to take action and in December 2017, the Commission issued a reasoned proposal, calling for the activation of the Article 7 (TEU) procedure against Poland for “a clear risk of a serious breach by the Republic of Poland of the rule of law.”¹³⁸ This was the **very first time the Article 7 (TEU) procedure was invoked since its creation.**

On 12 September 2018, the European Parliament approved a resolution stating that developments in Hungary “represent a systemic threat to the values of Article 2 TEU and constitute a clear risk of a serious breach thereof” and invited the Council “to determine whether there is a clear risk of a serious breach by Hungary of the values referred to in Article 2 TEU and to address appropriate recommendations to Hungary in this regard”. This was the first time the Parliament took the step to present the Council of the EU with such a reasoned proposal on the basis of Article 7(1) TEU.

However, in both the Hungarian and Polish procedures, the EU Member States in the Council have avoided voting to determine if such risks exist and appropriate sanctions need to be issued.¹³⁹

V.2.3. EU Rule of Law Conditionality Mechanism

The “**Rule of Law Conditionality Mechanism**” is another tool that the European Commission introduced for the first time with adoption the new Multi-annual Financial Framework (MFF) for 2021–2027, alongside the Recovery and Resilience Facility (RRF) for the economic recovery of the Covid-19 pandemic 2021–2024.¹⁴⁰ This mechanism **subordinates the release of EU funds to Member States to the respect of specific rule of law principles**: specifically, such mechanism can be activated when the Commission finds out that a **Member State breaches the rule of law principles that directly affect or seriously risk affecting the sound financial management of the Union budget or of the financial interests of**

¹³⁶ <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32016H1374>

¹³⁷ <https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1555064086018&uri=CELEX%3A32017H0146> and on 26 July 2017 (<https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1555064402661&uri=CELEX%3A32017H1520>)

¹³⁸ <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52017PC0835>

¹³⁹ For the weaknesses of this mechanism, though, please see supra, in the Foreword.

¹⁴⁰ EU General Regime of Conditionality Regulation, EUR-Lex - 32020R2092 - EN - EUR-Lex (europa.eu)

the Union in a sufficiently direct way.¹⁴¹ The Commission will then propose “appropriate and proportionate measures” against the Member State and the Council of the EU will make a final decision on their adoption. Such measures can include, for example, suspension of release of EU funds, suspension of existing commitments, or a prohibition to enter new legal commitments with that State.¹⁴²

V.3. How can CSOs meaningfully engage in the Rule of Law dialogue with the EU?

The dialogue between EU institutions, Member States and civil society stakeholders within the Rule of Law Mechanism (see V.2.1. above) is a crucial pre-condition for the early identification of breaches that may give way to different measures depending on their nature (e.g., the opening of EU infringement proceedings, Article 7 procedure, conditionality mechanism, etc.).

As already pointed out by other civil society actors,¹⁴³ the annual Rule of Law consultation carried out by the European Commission Directorate General on Justice and Fundamental Rights (“DG JUST”) is currently **the main channel offered to CSOs** to contribute to the Rule of Law Review Cycle by conveying information and concerns on the shrinking civic space in the EU Member States.

However, despite ongoing adjustments and improvements, the process is still criticized by many for failing to provide CSOs with meaningful opportunities to engage in the reporting process and influence its outcome. Concerns include from the very short consultation timeframe the rigid structure of the consultation questionnaire and the lack of transparency of the other stages of the process – from consultation design to country visits and evaluation – as well as the exclusion of CSOs from follow-up technical and political dialogues with national governments.¹⁴⁴

141 See Guidelines on the application of the conditionality Regulation: https://commission.europa.eu/system/files/2022-03/c_2022_1382_3_en_act_part1_v7.pdf

142 Philea, together with wider civil society, has published a report on the involvement of civil society organisations in the consultation processes, monitoring and implementation of the National Recovery and Resilience Plans. CSOs note the importance of civil dialogue in the process of crafting and monitoring the Plans, and stress that final beneficiaries of the funds should not be penalised if the conditionality mechanism is triggered.

143 European Civic Forum, Civil Society Europe, Towards an open, transparent, and structured EU civil dialogue Civil society’s views on challenges and opportunities for an effective implementation of Article 11 TEU, Study by Linda Ravo, with inputs from the European Civic Forum group of National Platforms of NGOs and Civil Society Europe working group on civic Space, April 2021, p.21, available at <https://civic-forum.eu/wp-content/uploads/2021/02/Civil-Dialogue-Study.pdf>

144 Ibid

Pros and Cons of the latest 2022-2023 Rule of Law Cycle:

Pros	Cons
Inclusion of sub-chapter on “Enabling framework for civil society” under the pillar on “Other institutional issues linked to checks and balances”	Lack of standalone pillar on civic space as a core component of the rule of law to be rigorously assessed for in every country report.
Inclusion of country-specific recommendations and commitment to follow up on their implementation	<ul style="list-style-type: none"> • Unclear how the Commission follows up and assesses the successful implementation of country recommendations; • CSOs are excluded from follow-up technical and political dialogues with national governments
Country visits with different stakeholders, including CSOs	Very short-time frame for country visits and only human rights organisations are usually invited to meetings
Public calendar of country visits conducted in preparation of the country reports	Lack of transparency of organisation of country visits
Intended as an ongoing dialogue	<ul style="list-style-type: none"> • Rigid structure of the questionnaire • Lack of transparency of the other stages of the cycle (e.g., questionnaire design, choice of recommendations) • Timing of report publication in July when most national parliaments enter summer recess stifles public awareness and media coverage • Limited length of the Rule of Law Report and country chapters • Limited time period to develop the Rule of Law Report, made even more challenging when sudden political crises erupt
Forthcoming extension of Rule of Law Mechanism to eligible EU Candidate Countries	Lack of transparency of process leading to design of ad hoc Mechanism for EU Candidate Countries, including selection of suitable countries

According to several civil society organisations, the European Commission should take the following steps to strengthen the EU Rule of Law Mechanism and ensure it is an effective and meaningful participatory tool for civil society to uphold the rule of law:

- Devote a standalone pillar to the enabling environment for civic space in its EU Rule of Law Report, with more detailed and targeted recommendations for improvement in each country chapter. The questions for this pillar should be designed in meaningful consultation with civil society organisations (“CSOs”).
- Revise the structure of the country chapters, allowing more flexibility in their length and using a language more accessible to non-legal experts, or at least accompany them with infographics, practical examples and explanations.
- Devise a clear and transparent methodology to follow up with each country and assess the effective implementation of its recommendations on an enabling environment for civic space. Both the methodology design and the assessment of implementation should be conducted in cooperation with CSOs.
- Extend the official time allowed for the Rule of Law Consultation and postpone or advance the publication of the final Report and country chapters so that it does not coincide with parliaments’ recess.
- Consider offering additional participatory methods to engage broader civil society voices in the Consultation, e.g. by allowing feedback via online/hybrid platforms and other facilitation tools. ECNL’s new research¹⁴⁵ on participation methods can serve as an inspiration.
- Strengthen the capacity of the EU Fundamental Rights Agency (“FRA”) to facilitate multi-stakeholder exchanges within the Annual Rule of Law Cycle. FRA should continue promoting and supporting dialogues between national institutions, civil society and the European Commission. Such national RoL dialogues should be organised jointly by the European Commission and FRA annually in each Member State, in order to ensure consistent inclusion of CSOs in follow-up technical and political dialogues with national governments in all (not just selected) Member States. The structure and periodical occurrence of such dialogues should be planned ahead of each official Rule of Law Cycle Consultation. Proactively reach out to grassroots organisations and marginalized groups in each country to elicit their feedback on the enabling environment for civic space in their country.
- Include CSOs and grassroots organisations from EU Candidate Countries in the design and implementation of the ad hoc Rule of Law Mechanism for such countries.

¹⁴⁵ See ECNL, New Dimensions for Public Participation - Models to Enhance Engagement in the European Union, 2023: <https://ecnl.org/publications/new-dimensions-public-participation>



ANNEX I

Overview of (legal) remedies for CSOs: opportunities and challenges

REMEDY	OPPORTUNITIES	CHALLENGES
<p>Litigation via national court</p>	<p>Rights and freedoms which individuals and CSOs derive from EU law can be directly invoked before national courts.</p> <p>Only via national courts can CSOs obtain:</p> <ul style="list-style-type: none"> • The modification or repeal of the national law/measure; • The suspension or annulment of a decision; • Compensation for damage and/or that the competent public authority takes a new decision. <p>National courts' rulings set a precedent and become part of the public record.</p> <p>If the national court has failed to properly interpret or apply EU law, this qualifies as an infringement of EU law for which individuals and/or CSOs may later obtain compensation for damage.</p>	<p>Can be lengthy and expensive.</p> <p>In order to take a case to a national court an individual or a CSO will normally have to show that they are affected by the contested national law or measures. In some cases, this may imply that an individual or CSO must deliberately choose not comply with such law or measures, with the risk of incurring into the sanctions provided (which in some cases may even consist of closure of the CSO itself).</p> <p>CSOs may not wish to be directly involved in litigation for fear of becoming the subject of public smearing campaigns in their country.</p> <p>CSOs may not trust the independence of the judicial system.</p>

REMEDY	OPPORTUNITIES	CHALLENGES
<p>Prompting a preliminary reference to CJEU via litigation in national court</p> <p>(Note: plaintiffs cannot refer a case to CJEU themselves but only invite the national court to make a referral)</p>	<p>Allows the plaintiff to obtain a clear interpretation of the EU provisions applicable to the case.</p> <p>The CJEU preliminary ruling is directly binding on the referring national court, which has to make a final decision based on EU law as interpreted by the CJEU.</p> <p>The CJEU preliminary ruling is a final determination of the interpretation and application of EU law, which sets a precedent for all authorities and courts across the EU.</p> <p>The procedure is free of charge.</p>	<p>A request to a national court to refer the case to the CJEU by one of the parties is not binding on the national court – so the court may decide not to refer the case.</p> <p>The preliminary reference procedure can be very lengthy (though the referring court may ask the CJEU for an expedited or urgent procedure but only in exceptional circumstances).</p> <p>In a preliminary reference procedure, the CJEU only interprets the EU provisions applicable to the case: it has no mandate to interpret national law or directly assess its compatibility with EU law, nor it can rule on the specific case at hand. Therefore, it is ultimately still the national court that will have to hand down its ruling to implement the CJEU preliminary ruling at national level</p>

ANNEX II

Submitting a complaint to the European Commission – key practical steps

It is not too complicated to launch a complaint to the European Commission – anyone can do it and the process is rather standardised. Here you will find an overview of the key practical steps to take and some basic information about the possible follow-up to your complaint.

Which forms to use and how to submit the complaint?

You must submit your complaint via the standard complaint form or by addressing a letter to the European Commission clearly explaining the national measure contested and the provisions of EU law which you think are affected. You may draft your complaint in any official EU language.

To submit your complaint, you may:

- Use the **online procedure**: You can complete and submit the online complaint form at this link: https://ec.europa.eu/assets/sg/report-a-breach/complaints_en/.
- If you wish to submit a complaint **by post**, you may use a **standard complaint form** which is available in all EU languages: https://ec.europa.eu/info/sites/info/files/complaint-form_en_1.docx . The form will help you structure your complaint and ensure it contains all the relevant information. To facilitate the processing of your complaint, you should fill in the form on screen or by hand in a legible manner.

If you wish to send the complaint **via post** you may send it to the following address:

European Commission
Secretary-General
B-1049 Brussels
BELGIUM

You may also address your complaint to the European Commission's office in your country: http://ec.europa.eu/represent_en.htm.

What to include in the complaint?

You should describe exactly how you believe that national authorities have **infringed EU law** (via a law, an administrative measure put on you as an individual or an organisation), and which is the EU provision that you believe **they have infringed** (e.g. Treaty provisions, acts of secondary law or CFR articles). This may not be an easy task. You may consider consulting external

expertise to describe the breach with EU law in sufficient detail, see chapter on resources for more information on pro bono lawyers/focal points of assistance.

You should provide detailed information on any steps you have already taken to obtain redress at national level.

What happens with the complaint?

The European Commission will have to confirm to you that it has received your complaint within 15 working days. Within the following 12 months, the European Commission will inform you on the assessment of your complaint including whether it intends to initiate a formal infringement procedure against the country in question.

If the issue that you raise is especially complicated or more information is needed, you will be informed if the assessment takes longer than 12 months.

If the European Commission thinks that your problem could be solved more effectively by any of the available informal or out-of-court problem-solving services, it may propose to you that your file be transferred to those services.

If the European Commission concludes that your problem does not involve a breach of EU law, it will inform you by letter before it closes your file.

At any time, you may give the European Commission additional material about your complaint or ask to meet one of its representatives.

Confidentiality: Should the Commission contact the authorities of the country against which you have made your complaint, it will not disclose your identity unless you have given your express permission to do so.

Find out more about how the European Commission handles its relations with complainants in the Communication on the handling of relations with the complainant in respect of the application of Union law: http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv%3AOJ.C_.2017.018.01.0010.01.ENG&toc=OJ%3AC%3A2017%3A018%3ATOC

What does an infringement procedure consist of concretely?

If the European Commission identifies possible infringements of EU law on the basis of a complaint (or on the basis of its own initiative investigations), and the EU country concerned does not rectify the suspected violation, the European Commission may decide, under its discretionary power, to launch a formal infringement procedure.

The procedure follows a **number of steps laid out in the EU treaties** as follows, each ending with a formal decision:

STEP 1: LETTER OF FORMAL NOTICE

The European Commission sends a **letter of formal notice** requesting further information to the country concerned, which must send a detailed reply within a specified period, usually 2 months.

STEP 2: REASONED OPINION

If the European Commission, after having assessed the Member State's observations, concludes that the country is failing to fulfil its obligations under EU law, it may address to the Member State a **reasoned opinion**: a formal request to comply with EU law. It explains why the Commission considers that the country is breaching EU law. It also requests that the country informs the Commission of the measures taken, within a specified period, usually 2 months.

STEP 3: REFERRAL TO THE CJEU

If the country still does not rectify the violation, the European Commission may decide to refer the matter to the CJEU.

STEP 4: CJEU RULING

If the CJEU judgement confirms that the Member State has infringed EU law, the **national authorities must take action to comply with the CJEU judgment**.

Affected individuals and organisations affected by the breach of EU law established by the CJEU will have to take a case to the competent national court, relying on the CJEU judgement.

STEP 5: SANCTIONS

If, despite the CJEU judgment, the Member State still doesn't rectify the situation, the European Commission may refer the country back to the CJEU and propose the imposition of **financial penalties**, which can be either a lump sum and/or a daily payment. These penalties are calculated taking into account:

- the importance of the rules breached and the impact of the infringement on general and particular interests
- the period the EU law has not been applied
- the country's ability to pay, ensuring that the fines have a deterrent effect

The actual decision on whether to impose financial penalties and on their amount rests with the CJEU.

Where to find information about past and current infringement procedures?

Information about Commission decisions on infringements is available online. You can search for this information via this online tool, by EU country, policy area or date: http://ec.europa.eu/atwork/applying-eu-law/infringements-proceedings/infringement_decisions/?lang_code=en.

The European Commission also publishes annual reports on monitoring the application of EU law, presenting infringement cases by policy area and country: https://ec.europa.eu/info/publications/annual-reports-monitoring-application-eu-law_en

European Center for Not-for-Profit Law Stichting

5 Riviervismarkt, 2513 AM, The Hague, Netherlands



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