

The EU Democratic Governance Pact
Upholding the Rule of law and Fundamental Rights
ALDE initiative outline

Introduction

Countries who want to join the European Union have to meet the highest standards of democratic governance and human rights, as stipulated by the so-called Copenhagen criteria. The doors of the EU remain tightly closed to countries that do not respect freedom of the press, equal rights for LGBTI people or independence of the judiciary. The prospect of EU membership is a strong incentive for countries to make every effort to qualify as a model democracy. But the EU is not nearly as strict when it comes to countries that are already members of the EU. The EU has only a few weak instruments for making sure its members remain committed to democratic governance, the rule of law and fundamental rights, on top of that the member states have little appetite for binding rules in those areas.

In recent years, the EU was unable and unwilling to discipline members of the club who do not respect the rules. Fundamental rights continue to be repeatedly violated: deportation of Roma people, anti-gay laws, gagging and intimidating the media, undermining the independency of the judiciary, clandestine mass surveillance programmes, complicity in torture programmes, manipulation and abuse of electoral laws to eliminate opposition parties, impunity for corruption, and much more. Member states have all signed up to the EU Treaties, but in practice they are very reluctant to apply the standards they have signed up to. In the absence of binding rules, and in a climate of general disdain for democracy, the rule of law and fundamental rights, member states do not feel bound in any way by the standards they impose on candidate countries. Enforcement of those standards is left to the European courts in Luxemburg and Strasbourg.

The EU institutions themselves, the custodians of the EU Treaties, are sometimes guilty of making policies that are contrary to our own standards of democratic governance that may even violate fundamental rights or the rule of law, for example the right to privacy, the right to a fair trial, the principle of equality, or the standards of transparent and democratic lawmaking.

The EU cannot be credible, cannot have moral authority in the world, if it is unable to uphold its own standards. Democratic governance, the rule of law and fundamental rights are not secondary to single market rules or budget discipline. If anything, they are even more important. It is no coincidence that the values of the European Union are mentioned in Article 2 of the Treaty, before all other aims of the EU. European values are given the highest importance in the Treaties, now let's make sure they also get the highest importance in practice.

The European Union urgently needs effective instruments to ensure all its members abide by the rules. Like the Stability and Growth Pact for the Eurozone, the European Union needs a **Democratic Governance Pact**.

The financial crisis and its impact on the European economy and budgets led the European Union to take action in reinforcing its budgetary and economic coherence, adopting new instruments so that member states better respect their obligations and commitments as per the Treaties. Political momentum is needed for the same level of compliance and a common approach to be taken when it comes to the rule of law and fundamental rights in the EU. ALDE is putting forward concrete proposals to make sure the Union delivers on this essential matter.

The EU needs to provide itself with the tools needed for compliance and enforcement. ALDE proposes to bundle all tools in a **Democratic Governance Pact (DGP)**, laying down rules for the monitoring and enforcement of Democratic Governance, the Rule of Law and Fundamental Rights by member states and by the EU institutions. This initiative can be implemented without Treaty

change, it only requires political will. Furthermore, ALDE is willing to look ahead and to explore potential Treaty changes that would be necessary in order further ensure compliance with the values and principles on which the EU is based.

ALDE proposes various instruments for annual country monitoring, for reporting breaches or negative developments, and for initiating procedures against a country that persistently fails to respect the standards laid down in the DGP.

The EU Democratic Governance Pact

The ALDE group calls on the European Institutions to fulfil their responsibilities and comply with their Treaty obligations, by committing to a roadmap for the adoption of a Democratic Governance Pact, without undue delay. ALDE urges European Commission Vice-President Timmermans, who is responsible for the rule of law and the application of the Charter of Fundamental Rights, to ensure the Commission fulfils its role as guardian of the Treaty and addresses the way both member states and EU institutions are complying with EU values as set out in the Treaty. ALDE proposes an EU Democratic Governance Pact (DGP) that outlines the instruments for upholding and enforcing the rules on democratic governance, the rule of law, and fundamental rights, that all member states and the EU institutions should sign up to. The Democratic Governance Pact will become for democracy, the rule of law and fundamental rights, what the Stability and Growth Pact is to the Eurozone.

Five small steps for democracy, the rule of law and fundamental rights, one big step for European citizens

1. The Charter of Fundamental Rights as a legal tool for enforcement

- The Charter of Fundamental Rights has so far been interpreted by the Commission in the narrowest possible sense and is used mainly as a point of reference in policy papers than as a legal tool. It is essential that the Charter of Fundamental Rights becomes a real legal tool for the protection of citizens' rights. It must be applied in conjunction with Article 2 of the Treaties, and used for infringement procedures against fundamental rights violations. It will thus serve to tackle fundamental rights violations beyond specific breaches of EU laws.

2. Accession of the EU to the European Convention of Human Rights

- The accession of the EU to the European Convention of Human Rights (ECHR), which is a treaty obligation, is an essential step in ensuring individuals have access to proper protection of their human rights in relation to the acts and omissions of the EU, and to effective remedies where their rights are violated. The current situation of the rule of law and fundamental rights should be assessed in every member state, and the EU institutions should not be exempted from complying with these standards in the decisions they take and the legislation they adopt.

- The recent opinion of the Court of Justice on this matter is a serious setback for a smooth completion of the accession process, but the EU must now, as a matter of urgency, find a new strategy for meeting the treaty obligation of acceding to the ECHR. In parallel, immediate action can be taken to strengthen the compliance of EU institutions' decisions with fundamental rights standards.

3. Fundamental rights in all EU policies

- While pursuing negotiations for the accession of the EU to the ECHR, the European Commission should immediately introduce in its own internal procedures, including a mandatory impact assessment for all its legislative and policy proposals, looking at democratic standards, rule of law

and fundamental rights. Any legislative proposal should be accompanied by an opinion from the European Fundamental Rights Agency, and the European Data Protection Supervisor when appropriate and their opinions must be made public.

- The Council has recently adopted guidelines on methodological steps to be taken to check fundamental rights compatibility at the Council's preparatory bodies; their application should also become a mandatory process.

- The European Parliament should ensure the positions it adopts on legislative files are complying with fundamental rights standards, through the establishment of a dedicated expert panel, led by the EP legal service.

4. The EU Scoreboard for Democracy, Rule of Law and Fundamental Rights (DLR)

- Scrutiny of countries will not be reserved for candidate countries or a handful of new member countries, but it will be expanded to cover all EU member states, indiscriminately and on an equal basis. Looking at the state of democracy, rule of law and fundamental rights in every member state implies having a common grid and indicators to carry out an impartial, systematic assessment.

- A set of indicators on the situation of democracy, rule of law and fundamental rights should be defined and included into an EU scoreboard, which would serve as a basis for a periodic country-by-country assessment. This will be the "DLR Yardstick", highlighting a level of compliance for each indicator.

- The upcoming revision of the founding regulation of the EU Fundamental Rights Agency will be used to expand FRA's mandate and give the agency the possibility to carry out the assessment as per the EU DLR scoreboard, and come up with an annual country-by-country DLR monitoring report.

- Indicators could include: freedom of speech; freedom of the press and media pluralism; equality and non-discrimination; freedom of religion, belief, conscience; independence of the judiciary; freedom of assembly; position of political parties, hurdles for opposition; separation of powers; development civil society; transparency; rule of law; access to justice

5. A European semester for Democratic Governance, Rule of Law and Fundamental Rights (DLR)

- Based on the EU scoreboard assessment and results, the EU Fundamental Rights annual monitoring report shall be the starting point of the European DLR Semester, during which any potential breach of rule of law and fundamental rights can be reported and addressed as part of a dialogue between EU institutions and the member state concerned.

- The DLR semester shall include a binding mechanism, initiated by the European Commission on its own, or upon recommendation from the EU Fundamental Rights Agency, that will serve as a preventive and corrective arm before the application of the Article 7 procedure.

- Similar to the existing mechanism for the EU economic governance, the establishment of a European DLR semester for would fill existing gaps and allow for an automatic and gradual response to breaches of rule of law and fundamental rights at member state level.

- The Democratic Governance Semester will have a mandatory annual cycle of debate, involving the European Parliament, national parliaments, the Commission, the Council and the Fundamental Rights Agency.

Legal basis

- The proposals and instruments called by ALDE fit within the remits of the current Treaties and would not necessitate any change of the Treaties.
- The legislative proposals necessary to implement the instruments put forward by ALDE can be presented by the European Commission on the basis of Art 2. TUE and the Charter of Fundamental Rights

A - Closing gaps and loopholes to ensure an effective rule of law and fundamental right compliance

- **Absence of a preventive or sanctioning arm before the Art 7 procedure**
 - Art 2 TEU / Copenhagen criteria: there is no long-term or periodic assessment of these criteria once a country has joined the EU
 - Art 7 TEU: the "nuclear option" which proved inefficient in addressing the numerous gradual and systemic breach of rule of law and fundamental rights over the past years
 - New rule of law mechanism EC communication: a useful tool on paper, but which does not fill the gap in the absence of binding instrument to initiate the intermediary steps foreseen
- **Breaches of rule of law and fundamental rights remain subject to a contextual and/or political assessment**
 - Without common and objective indicators, discussions about the situation of the rule of law and fundamental rights in a member state are constantly challenged on the basis of political or institutional considerations.
 - Debates about the "relativity" of certain breaches of fundamental rights are driving discussion away from a proper legal assessment of a member state compliance with Article 2 of the Treaties and the Charter of Fundamental Rights.
 - Compliance with EU primary and secondary law is a legal obligation for all member states, and for the EU institutions themselves; it should not be considered as a political option or decision.
- **Lack of binding procedures too often leads to a permanent status quo or non-action, with the complicity of EU institutions**
 - The Commission presented its new "rule of law mechanism" through the adoption of a Communication, a text which has no binding or legal value and does not set any obligation for when the Commission should activate this mechanism
 - The fact that the European Commission did not even activate the first step of its new mechanism (a structured exchange with a member state violating rule of law and fundamental rights) following the recent event in Hungary is symptomatic of this procedural loophole.
 - The December 2014 Council conclusions on ensuring respect for the rule of law illustrate the lack of ambition from member states in addressing this issue and their objective of maintaining any debate within the remits of a "dialogue", primarily based on intergovernmental cooperation

Gaps and loopholes identified calls for the adoption of a binding instrument, relying on a set of objective indicators, and allowing an automatic and gradual response to breaches of rule of law and fundamental rights

B - Designing an EU Scoreboard for Democracy, Rule of Law and Fundamental Rights (DLR), to support a periodic country by country assessment

- **Setting up an expert group for the definition of democracy, rule of law and fundamental rights indicators**
 - The set of indicators should reflect the Copenhagen political criteria to be met by accessing countries, as well as the values and rights as per Article 2 of the Treaties and the Charter of Fundamental Rights.
 - Indicators should be defined on the basis of existing or already developed and recognised fundamental rights standards – such as those developed at UN and Council of Europe level, taking into account input from the EU fundamental rights Agency, existing international bodies and civil society organisations working in the area of human rights and fundamental freedoms.
 - Indicators should notably include: freedom of speech; freedom of the press and media pluralism; equality and non-discrimination; freedom of religion, belief, conscience; independence of the judiciary; freedom of assembly; position of political parties, hurdles for opposition; separation of powers; development civil society; transparency; rule of law; access to justice
 - Methodology for the definition of these criteria should build upon already existing monitoring instruments such as the Justice Scoreboard or the Cooperation and Verification Mechanism for Romania and Bulgaria. It should be defined in cooperation with international bodies already using similar standards, in particular the Council of Europe Venice Commission.

Similar instruments already exist at EU level as part of the EU economic governance framework, for example the Macro-economic Imbalance Procedure (MIP) scoreboard. The setting up of this expert group can be decided by the European Commission on its own, as a decision without any formal legislative proceeding

- **Expanding the competences and structure of the European Union Fundamental Rights Agency (FRA)**
 - The FRA founding regulation should be amended in order to expand the mandate and fields of competence of the agency, so that it can perform the monitoring of the common rule of law and fundamental rights indicators, and provide the agency with the additional staff, financial resources to perform its new tasks - while maintaining the Agency independence and impartiality as part of its core establishing principles.
 - A rule of law and fundamental right assessment committee (FRA assessment committee) should be established within the agency in order to analyse and review the results of the indicators monitoring carried out on a regular basis. This assessment should notably include the field of media freedom and independence
 - The FRA assessment committee should be composed of independent fundamental rights academics, lawyers and experts, acting in their individual capacity and in full impartiality.

Specialised expert committees already exist in other EU regulatory agencies, for example within the European Medicine Agency or the European Food Safety Agency. While the Agency has the power to initiate itself the issuing an opinion, it is for the executive, i.e. the Commission, to endorse the recommendation made and approve it as a decision.

- **Establishing a democracy, rule of law and fundamental rights reporting and alert procedure**

- The FRA assessment committee should adopt a yearly monitoring report, presenting a detailed review of each indicator, in each member state. This annual report should be forwarded by the agency to the Commission, Parliament and Council.
 - Upon the issuing of the monitoring report, the Commission and the Council Presidency should address in front of the European Parliament the conclusions made by the FRA assessment committee.
- Based on its yearly report, and in case one or several indicators highlight a breach of the rule of law or fundamental rights in one or several Member States, the FRA assessment committee may issue a recommendation to the Commission for giving a "formal notice" to the Member State concerned.
- The FRA assessment committee may convene an extraordinary meeting in the event of sudden and/or multiple breaches of the rule of law and fundamental rights in a given Member State, in order to decide upon the issuing of a recommendation for an immediate "formal notice" to be given by the Commission.

In order to translate these changes into EU legislation, the European Commission should come forward with the following legislative proposal

- Proposal for a regulation establishing an EU rule of law and fundamental rights scoreboard

- Proposal for a regulation amending Council Regulation (EC) No 168/2007 of 15 February 2007 establishing a European Union Agency for Fundamental Rights

C - Establishing a European semester for Democratic Governance, Rule of Law and Fundamental Rights (DLR): a binding EU mechanism

- **"Formal notice" procedure**

- Following the publication of the EU scoreboard and FRA assessment committee yearly monitoring report, The European Commission, on its own-initiative or upon recommendation from the FRA assessment committee, may give a "formal notice" to a member states related to one or several breaches of the rule of law and fundamental rights (as a result of the assessment carried out under the EU rule of law and fundamental right scoreboard).
- Upon receiving a formal notice from the Commission, the member state concerned should have the opportunity to submit its observations to the concerns raised by the European Commission notice, in a given timeline
- Following the issuing of a formal notice, the Commission should undertake an in-depth assessment based on the indicators highlighting concerns, taking into account the potential observations provided by the member state concerned.

Similar to the initial process of an infringement procedure

- **Rule of law and fundamental rights dialogue**

- As part of a rule of law and fundamental rights dialogue, the European Parliament competent committee should invite Ministers from a member state under a formal notice procedure, as well as the responsible Commissioner, to exchange views about the concerns raised by the European Commission and the potential observation provided by the member

state concerned. The formal notice initiated by the Commission should also be specifically addressed as part of the European Parliament annual report on the situation of fundamental rights in the EU.

- The national Parliament of a member state under a formal notice procedure may invite the European Commission for a debate on the concerns raised and the particular indicators highlighting of breach of the rule of law or fundamental rights.
- The Commission formal notice given to a member state should also be automatically included to the agenda of the next Justice and Home Affairs Ministerial Council, allowing for a mutual exchange of view among member states and potential Council conclusion

Similar to the economic dialogue established under the EU economic governance framework.

- **"Formal recommendation" and activation of the mechanisms set out in Article 7 TEU**

- Following the conclusion of its in-depth assessment carried as a follow of a formal notice give to a member state, the Commission should decide - in a given timeline - whether the concerns raised have been satisfactorily addressed by the member state concerned through its observation or potential corrective measures taken at national level
- If the Commission concludes that the concerns raised as part of its formal notice have not been addressed by the Member States concerned, it should issue a "formal rule of law and fundamental rights recommendation", including corrective measures to be taken by the Member States in a given timeline.
- The formal recommendation issued by the European Commission should be included to the agenda of the next Parliament Plenary session and of the next Justice and Home Affairs Ministerial Council - and may be opposed by a qualified majority of vote (reversed qualified majority). The opposition to a formal recommendation is without prejudice to the activation of the Art 7 procedure as per the Treaty.
- In the absence of corrective measure taken by the member states concerns, the Commission should initiate an infringement procedure (if applicable) or activate the procedure foreseen under Article 7 TEU.

Similar to the 2-pack corrective arm

In order to translate these changes into EU legislation, the European Commission should come forward with the following legislative proposal:

- Proposal for a regulation establishing European semester for democratic governance

Budgetary impact

- Essentially reflecting the necessary increased resources for the Fundamental Rights Agency and the functioning costs of the FRA assessment committee
- The termination of the Cooperation and Verification Mechanism for Romania and Bulgaria could potentially free up some staff/financial resources

Going further - Proposals for Treaty changes

- expand the role of the Court of Justice of the European Union by creating a new specific procedure to enforce the rule of law principle of Article 2 TEU in a member state by means of an infringement procedure brought by the Commission or another member state before the Court of Justice of the European Union (Currently, the Court of Justice of the European Union can only check whether the procedural rules of Article 7 TEU have been adhered to)
- revision of Article 7 of the EU Treaty, adding an 'application of Article 2 of the EU Treaty' stage, separating the 'risk' stage from the 'violation' stage, with different thresholds for the majorities provided for, a strengthening of technical and objective (not only political) analysis, enhanced dialogue with the Member States' institutions and a wider range of detailed and predictable penalties which are applicable throughout the procedure (Michel Report)
- include a reference to the FRA in the Treaties, including a legal base making it possible to amend the Agency's founding regulation not by unanimity as is currently the case but via the ordinary legislative procedure
- create a possibility for national Parliament to refer a draft national law to the CJEU for an opinion on its compliance with the Treaties and the Charter of Fundamental Rights