

***DEMOCRACY,
THE RULE
OF LAW AND
FUNDAMENTAL
RIGHTS IN
EU POLICY***

***BACKGROUNDEERS FOR THE GERMANY
PRESIDENCY OF THE EU***

This document contains a collection of 10 concise backgrounders in selected areas of EU policy. The paper features analysis on topics on which Liberties has expertise to offer the German Presidency. Each backgrounder outlines the state of play, identifies factors interfering with the realisation of the EU's founding values and offers potential solutions the German Presidency could promote.

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Strengthening the EU's ability to promote and protect Article 2 values

A number of governments of EU countries are undermining the basic values on which the EU is founded, set out in Article 2 of the Treaty on European Union (TEU). The problematic policies that these Member States are implementing include: interfering with the independence of the judiciary, interfering with the independence and pluralism of the media, restricting the activities of civil society organisations (CSOs) and restricting the right to peaceful protest, as well as rhetorical attacks and restrictive policies targeting marginalised groups such as migrants, ethnic minorities, women and LGBTI people. The public emergency caused by the coronavirus pandemic has also been used by some governments as an excuse to weaken checks and balances or introduce overly restrictive measures, well beyond a genuine and proportionate response to the outbreak.

So far, the EU has only had modest success in persuading governments to desist from and reverse these policies. Building on the Commission's blueprint for the rule of law as set out in its July 2019 communication, this backgrounder briefly outlines the key elements the German Presidency should focus on in the coming months to reinforce the EU's action to better promote and protect basic Article 2 values.

Promotion

As announced by the Commission, the new Rights and Values Programme should be used to build a "rule of law culture" in EU Member States. To that effect, the "values" strand of the programme should be dedicated to building the capacity of CSOs to create grassroots support among the public for Article 2 values, including by improving, through value-based framing, the way they communicate with the public. The Council has a key role to play to make sure that the support the EU provides can make a real difference. First, the Council should oppose the Commission's plans to cut the already too small budget envelope allocated to this priority and support the European Parliament's proposal to substantively revise it up instead. Secondly, the Council should monitor implementation by the Commission to ensure that the Programme makes funding easily accessible to CSOs working at national and local level, in a way that guarantees their long-term financial sustainability.

Prevention

The Commission has initiated an annual rule of law review cycle, with the first annual report due in September 2020. To ensure these reports have a beneficial impact, the Presidency should replace the Council's rule of law "dialogue" with a meaningful peer review process to discuss and follow up on the findings of the report.

Response

Persistent breaches of Article 2 values have to be met with sanctions, as provided for in the Treaties. The Council should adopt internal rules to make the Article 7 TEU procedure more effective and transparent and create a rule of law working party to support its efforts. The Council should also work towards a swift agreement with the Parliament on adopting the Commission proposal on funding conditionality for serious rule of law deficiencies.

Protecting civic space

Civil society organisations (CSOs) are key to the proper functioning of a healthy democracy. Like the media, CSOs inform the public about political debates that may affect their rights and quality of life, so that the public can make informed decisions. Like the judiciary, CSOs uphold the rule of law by making sure governments are accountable to the law. CSOs also put participatory democracy into practice by offering the public organised channels through which to speak to their representatives.

Challenges facing CSOs

Governments are creating an increasingly restrictive environment for CSOs that promote the rule of law, democratic pluralism, fundamental rights, anti-corruption and environmental protection. In some cases this is the result of deliberate attempts by authoritarian leaders to crack down on critical voices. In others it is the unintended consequence of short-sighted policies. Broadly speaking, the problems facing CSOs are:

- Hostile rhetoric and smear campaigns by political figures and allied media outlets. This is designed to undermine public trust in and support for CSOs and undermine staff morale.
- Cuts in public funding and attempts to block private funding. This is designed to reduce the resources available to CSOs.
- Disproportionately burdensome administrative obligations, for example on financial reporting. These are intended to drain CSO resources and distract them from their normal activities.
- Harassment through legal channels such as audits and the threat of criminal sanctions. This is designed to drain CSO resources, and deter them from carrying out their normal activities, as well as to undermine staff morale.
- Inadequate national regulatory frameworks to enable a free and safe civic space.

How the Council Presidency could support policies that protect CSOs

The Presidency could take a number of steps to support the creation of an environment in which CSOs can flourish in their role as protectors and promoters of pluralist democracy, the rule of law and fundamental rights. Such steps include:

- Ensuring that the health of civic space is among the issues falling in the substantive scope of a new rule-of-law peer review mechanism in the Council.
- Fostering discussions at expert level among Member States on how to implement relevant EU law, such as rules on anti-money laundering and terrorist financing, in line with the right to freedom of association and freedom of expression as protected by the Charter of Fundamental Rights.
- Adopting EU wide rules to fill gaps in the protection of CSOs and rights and democracy activists, such as rules to prevent abusive lawsuits targeting independent watchdogs (known as SLAPPs) or rules to create a Statute for European Associations.
- Supporting CSOs through the Rights and Values Programme, promoting their long-term financial sustainability and increasing their resilience against attacks and restrictions by, for example, building their capacity on litigation and strategic communications.

Microtargeted online political campaigns.

Democracy is one of the values on which the European Union is founded, as set out in Article 2 of the Treaty on European Union. However, the digital revolution is transforming the world of politics and poses a threat to our democracies. Online political microtargeting allows for the formulation of personalised messages and their direct delivery to groups and individuals. While political targeting existed prior to the information age, fine-grained online political microtargeting informed by advanced statistical and machine learning algorithms is a new phenomenon made possible by the increased availability of demographic, lifestyle and personality data on voters.

Online political microtargeting has possible advantages for citizens, in the sense that it can reach those who ignore traditional mass media. It can also stimulate interest in politics among those who are disengaged, by delivering information on subjects tailored to their interests. However, the technique also poses some threats.

First, polarisation. In a well-functioning democracy, citizens encounter points of views that differ from their own. However, targeted advertising tends only to expose citizens to opinions similar to their own, which reinforces their views instead of causing them to assess them critically. Second, dishonesty. Microtargeting campaigns allow the same actor to provide different categories of voters with plainly contradictory messages while concealing this duplicity.

How the German Presidency could help mitigate potential harm to democracy

- Strongly encourage Member States to provide their data protection authorities (DPAs) with the funds necessary for the tasks they are expected to undertake and to explore ways of making funding as independent of political interests as possible. The United States has more experience of advanced microtargeting models than Europe. And in recent years, political parties across Europe have started to hire US experts to apply these techniques in their campaigns. Microtargeting as practiced in the US relies on voter databases. It would not be possible to maintain such databases in a country that complies with the General Data Protection Regulation. However, national DPAs rarely investigate personal data use by political parties. This is presumably because they fear reprisals through a funding cuts, and because they already lack adequate funding and staff.
- Facilitate best practices among Member States. Elections are regulated differently and by different bodies across the Member States, meaning that there are many models and experiences to draw on. The Presidency should help Member States consult each other regularly on how to tackle the challenge of preserving democracy in the digital age.
- Urge digital platforms to be more transparent. When individuals are made aware of why they are receiving specific messages, they are more likely to evaluate them critically. In response to regulators' concerns, digital platforms have recently started to offer some transparency mechanisms. However, these are still rudimentary.

Artificial intelligence

Artificial Intelligence (AI) is a set of technologies that are inspired by the ways people sense, learn and reason. The term AI refers to a collection of technologies that includes, among other things, machine learning, natural language processing, big data analytics, predictive models and algorithms. AI could help us fight climate change, transform health care, and revive sluggish economies. But it could also undermine our fundamental rights. Concerns are growing that in its recent applications, AI is perpetuating bias in criminal justice and in job markets by amplifying the embedded biases in the data it is trained on (thereby breaching the prohibition on discrimination) and that it facilitates increased surveillance (thereby restricting privacy, freedom of expression and freedom of assembly). Activists and researchers also warn of its potential to facilitate the spread of disinformation and to exacerbate inequality and market concentration.

The European Commission's recent White Paper on Artificial Intelligence adopts an uncritical approach to AI and firmly encourages a broader uptake of the technology, especially by the public sector. The Commission calls for relatively high safety standards only to certain "high-risk" uses of AI, based on the sector the technology would be used in. Determinations about the risk posed to fundamental rights cannot be assessed in the abstract according to the sector of application. Rather, AI systems should undergo a mandatory *ex ante* fundamental rights impact assessment from an external body. In addition, the Commission should encourage ongoing democratic oversight of new technologies and call for certain uses of the technology to be banned outright.

How the German Presidency could ensure AI use respects and promotes fundamental rights

- Encourage Member States to properly resource their data protection authorities. A vast amount of data is needed to train AI systems. The General Data Protection Regulation (GDPR) offers a high level of protection for personal data. However, most data protection authorities are unable to enforce the GDPR in practice due to understaffing, underfunding and lack of requisite expertise in advanced information technologies.
- Urge the Commission to ban remote biometric identification. Without a ban, law enforcement agencies all over Europe will increasingly use the technology in ways they see fit, in many cases under highly questionable interpretations of national law. Police surveillance coupled with remote biometric identification technology endangers our democracies. It will deter citizens from democratic participation through and from exercising their rights to freedom of expression and assembly. This is especially dangerous in times when authoritarianism is on the rise.
- Give its political backing to civil liberties groups lobbying for strong democratic oversight to be laid down in the new regulatory framework for AI. People should have a say over whether, and if, where and how, AI can be used. This is particularly important where AI-based technologies affect citizens' civil liberties and/or their access to public services.

Implementing Article 17 of the Directive on Copyright

The Commission is currently finalising guidelines on the implementation of Article 17 of the Directive on Copyright in the Digital Single Market (DSM Directive). Article 17 changes the liability regime for content service providers by eliminating the limited liability rule established in Article 14(1) of the current e-Commerce Directive 2000/31/EC. The liability regime set out in Article 17 of the copyright directive creates the risk that online content sharing service providers (OCSSPs) will engage in monitoring users, prior filtering and removal of content in violation of fundamental rights to freedom of expression and data protection.

The DSM Directive does not impose general monitoring obligations on Member States, and clearly states that mandatory upload filters are avoidable. MEPs, the Commission and many Member States, including Germany, also reiterated during negotiations that governments should not permit the use of upload filters in transposing the DSM. The recently published German proposal for transposition of the DSM Directive should be considered a model for other Member States. The German presidency should encourage the Commission to include the following safeguards in its guidelines on Article 17 and encourage Member States to implement them:

- Implement the full list of ‘exceptions and limitations’, since these play a significant role in ensuring freedom of expression and freedom to receive information for users. This would ensure the same level of protection for users across the EU and provide clarity for OCSSPs on the scope of user privileges under Article 17(7) of the DSM Directive.
- Create effective and expeditious complaint and redress mechanisms so users can challenge decisions of OCSSPs. Such redress mechanisms must include human intervention. Further, OCSSPs should not be allowed to bypass this safeguard, for example, by requiring users to waive this right under their terms and conditions.
- Establish reporting duties for OCSSPs and rightholders regarding the functioning of i) information-sharing between them ii) the operation of complaint and redress mechanisms iii) and their decision-making processes. Such transparency will make users’ rights effective in practice.
- Avoid mandatory upload filters and ensure that human intervention is incorporated into any automated decision-making processes used by OCSSPs.
- Comply fully with Article 22 of the General Data Protection Regulation. Any algorithm-curated content moderation relating to Article 17(4)(b)(c) will automatically involve the processing of personal data. Article 22 of the GDPR prevents users from being subject to a decision based solely on automated processing which produces legal effects concerning him/her or similarly significantly affects him/her. Exceptions to this are decisions based on i) a contractual relationship ii) authorized by law iii) or users’ explicit consent. However, accepting terms of services is not considered a contractual relationship. And the DSM Directive and national legislation cannot be considered as authorization by law because upload filters fail to meet the legitimate interest requirement set out in the GDPR.

Revision of the e-Commerce Directive

After almost twenty years, the e-Commerce Directive is understandably in need of an update to take into account developments in technology, changes in media systems, and the impact of the digital world on our democracies. However, there is a risk that revising the directive will negatively affect fundamental rights, especially due to the choice of liability regimes for internet companies that host and communicate content that is deemed unlawful. This creates the danger that intermediary service providers will engage in overly cautious prior filtering and remove content in such a way that interferes with rights like freedom of expression and data protection.

The trend towards introducing intermediary liability can be seen in a number of legislative developments at EU and national level. The recently revised Copyright DSM Directive makes intermediaries directly responsible for content uploads that might breach copyright. The revised Audiovisual Media Services Directive and the proposed Regulation on preventing the dissemination of terrorist content online aim to create similar intermediary liability regimes. The same is true for Germany's Network Enforcement Act (NetzDG) and the French anti-disinformation law. All of these developments conflict with the approach to regulating internet content introduced by the original e-Commerce Directive, which attempted to strike a fairer balance between fundamental rights and commercial and public interests.

The regulation of digital services should be achieved without compromising fundamental rights. The German Presidency should encourage the Commission to incorporate the following safeguards as it moves forward with the Digital Services Act:

- All relevant stakeholders should be included in the process of developing new legislation. This should include civil society organisations advancing the rights of users.
- Platforms should be obliged to be transparent about their content curation, and data-harvesting business model. This will also allow authorities to enforce the GDPR and competition rules more effectively, while ensuring that platforms do not act in a way that distorts freedom of expression, access to information, or democratic processes.
- New legislation should differentiate between service providers that have significant market power and small and medium-sized companies and start-ups. Services with a quasi-monopoly should be regulated differently and considered as providing a public, rather than a purely commercial, service.
- If the EU chooses to pursue regimes that create intermediary liability, it should create a counter-incentive to prevent intermediaries excessively restricting freedom of expression so as to avoid sanctions. Platforms should be liable for banning access to lawful content and not only for restricting access to unlawful content.
- New mechanisms should avoid imposing or incentivising the introduction of monitoring and filtering systems.
- New legislation should not hinder innovation and the online market.

Countering online disinformation

Targeted online disinformation campaigns have the potential to compromise the fairness of elections and referendums. Disinformation became prominent on the EU's agenda following revelations about the 2016 US Presidential election, the Brexit referendum and the Facebook-Cambridge Analytica data scandal. In response, the Commission has elaborated an Action Plan on disinformation. In addition, internet platforms, leading social networks, and the advertising industry have agreed to a self-regulatory Code of Practice on Disinformation. The future Digital Services Act is also expected to regulate cross-border micro-targeted political advertising in the context of disinformation and content regulation.

It is important to safeguard the fairness of elections and referendums. But there is a risk that measures to tackle disinformation will interfere with freedom of expression, which also damages democratic processes. One of the biggest challenges in countering online disinformation is being able to distinguish between misleading content, errors, parody and biased news. This makes it difficult to respond to disinformation simply by prohibiting offending content. Such an approach carries a high risk of interfering with legitimate free speech and access to reliable information, which has an impact on democratic debate.

The German Presidency should urge the Commission to analyse the actual impact of disinformation on elections and on society before taking further regulatory measures. The reporting mechanism prescribed by the Code of Practice on Disinformation should make this possible. The Commission will only be in a position to develop a proportionate response once the impact of disinformation is clear.

Rather than focusing on prohibiting content based on its validity, which carries risks for freedom of expression, the German Presidency should encourage the Commission and Member States to concentrate on neutralising the potential impact of disinformation through at least two measures.

First, through thorough enforcement of the General Data Protection Regulation and adoption of the ePrivacy Regulation. Online disinformation can only have an impact if it reaches the audience it targets. And targeting sections of the public without their consent in this way is only possible if an organisation has engaged in profiling based on unlawful data controlling and processing. Data protection rules offer an indirect route to combating online disinformation while preserving freedom of expression. The German Presidency should encourage Member States to provide sufficient financial support to under-resourced national data protection authorities (DPAs) to facilitate this work. The Commission could also be encouraged to support DPAs through other measures, such as providing training.

Second, the German Presidency should encourage the Commission and Member States to invest in further activities to improve media literacy among the public. This is crucial to empower people with relevant knowledge and diminish the possible harm of disinformation. Neutralising the impact of disinformation through the enforcement of data protection rules and support for media literacy, will make risky measures that threaten freedom of expression unnecessary, while preserving the integrity of elections and referendums.

Criminalisation of assistance to refugees and migrants

As a consequence of offering humanitarian assistance to migrants and refugees, many Member State authorities have subjected civil society organisations (CSOs) and private individuals to harassment, intimidation and even prosecution. As of December 2019, over 170 people in 13 Member States were facing criminal prosecutions, including for merely giving someone a lift in their car or for providing shelter to asylum seekers. Although most cases end with acquittal, lengthy legal procedures exert a heavy toll and discourage human rights defenders from engaging in humanitarian assistance. The German Presidency should place the revision of relevant legislation on the political agenda to avoid further criminalisation and obstruction of humanitarian assistance.

Facilitation Directive

Directive 2002/90/EC defines what constitutes facilitation of unauthorized entry, transit and stay in the territory of the EU. Article 1(2) of the directive gives Member States discretion to refrain from applying sanctions when individuals provide humanitarian assistance without seeking profit. However, because this is presented merely as a possibility and not as an obligation, some Member States have chosen to sanction individuals offering humanitarian assistance. This violates EU law. Article 53 of the Charter of Fundamental Rights states that the Charter must be interpreted in conformity with international treaties to which the EU is a party. The EU is party to the UN Protocol against the Smuggling of Migrants, which states that facilitation is only a crime when performed in exchange for “financial or other material benefit”. States that are criminalising humanitarian assistance to asylum seekers are thus violating the Facilitation Directive read in the light of the Charter. In a resolution of 2018, the European Parliament urged the Commission to bring the directive in line with the UN Smuggling Protocol and make the exemption set out in Article 1(2) obligatory with appropriate interpretation guidelines. In April 2020, Commissioner-designate for Home Affairs, Ylva Johansson, admitted that the directive contains flaws and committed “to further look at the issue”. The Presidency of the Council of the EU should press the Commission and Member States to address the shortcomings and avoid further misuse of the directive.

Supporting Civil Society Actors

The EU is committed to protecting and strengthening a vibrant and independent civil society. However, Hungary, Italy and other Member States have passed laws designed to disrupt the work of CSOs that provide assistance to refugees and migrants. CSOs conducting search and rescue (SAR) operations in the Mediterranean for example have been accused of facilitating illegal entry and colluding with smugglers. In June 2019, the Italian government approved Legislative Decree 53/2019, which imposes financial penalties of up to 1 million euros and potential vessel impoundment if a shipmaster enters Italian waters without permission. Despite a change in government, leading to less restrictive migration policies, the decree is still in place. The German Presidency should not only urge the Italian government to abolish the legislation but also encourage the Commission and Member States to redeploy SAR operations and support the work of CSOs that are saving lives at sea.

Search and rescue missions in the Mediterranean

Since 2014, over 20,000 people have lost their lives attempting to reach European shores. The dominant narrative behind the EU's policy on the Mediterranean is that search and rescue (SAR) operations encourage migrants to cross. Yet, studies have shown that the existence of SAR operations have little impact on the number of attempted crossings.

There are currently no state-led SAR operations in the Mediterranean. Operation IRINI's primary aim is to enforce the UN arms embargo on Libya (it does not have a SAR mandate). Italy and Malta have used the pandemic as a pretext to close their ports, and the NGO rescue ships *Aita Mari* and *Alan Kurdi* have been impounded on "technical grounds". There are numerous reports of illegal maritime pushbacks conducted and coordinated by the Hellenic Coast Guards and Maltese authorities, as well as refusal to engage in rescues after receiving calls of distress, which violates a series of laws and treaties, including Article 2(1) of the EU Charter of Fundamental Rights, international maritime law and the principle of non-refoulement.

The EU has outsourced responsibility for SAR operations to the Libyan Coast Guard (LCG), which is known for abusive treatment towards migrants: It returns intercepted refugees to war-torn Libya where they are often brutally beaten and imprisoned in extremely poor sanitary conditions, made even more dangerous by the pandemic. By providing funding and training to the LCG, the EU has become complicit in these rights violations. On 27th April the Commission recognised that Libya is not a "safe" country. The LIBE Committee of the European Parliament has demanded that the EU stop working with the LCG, but to no avail.

The dispute over disembarkation and relocation has persisted. While certain Member States systematically refuse to host newcomers, countries of first arrival have been put under disproportionate pressure. Liberties welcomes the initiative by some Member States who pledged to relocate 1,600 unaccompanied minors from reception facilities on Greek islands, but this is too little to alleviate the strain on coastal states.

How the German Presidency can save lives and restore the EU's international reputation

- Support an SAR mandate for Operation IRINI, encourage Member States to redeploy SAR operations, and welcome the contribution of NGOs to SAR. It should also encourage Malta and Italy to release confiscated rescue vessels and reopen their ports.
- Encourage the Commission to launch investigations into illegal pushbacks conducted and coordinated by the Maltese authorities and Greek Coast Guard.
- Encourage the EU to stop funding and training the LCG as long as rights violations continue.
- Give its political backing to a mandatory relocation mechanism with strong financial incentives, based on objective criteria such as a country's GDP and population size. Funds should be made directly available to communities hosting newcomers and financial penalties imposed on Member States that refuse to participate.

Successful inclusion of newcomers

Some Member States are struggling to integrate newcomers into labour and housing markets, education systems and mental and physical health services. It is crucial to invest in integration early on arrival to avoid higher non-integration costs in the future, such as intergenerational poverty and social exclusion. To realise the benefits of successful integration, Member States should promote active participation in economic, social and cultural life, thus strengthening newcomers' sense of belonging. The German Presidency has the opportunity to lead by example and promote sustainable solutions that inspire a two-way integration process between newcomers and their host communities.

Intensify support at local level

The implementation of integration policy largely takes place at local level. Civil society organisations (CSOs) and local authorities have extensive experience in receiving newcomers. However, they have little say in integration policies and they lack funding. The EU should make funding directly available to local authorities rather than channelling it through national governments, especially in Member States that have a track record of failing to implement EU asylum law and policy. The Presidency could give its political support in MFF negotiations to increasing the budget of the Urban Innovative Actions Initiative, which is directly accessible to local governments. The Presidency should also show its support for city networks such as EUROCITIES, given their success in the reception and integration of refugees.

Support social innovation

CSOs have helped governments harvest the fruits of successful integration. New initiatives and social enterprises have emerged all over Europe. These help to implement innovative integration projects and policies that have the potential to be scaled up. Successful projects include mentoring programs, whereby jobseekers are connected with retirees, co-housing arrangements, matching newcomers with locals of a similar age or innovative funding models, such as social impact bonds (SIBs), which mobilise private investors to fund a social service, such as housing or language courses. The Presidency should encourage the creation of new programs and the development of existing ones and stand behind an increase in financial support for research and networking between national and local authorities to assess, share and scale up good practices.

Improve communication

Public debate on migration in the EU is often dominated by anti-immigration rhetoric. Many media outlets, governments, and even the Commission often use fear-inspiring language that pictures migrants and refugees as potential dangers that we need to be wary about. For example, the Migration and Home Affairs portfolio uses the phrase "Protecting our European Way of Life". The German Presidency has the opportunity to lead by example by promoting a narrative that convinces people of the positive effects of migration, and fostering a welcoming environment that unites newcomers and their host communities.

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Experts

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EU tools for the protection and promotion of Article 2 values

Protection of the civic space

Countering populist authoritarians

Values-based framing

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The Civil Liberties Union for Europe (Liberties) is a non-governmental organisation promoting and protecting the civil liberties of everyone in the European Union. We are headquartered in Berlin and have a presence in Brussels. Liberties is built on a network of national civil liberties NGOs from across the EU. Unless otherwise indicated, the opinions expressed by Liberties do not necessarily constitute the views of our member organisations.

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