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Exploring avenues in the EU's rule of law crisis

What role for the Netherlands?

Despite the existence of an extensive 'rule of law toolbox', the EU has found it difficult to deal with rule of law issues. Many experts attribute the EU's failure to act to a lack of political will and determination on the part of EU institutions and member states. However, not all actors are lacking in political will (equally). The Netherlands, for instance, has been very concerned about the erosion of the rule of law inside the EU and has been one of the more active member states – along with, for instance, Belgium, Finland, Sweden and Denmark – in trying to address the EU's rule of law crisis. In this policy brief, we examine three possible avenues available to the Netherlands to strengthen the political will of EU institutions and (like-minded) peers to assertively address this crisis and to increase pressure on backsliding member states to safeguard the rule of law.

Introduction

In its recently published 2021 Rule of Law Report, the European Commission explains that the rule of law is an integral part of the democratic identity of the EU and that the key principles of the rule of law¹ are common to all member states.² However, the report highlights that in some EU countries these principles are increasingly under pressure. In fact, the report raises serious concerns

about judicial independence, media plurality, the legislative process, and the separation of powers in a number of EU member states.

The erosion of the rule of law inside the EU should be of significant concern to the whole of the Union. The rule of law crisis not only undermines the EU's internal cohesion as well as its credibility, but also bears the risk of fundamentally damaging the foundations of European cooperation.³ The functioning of

1 Which it identifies as: 'legality, legal certainty, prohibition of the arbitrary exercise of executive power, effective judicial protection by independent and impartial courts respecting fundamental rights in full, the separation of powers, permanent subjection of all public authorities to established laws and procedures, and equality before the law.'

2 The European Commission, *2021 Rule of Law report: The rule of law situation in the European Union* (Brussels: European Commission, 2021), 1.

3 The Minister of Foreign Affairs, the Minister of Justice and Security, the Minister of the Interior and Kingdom Relations, the Minister of Legal Protection and the Minister for Primary and Secondary Education and Media of the Netherlands, *Dutch government assessment of the European Commission's 2020 Rule of Law report* (The Hague: the Government of the Netherlands, 2020).

the internal market, for instance, is crucially dependent on mutual trust in each other's legal systems. Without that trust, the system of cooperation will eventually erode.

Yet so far, despite the existence of an extensive 'rule of law toolbox', it has proven awfully difficult for the EU to put a halt to rule of law backsliding in member states. Many experts attribute this failure to a lack of political will and determination on the part of EU institutions and member states.⁴ However, not all actors are lacking in political will (equally). The Netherlands, for instance, has been one of the more active member states⁵ – along with, for instance, Belgium, Finland, Sweden and Denmark – in trying to address the EU's rule of law crisis. It was also one of the most vocal advocates of the recently introduced 'rule of law conditionality', the latest addition to the EU's rule of law toolbox, which ties EU funds to compliance with the Union's key legal principles.

Effectively tackling the erosion of the rule of law inside the EU requires broader engagement and a 'coalition of the willing' that is prepared to take the necessary steps to protect one of the EU's most fundamental values. In this policy brief, we therefore explore the possible avenues available to the Netherlands to increase pressure on EU institutions, like-minded peers and backsliding member states to both protect and adhere to the rule of law. For this research, we made use of desk research

and semi-structured expert interviews. We conducted 10 interviews in total, including Commission officials, Members of European Parliament (MEPs), legal and academic experts, and civil society activists.

This policy brief is divided into three sections. The first section explores the reason(s) for the EU's failure to effectively tackle its rule of law crisis. The second section discusses three possible avenues for the Netherlands to strengthen the political will of EU institutions and like-minded peers to assertively address this crisis and to increase pressure on backsliding member states to abide by the rule of law. Finally, the third section reflects on potential partners the Netherlands may wish to engage with in building a 'rule of law coalition'.

A matter of political will

Despite the fact that the EU has, over the years, created an extensive rule of law toolbox with a number of instruments at its disposal, it has proven rather unsuccessful in safeguarding the rule of law within its borders. According to many experts, it is not so much (or not just) the instruments that are lacking, but rather the political will on the part of member states and EU institutions to effectively hold rule of law backsliders to account.⁶

The dominant intergovernmentalism in the *EU Council of Ministers* and the influence of the norms of respect for national sovereignty and mutual trust seem to have discouraged member states from intervening in the domestic politics of backsliding

4 See for instance: Felix Schlagwein, "[Hungary is no longer a democracy, says Hungarian legal scholar](#)", *Deutsche Welle*, May 14, 2020; R. Daniel Kelemen, "[Written submission in response to the Rule of Law call by the Joint Committee on European Union Affairs of the Houses of the Oireachtas](#)", *Reconnect*, January 22, 2021, 5; Kim Lane Scheppele, Dmitry Kochenov and Barbara Grabowska-Moroz, "[EU Values Are Law, After All: Enforcing EU Values Through Systemic Infringement Actions by the European Commission and the Member States of the European Union](#)", *Yearbook of European Law*, no. 39 (Nov 2020): 11.

5 It should be noted, however, that the Netherlands, too, faces issues in the area of the rule of law. Addressing these will be crucial if the Netherlands is to play a constructive, credible and effective role in the EU's rule of law crisis. The authors will return to this point in the conclusion.

6 Schlagwein, "[Hungary is no longer a democracy](#)"; Kelemen, "[Written submission in response to the Rule of Law call by the Joint Committee on European Union Affairs of the Houses of the Oireachtas](#)"; 5; Laurent Pech and Anna Wójcik, "[A Bad Workman always Blames his Tools: an Interview with Laurent Pech](#)", *Verfassungsblog: On Matters Constitutional*, May 28, 2018; Kim Lane Scheppele and R. Daniel Kelemen, "[Defending Democracy in EU Member States: Beyond Article 7 TEU](#)", in *The EU at a Crossroads: From Technocracy to High Politics?*, eds. Francesca Bignami (Oxford: Oxford University Press), 548-549.

states.⁷ These dynamics are visible in the implementation of the Article 7 procedures against both Poland (started in 2017) and Hungary (started in 2018). The procedure is sometimes called the EU's 'nuclear option' as it provides for the most serious political sanction the bloc can impose on a member state: the suspension of the right to vote on EU decisions.⁸ While this instrument has significant shortcomings – most notably, the final step in the Article 7 procedure requires de facto unanimity – member states have also remained reluctant to even bring the process forward.⁹ The General Affairs Council has stalled hearings on the Article 7 procedure since the beginning of the Covid-19 pandemic 'due to the impossibility of holding physical Council meetings'.¹⁰ Only recently, in June 2021, when EU leaders had one of their first physical summits since the pandemic began, it resumed hearings for both countries. However, even before the beginning of the pandemic, the Council was criticised for not organising the hearings in a 'regular, structured and open manner'.¹¹ The last hearing on the Article 7 procedure against Poland pre-dating the pandemic was held in December 2018.¹²

The *European Parliament* has generally been a vocal actor in the EU's rule of law crisis through its reports, opinions and press statements.¹³ However, its biggest political group, the European People's Party (EPP), long tolerated the Hungarian Fidesz party within its ranks, providing (indirect) cover for the party's rule of law breaches back home.¹⁴ After a vote in March this year that would likely have led to the expulsion of the Fidesz party from the EPP group, Fidesz decided to leave on its own initiative, potentially paving the way for EPP politicians to speak out more forcefully in the future.¹⁵

Finally, the EU's lack of political will is also visible at *European Commission* level. Some political observers have rightfully remarked that the Commission has failed in its political role as 'Guardian of the Treaties' and that it responded too late and inadequately in addressing rule of law backsliding within the Union.¹⁶ Instead of using the instruments it has at its disposal, it keeps creating new tools – an often-heard argument.¹⁷

In addition, the European Commission's approach to the Rule of Law crisis has often been rather technical and narrow, failing to

7 R. Daniel Kelemen, "The European Union's authoritarian equilibrium", *Journal of European Public Policy* 27, no. 3 (2020): 489.; Laurent Pech and Kim Lane Scheppele, "Illiberalism within: rule of law backsliding in the EU", *Cambridge Yearbook of European Legal Studies*, no. 19 (2017): 3-47.

8 "What is Article 7, the EU's nuclear option?", *Politico*, September 12, 2018.

9 Petra Bárd and Sergio Carrera, "The Commission's decision on 'Less EU' in safeguarding the rule of law: a play in four acts", *CEPS Policy Insights*, March 1, 2017; "Article 7 hearings on Hungary and Poland must finally lead to concrete action", Progressive Alliance of Socialists and Democrats (S&D), published June 22, 2021.

10 Council of the European Union, *Outcome of the Council Meeting, 3770th Council meeting: General Affairs* (Brussels: Council of the European Union, 2020).

11 European Parliament, *European Parliament resolution of 16 January 2020 on ongoing hearings under Article 7(1) of the TEU regarding Poland and Hungary* (Brussels: European Parliament, 2020).

12 European Parliament, *Protecting the rule of law in the EU: Existing mechanisms and possible improvements* (Brussels: European Parliament, 2019), 9.

13 For example, 1) European Parliament, *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 serious breach by Hungary of the values on which the European Union is founded* (Brussels: European Union, 2019); European Parliament, *Application of Regulation 2020/2092: the Rule of Law conditionality mechanism* (Brussels: European Parliament, 2021); Daniel Boffey, "MEPs back action against European Commission over Poland and Hungary", *The Guardian*, June 10, 2021.

14 Keleman, "The European Union's authoritarian equilibrium", 487.

15 Orlando Crowcroft, "Hungary PM Orban's party quits the largest group in the European Parliament", *Euronews*, March 3, 2021.

16 For example, Daniel Hegedüs, *What role for EU institutions in confronting Europe's democracy and rule of law crisis?* (Washington: The German Marshall Fund of the United States, 2019).

17 Pech and Wójcik, "A Bad Workman Always Blames his Tools".

address the systemic threats to EU values.¹⁸ Scheppele, Kochenov and Grabowska-Moroz point, for instance, to the European Commission’s narrow use of infringement procedures (Article 258 TFEU – Treaty on the Functioning of the European Union). Like the Article 7 procedures, the infringement actions are seen as a ‘heavy tool’, with which the Commission can start an infringement action against a member state suspected of breaching its obligations under EU law by delivering a reasoned opinion on the issue. If the member state, after several actions, does not comply, the Commission can decide to refer the matter to the EU Court of Justice (CJEU).¹⁹

The Commission has launched a series of infringement actions against Poland and Hungary,²⁰ but often on the basis of rather technical violations of EU regulations that failed to recognise the systemic threat to the rule of law. For instance, in 2011, when the Hungarian government lowered the retirement age of judges from 70 to 62 years – a move widely seen as a threat to the independence of the judiciary – the Commission took Hungary to the CJEU on the basis of age discrimination, rather than on the basis of a threat to judicial independence. Although the Commission won the court case, the damage was already (largely) done: the Hungarian government provided the judges with financial compensation but never re-instated them.²¹ So, despite its legal success, the Commission

looked impotent in solving the real political issue.²²

It should probably be noted that this is not just due to a lack of political will on the part of the Commission. When it comes to individual infringement actions, the Commission has only limited room for manoeuvre. By design, infringement actions are meant to address a specific breach of EU law. However, rather than simply continuing its individual infringement actions against technical violations, the European Commission could consider starting a *systemic* infringement procedure. By bundling a set of specific violations into a single general infringement action, it could demonstrate how a pattern of unlawful choices and actions rises to the level of a systemic violation. Scheppele, Kochenov and Grabowska-Moroz explain how this could work: ‘A systemic infringement action would aim directly at the systemic nature of the violation by compiling a single legal action from a set of troubling laws, decisions and actions of the Member State in question to argue that a pattern of violations show that values are breached.’²³ However, it must be said that many of our interviewees deemed it unlikely that the Commission would start such a systemic infringement procedure any time soon.

It must also be noted that EU institutions and member states have begun to take the rule of law crisis more seriously in recent years, as reflected, for instance, in the recent efforts to strengthen the EU’s ‘rule of law toolbox’. However, the effectiveness of this reinforced toolbox will be largely dependent on the political will of EU institutions and member states to effectively and comprehensively use its instruments. The next section looks at

18 Scheppele, Kochenov and Grabowska-Moroz, “EU values are laws, after all”, 44.

19 European Union, “Consolidated version of the treaty on European Union”, *Official Journal of the European Union*, C326/13 (2012): 19–20.

20 Concerning Poland: in 2017, 2018 and 2019. Concerning Hungary: 2015, 2017, 2018 and 2019.

21 Uladzislau Belavusau, “On age discrimination and beating dead dogs: Commission v. Hungary”, *Common Market Law Review*, 50 (2013): 1145–1160; European Parliament, *Protecting the rule of law in the EU: Existing mechanisms and possible improvements* (Brussels: European Parliament, 2019), 6; Gábor Halmai, “The Early Retirement Age of the Hungarian Judges”, in *EU Law Stories: Contextual and Critical Histories of European Jurisprudence*, eds. Fernanda and Davis (Cambridge: Cambridge University Press, 2017).

22 R. Daniel Kelemen, “Europe’s other democratic deficit: National authoritarianism in Europe’s Democratic Union”, *Government and opposition* 52, no. 2 (2017): 224.

23 Dimitry Kochenov, “Biting Intergovernmentalism: the case for the reinvention of article 259 TFEU to make it a viable rule of law enforcement tool”, *Hague Journal on the Rule of Law*, 7.2 (2015): 153–174; Scheppele, Kochenov and Grabowska-Moroz, “EU values are laws, after all”, 63.

three avenues the Netherlands could explore to strengthen political will and increase pressure on backsliding member states to abide by the rule of law.

Three avenues for strengthening political will and increasing peer pressure

Based on interviews and literature review, we identified at least three potential avenues that the Netherlands could explore in raising pressure on EU institutions, like-minded peers and backsliding member states. First, it could consider taking backsliding member states to the European Court of Justice itself. Second, it could take the lead in strengthening interparliamentary cooperation and dialogue on the rule of law. Third, it could intensify its efforts to strengthen civil society in backsliding member states. It should probably be noted, however, that – apart from the fact that these avenues are not exhaustive²⁴ – there is no silver bullet, and that each of these avenues comes with its own merits and shortcomings.

1) Starting an Article 259 TFEU infringement procedure

One particularly controversial avenue open to the Netherlands is for it to bring its backsliding peers to the European Court of Justice. It could do so under Article 259 TFEU, which states that ‘a Member State which considers that another Member State has failed to fulfil an obligation under the Treaties may bring the matter before the Court of Justice of the European Union’ – after having first brought the matter before the European Commission that

is.²⁵ Such an infringement action would allow the Netherlands to assume a more proactive role in confronting rule of law backsliders.²⁶ It would send a strong message to the member state in question, and would increase the pressure on the European Commission to more actively fulfil its role as ‘Guardian of the Treaties’.²⁷

In fact, in November 2020, the Dutch *Tweede Kamer* (House of Representatives) urged its government to investigate and make the necessary preparations, preferably in cooperation with like-minded member states, to bring Poland before the EU Court of Justice because of political interference in the appointment of and continuing disciplinary proceeding against judges as well as ‘the Commission’s failure to enforce previous Court rulings’.²⁸ However, the Dutch government remained hesitant and found little enthusiasm among its partners for this course of action.²⁹ Then-Foreign Minister Stef Blok gave several reasons for the government’s hesitancy and partners’ caution. First of all, the procedure was deemed to undermine the role of the Commission as Guardian of the Treaties. Second, the member states were deemed to lack the expertise and capacity that the Commission has in bringing such cases to the Court. Third, and finally, Article 259 TFEU was deemed to be such a strong and rarely used instrument that it would fundamentally and seriously disrupt the bilateral dialogue with the member state in question. Blok stressed that the ‘possible use of Article 259

24 The Netherlands could, for instance, also increase its discursive pressure on backsliding member states. Dutch Prime Minister Rutte has been very vocal in confronting backsliding peers, for instance challenging Hungarian Prime Minister Órban to trigger Article 50 and publicly speculating about the founding of a new EU without Poland and Hungary. However, our interviewees disagreed over the helpfulness of such statements.

25 European Union, “[Consolidated Version of the Treaty on the Functioning of the European Union](#)”, *Official Journal of the European Union*, C326/47, October 26, 2012, 161.

26 Meijers Committee, *CM1909 Opinion of the Meijers Committee on interstate procedures and the rule of law* (Amsterdam: Meijers Committee, 2019), 5.

27 Scheppelle, Kochenov and Grabowska-Moroz, “[EU values are laws, after all](#)”, 103.

28 Tweede Kamer, “[Motie van het lid Groothuizen c.s. over onderzoek om Polen voor het Europese Hof van Justitie te dagen](#)”, November 16, 2020.

29 Tweede Kamer, “[Reactie op de motie van het lid Groothuizen c.s. over onderzoek om Polen voor het Europese Hof van Justitie te dagen \(Kamerstuk 35570-VI-58\)](#)”, February 1, 2021.

TFEU should therefore really be a last resort when all other instruments have failed'.³⁰

One could of course debate over the question of whether the EU's rule of law crisis has not already entered the 'last resort stadium'. But the fact of the matter remains that there appears to be insufficient enthusiasm among the Netherlands' partners for this course of action. Although the Netherlands could technically pursue this route on its own, it is doubtful whether that would be advisable, as it could have negative repercussions for the bilateral relationship and carries less weight than when being put forward by several member states together. That said, the (threat of) use of Article 259 should remain firmly on the table, particularly if the reinforced toolbox fails to make much of a difference.

2) Strengthening interparliamentary cooperation

A second avenue, which has received very little attention in the literature so far but figured in our conversations with experts, is for the Netherlands to play a leading role in strengthening the role of, and coordination between, the national parliaments in the EU's rule of law dialogue. According to [the Meijers Committee](#), an independent group of experts in the field of European law, national parliaments have an important role to play. The group calls on national parliaments to intensify their cooperation and coordination in order to 'increase pressure on their national governments as well as their peers in the European Parliament to act to protect the rule of law'.³¹ With the previous avenue in mind, national parliaments could, for instance, cooperate on pressuring their respective governments to pursue an Article 259 infringement action. The European Commission also foresees an important role for national parliaments and interparliamentary dialogue: in its

Blueprint for Action it points out parliaments' responsibilities in 'holding the executive accountable'.³²

The Dutch *Tweede Kamer* is actually a good example of a parliament which has (extensively) discussed the EU's rule of law situation and been active in urging its government to play an assertive role in the rule of law crisis. It has held hearings on rule of law backsliding in Poland and Hungary³³, has urged its government to file a claim against Poland at the European Court of Justice for disrespecting the rule of law,³⁴ appointed two rule of law rapporteurs,³⁵ and initiated investigative visits to Poland and Hungary – though the latter visit had to be cancelled after the Hungarian government refused to meet the delegation.³⁶ In a statement to the Dutch parliament, Marta Pardavi, co-chair of the Hungarian Helsinki Committee, urged the Dutch parliament to encourage colleagues from other EU parliaments to become more active also.³⁷

Dutch parliamentarians could be more active through forums such as COSAC (Conference of Parliamentary Committees for Union Affairs of Parliaments of the European Union), a body consisting of EU affairs committees of national parliaments that meets twice a year. In fact, in 2016, during the Dutch Presidency of the EU Council,

30 Tweede Kamer, "[Reactie op de motie van het lid Groothuizen](#)".

31 Meijers Committee, *CM2005 EU-relevant 'rule of law' protection instruments, procedures, policies and tools: an overview of available instruments* (Amsterdam: Meijers Committee, 2020), 2.

32 European Commission, *Strengthening the rule of law within the Union A blueprint for action* (Brussels: European Commission, 2019), 5.

33 "[Dutch Parliament Explores Rule of Law Backsliding in Hungary and Poland](#)", Netherlands Helsinki Committee, published February 18, 2019.

34 Aleksandra Krzysztoszek, "[Dutch government urged to sue Poland in top EU court over rule of law debacle](#)", *Euractiv*, December 2, 2020.

35 The first two rapporteurs were appointed in 2018. See: "[Stieneke van der Graaf \(CU\) en Vicky Maeijer \(PVV\) rapporteurs Rule of Law](#)", Parlement.com, published November 14, 2018; The two current rapporteurs are Agnes Mulder (CDA) and Roelien Kamminga (VVD).

36 Joób Sándor, "[Hungarian government refuses to meet Dutch rule-of-law delegation: Netherlands is not a supervisory body to Hungary](#)" *Index*, February 4, 2019 (Translation: Zoltán Kovács).

37 Tweede Kamer, "[Rule of Law/ Rechtsstatelijkheid](#)", February 14, 2019.

the Dutch parliament launched a debate in COSAC about initiating a more permanent interparliamentary dialogue mechanism on the rule of law.³⁸ Yet nothing much came of it. Similarly, the European Parliament's efforts under the DRF (EU mechanism on democracy, the rule of law, and fundamental rights) to establish interparliamentary cooperation between itself and national parliaments on this matter have been received with little enthusiasm from national parliaments. According to Maria Schinina, the national parliaments 'do not accept the EP's lead in driving the interparliamentary processes and prefer informal *fora* of interparliamentary dialogue'.³⁹ As a result, there has not been much structural cooperation between national parliaments on the rule of law.

This is a missed opportunity. Not only would strengthened coordination and cooperation between national parliaments on this matter provide a complementary form of peer pressure and review, it would also provide a complementary form of dialogue and exchange. The Dutch government and parliament could resume an active role in restarting the conversation (in COSAC) about establishing a more permanent interparliamentary dialogue mechanism dedicated to the rule of law. The French EU Presidency in the first half of 2022 might provide a window of opportunity in this regard – considering that the French *Assemblée Nationale* has previously expressed itself in favour of a more permanent dialogue mechanism.⁴⁰

3) *Strengthening civil society in backsliding member states*

A third potential avenue that the Netherlands could explore in increasing (bottom-up) pressure on backsliding member states is to intensify its efforts to strengthen civil society. Almost all of our interviewees – whether Commission officials, MEPs, academic experts or activists – stressed the essential role of civil society in protecting and strengthening the rule of law in backsliding countries. Civil society organisations (CSOs) not only perform an essential watchdog function, holding their governments to account, but also play a crucial role in the development of a democratic and rule-of-law culture – which ultimately can only be built from within.

However, although countries such as Poland and Hungary actually possess a vibrant civil society, their civic space is increasingly under pressure.⁴¹ What can the Netherlands do to better protect civil society and even strengthen its resilience – outside of the more legal routes that are being used to protect civil society in these countries?

There are several ways to support civil society in backsliding member states. The most obvious though not perfect one is through increased funding for CSOs. The Dutch embassies in Budapest and Warsaw for instance already provide (financial) assistance to civil society organisations working on protecting the rule of law.⁴² The Dutch government could potentially increase funding, for instance by expanding its recently established rule of law fund. The main drawback of such bilateral funding, however, is that it is highly political and could be seen as meddling in another member state's domestic affairs.

38 Maria Schinina, [Strengthening the rule of law in the EU: what role for the interparliamentary cooperation?](#) (Brussels: Institute for European Studies, 2020); European Parliament, [Contributions of the LV COSAC: The Hague 12-14 June 2016](#) (Brussels: European Parliament, 2016).

39 Schinina, [Strengthening the rule of law in the EU](#).

40 Tweede Kamer, "[Staat van de Europese Unie 2017: Verslag van een interparlementaire commissievergadering](#)", June 28, 2017.

41 Giada Negri, "[How European Civil Society Is Pushing Back Against Democratic Erosion](#)", *Carnegie Europe*, March 12, 2020.

42 Ministry of Foreign Affairs, [Human Rights Report 2019](#) (The Hague: Ministry of Foreign Affairs, 2020), 53-79; Tweede Kamer, "[Aanhangsel van de Handelingen: Vragen gesteld door de leden der Kamer, met de daarop door de regering gegeven antwoorden](#)", April 8, 2021.

Another option is therefore to push for more EU-level funding. In fact, the EU recently launched its 'Citizens, equality, rights, and values' programme. The fund's objective is to 'protect and promote the rights and values as enshrined in the Treaties, the Charter and in the applicable international human rights conventions'. While this fund is certainly to be welcomed, it remains to be seen whether the fund will make a big difference to rule of law-oriented CSOs in backsliding states. Although the Fund aims to promote the Union's values, including the rule of law, the fund is not specifically dedicated to protecting the rule of law as such, nor does it specifically target CSOs from backsliding states – the Fund is open to CSOs from all member states. The Netherlands could take an active role, however, in ensuring that as much (of that) funding as possible goes to the protection of the rule of law in backsliding member states. It should be emphasised, however, that funding for CSOs should remain demand-driven.

But the Netherlands can provide other forms of assistance also.⁴³ Indeed, some of the civil society activists we spoke to suggested that the Netherlands should play an active role in facilitating cooperation between Dutch civil society on the one hand and Polish and Hungarian civil society, for instance, on the other – possibly with help from their embassies. Strengthening (pan-)European civil society alliances and networks could not only raise the necessary awareness for rule of law backsliding in the Union, but could also provide CSOs with a sense of protection, knowing that any potential attacks against them would not go unnoticed. In fact, the government already focuses on facilitating 'people-to-people and profession-to-profession contacts'.⁴⁴ Yet the responsibility in this case lies not only with the government, but also, and perhaps more importantly, with Dutch and European civil society itself.

43 See also: Advisory Council on International Affairs (AIV), *De wil van het volk? Erosie van de democratische rechtsstaat in Europa* (The Hague: AIV, 2017).

44 Ministry of Foreign Affairs, *Human Rights Report 2019*, 12.

Building a more encompassing rule of law coalition

Of course, any potential efforts to increase peer pressure within the Union to protect and adhere to the rule of law are bound to benefit from coalition building. Whether the Netherlands intends to start an Article 259 TFEU infringement procedure, wants to table the establishment of an interparliamentary dialogue mechanism on the rule of law, or wants to expand EU funding for civil society, it will likely require the help and engagement of others.

The Netherlands already cooperates with other like-minded member states, such as Belgium, Denmark, Finland and Sweden, on a regular basis. Those five states joined the European Commission before the European Court of Justice in its case against Poland's disciplinary regime for judges.⁴⁵ However, this 'rule of law coalition' needs the weight of a bigger member state, most notably France and/or Germany.

France's President, Emmanuel Macron, has been a vocal criticaster of rule of law backsliding in Poland and, in particular, Hungary. The Netherlands could therefore more actively approach France and see if there are opportunities for intensifying cooperation on the rule of law dossier. The German government, on the other hand, has been much less vocal in the EU's rule of law crisis. Experts have linked Germany's hesitancy to call out backsliding member states to a number of factors. Some suggest that Merkel has been reluctant to take an assertive stance because of the Christian Democratic Union's EPP membership (which until recently included the Hungarian Fidesz party).⁴⁶ Others link it to the strong economic interests between Germany and some of

45 Hans von der Burchard, "[Commission, 5 EU members clash in court with Poland over rule of law](#)", *Politico*, December 1, 2020.

46 Ben Knight, "[Angela Merkel's MEPs criticized for appeasing Hungary's Viktor Orban](#)", *Deutsche Welle*, June 16, 2017.

the backsliding member states.⁴⁷ Then there is also the fact that, for historical reasons, Germany wants to avoid being seen as ‘bullying its eastern neighbours’.⁴⁸ However, Germany’s elections in September could have implications for the country’s approach to the EU’s rule of law crisis. The Greens, who may join a future governing coalition, are much more critical of rule of law backsliding than the Christian Democrats and Social Democrats. The elections might therefore provide a window of opportunity for the Dutch government to engage Germany in more actively addressing the EU rule of law crisis.

Finally, it will also be important to engage the central and eastern European member states. In fact, during the Multiannual Financial Framework negotiations in 2020, it was not only ‘the usual suspects’ that insisted on a rule of law mechanism, but also member states such as Slovakia and Romania.⁴⁹ Forming partnerships with member states such as these would go a long way in hitting home the message that the EU’s rule of law crisis is of concern to all. A member state not to be ignored in this case is Slovenia. In July, the country began its EU Council Presidency. Among its priorities, it lists the strengthening of the rule of law inside the EU, and recently proposed the creation of a European institute for constitutional law, similar to the Venice Commission (a Council of Europe institution).⁵⁰ While one should very much doubt the Slovenian government’s sincerity in prioritising the rule of law – Slovenian Prime Minister Janez Janša and his government have been criticised for trying to suppress checks and balances in the country, curbing

media freedom and weakening courts and independent watchdogs⁵¹ – it does provide an opportunity to keep the issue high on the agenda and push for continued dialogue.

Conclusion: A shared responsibility

The European Union is experiencing a rule of law crisis, which not only undermines its internal cohesion but also bears the risk of fundamentally damaging the foundations of European integration. But despite the high interests at stake *and* an existing rule of law toolbox, the Union has not succeeded in putting a halt to rule of law backsliding in member states: the main obstacle being a lack of political will on the part of member states and EU institutions.

However, not all member states are lacking in political will equally. In this policy brief, we have covered three potential avenues that the Netherlands – one of the more vocal actors – could explore to strengthen the political will of EU institutions as well as (like-minded) peers to assertively address the rule of law crisis and increase pressure on backsliding member states, namely:

- starting an Article 259 TFEU infringement procedure
- strengthening interparliamentary cooperation and dialogue on the rule of law
- intensifying efforts to strengthen civil society in backsliding member states.

47 Judy Dempsey, “Germany Needs to End Hungary and Poland’s Blackmail”, *Carnegie Europe*, November 17, 2020.

48 Dempsey, “Germany Needs to End Hungary and Poland’s Blackmail”.

49 Lucas Guttenberg and Piotr Buras, “How the EU should turn the tables on Hungary and Poland”, *European Council on Foreign Relations*, December 1, 2020.

50 Slovenian Presidency of the Council of the European Union 2021, “Priorities”, 2021; David Herszenhorn, “Slovenia’s Janša describes plans to Balkanize the EU”, *Politico*, May 26, 2021.

51 David Herszenhorn and Hans von der Burchard, “Rule of law disputes cast shadow over opening of Slovenia’s EU Council presidency”, *Politico*, July 1, 2021; The Commission is also critical in its 2021 Rule of Law Report [Country Chapter Slovenia], pointing, for instance, to challenges in proceedings relating to economic and financial crime cases, concerns about the effective enforcement of anti-corruption rules and the deterioration of media freedom and pluralism, source: European Commission, *Rule of Law Report – Country Chapter on the rule of law situation in Slovenia* (Brussels: European Commission, 2021).

With these avenues, the Netherlands could operate within existing frameworks, but complement the sometimes narrow and technical approach of the European Commission – allowing for more systemic and bottom-up action. It furthermore avoids ‘falling prey’ to the political calculations of and sole dependence on other EU member states. Although there is no silver bullet to tackle the EU’s rule of law crisis – the protection of the rule of law remains a shared responsibility and can only be assured through collective and comprehensive action –, persistent efforts to increase political will inside the Union are essential in enforcing the institutions and member states to finally make appropriate and effective use of the (legal) tools at their disposal.

As a final point, it is important to mention that the Netherlands cannot be complacent in its efforts to tackle the EU’s rule of law crisis. The Commission noted in its latest Rule of Law Report that although the Netherlands is considered one of the least

corrupt countries in the European Union, there are some concerns. For example, there has been an increase in threats and violence against journalists, which is reflected in the recent assassination of Dutch crime journalist Peter R de Vries and the cancellation of a TV programme (RTL Boulevard) due to serious threats.⁵² Furthermore, the report highlights concerns about the adequacy of available funding in the current system of legal aid as well as about the transparency of political party financing.⁵³

The Rule of Law Report only assesses developments in the 27 member states, which means it does not provide any concrete points for improvement. Yet, it shows that the Netherlands is not without its own rule of law challenges. Addressing these challenges – and owning up to them – will be crucial if the Netherlands is to play a constructive, credible and effective role in the EU’s rule of law crisis.

52 European Commission, *Rule of Law Report – Country Chapter on the rule of law situation in the Netherlands* (Brussels: European Commission, 2021), 11.

53 European Commission, *Rule of Law Report – Country Chapter on the rule of law situation in the Netherlands*, 11.

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Clingendael – the Netherlands Institute of International Relations – is a leading think tank and academy on international affairs. Through our analyses, training and public debate we aim to inspire and equip governments, businesses, and civil society in order to contribute to a secure, sustainable and just world.

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