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QUESTIONNAIRE TOPIC I: MUTUAL TRUST, MUTUAL RECOGNITION AND THE RULE OF LAW

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The initial debate on fundamental rights and the rule of law in European integration was focused on the risk that the (then) European Communities might pose to the fundamental rights and rule of law usually guaranteed in its Member States. For years, the fundamental rights discourse on European integration was focused on the need for the EU legal order to take fundamental rights seriously in reviewing the powers of EU institutions, not Member States. The protection of fundamental rights in the Member States was a matter left to be addressed under national constitutions or the European Convention of Human Rights and Fundamental Freedoms.

This limited incorporation (to borrow an expression from US federal law) of EU fundamental rights in the legal orders of its Member States was reflected in the case-law of the Court of Justice and, even more emphatically, the Charter of Fundamental Rights, whose Article 51(1) states that: “The provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law.” (emphasis added).

Gradually, however, the focus has shifted to the need for the European Union to also guarantee fundamental rights and the rule of law at the level of its Member States. In many respects, the latter has now become a topic of higher interest in the legal literature and the case-law. The reason has to do with the expansion of European integration which, in turn, increases the interdependence between its Member states and between their legal orders and the EU legal order, with respect to fundamental rights and the rule of law. In that context, mutual trust and mutual recognition are of particular relevance. Mutual recognition is a principle of EU law that brings into direct contact the legal orders (and their institutions) of the different Member States. Introduced as an instrument of market integration it was progressively adopted in other areas of EU law such as justice and asylum policies. The principle of mutual recognition requires, however, mutual trust between the national legal orders. We could say that the underlying assumption of mutual recognition is the common constitutional identity of Member States as to the values enshrined in Article 2 TEU (democracy, the rule of law and fundamental rights). These values have therefore become accession criteria for any candidate Member State under Article 49 TEU. It has become clear, however, that simply controlling compliance with such values at the moment of accession is not enough. That was the reason why Article 7 was inserted into the Treaties. But Article 7 depends on a political decision and not judicial enforcement. In addition, the requirements triggering that political decision are extremely hard to satisfy. It was thought, initially, that the simple deterrent effect of Article 7 might be enough to prevent a risk for those values in any Member State. Unfortunately, recent developments in some Member States have raised serious doubts on the effectiveness of Article 7. It is in that context that a variety of new instruments have been introduced to monitor and enforce the rule of law and fundamental rights in the Member States. These go from soft law instruments, such as the rule of law dialogue, to the introduction of rule of law conditionality in the EU funds or a more pro-active and extensive use of other EU Treaty legal provisions (such as Article 19) in reviewing possible violations of the rule of law and other fundamental values and rights in Member States.

This enhanced application of the rule of law and Article 2 values in the domestic legal order of Member States is not absent of challenges. First, the concept of the rule of law is, itself, contested. There is a close link between the rule of law, democracy and fundamental rights. It is hard to conceive of democracy and fundamental rights, at least in the context of European liberal democracies, without the rule of law. Without the rule of law there is no equality under the law, no genuine consent of the governed or effective protection of fundamental rights. At the same time, without democracy or fundamental rights the fundamental assumptions and objectives of the rule of law would be put into question. This broader conception of the rule of law, intimately linked to the concept of a liberal democracy, is however under challenge in some EU Member States.

A second challenge derives from the expansion in the scope of application of EU law and policies in the domestic legal orders of Member States that results from the enforcement of the rule of law in Member States. It can be argued that this expansion is simply the natural (and logical) consequence of the degree of economic, social and legal interdependence between both the national legal orders and between those orders and the EU legal order itself. This view is not consensual, however. It has even led to accusations that such an enforcement role would be *ultra vires*. One interesting aspect to review is, therefore, the different normative foundations that can be put forward both to support or oppose a role of the EU legal order in monitoring and enforcing the rule of law at the level of its Member States.

This second challenge connects to the recent examples of national challenges to the primacy of EU law. Are these related or independent phenomena? And to what extent do challenges to the primacy of EU law, by undermining its uniform application, undermine the rule of law in the EU legal order itself? Can there be a pluralist (non-hierarchical) understanding of the relationship between the EU and national legal orders that is compatible with the respect for the rule of law in the EU legal order?

Finally, the authority of the European Union in protecting the rule of law in its Member States will strongly depend on the standards with which the Union itself will comply. Recent cases have led some to cast doubts on the extent to which the EU is itself willing to be subjected to the same standards it is requiring from its Member States. Consider for example the controversies surrounding the appointment of the European Public Prosecutors (where the Council has, in some cases, at the request of national governments, replaced the preferences of the independent committee) or the case involving former Advocate General Sharpston. These two examples highlight the extent to which the intergovernmental character of the EU decision-making may be in clear tension with the demands of the rule of law. It should, however, be unacceptable, for example, for national governments to be able to do at the EU level what they wouldn't be able to do, under the rule of law, at national level.

Chapter 1: Concept of the Rule of Law

Question 1

What is the dominant concept (or concepts) of the rule of law in your Member State?

- a. Does it include, notably, the protection of fundamental rights and democracy?
- b. Is the concept of the rule of law, in your Member State, conceived as inherently linked to liberal democracy or linked to respect for values such as those referred to in Article 2 TEU (i.e. human dignity, freedom, democracy, equality, respect for human rights)?
- c. Is the concept of the rule of law related to effective checks and balances and independent institutions? What is the law and practice, in your Member State, guaranteeing such independence?

Question 2

How does your understanding of the concept of the rule of law in the Union legal order, and the requirements flowing from that concept, correspond to the concept of the rule of law in your Member State? Do the concepts overlap, complement each other or do they sometimes enter into conflict with one another?

Question 3

EU law has promoted the independence of regulatory agencies in a variety of domains (such as with central banks or competition authorities). What has been its effective impact in promoting a culture of regulatory independence in your Member State? Is that role contested in any way? And is this role linked to broader rule of law discussions? How does your Member State reconcile the requirement for institutional independence with democratic accountability?

Question 4

To what extent does the national law of your Member State make it possible for individuals to have effective remedies and access to courts? Can you briefly describe and summarise the legal scholarship and case law on this?

Chapter 2: Normative Foundations for the Role of the European Union in Protecting the Rule of Law

Question 5

How is the role of the EU law in enforcing the rule of law in your Member State justified or challenged in legal scholarship and, more broadly, in public discourse?

Question 6

Is that role constructed as addressing moral and political externalities, as a consequence of the interdependence between the EU and national legal orders or as a form of external discipline similar to the ECHR?

Chapter 3: Instruments for enforcing and protecting the rule of law and the role of the CJEU

Question 7

What is the assessment, in your Member State, of the traditional legal and political instruments available to the EU in enforcing the rule of law in its Member States, from the accession criteria to infringement actions or recourse to Article 7 TEU, including the limited scope of application of EU fundamental rights to acts of Member States recognized in the case-law of the Court of Justice and Article 51(1) of the Charter? Can you describe and summarise the legal scholarship debate on these issues in your Member State?

In addition:

- a. Does your Member State legal scholarship consider infringement actions as an effective tool in Union enforcement of the rule of law?
- b. Was funds conditionality on the rule of law object of debate in your country? What are the predominant views on Regulation 2092/2020 and on the Judgments of the European Court of Justice of 16 February 2022, in cases Hungary / Parliament and Council (C-156/21, EU:C:2022:97) and Poland / Parliament and Council (C-157/21, EU:C:2022:98)?
- c. Is there support for additional instruments aimed at protecting the rule of law, such as a Copenhagen Criteria Commission or others? Is there a preference for hard or soft law instruments?

Question 8

How has the case-law of the Court of Justice on judicial independence and Article 19 TEU been accepted and discussed in your State? Are there any proposals or discussions to extend the same approach to other areas and provisions of EU law that may depend on national compliance with the values of Article 2 TEU (such as reviewing national rules and measures that could impact the free and democratic character of the elections to the European Parliament)?

Question 9

To what extent is the increased role of the European Court of Justice in the realm of the rule of law and fundamental rights protection at the level of the Member States perceived as compatible with the current institutional and procedural arrangements of the EU judicial system?

Chapter 4: Impact on Mutual Recognition and Mutual Trust

Question 10

Are there instances where your national courts have refused (or simply questioned) to enforce judicial decisions or EAWs from other Member States in light of concerns with the rule of law in those Member States?

Question 11

Recent case-law of the ECJ concerning the impact of rule-of-law concerns on judicial cooperation based on mutual recognition and mutual trust has distinguished between systemic rule of law

breaches, on the one hand, and the specific threat to a breach of fundamental rights in individual cases, on the other. According to such case-law it appears that only concrete and justified threats justify the non-execution of EAWs. Can you describe and summarise the legal scholarship debate on these issues in your Member State?

Question 12

Are there other areas of the law where mutual recognition might be impaired because of concerns with the rule of law in certain Member States (consider, for example, competition law or civil and commercial matters)?¹

Question 13

Are there also instances where either national authorities or legal scholars have challenged the compliance with the rule of law by EU institutions themselves? In particular, but not exclusively:

- a. How are the institutional rules and procedures regarding the Court of Justice of the EU or the European Public Prosecution Office assessed in your country in light of the rule of law requirements? Is this seen in anyway as undermining the claims made by the European Union with regard to the respect of the rule of law by Member States?;
- b. Are there any cases where the inter-governmental character of some EU institutions and procedures may have allowed national political authorities to evade requirements stemming from the rule of law? In other words, to do, collectively, at the EU level things in a manner that is perceived as challenging the rule of law?

Chapter 5: The Rule of Law and the Existential Requirements of EU Law

Question 14

Are there instances of national judicial decisions challenging the primacy of EU law in your national legal order? If so:

- a. Are they in any way linked to the rule of law debates?
- b. Is the primacy of EU law understood, in your State, as necessary to comply with the principle of equality under the law?

Question 15

Has the concept of national constitutional identity (Art 4(2) TEU) been defined in the case-law of national constitutional or supreme courts and/or by scholars? Has the emerging notion of "EU constitutional identity" been subject to debate in national case-law or doctrine? If so, how do the concepts of national constitutional identity and EU constitutional identity relate to each other.

¹ See, for example, judgment of the General Court of 9 February 2022, Sped-Pro/Commission (T-791/19, EU:T:2022:67).