

# THE CONCEPT OF CHILLING EFFECT

ITS UNTAPPED POTENTIAL  
TO BETTER PROTECT DEMOCRACY,  
THE RULE OF LAW, AND FUNDAMENTAL  
RIGHTS IN THE EU

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# EXECUTIVE SUMMARY

**ECHR Law:** Chilling effect is a well-established concept in the case law of the European Court of Human Rights. In practice, this concept has been predominantly used in freedom of expression-related cases where the applicants were journalists. More recently, the Strasbourg Court has received an increasing number of applications from judges, in which it has been argued that the threats and/or sanctions imposed on them have had a chilling effect.

**EU Law:** Chilling effect is usually known as dissuading or deterrent effect in EU law and has long been used, implicitly or explicitly, in areas such as competition law or free movement law. However, the case law of the CJEU has traditionally shown a very limited use of the notion in “fundamental rights/EU values” cases. This changed in 2020 following the judgments issued in Joined Cases C-558/18 and C-563/18, *Miasto Łowicz and Prokurator Generalny*, and Case C-78/18, *Commission v. Hungary (Transparency of Associations)*.

**Article 2 TEU values:** Democracy, the rule of law and fundamental rights are interconnected and mutually reinforcing values, which is why it would be misguided to seek to limit the use of the concept of chilling effect to “fundamental rights” cases, narrowly understood. The concept of chilling effect should therefore also be used to protect the exercise of procedural rights and procedural obligations.

**Main problematical national measures:** To help prevent autocratic-minded authorities from achieving their self-censorship goals, the concept of chilling effect should be systematically considered and explicitly used to politically and, where possible, legally challenge two main types of national

measures: (i) national measures whose vague or ambiguous content, specific or combined effects and/or arbitrary application can dissuade natural and/or legal persons *from exercising their EU rights* for fear of falling foul of these measures and (ii) national measures which are adopted and/or applied with the aim to dissuade natural persons *from fulfilling their professional obligations*, as for instance in the case of judges, prosecutors and lawyers.

**Dassonville-like enforcement approach:** The European Commission should adopt a *Dassonville*-like enforcement approach to better protect fundamental rights/EU values. In other words, the Commission should pay special attention to all measures enacted by member states which are capable of dissuading, directly or indirectly, actually or potentially, natural or legal persons from exercising their EU rights or fulfilling their EU obligations *even* where these measures are *not* applied/enforced. In this context, the European Commission must not only have regard to the content of the relevant measures but also consider their indirect, potential and combined effects. Doing so will enable the Commission to more easily construe these measures as falling within the scope of EU law, which can be the subject of infringement actions. In this respect, one must stress that the longer the Commission waits to act, the more irreparable damage is done.

**Protecting the right to freedom of association, and more broadly Europe’s civic space:** The Commission (or individual member states) should build on the Court of Justice’s ruling in *Transparency of Associations* and challenge *inter alia* the chilling effect of any national measure, broadly understood,

which interferes with the exercise of Charter rights and in particular freedom of association, if the mere existence of “regulatory constraints” or the mere prospect of the potential application of any national measure can have a negative impact on donors and/or the activities of a civil society organisation.

**Smear campaigns targeting civil society organisations and human rights activists/defenders:** The Commission (or individual member states) should consider launching infringement actions based on the concept of chilling effect, to the extent that smear campaigns—regardless of whether they originate from “public authorities” broadly understood or proxies—can be construed as unjustified restrictions on the exercise of freedom of association, in breach of EU law.

**Smear campaigns targeting judges:** The Commission (or individual member states) should also consider launching infringement actions on the sole basis of the chilling effect smear campaigns (such as the Polish publicly financed billboard campaign in 2017) have on the EU principle of judicial independence. It is further submitted that Article 19(1) TEU offers a bridge through which the European Commission could pursue the Council of Europe’s judicial and non-judicial findings in relation to threats or violations of the principle of judicial independence, as well as threats and/or violations of judges’ human rights which in turn undermine judicial independence.

**Smear campaigns targeting journalists:**

Regarding SLAPPs, the best course of action may be a revision of the Rome II and Brussels Ia Regulations. More ambitiously, an entirely new EU anti-SLAPPs regulation or directive could be put forward by the Commission. Regarding smear campaigns, it is proposed to explore short term action in the form of an infringement case based on Directive 2019/1937 once its implementation period comes to an end on 17 December 2021.

**Negative and positive obligations:** Article 2 TEU values, as concretised in different provisions of the Treaties and the EU Charter, must be interpreted as imposing on the EU institutions and its EU member states *negative* as well as *positive* obligations. Negatively, Article 2 TEU must be construed as imposing an *obligation to refrain* from creating a climate of distrust, fear or stigmatisation and taking measures which can have a chilling effect on specific categories of natural or legal persons or on society in general by discouraging the legitimate exercise of the rights provided for by EU. Positively, Article 2 TEU must be construed as imposing *an obligation to create* a favourable environment for the fulfilment of the values provided for in this Treaty provision, as well as an obligation to react when threats, attacks, smear campaigns, etc., aim to discourage journalists, judges, lawyers, etc., from exercising their rights and/or fulfilling their professional duties.

# 1. WHAT IS CHILLING EFFECT?

In the European Commission's first Rule of Law Report and connected country chapters published on 30 September 2020, the concept of chilling effect is mentioned 20 times in relation to legal measures, political attacks, smear campaigns, abusive lawsuits and threats targeting journalists, civil society, judges and prosecutors.<sup>1</sup> For the Commission, these developments can *inter alia* negatively affect public debate, media freedom as well as public trust in the judiciary and therefore its independence, not to mention threaten the physical safety of those being targeted. In several instances, the European Commission refers to chilling effect in relation to developments already denounced by bodies of the Council of Europe. Chilling effect is however never defined in either the Commission's transversal report or the country chapters, which is why this paper will attempt to offer a definition below, before outlining its scope and primary objective.

From a legal point of view, chilling effect may be defined as the *negative* effect any state action has on natural and/or legal persons, and which results in pre-emptively *dissuading* them from exercising their rights or fulfilling their professional obligations, for fear of being subject to formal state proceedings which could lead to sanctions or informal consequences such as threats, attacks or smear campaigns. State action is understood in this context as any measure, practice or omission by public authorities which may deter natural and/or legal persons from exercising any of the rights provided to them under national, European and/or international law, or may discourage the potential fulfilment of one's professional obligations (as in the case of judges, prosecutors and lawyers, for instance).

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<sup>1</sup> The European Commission communication, *2020 Rule of Law Report – The rule of law situation in the European Union*, COM(2020) 580 final and the 27 country chapters are available [online](#). The chilling effect is mentioned in 12 country chapters: Bulgaria; Germany; Estonia; Ireland; France; Croatia; Hungary; Poland; Portugal; Romania; Slovenia; Finland.

While there could be situations where state action might unintentionally produce a “chilling effect” on natural and/or legal persons, national authorities may also deliberately adopt measures, undertake specific actions and/or fail to react with the view of *unlawfully* dissuading *lawful* behaviours<sup>2</sup> they do not approve of. Three main “techniques” to dissuade natural or legal persons from exercising their rights can be briefly outlined in this respect: (i) The adoption of deliberately ambiguous legal provisions; (ii) The arbitrary enforcement of these provisions against the most vocal critics of the autocratic-minded authorities of the day—be they opposition politicians, journalists, judges, prosecutors, lawyers,

academics or civil society groups—if only to “send a message” to the public at large; (iii) The adoption of disproportionate sanctions, as this will in turn further discourage people from exercising their rights and/or obligations and therefore limit the need for future arbitrary enforcement of the relevant legal provisions whose lack of foreseeability is intentional.<sup>3</sup>

In short, chilling effect is primarily about public authorities, directly or through proxies, aiming to create a climate of self-censorship regardless of whether the conduct being contemplated is protected under national and/or European law.

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- 2 The aim of deterring *unlawful* behaviour, especially via criminal law, is however not an issue provided that the content and application of relevant legal norms, including legal provisions providing for sanctions, are compatible with constitutional, European and/or international norms. This means, *inter alia*, to borrow from Article 52 of the EU Charter of Fundamental Rights that any limitation on the exercise of rights must be provided for by law; respect the essence of those rights; and limitations be made only if they are necessary and genuinely meet objectives of general interest or the need to protect the rights and freedoms of others.
- 3 This would of course not be compatible with human rights law. It is for instance well established in the case law of the European Court of Human Rights that legal provisions must be accessible to the persons concerned and foreseeable as to their effects, as well as indicate the scope of any discretion granted to the competent authorities, and the manner of their exercise be indicated with sufficient clarity to give the individual adequate protection against arbitrary interference. See e.g. recently the case of *Selahattin Demirtaş v. Turkey* (no. 2), CE:ECHR:2018:1120JUD001430517.

## 2. CHILLING EFFECT IN ECHR AND EU LAW: SCOPE OF PAPER AND MAIN OBJECTIVE

Different legal systems apply the notion of chilling effect. While this paper is primarily concerned with chilling effect in EU law, it will first focus on the ECHR framework. This ECHR *détour* is warranted if only because chilling effect<sup>4</sup> has been extensively and regularly used by the European Court of Human Rights, mostly in freedom of expression related cases and more recently in cases raising judicial independence issues, as will be shown in Section 3. While chilling effect is yet to be formally described as a “Convention notion” and defined “in any substantial way”,<sup>5</sup> the Strasbourg Court has relied on the concept to justify a strict scrutiny review of national measures which the Court understands as most likely to produce negative effects going beyond the individual instances where they are applied,

resulting in natural and legal persons being *dissuaded* from exercising their rights for fear of being subject to these measures.

By contrast—and until recently, as we shall see in Section 4 of this paper—the Court of Justice of the EU showed little inclination to make meaningful use of the notion of chilling effect (usually known as dissuading or deterrent effect in EU law) in fundamental rights/EU values cases,<sup>6</sup> possibly because it had yet to be faced with a flow of national measures which necessitated recourse to it. This changed in 2020 following years of “rule of law backsliding” first in Hungary and subsequently in Poland.<sup>7</sup> In the context of an infringement case dealing with Hungary’s law on the transparency of

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4 Within the ECHR framework, chilling effect is usually translated as *effet inhibiteur* in French.

5 T. Baumbach, “Chilling Effect as a European Court of Human Rights’ Concept in Media Law Cases” (2018) 6(1) *Bergen Journal of Criminal Law and Criminal Justice* 92, p. 111.

6 Fundamental rights cases must not be understood as not including cases relating to democracy and/or the rule of law. Indeed, when one compare Article 2 TEU values to the provisions of the EU Charter of Fundamental Rights, “it becomes clear that the Charter boils down to a ‘translation’, complete or partial, of the values listed in Article 2 TEU into a more detailed list of fundamental rights and principles”: G. Toggenburg and J. Grimheden, “Upholding Shared Values in the EU: What Role for the EU Agency for Fundamental Rights?” (2016) 54(5) *JCMS* 1093, p. 1098. For instance, the EU Charter of Fundamental Rights includes provisions which guarantee the core components of the rule of law (see Title VI on justice). Furthermore, the rule of law may be said to be a concept inherent in all the provision of the EU Charter, as it is said by the European Court of Human Rights to be a concept inherent in all the Articles of the ECHR. Similarly, the rule of law and democracy are closely interconnected, with the rule of law being held by the European Court of Human Rights as one of the foundations of an effective and meaningful democracy: *Uspakich v Lithuania*, 20 December 2016, CE:ECHR:2016:1220JUD001473708, para. 87.

7 For further analysis and references, see L. Pech and K.L. Scheppele, “Illiberalism Within: Rule of Law Backsliding in the EU” (2017) 19 *CYELS* 3.



foreign-funded civil society organisations<sup>8</sup> and two national requests for a preliminary ruling raising the issue of Poland's new disciplinary regime for judges,<sup>9</sup> the Court took account of the dissuasive/deterrent effect of the relevant national measures before unambiguously making clear that they are not compatible with freedom of association and judicial independence as guaranteed under EU law. These judicial developments in Luxembourg no doubt explain, as previously noted, the European Commission's arguably new and welcome inclination to make more prominent use of the concept in relation to national measures whose vague content, combined effects and/or arbitrary application can lead to diffuse and negative effects, resulting in

natural or legal persons abstaining from exercising their rights for fear of falling foul of the national measures.<sup>10</sup>

Following a detailed overview of how the Court of Justice astutely adopted a chilling effect-based approach in joined Cases C-558/18 and C-563/18, *Miasto Łowicz and Prokurator Generalny* and Case C-78/18, *Commission v. Hungary* to better protect judicial independence and freedom of association, Section 5 of this paper will conclude by outlining how the concept of chilling effect could be used to better protect democracy, the rule of law and fundamental rights in the EU.

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8 Case C-78/18, *Commission v. Hungary*, EU:C:2020:476.

9 Joined Cases C-558/18 and C-563/18, *Miasto Łowicz and Prokurator Generalny*, EU:C:2020:234.

10 European Commission communication, *2020 Rule of Law Report – The rule of law situation in the European Union*, COM(2020) 580 final, 30 September 2020, p. 11 and p. 20.

# 3. CHILLING EFFECT IN ECHR LAW: A WELL-ESTABLISHED CONCEPT

Chilling effect is by now a well-established concept in ECHR law<sup>11</sup> yet it is one which the European Court of Human Rights has most likely borrowed from the case law of the US Supreme Court relating to the First Amendment.<sup>12</sup> This “borrowing” may itself reflect the prior “borrowing” of the concept by the German Federal Constitutional Court in the late 1960s to similarly better protect freedom of expression,<sup>13</sup> which is the same area where the effect of chilling

effect is the most noticeable in the case law of the European Court of Human Rights.<sup>14</sup> The Strasbourg Court’s extensive and regular use of chilling effect has, in turn, led the main bodies of the Council of Europe to take this concept into account. They have done so not only to defend media freedom but more recently and noticeably, judicial independence, in a context of increasing and spreading rule of law backsliding, as previously highlighted.

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- 11 The first instance where a chilling effect was alleged appeared to be the case of *Donnelly and others v. UK*, 5 April 1973, CE:ECHR:1973:0405DEC000557772, where the applicant was represented by Professor Kevin Boyle who studied at Yale University and who subsequently became a well-known and respected human rights lawyer and scholar. In this case, the applicant alleged at para. 39 the chilling effect torture would have “on all members of society” as “it would inhibit the full exercise of political rights as well as violate the rights of those actually brutalised”. The concept of chilling effect was then not alleged until 1982, in a case where the European Commission of Human Rights referred to the case law of the US Supreme Court in relation to the chilling effect the oath of allegiance procedure would have on the free expressions of opinions in society, before concluding that “it follows that the applicant’s complaints cannot be regarded as incompatible with the provisions of the Convention and in particular with Article 10 thereof”: *X. v. Germany*, 16 December 1982, CE:ECHR:1982:1216DEC000922880, para. 1.
- 12 See e.g. *Philadelphia Newspapers v. Hepps*, 475 U.S. 767 (1986), p. 777: “Because such a “chilling” effect would be antithetical to the First Amendment’s protection of true speech on matters of public concern, we believe that a private-figure plaintiff must bear the burden of showing that the speech at issue is false before recovering damages for defamation from a media defendant.” The synonymous expression of deterrent effect has also been used: see e.g. *Speiser v. Randall*, 357 US 513 (1958), p. 518: “To deny an exemption to claimants who engage in certain forms of speech is, in effect, to penalize them for such speech. Its deterrent effect is the same as if the State were to fine them for this speech.” One may also note that the concept of chilling effect has been codified at US state level. See e.g. California Code, Code of Civil Procedure, § 425.16(a): “The Legislature finds and declares that there has been a disturbing increase in lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances. The Legislature finds and declares that it is in the public interest to encourage continued participation in matters of public significance, and that this participation should not be chilled through abuse of the judicial process...”
- 13 J. Staben, *Der Abschreckungseffekt auf die Grundrechtsausübung: Strukturen eines verfassungsrechtlichen Arguments*, Mohr Siebeck GmbH and Co. KG, 2016. For an example, see BVerfGE 54, 129, pp. 135-136: “For the condemnation to pay damages does not lead solely to satisfaction for a defamation lying in the past. It inevitably develops preventive effects by subjecting the expression of critical opinions to high financial risk; it may thus reduce willingness to exercise criticism in future, and in this way bring about adverse effects on free intellectual debate that must affect the core of the constitutional guarantees”.
- 14 For an analysis focusing on the application of the criminal law of defamation and the chilling effect it may produce on the right to freedom of expression under Article 10 ECHR, see R. O’Fathaigh, “Article 10 and the chilling effect principle” (2013) 3 *European Human Rights Law Review* 304.

### 3.1 CHILLING EFFECT IN THE EUROPEAN COURT OF HUMAN RIGHTS' CASE LAW

As of 1 January 2021, a quick search of the HUDOC database gives 353 results with respect to judgments issued by the Grand Chamber, Chamber or Committee of ECtHR judges. However, this does not mean an actual reliance on the concept by the Court itself in 353 judgments. Indeed, a chilling effect is more often alleged by applicants than used by the Court in its own reasoning. For instance, in a recent Grand Chamber judgment regarding the lifting of a member of parliament's immunity and pre-trial detention on terrorist charges for political speeches, a chilling effect on dissent and freedom of expression was alleged by the applicant, but the Court did not address this claim specifically although it did agree with the applicant regarding the violation of Article 10 ECHR.<sup>15</sup> Similarly, but more rarely, there are examples where the defendant rather than the applicant relied on the concept—for instance the case where the Hungarian government raised the “chilling effect” that eventual “broadening of the notion of legitimate expectation” by the Court would have “on national legislatures”.<sup>16</sup> The Court did not subsequently address this point.

In a recent categorisation of the case law in relation to the use of chilling effect, seven categories were

outlined by the author: (i) cases relating to the right to work as a journalist; (ii) cases relating to the protection of journalistic sources; (iii) cases relating to criminal sentences imposed on journalists; (iv) cases relating to awarding of damages and sanctions such as fines imposed on journalists; (v) cases relating to suspended prison sentences imposed on journalists; (vi) cases relating to a set of sanctions viewed as a whole imposed on journalists and (vii) what the author describes as “remarkable cases”, i.e., cases relating to media but raising more unusual issues such as a ban on the publication of certain images and a civil law injunction prohibiting the republication of a specific passage from a previously published article.<sup>17</sup>

As the categories above clearly suggest, the European Court of Human Rights has primarily relied on the concept of chilling effect to extensively protect freedom of expression, and media freedom in particular. One would be wrong, however, to infer that the Court has been concerned with the situation of journalists or freedom of expression exclusively. For instance, in one case the Court relied on the notion of chilling effect to protect an opposition politician and the right to freedom of assembly in Russia.<sup>18</sup> In another, the Court referred to chilling effect in relation to a sanction adopted against a Muslim prisoner for performing acts of worship at night time in breach of a prison schedule.<sup>19</sup> There have been also cases where the chilling effect of

15 *Selahattin Demirtaş v. Turkey (no. 2)*, 22 December 2020, CE:ECHR:2020:1222JUD001430517.

16 *Béla Nagy v. Hungary*, 13 December 2016, CE:ECHR:2016:1213JUD005308013, para 61.

17 T. Baumbach, “Chilling Effect as a European Court of Human Rights Concept in Media Law Cases”, op. cit., pp. 98 et seq.

18 *Navalny v. Russia*, 15 November 2018, CE:ECHR:2018:1115JUD002958012 (references omitted): “103. The Court reiterates that an interference with the right to freedom of assembly does not need to amount to an outright ban, legal or *de facto*, but can consist in various other measures taken by the authorities. The term “restrictions” in Article 11 § 2 must be interpreted as including both measures taken before or during a gathering and those, such as punitive measures, taken afterwards. For instance, a prior ban can have a chilling effect on those who may intend to participate in a rally and thus amount to an interference, even if the rally subsequently proceeds without hindrance on the part of the authorities [...] 152. It should be further stressed that the applicant's arrests, detention and ensuing administrative convictions could not have failed to have the effect of discouraging him and others from participating in protest rallies or indeed from engaging actively in opposition politics. Undoubtedly, those measures also had a serious potential to deter other opposition supporters and the public at large from attending demonstrations and, more generally, from participating in open political debate. Their chilling effect was further amplified by the fact that they targeted a well-known public figure, whose deprivation of liberty was bound to attract wide media coverage.” (our emphasis)

19 *Korostelev v. Russia*, application no 29290/10, 12 May 2020, para. 64: “Lastly, the Court notes that being a form of disciplinary punishment, the reprimand not only decreased the applicant's chances of early release, mitigation of the prison regime, or of obtaining a reward, but also had a chilling effect on other prisoners”.

criminal law provisions relating to abortion has been raised.<sup>20</sup> Finally, in some cases, chilling effects concerns were raised in relation to the violation of the right of freedom of expression of judges who spoke to defend judicial independence in the face of threats originating from national authorities. Two judgments are worth detailing in this respect: the Grand Chamber judgment of 28 October 1999 in *Wille v. Liechtenstein*<sup>21</sup> and the Grand Chamber judgment of 23 June 2016 in *Baka v. Hungary*.<sup>22</sup>

The case of *Wille* followed the announcement by the Prince of Liechtenstein of his intention not to reappoint the applicant—a senior judge—to a public post. In its reasoning, the Grand Chamber emphasised the chilling effect of the public statement by the Prince on the exercise by the judge of his freedom of expression, as it was likely to discourage him from making statements of that kind in the future.<sup>23</sup> Hence there was indeed an interference with the exercise of the President of the Liechtenstein Administrative Court’s right to freedom of expression. This interference was furthermore not necessary in a democratic society in light of the different circumstances outlined by the Court and in particular, the fact that the senior judge primarily expressed scholarly views on constitutional law matters during an academic lecture. In other words, the Prince was wrong to announce his intention not to appoint the judge to public office ever again. As

the Court stated, “questions of constitutional law, by their very nature, have political implications”,<sup>24</sup> which does not mean national authorities can prevent and/or discipline judges on this basis.

In the case of *Baka*, the Grand Chamber had to review the premature termination of the President of the Hungarian Supreme Court’s mandate on account of his criticism, expressed in his professional capacity, of Prime Minister Viktor Orbán’s judicial “reforms”. Amongst other claims, the senior judge

contended that the impugned interference had not only violated his freedom of expression but, in a broader perspective—through the violation of the security of tenure and the *chilling effect* that these events exerted on other judges—, had also compromised the independence of the judiciary.<sup>25</sup>

In its judgment, the Grand Chamber reiterated

the “*chilling effect*” that the fear of sanction has on the exercise of freedom of expression, in particular on other judges wishing to participate in the public debate on issues related to the administration of justice and the judiciary. This effect, which works to the detriment of society as a whole, is also a factor that concerns the proportionality of the sanction or punitive measure imposed.<sup>26</sup>

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20 See recently *A, B and C v. Ireland*, application no 25579/05, 16 December 2020, para. 131: “The risk of such sanctions will be examined on the merits of the third applicant’s complaints in so far as she maintained that those sanctions had a chilling effect on the establishment of her eligibility for a lawful abortion in Ireland”. See also para. 254: “Against this background of substantial uncertainty, the Court considers it evident that the criminal provisions of the 1861 Act would constitute a significant chilling factor for both women and doctors in the medical consultation process, regardless of whether or not prosecutions have in fact been pursued under that Act.”

21 CE:ECHR:1999:1028JUD002839695.

22 CE:ECHR:2016:0623JUD002026112. For further analysis, D. Kosař and K. Šípulová, “The Strasbourg Court Meets Abusive Constitutionalism: *Baka v. Hungary* and the Rule of Law” (2018) 10 *Hague J Rule Law* 83.

23 *Wille v. Liechtenstein*, op. cit., para. 50.

24 Ibid., para. 67.

25 *Baka v. Hungary*, op. cit., para. 130.

26 Ibid., para. 167.

Applying these guiding principles in the present case, the Court held that

the premature termination of the applicant’s mandate undoubtedly had a “*chilling effect*” in that it must have discouraged not only him but also other judges and court presidents in future from participating in public debate on legislative reforms affecting the judiciary and more generally on issues concerning the independence of the judiciary.<sup>27</sup>

In this light, the Court unsurprisingly concluded that the impugned restrictions on the senior judge’s exercise of his right to freedom of expression were not compatible with Article 10 ECHR. One may however note that Hungarian authorities have yet to comply with this judgment, with the Committee of Ministers recently noting “with grave concern the reports suggesting that the “*chilling effect*” of the violation found by the Court under Article 10 and affecting the freedom of expression of judges and court presidents in general has not only not been addressed but *rather aggravated*” (our emphasis).<sup>28</sup> In addition, the same body felt the need to reiterate its last decision in this respect which “urged the authorities to provide information on the measures envisaged to counter this “*chilling effect*” in order to fully guarantee and safeguard judges’ independence and freedom of expression and dispel the existing concerns about the situation”.<sup>29</sup>

In addition to *Wille* and *Baka*, and to conclude this overview of the Strasbourg Court’s case law, the judgment of 5 May 2020 in the case of *Kövesi v. Romania*<sup>30</sup> is worth attention, as it confirms that the guiding principles set out for judges fully apply to prosecutors. In the context of a case where the applicant—then a chief prosecutor of a national anti-corruption unit, before she became the first

head of the EU’s European Public Prosecutor’s Office—was removed from office in July 2018 *inter alia* for criticising legislative changes which aimed to facilitate impunity for acts of corruption, the Court’s chamber judgment held that there had been a violation of Article 10 ECHR. Recalling the principles it set out most notably in *Baka*, the Court unsurprisingly concluded that the premature termination of the applicant’s mandate constituted an interference with the exercise of her right to freedom of expression before holding, more unusually, that this interference did *not* pursue any legitimate aim.<sup>31</sup> As far as the final requirement of being necessary in a democratic society, the Court found in particular that

209. Furthermore, the premature termination of the applicant’s mandate was a particularly severe sanction, which undoubtedly had a “*chilling effect*” in that it must have discouraged not only her but also other prosecutors and judges in future from participating in public debate on legislative reforms affecting the judiciary and more generally on issues concerning the independence of the judiciary.

## 3.2 CHILLING EFFECT IN THE ACTIVITIES OF COUNCIL OF EUROPE BODIES

As shown above, the concept of chilling effect is not used exclusively by the European Court of Human Rights, but is also regularly used by multiple bodies of the Council of Europe. In relation to the Committee of Ministers, another example is its interim resolution in relation to the execution of the judgment of *Kudeshkina*, in which the European

27 Ibid., para. 173.

28 Committee of Ministers, H46-11 *Baka group v. Hungary* (Applications No. 20261/12, 22254/14), CM/Notes/1355/H46-11, 1355<sup>th</sup> meeting, 25 September 2019, para. 7.

29 Ibid., para. 8.

30 CE:ECHR:2020:0505JUD000359419.

31 Ibid., paras. 196-200. The Romanian government had the audacity, not to say the bad faith, to argue that a measure which blatantly violated judicial independence allegedly served the aim of protecting the rule of law.

Court of Human Rights stated that the Russian authorities had yet “to remove the chilling effect on judges’ freedom of expression of the violation found in this case”.<sup>32</sup>

In relation to the Parliamentary Assembly of the Council of Europe, the resolution dedicated to the functioning of democratic institutions in Poland specifically raised the chilling effect of (abusive) disciplinary proceedings on Polish judges and prosecutors and its impact on judicial independence there:

11. The Assembly deplores the abuse of disciplinary proceedings against judges and prosecutors in Poland. It reiterates its concern that the political control of the Minister of Justice over the initiation and conduct of these proceedings does not provide the required safeguard against their abuse. The very high number of investigations started against judges and prosecutors, on subjective grounds, which subsequently are neither formally ended nor result in the start of formal proceedings, deprive the judges and prosecutors concerned of their right of defence and has a *chilling effect* on the judiciary. This therefore undermines its independence.<sup>33</sup>

The report on which the above resolution is based similarly criticises extensively the chilling effect of the alleged “reforms” undertaken by Polish authorities:

100. [...] Irrespective of the small number of actual disciplinary cases opened, the large number of investigations started by disciplinary officers directly accountable to the Minister of Justice, and the time it takes to close these investigations, if at all, clearly has a *chilling effect* on the judiciary and affects their independence. [...]

103. [...] In this context, the negative portrayal, even stigmatisation, of the judiciary and individual judges and prosecutors by high ranking members of the authorities and ruling majority, as well as the public media, is of concern. This deteriorates public trust in the judiciary, contrary to the stated aims of the reforms initiated by the government and can have a *chilling effect* on individual judges.<sup>34</sup>

The Venice Commission has also made use of the concept of chilling effect. An example is the opinion dedicated to some of Orbán’s judicial “reforms” which, amongst other things, paved the way for the arbitrary termination of András Baka’s mandate as President of the Supreme Court on 1 January 2012, three and a half years before its expected date:<sup>35</sup>

40. However, it must be pointed out that the NJC [National Judicial Council], as the institution for the supervision of the President of the NJO [the National Judicial Office was established by Orbán on 1 January 2012<sup>36</sup>], is dependent on the latter in many ways – the President of the NJO controls those who

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32 [Interim resolution CM/ResDH\(2020\)203](#) adopted by the Committee of Ministers on 1 October 2020. In the case of *Kudeshkina v. Russia*, the applicant was dismissed “in 2004 from judicial office for making critical statements about the judiciary in media interviews during her parliamentary election campaign in 2003 while on leave from her post as judge”. One may note, in passing, the dramatic lack of effectiveness at times of the ECHR system, as the applicant was never reinstated to her post due to the domestic courts refusing to reopen the proceedings against her, with the execution of the Court’s judgment in the case pending since 2009.

33 Resolution 2316 (2020).

34 *Document 15025*, Report by Rojhan Gustafsson and Pieter Omtzigt, 6 January 2020.

35 Venice Commission, *Opinion on Act CLXX of 2011 on the Legal Status and Remuneration of Judges and Act CLXI of 2011 on the Organisation and Administration of Courts of Hungary*, Opinion 663/2012, CDL-AD(2012)001, 19 March 2012.

36 The NJO was led by Tunde Handó – the spouse of a prominent ruling party lawmaker – until December 2019 when she was moved to Orbán’s Constitutional Court: Z. Simon, “Orban shows softer side by removing controversial court chief”, *Bloomberg*, 28 October 2019. In its first rule of law report on Hungary, the European Commission observed that the NCJ has faced “difficulties in counterbalancing the powers of” the President of the NJO as it “is facing a series of structural limitations that prevent it from exercising effective oversight regarding the actions” of the NJO President such as the absence of any right to be consulted on legislative proposals affecting the justice system and a limited role regarding judicial appointments. This European Commission, *2020 Rule of Law Report. Country Chapter on the rule of law situation in Hungary*, 30 September 2020, SWD(2020) 316 final, p. 2.

should control the President. First of all, since all its members are judges, they are potential subjects to a number of allegedly neutral administrative measures, such as transfers to lower level courts (Section 34.2 ALSRJ), which can easily result in a *chilling effect*. [...] The mere presence of the President of the NJO in every meeting may prevent critical thoughts from being voiced, thus amounting to a *massive chilling effect*. It also grants him/her a perfect insight into each and every process within the NJC.

73. Insofar as all rules imply an interference in the administration of justice of the lower courts or tribunals, they can have a *chilling effect* on the independence of the individual judge and must be deemed to be in contradiction with the spirit of Article 26.1 of the Fundamental Law, which reads as follows: “Judges shall be independent and only subordinated to Acts; they shall not be given instructions as to their judicial activities.”

115. Since the provision of the Fundamental Law concerning the eligibility to become President of the *Curia* might be understood as an attempt to get rid of a specific person who would be a candidate for the President, who has served as president of the predecessor of the *Curia*, the law can operate as a kind of a sanction of the former president of the Supreme Court. Even if this is not the case, the impression that this might be the case, bears the risk of causing a *chilling effect*, thus threatening the independence of the judiciary.

As the excerpts above show, the Venice Commission has referred to chilling effect in a context where the predominant issue was not freedom of expression but judicial independence. However, it is also, of course, possible to find opinions of the Venice Commission where chilling effect is used in relation to what remains its primary area of application. For example, an opinion concerned with some provisions of the Turkish Criminal Code refers inter alia to reports from other bodies where chilling effect was also mentioned (footnotes omitted):<sup>37</sup>

21. In the same report, the Commissioner [for Human Rights of the Council of Europe] also expressed concern about the lack of proportionality in the interpretation and application of the existing statutory provisions by courts and prosecutors, the excessive length of criminal proceedings and remands in custody, the problems concerning defendants' access to evidence against them pending trial, and the lack of restraint on the part of prosecutors in filing criminal cases which create a distinct *chilling effect* on freedom of expression in Turkey and which has led to self-censorship in Turkish media.

27. States are under an obligation to create a favourable environment where different and alternative ideas can flourish, allowing people to express themselves and to participate in public debates without fear. This obligation also imposes on States the obligation to refrain from taking measures which can have a *chilling effect* on society in general by discouraging the legitimate exercise of free speech due to the threat of legal sanctions.

31. The Venice Commission welcomes those examples of application of the ECHR requirements by higher domestic courts to cases of non-violent speech and the principled approach of the Public Prosecutor of the Court of Cassation in his written opinions. The highest courts' guidance is very important for the lower courts in the interpretation and implementation of human rights standards in their case law. However, given the high number of investigations and prosecutions under the provisions subject to the present opinion, in particular against journalists, the Venice Commission considers that the *chilling effect* on the expression of views on matters of public interest and the consequent self-censorship is not necessarily created by final judgments of the highest courts restricting rights, but by all kinds of measures taken by the authorities, including investigations, prosecutions and drastic custodial measures such as detentions, which thus constitute interference with the right to freedom of expression.

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37 Venice Commission, *Opinion on Articles 216, 299, 301 and 314 of the Penal Code of Turkey*, Opinion 831/2015, CDL-AD(2016)002, 15 March 2016.

33. Consequently, the following analysis should also be read in the light of the State's obligation to prevent any *chilling effect* on legitimate expressions of non-violent speech. In this respect, not only the judgments rendered by the highest courts are important, but the number and content of criminal investigations, prosecutions and detentions under these provisions are also relevant.

68. Secondly, as to the insults containing profanity uttered against the President of the Republic and the members of his family are concerned [...] Although the expressions may contain swear words, the arrest of a 16 year-old boy at his school for insulting the President and the prison sentences pronounced by courts (see paras. 62 and 65) are very likely to create a *chilling effect* on society as a whole and cannot be considered proportionate to the legitimate aim pursued, i.e. protecting the honour and dignity of the President.

124. All four articles have to be applied in a radically different manner to bring their application fully in line with Article 10 ECHR and Article 19 ICCPR. The Commission underlines that prosecution of individuals and convictions in particular by lower courts, which have a *chilling effect* on the freedom of expression, must cease. This is not sufficient if individuals are in some cases finally acquitted by the Court of Cassation after having been subject of criminal prosecution for several years. Moreover, the Commission underlines the importance of States' positive obligation to create a favourable environment where different and alternative ideas can flourish.

One may finally mention the reports by the Group of States against Corruption (GRECO) which have primarily invoked the concept of a chilling effect to criticise national developments whose purpose and/or effect are to undermine judicial independence:

51. In addition to the concerns described, the GET [GRECO Evaluation Team] has reservations about various subtle ways in which the Minister of Justice / Prosecutor General can intervene in the judicial branch, in a way that may have a *chilling effect* on the independence of the judiciary...<sup>38</sup>

17. That said, it cannot be ruled out that a parliamentary inquiry like the current one, if directed towards the investigatory authorities, prosecution service and the judiciary in ongoing individual cases, may potentially interfere with the separation of powers and respect for judicial independence. Consideration must be given to the risk of a *chilling effect* on judicial independence in the pending proceedings, as well as in future similar proceedings, and the potential impact on criminal investigations and proceedings relating to corruption against influential or politically connected persons.<sup>39</sup>

To bring this overview of the Council of Europe framework to an end, the most significant recent development may be the increasing use of the concept of chilling effect beyond what used to be its primary area of application, i.e., the protection of journalists' freedom of expression and media freedom, to protect judicial independence both in its collective and individual dimension. As will be shown below, recent developments within the EU framework show an increasing embrace of chilling effect in reaction to national measures which deliberately seek to undermine judicial independence, but also freedom of association.

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38 GRECO, *Addendum to the Fourth Round Evaluation Report on Poland (Rule 34)*, 22 June 2018.

39 GRECO, *Ad hoc Report on Slovenia (Rule 34)*, 6 December 2019.



## 4. CHILLING EFFECT IN EU LAW: A CONCEPT RIPE FOR INCREASED USE IN FUNDAMENTAL RIGHTS/ EU VALUES CASES

By contrast to Council of Europe bodies, EU institutions have made a much more limited use of the concept of chilling effect to protect media freedom or judicial independence, at least until recently. This is not surprising, given that unlike the Council of Europe, the EU does not primarily specialise in the protection of fundamental rights, democracy and the rule of law. Furthermore, as previously outlined, the concept of chilling effect has been primarily raised in relation to media freedom and journalists' right to freedom of expression. Due to the limited and mainly economic focus of EU competence in the media area,<sup>40</sup> the limited scope of application of EU law/the EU Charter,<sup>41</sup> and a membership which is (theoretically) limited to "consolidated democracies",<sup>42</sup> the Court of Justice has also had fewer opportunities to review the potential chilling effect—as defined in this paper—of

EU or national measures on the right to freedom of expression or the requirements essential to effective judicial protection—such as judicial independence, another increasing area of concern for Council of Europe bodies in the past decade.

As far as the EU is concerned, this state of play may be explained by a more practical reason: all was considered well in the best of all possible worlds, and therefore there was no need to consider the use of the concept of a chilling effect to protect fundamental rights, democracy and the rule of law. The situation arguably changed in 2020, which may be explained in turn as the culmination of a process of increasing public awareness of the reality of democratic and rule of law backsliding in a growing number of EU countries,<sup>43</sup> which has resulted inter alia in Hungary being no longer considered a democracy, "leaving

40 See e.g. the report of the EUI Centre for Media Pluralism and Media Freedom, *European Union Competencies in Respect of Media Pluralism and Media Freedom*, RSCAS Policy Paper 2013/01.

41 See e.g. X. Groussot, L. Pech, G. Petursson, "The Scope of Application of Fundamental Rights on Member States' Action: In Search of Certainty in EU Adjudication", Eric Stein Working Paper no 1/2011.

42 See Article 49 TEU and the EU's so-called "Copenhagen criteria". On the notion of consolidated democracy, see e.g. J. Linz and A. Stepan, "Toward Consolidated Democracies" (1996) 7(2) *Journal of Democracy* 14.

43 As part of this increasing public awareness and criticism of autocratic developments in the EU, the European Commission launched its first ever annual and permanent rule of law reporting mechanism last September, with the Council and Parliament adopting a few weeks later the first ever conditionality mechanism specifically dedicated to the protection of the EU budget in case of breaches of the principles of the rule of law in the member states. The Commission rule of law transversal and country reports were published on 30 September 2020, while Regulation 2020/2092 was published on 22 December 2020.

the EU with its first non-democratic Member State” in 2020.<sup>44</sup> This is evidenced by the Commission’s first annual rule of law report, published on 30 September 2020, which explicitly refers to the chilling effect of political attacks and disciplinary measures targeting judges, as well as the chilling effect of the threats and attacks targeting journalists.<sup>45</sup>

This welcome acknowledgement follows two important judgments issued on 26 March 2020 and 18 June 2020 in which the Grand Chamber of the Court of Justice relied on the concept of chilling effect—albeit using different wordings—in response to the argument that the measures adopted by Hungarian and Polish authorities targeting NGOs and judges had created a deterrent or dissuasive effect, in violation of EU law.<sup>46</sup> Before reviewing these two judgments, a brief overview of the case law will be offered so as clarify the extent to which chilling effect has been relied on, by whom and with what results in non-fundamental rights cases.

## 4.1 CHILLING EFFECT IN NON-FUNDAMENTAL RIGHTS CASES

At first glance, it is not easy to identify the significant number of cases not related to fundamental rights where the concept of chilling effect is mentioned. Indeed, as of 1 January 2021, a search for “chilling effect” in the Court’s database gives a list of only 27 results, almost all of which refer to Advocate General opinions, except for one judgment from the former Civil Service Tribunal, two from the General Court and two from the Court of Justice.

The relevant paragraphs from these five judgments will be quoted below to show the context and extent to which (if any) the judges made use of the concept of chilling effect, whose French translation—French being the working language of the Court—will be given between square brackets, as it reveals the use of different phrasings:

The referring court bases that conclusion on changes found by it to be particularly significant, such as: [...] the fact that the Minister for Justice is now the Public Prosecutor, that he is entitled to play an active role in prosecutions and that he has a disciplinary role in respect of presidents of courts, which has the potential for a *chilling effect* [*effet dissuasif*] on those presidents, with consequential impact on the administration of justice<sup>47</sup>

Accordingly, as Cromwell and Others and TNT Post Slovensko submit, that situation had a *chilling effect* [*situation a pu dissuader*] upon the launching of calls for tenders for hybrid mail services including the delivery of items and, therefore, influenced the existence, or the development in demand for, such services.<sup>48</sup>

Although proceedings before the Tribunal are not criminal proceedings, Article 10 of the ECHR, as interpreted by the European Court of Human Rights, provides general protection for the freedom of expression of lawyers [...] Thus, the European Court of Human Rights held in paragraph 175 of *Kyprianou v. Cyprus* that ‘[f]or the public to have confidence in the administration of justice they must have confidence in the ability of the legal profession to provide effective representation. ... It follows

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44 VDEM, *Autocratization Surges - Resistance Grows. Democracy Report 2020*, March 2020, p. 4. See also VDEM, “Democratic Declines in Hungary”, 7 June 2019.

45 European Commission, *2020 Rule of Law Report. The rule of law situation in the European Union*, COM(2020) 580 final, 30 September 2020, pp. 11 and 19.

46 See joined Cases C-558/18 and C-563/18, *Miasto Łowicz and Prokurator Generalny*, EU:C:2020:234 and Case C-78/18, *Commission v. Hungary*, EU:C:2020:476.

47 Case C-216/18 PPU, *LM*, EU:C:2018:586, para. 21.

48 Case T-556/08, *Slovenská pošta*, EU:T:2015:189, para. 137.

that any “chilling effect” [*effet dissuasif*] [liable to be caused by the imposition of a penalty on a lawyer] is an important factor to be considered in striking the appropriate balance between courts and lawyers in the context of an effective administration of justice’.<sup>49</sup>

On the contrary, the complainants stated that ‘the very knowledge that Astra would benefit from a period of protection covered by the SPC ha[d] a “chilling” effect [*pour effet de refroidir*] on those preparing to enter the market’.<sup>50</sup>

That conclusion is also supported by the applicants’ argument that the PKK’s listing has a “profoundly chilling effect” [*effets démoralisants*] on the KNK’s ability to pursue those aims and objectives. By virtue of the above-cited case law, it cannot be concerned individually in that respect.<sup>51</sup>

Taking these five judgments together, there is only one instance where the concept of chilling effect was used in the relevant court’s reasoning to reject an application for waiver of the immunity enjoyed by Commission representatives in judicial proceedings, and this was done by directly quoting from a judgment of the European Court of Human Rights. Interestingly, this was a case raising the issue of the freedom of expression of lawyers—freedom of expression being the primary area where the notion of chilling effect is used by the Strasbourg Court.

In the other four cases listed above, one national referring court and the applicants claimed a chilling effect in relation to different measures, such as the role of a Minister for Justice who became simultaneously the country’s Public Prosecutor; findings of abuse of dominant position; and some

restrictive measures directed against certain persons and entities with a view to combating terrorism. In these four judgments, however, neither the Court of Justice nor the General Court found it necessary to address the chilling effect argument to decide the cases.

Could it therefore be concluded that the concept of chilling effect has played virtually no role in the case law of EU courts? Not quite. As the different French translations listed above suggest, there are some linguistic issues making it difficult to identify relevant cases, with a lack of translation consistency working in both directions. First, while chilling effect was used in the five cases listed above, different terms were used in the French version of the judgments: *effet dissuasif*; *effets démoralisants*; *effet de refroidir*. Second, and more importantly, where *effet dissuasif* is used, one can find at least three different English translations with dissuasive effect and deterrent effect being used in addition to chilling effect. To complicate matters further, dissuasive effect and deterrent effect are translations which are much more often used, even though all the English variants of “*effet dissuasif*” are seemingly understood as synonymous by the EU courts.

Considering these linguistic issues, to fully appreciate the extent to which dissuasive/deterrent/chilling effect has been used in the case law of the EU courts to date, one should instead search for *effet dissuasif*, which gives a total of 1219 results. Of these, 599 are judgments, with the first to refer to the concept seemingly being a competition law judgment issued by the General Court on 24 October 1991.<sup>52</sup>

It would be wrong, however, to conclude that we have 599 judgments where the General Court or the

49 Case F-44/05 RENV, *Strack v Commission*, EU:F:2012:144, para. 75.

50 Case T-321/05, *AstraZeneca*, EU:T:2010:266, para. 349.

51 Case C-229/05 P, *PKK*, EU:C:2007:32, para 47 (the judgment merely refers here to use of the chilling effect by the General Court in the order of 15 February 2005 being appealed: Case T-229/02).

52 Case T-2/89, *Petrofina*, ECLI:EU:T:1991:57, para. 259. In this instance, the Commission made an incidental reference to its policy to impose heavy fines to increase the “*effet dissuasif*” of its sanctions. The AG designated in this and other connected cases also made use of the concept, but similarly only in relation to the Commission’s fine policy in antitrust cases; see Opinion of AG Vesterdorf delivered on 10 July 1991 in Case T-1/89, EU:T:1991:38.

Court of Justice have relied on *effet dissuasif* in their reasoning. The concept may be instead raised by parties or national referring courts without the EU courts subsequently relying on it and indeed, this is predominantly the situation. However, we also have examples where the EU courts do make use of the concept. To quickly understand the extremely diverse contexts in which *effet dissuasif* may be used, the relevant paragraphs from the five most recent judgments issued by the Court of Justice as of 1 January 2021 are quoted below:

The Court has held that if it were open to the national court to revise the content of unfair terms included in such a contract, such a power would be liable to compromise attainment of the long-term objective of Article 7 of Directive 93/13. That power would contribute to eliminating the *dissuasive effect* on sellers or suppliers of the straightforward non-application with regard to the consumer of those unfair terms, in so far as those sellers or suppliers would still be tempted to use those terms in the knowledge that, even if they were declared invalid, the contract could nevertheless be modified, to the extent necessary, by the national court in such a way as to safeguard the interest of those sellers or suppliers.<sup>53</sup>

(Text originally in French)<sup>54</sup> À cet égard, une incrimination pénale visant à punir l'enlèvement international d'enfant, y compris lorsque celui-ci est le fait d'un parent, est, en principe, apte à assurer, en raison notamment de son *effet dissuasif*, la protection des enfants contre de tels enlèvements ainsi que la garantie de leurs droits.<sup>55</sup>

As regards [...] the objective of Directive 2000/35, it must be borne in mind that that directive, as stated in recitals 9, 10 and 20 thereof, seeks to harmonise the consequences of late payment in order to *make them dissuasive* ["donner un *effet dissuasif*" in French], so that commercial transactions throughout the internal market are not hindered.<sup>56</sup>

(Text originally in French)<sup>57</sup> D'autre part, rendre la requérante solidairement responsable du paiement de ladite amende serait de nature à affaiblir l'*effet dissuasif* d'une telle sanction pour l'auteur direct d'une infraction, étant donné que la Commission pouvait décider de ne poursuivre le recouvrement de l'amende infligée qu'auprès de la requérante [...] En cinquième lieu, l'argumentation de la requérante selon laquelle le fait de lui imposer une amende, solidairement avec PrysmianCS, affaiblirait l'*effet dissuasif* de la sanction à l'égard de cette dernière est fondée sur la prémisse incorrecte selon laquelle la sanction devrait, dans un tel cas, se concentrer sur la filiale plutôt que sur sa société mère.<sup>58</sup>

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53 Case C-269/19 *Banca*, EU:C:2020:954, para. 31.

54 The judgment is available only in French, see here for free translation "In this regard, a criminal offense aimed at punishing international child abduction, including when it is the act of a parent, is, in principle, capable of ensuring, in particular by virtue of its dissuasive effect, the protection of children against such abductions as well as the guarantee of their rights."

55 Case C-454/19, *Staatsanwaltschaft Heilbronn*, EU:C:2020:947 (no English version of the judgment), para. 43.

56 Case C-299/19, *Techbau*, EU:C:2020:937, para. 53.

57 The judgement is only available in French, see here for free translation "On the other hand, making the applicant jointly and severally liable for payment of that fine would weaken the dissuasive effect of such a sanction for the direct perpetrator of an infringement, given that the Commission could decide not to prosecute the recovery of the fine imposed only from the applicant [...] Fifth, the applicant's argument that imposing a fine on it, jointly and severally with PrysmianCS, weakens the deterrent effect of the sanction on the The latter is based on the incorrect premise that the sanction in such a case should focus on the subsidiary rather than on its parent company."

58 Case C-611/18 P, *Pirelli*, EU:C:2020:868, paras 89 and 99 (no English version of the judgment).

However, a measure such as that at issue in the main proceedings is clearly liable to have a *deterrent effect* on patients wishing to purchase medicinal products online and therefore constitutes such a restriction.<sup>59</sup>

As shown above, the subject of the cases where dissuasive/deterrent effect is mentioned can be extremely diverse, with consumer protection, late payments in commercial transactions, unfair terms in consumer contracts, cross-border abduction of minors, and online sale of medicinal products being the main issues of the cases listed above.

There are, however, very few judgments concerning the chilling/deterrent/dissuasive effect of measures on fundamental rights grounds, including judicial independence in relation to the right to an effective remedy and to a fair trial or the right/obligation (for national judges) to refer questions to the Court of Justice,<sup>60</sup> which may well be explained by the relatively recent nature of the process of rule of law backsliding first witnessed in Hungary in 2010, and in Poland in 2015. Indeed, to the best of this author's knowledge, the Court of Justice has only meaningfully addressed the dissuasive effect of national measures in joined Cases C-558/18 and C-563/18, *Miasto Łowicz and Prokurator Generalny*, and Case C-78/18, *Commission v Hungary (Transparency of associations)*. That said, one must be mindful that relying on the concept of chilling/deterrent/dissuasive effect in EU law cases to protect democracy, the rule of law and fundamental rights would not be ground breaking. Indeed, the concept has been, for quite some time, extensively used, explicitly or implicitly, with respect

to the EU's four freedoms. As observed by AG Sharpston (footnotes omitted):

69. It is trite law that, in order to be able to claim classic economic rights associated with the four freedoms, some kind of movement between Member States is normally required. Even in that context, however, it is noteworthy that the Court has accepted the importance of not hindering or impeding the exercise of such rights and has looked askance at national measures that might have a *dissuasive effect* on the potential exercise of the right to freedom of movement.

70. [...] The *chilling effect* of a national measure can be sufficient to trigger the application of what is now Article 34 TFEU (formerly Article 28 EC). Thus in *Carbonati* the Court, following Advocate General Poiares Maduro, found that charges imposed on goods within an individual Member State were in breach of the Treaty.<sup>61</sup>

In a context of increasing democratic and rule of law backsliding, where legal autocrats do not necessarily aim to enforce new restrictive measures but rather aim to dissuade individual critics, civil society groups or judges from exercising their constitutional and/or European rights which amount at times, as for instance in the case of judges, to exercising their obligations in EU law,<sup>62</sup> the European Commission has finally and positively relied on the concept of chilling effect.<sup>63</sup> Looking beyond EU institutions, there is also evidence of national governments of EU countries—as well as professional organisations such as judicial networks and associations—making an increasing use of the concept in the face of increasing

59 Case C-649/18, A, EU:C:2020:764, para. 90.

60 The fundamental right dimension of the EU preliminary ruling procedure was made clear by the European Court of Human Rights in the case of *Sanofi Pasteur v. France*, 13 February 2020, CE:ECHR:2020:0213JUD002513716. In this judgment, the Strasbourg Court found a violation of Article 6(1) ECHR on account of the failure to provide reasons for the decision to refuse the applicant company's request that questions be referred to the Court of Justice for a preliminary ruling.

61 Opinion of AG Sharpston delivered on 30 September 2010 in Case C-34/09, *Zambrano*, EU:C:2010:560.

62 For instance, the obligation to bring matters of EU law to the attention of the European Court of Justice for judges appointed to courts of last resort or the obligation to check if an infringement of the fundamental right to an effective remedy before an independent and impartial tribunal previously established by law is invoked, whether an irregularity vitiating the relevant national judicial appointment procedure could lead to an infringement of that fundamental right.

63 European Commission communication, *2020 Rule of Law Report – The rule of law situation in the European Union*, COM(2020) 580 final, 30 September 2020, p. 11 and p. 20.

threats to both media freedom and judicial independence at EU Member State level.<sup>64</sup>

The joined Cases C-558/18 and C-563/18 *Miasto Łowicz and Prokurator Generalny* will first be reviewed to show that the Court of Justice is ready to welcome the use of this concept to protect judges and through them, judicial independence. Case C-78/18, *Commission v Hungary (Transparency of associations)*, will then be analysed, as it similarly shows the Court's readiness not to tolerate national measures which could dissuade natural and legal persons from exercising their EU Charter rights and freedoms.

## 4.2 CHILLING EFFECT AND THE PROTECTION OF JUDICIAL INDEPENDENCE

In the third infringement action relating to Poland's new disciplinary regime for judges, the Commission alleged the chilling effect of two aspects of this latest "reform" of the Polish judiciary. First, the

Commission argued that the "new regime creates a chilling effect for making use" of the right enshrined in Article 267 TFEU to refer questions to the Court of Justice.<sup>65</sup> Second, the Commission emphasised that the continuing functioning of the so-called Disciplinary Chamber despite judgments finding it to be an unlawful body not only creates a risk of irreparable damage for Polish judges, but also increases "the chilling effect on the Polish judiciary," which is why the Commission decided to ask the Court of Justice to order interim measures,<sup>66</sup> which the Court granted on 8 April 2020.<sup>67</sup>

It is expected that a fourth infringement action will be lodged with the Court of Justice in 2021 in respect of Poland's "muzzle law".<sup>68</sup> While this muzzle law among other things facilitates the repression of critical judges, raising issues in relation to freedom of expression but also respect for private life, the Commission did not initially or explicitly allege the chilling effect of this widely-decried piece of legislation, but other European and international bodies specialising in rule of law matters did.<sup>69</sup> Commissioner Věra Jourová did however publicly

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64 See e.g. letter to Charles Michel by four associations of judges and prosecutors, 23 November 2020 regarding the deteriorating rule of law situation in Poland: "As long as the Disciplinary Chamber continues to operate, serious (irreparable) damage to Polish judges is done and the chilling effect on the Polish judiciary is even further increased."

65 European Commission, "Rule of Law: European Commission launches infringement procedure to protect judges in Poland from political control", IP/19/1957, 3 April 2019.

66 European Commission, "Court of Justice for interim measures regarding the Disciplinary Chamber of the Supreme Court in Poland", Daily news, 14 January 2020.

67 Case C-791/19 R, *Commission v Poland*, EU:C:2020:277.

68 At the time of writing, two reasoned opinions have been issued by the Commission in respect of Poland's "muzzle law". See European Commission, "Rule of Law: European Commission takes next step in infringement procedure to safeguard the independence of judges in POLAND", 30 October 2020, INF/20/1687 and European Commission, "Rule of Law: Commission adopts next step in the infringement procedure to protect judicial independence of Polish judges", 27 January 2021, IP/21/224.

69 See e.g. OSCE-ODHIR, Urgent Interim Opinion, Opinion no. JUD-POL/365/2019 [AIC], Warsaw, 14 January 2020, para. 61 (in bold in the original): "In light of applicable regional and international standards and recommendations, **the above-mentioned provisions should be removed and it should be ensured that any restriction of judges' freedom of expression adheres to the principles of legal certainty, necessity and proportionality, in line with Article 10 of the ECHR and Article 19 of the ICCPR, while striking a reasonable balance between freedom of expression of judges and the need for them to be and be seen as independent and impartial in the discharge of their duties.** This is all the more important since the fear of sanctions is likely to have a chilling effect on members of the judiciary and the way they exercise their freedom of expression"; para. 65: "The fact of making the information publicly available as contemplated in the Bill would make information about judges' affiliation in any type of non-profit organizations public, which may have a chilling effect on them and other judges wishing to join judges' associations types of associations, thus running the risk of unduly limiting their right to freedom of association, and potentially their right to respect for private life protected by Article 8 of the ECHR"; para. 70: "Generally, vague, imprecise and broadly-worded provisions that define judges' liability may have a chilling effect on their independent and impartial interpretation of the law, assessment of facts and weighing of evidence, and may also be abused to exert undue pressure on judges when deciding cases and thus undermine their independence and impartiality."

criticise the chilling effect on the Polish judiciary that recent cases involving the lifting of immunity of Polish judges have created.<sup>70</sup> And subsequently, in the supplementary infringement action launched in relation to this specific issue, the Commission finally explicitly refers to the notion of chilling effect, having first used the expression of “mere prospect” which the Commission borrowed from a previous judgment of the Court of Justice, mentioned later in this report:

The mere prospect for judges of having to face proceedings before a body whose independence is not guaranteed creates a ‘chilling effect’ for judges and can affect their own independence.<sup>71</sup>

As alluded to above, while the Court of Justice did not use the term “chilling effect” (or its variants: dissuasive effect or deterrent effect) in its interim order of 8 April 2020 regarding the continuing functioning of the Disciplinary Chamber,<sup>72</sup> it did make use of the logic underlying the concept, by referring to the effect that the “mere prospect” of being subject to a disciplinary procedure which could be ultimately decided by a body whose independence is not guaranteed could have on the independence of the Supreme Court and ordinary judges.<sup>73</sup>

This order is not however the first time the Court made use of the expression of “mere prospect”. Indeed, shortly before this interim order was issued,

the Court similarly answered the point submitted to its attention by two Polish referring judges in *Miasto Łowicz and Prokurator Generalny*, and according to whom Poland’s new disciplinary regime for judges confer

on the legislature and the executive the means to remove judges whose decisions displease them and accordingly to influence the judicial decisions they are called upon to make through the *deterrent effect* [*effet dissuasif* in the French version] that the prospect of such proceedings has on such persons.<sup>74</sup>

In response to this point, the Court of Justice decided to send a rather obvious warning to Polish authorities via an obiter dictum, but did so without explicitly using the concept of deterrent effect and without going beyond the sole issue of the right (and at times, the obligations) of national judges to refer questions to the Court (reference omitted):

Provisions of national law which expose national judges to disciplinary proceedings as a result of the fact that they submitted a reference to the Court for a preliminary ruling cannot therefore be permitted. Indeed, *the mere prospect*, as the case may be, of being the subject of disciplinary proceedings as a result of making such a reference or deciding to maintain that reference after it was made is likely to undermine the effective exercise by

70 [Twitter](#), 30 October 2020. See also ABA, *The Case of Judge Igor Tuleya: Continued Threats to Judicial Independence in Poland*, November 2020, p. 12: “The Polish government’s use of the judicial disciplinary system to interfere with Judge Tuleya’s judicial decisions fails to meet these international standards and threatens the independence of Poland’s judiciary. It further undermines Judge Tuleya’s fundamental rights and will likely have a chilling effect on other Polish judges’ participation in the public discourse over judicial reforms and independence of the judiciary.”

71 European Commission, “Rule of Law: Commission adopts next step in the infringement procedure to protect judicial independence of Polish judges”, 27 January 2021, IP/21/224.

72 For a comprehensive analysis of this interim order and the argument that there was no need for a specific, additional infringement action in relation to the lifting of judicial immunity by the “Disciplinary Chamber” as this issue is already covered and prohibited by the Court’s order, see L. Pech, Protecting Polish judges from Poland’s Disciplinary “Star Chamber”: *Commission v. Poland* (Interim proceedings) (2021) 58(1) *Common Market Law Review* 137.

73 Case C-791/19 R, *Commission v Poland*, ECLI:EU:C:2020:277, para. 90: “En effet, la simple perspective, pour les juges du Sąd Najwyższy (Cour suprême) et des juridictions de droit commun, d’encourir le risque d’une procédure disciplinaire pouvant conduire à la saisine d’une instance dont l’indépendance ne serait pas garantie est susceptible d’affecter leur propre indépendance. Est sans importance, à cet égard, le nombre de procédures effectivement engagées, à ce jour, à l’égard de tels juges ainsi que l’issue de ces procédures.”

74 Joined Cases C-558/18 and C-563/18, *Miasto Łowicz and Prokurator Generalny*, EU:C:2020:234, para. 14.

the national judges concerned of the discretion and the functions referred to in the preceding paragraph.<sup>75</sup>

By contrast, the Opinion of the Advocate General was more explicit, as it directly discussed the chilling effect of the relevant Polish measures, but this was most likely due to the concept being first used by the EFTA Surveillance Authority which rightly stressed the existence of “a chilling effect resulting from the fact that the referring courts were called upon to submit written statements in respect of the questions referred.”<sup>76</sup> In any event, it is submitted that the reference to “mere prospect” (“*seule perspective*” in French) should be understood as the Court’s making use, albeit implicitly, of the concept of chilling effect to protect the EU right to effective judicial protection. As observed by Sébastien Platon,

This emphasis on the psychological, subjective impact of national legislation is significant. It is reminiscent of the case law of the ECtHR on “chilling effect”, even though this concept is used mostly in freedom of expression cases. As with the ECtHR case law on media law, it could, for example, mean that even apparently small sanctions can affect judicial independence if, because they are unjustified or concern “sensitive” cases, they are likely to deter other judges from acting independently of the other powers, in particular the executive. This acknowledgement of the impact of the “chilling effect” of legislation on judicial independence stands in sharp contrast, however, with the mention by the Court itself, in paragraph 54, that “it should be noted... that [the investigation proceedings concerning the referring judges] have since been closed” in order to support its finding of inadmissibility. In taking note of this, the Court contradicts

its own insistence on the fact that the mere prospect of being disciplined is enough to deter judges from discharging their judicial duty in a truly independent manner.<sup>77</sup>

Leaving aside the issue of the Court’s contradicting itself in its use of the chilling effect framework of analysis, one may finally note that the Commission recently relied on the Court’s expression of “mere prospect” when it announced that it had (belatedly) decided to add a new grievance to its infringement procedure targeting Poland’s muzzle law. In the additional Letter of Formal Notice, the Commission indicated that “the mere prospect for judges of having to face proceedings before a body whose independence is not guaranteed is liable to affect their own independence.”<sup>78</sup> Two days before this additional letter of formal notice was announced, the concept of chilling effect was one of the key legal arguments raised during the hearing organised on 1 December 2020 in Case C-791/19, and which concerns Poland’s new disciplinary regime for judges:

**Finland** focused on the chilling effect that the Polish disciplinary system has on judges. Such effects are both real and serious. The Finnish delegation noted that a chilling effect is something that introduces an entirely new element into judges’ work. Working on a case now means knowing that you might end up being accused of a disciplinary offence. Fear of this is not speculation but based on several surveys conducted amongst Polish judges. This affects the judges, but also their families. A Polish judge may have to show exceptional courage just to rule on a case. Some judges do have that courage, others may decide to rule in a way that does not jeopardise their livelihoods. “Judges should not have to display particular courage or heroism to do their job right”.<sup>79</sup>

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75 Ibid., para. 58.

76 Opinion of AG Tanchev delivered on 24 September 2019, EU:C:2019:775, para. 80.

77 “Preliminary references and rule of law: Another case of mixed signals from the Court of Justice regarding the independence of national courts: Miasto Łowicz” (2020) 57(6) *CML Rev* 1843, pp. 1862-1863.

78 Rule of Law: Commission follows up on infringement procedure to protect judicial independence of Polish judges, 3 December 2020: [https://ec.europa.eu/commission/presscorner/detail/en/inf\\_20\\_2142](https://ec.europa.eu/commission/presscorner/detail/en/inf_20_2142).

79 J. Morijn, “A Momentous Day for the Rule of Law: The ECJ Hearing about the Disciplinary Regime for the Polish Judiciary”, *VerfBlog*, 12 December 2020.



Considering the continuing deterioration of the rule of law situation in Poland, and the significant number of pending cases raising the issue of the climate of intimidation and fear deliberately created by Polish authorities with respect to judges, but also prosecutors<sup>80</sup> and lawyers,<sup>81</sup> it is to be hoped that the Court of Justice will more directly and explicitly engage with the most serious issues raised by the Finnish government. One way of doing so would be for the Court to follow and build on the approach it adopted in relation to Hungary's (misleadingly named) Transparency Law.

### 4.3 CHILLING EFFECT AND THE PROTECTION OF FUNDAMENTAL RIGHTS

In the *Transparency of associations* case, the Court of Justice adopted a holistic review framework which looked at the “content and combined effects” of the various measures in dispute in this case.<sup>82</sup> This led the Court to conclude that the Hungarian measures constitute restrictions which do not comply with several provisions of EU primary law: the free movement of capital laid down in Article 63 TFEU as well as Articles 7, 8 and 12 of the EU Charter of Fundamental Rights, guaranteeing respectively the right to respect for private and family life, the right to the protection of personal data and the right to freedom of association.

The Court's analysis of the effects of the Hungarian measures is particularly noteworthy,<sup>83</sup> to the extent that the Court repeatedly emphasised the *deliberate* aim to create a *stigmatising effect* leading in turn to a *deterrent effect* in relation to the associations and foundations which are not to Orbán's liking, these two effects having been previously raised by the Commission and the Swedish government:

58 More specifically, the provisions referred to in paragraphs 50 and 54 to 56 of the present judgment establish a set of rules which applies, exclusively and in a targeted manner, to associations and foundations receiving financial support reaching the thresholds provided for by the Transparency Law that comes from other Member States or third countries. In particular, those provisions single them out as ‘organisations in receipt of support from abroad’, requiring them to declare themselves, to register and systematically to present themselves to the public as such, subject to penalties which may extend to their dissolution. In thus stigmatising those associations and foundations, those provisions are such as to create a climate of distrust with regard to them, apt to *deter* natural or legal persons from other Member States or third countries from providing them with financial support.

[...]

116 In this respect, it must first be observed that the obligations of declaration and publicity implemented by those provisions are such as to limit the capacity of the associations and foundations at issue to receive financial support sent from other Member States or third countries, having regard to the *dissuasive effect* of such obligations and the penalties attached to any failure to comply with them.

[...]

118 In that context, the systematic obligations in question are liable, as the Advocate General observed in points 120 to 123 of his Opinion, to have a *deterrent effect* on the participation of donors resident in other Member States or in third countries in the financing of civil society organisations falling within the scope

80 *Iustitia, Justice under pressure – repressions as a means of attempting to take control over the judiciary and the prosecution in Poland. Years 2015-2020*, 29 February 2020.

81 L. Pech, *Legal Opinion for the CCBE regarding pending Case C-55/20*, CCBE, 27 November 2020.

82 Case C-78/18, *Commission v. Hungary*, EU:C:2020:476.

83 "It is very significant that the judgment recognizes the chilling effect of such laws that bolster intimidation campaigns and foster a climate of distrust in the work of associations": N. Kazatchkine and K. Mccourt, <https://www.opensocietyfoundations.org/voices/european-union-court-rejects-hungarian-ngo-funding-law>, 18 June 2020

of the Transparency Law and thus to hinder the activities of those organisations and the achievement of the aims which they pursue. They are furthermore of such a nature as to create a generalised climate of mistrust vis-à-vis the associations and foundations at issue, in Hungary, and to stigmatise them.

While “chilling effect” was not used as such, the judgment used the synonymous expressions of “dissuasive effect” or “deterrent effect”<sup>84</sup> in relation to (i) the specific obligations imposed on exclusively “foreign” (or simply non-Hungarian) financial support to NGOs based in Hungary and (ii) the participation of donors not residing in Hungary. Even more remarkable and welcome is the fact that the Court did not merely integrate the dissuasive/deterrent effect of the Hungarian piece of legislation as part of its reasoning, but explicitly referred to this effect as one of the grounds which led it to conclude that the provisions of the Transparency Law restricts the right to freedom of association protected in Article 12(1) of the Charter, while also amounting to a restriction on the free movement of capital guaranteed to natural and legal persons under Article 63 TFEU. In both instances, the Court concluded that the Hungarian restrictions cannot be justified in accordance with the EU Treaties and the Court’s case law.

Several experts, including the present author, observed at the time of the judgment:

This finding is critical to wider arguments and concerns relating to the health of the civic space in Hungary: the impugned measures are not singular examples of bad law, but rather

representative of a broader pattern which has seen “legalistic autocrats” deliberately use legal regulation targeted at reducing or removing any degree of dissent or disagreement in the public and political space.<sup>85</sup>

One technique these legalistic autocrats<sup>86</sup> have refined over the years is the adoption of measures which aim to pre-emptively dissuade natural and legal persons from exercising their rights by creating a climate of fear or a climate of distrust, as in the case above. If successful, there is then no longer any need to enforce these measures, which could allow the relevant authoritarian regime to argue that they measures are complied with because the population at large views them as legitimate.

By adopting a holistic and prospective analysis of the *combined* and *potential* effects of the measures in dispute, the Court of Justice offers an effective way to challenge this technique under EU law. What’s more, the Court also positively added that the Commission does not have to provide evidence of the effect(s) of the measure(s) in dispute. A legal analysis of the potentially dissuasive effect of a piece of legislation as a whole should therefore be understood as sufficient to establish (or not) the existence of a failure to fulfil obligations. This is in line with the case law developed in relation to the EU’s “four freedoms”, and it is therefore to be hoped, that the Commission will make a wider and more systemic use of this avenue to bring to the Court any national measure which deliberately aims to dissuade natural and legal persons from exercising their EU rights and, in some cases, fulfilling their EU obligations, as in the case of national judges.

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84 While the English version of the judgment uses both expressions, only “*effet dissuasif*” is used in the French version of judgment. It is not clear, at least to the present author, why it was felt necessary to use “deterrent effect” to translate “*effet dissuasif*” in paragraph 118 of the judgment when “*effet dissuasif*” was translated as “dissuasive effect” in paragraph 116 of the same judgment. Another translation problem concerns the lack of translation of “*effet dissuasif*” in some instances. For example, the French version of Opinion of AG Campos Sánchez-Bordona delivered on 14 January 2020, EU:C:2020:1, para. 121, explicitly raises the issue of the Hungarian legislation’s dissuasive effect (“*Les exigences en matière de publicité imposées aux dons reçus de l’étranger peuvent avoir un effet dissuasif...*”) but the English version does not make this clear as it does not refer to any “effect” by providing instead that “The publication requirements imposed on gifts received from abroad may deter potential donors...”

85 P. Bard, J. Grogan and L. Pech, “The Democratic and Pluralist Society and its Enemies: The Court of Justice to the Rescue of Civil Society in the Member States”, RECONNECT blog, 23 June 2020.

86 K.L. Scheppelle, “Autocratic Legalism” (2018) 85 *The University of Chicago Law Review* 545.

# 5. THE UNTAPPED POTENTIAL OF THE CONCEPT OF CHILLING EFFECT TO HELP PROTECT DEMOCRACY, THE RULE OF LAW AND FUNDAMENTAL RIGHTS IN THE EU

## 5.1 DEMOCRACY, THE RULE OF LAW AND FUNDAMENTAL RIGHTS AS INTERCONNECTED AND MUTUALLY REINFORCING VALUES

As a preliminary point, it is important to recall that the values on which the EU is based, and in particular democracy, the rule of law and fundamental rights, must be understood as interconnected and mutually reinforcing:

Whereas the Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities, as set out in Article

2 of the Treaty on European Union (TEU); whereas those values are values which are common to the member states and to which all member states have freely subscribed; whereas democracy, the rule of law and fundamental rights are mutually reinforcing values<sup>87</sup>

While there is no hierarchy among Union values, respect for the rule of law is essential for the protection of the other fundamental values on which the Union is founded, such as freedom, democracy, equality and respect for human rights. Respect for the rule of law is intrinsically linked to respect for democracy and for fundamental rights. There can be no democracy and respect for fundamental rights without respect for the rule of law and vice versa<sup>88</sup>

87 European Parliament resolution of 7 October 2020 on the establishment of an EU Mechanism on Democracy, the Rule of Law and Fundamental Rights (2020/2072(INI)), recital A.

88 Regulation 2020/2092 of 16 December 2020 on a general regime of conditionality for the protection of the Union Budget, OJEU L 433/I/1, recital 6.

This means that it would be misguided to seek to limit the use of the concept of chilling effect to “fundamental rights” cases, narrowly understood. Even procedural rights—or indeed procedural obligations, such as the obligation to refer matters of EU law to the Court of Justice for national courts of last resort—have a human rights dimension, as confirmed recently by the European Court of Human Rights.<sup>89</sup>

## 5.2 KEY FINDINGS

As regards ECHR law, this paper shows that “chilling effect” is a well-established concept in the case law of the European Court of Human Rights, and was first relied upon by an applicant in a case decided by the European Commission of Human Rights in 1973. The Strasbourg Court has since used it to subject to the strictest scrutiny specific types of national interferences with the exercise of ECHR rights, which the Court understands as most likely to produce negative effects going beyond the individual instances where they are applied, resulting in natural and legal persons being *dissuaded* from exercising their rights for fear of being subject to these measures. In practice, “chilling effect” has been predominantly used in freedom of expression-related cases, where the applicants were journalists with a more limited use to protect freedom of assembly. More recently, the Court has received an increasing number of applications from judges, in which the chilling effect of threats and/or sanctions imposed on these judges has been argued and the Court has agreed with the applicants, most notably in the case of *Baka v. Hungary*.

The Strasbourg Court’s extensive and regular reliance on the concept of chilling effect has, in turn, seemingly led the main bodies of the Council

of Europe to take this concept into account—not only in order to defend media freedom but more recently and noticeably, judicial independence. Two noteworthy aspects of the use of chilling effect in the latter context are (i) the emphasis on the *collective* chilling effect that different individual measures such as disciplinary proceedings or a court transfer can have on the judiciary as a whole, regardless of whether they are concluded or not and, if concluded, whether or not they result in sanctions; and (ii) the acknowledgement that informal developments such as attacks by public officials, elected officials and/or public media outlets on the judiciary and/or individual judges and prosecutors can also have an *individual* chilling effect on the independence of individual judges and prosecutors which, in turn, affects the independence of the judiciary as a whole.

As regards EU law, the notion of chilling effect is usually known as dissuading or deterrent effect in EU law and has long been used, implicitly or explicitly, in a number of areas such as competition law or free movement law, with the first explicit mention of it made by the European Commission in a competition law case decided by the EU General Court in 1991. While there is a significant number of cases where the notion of dissuading/deterrent effect is mentioned by the parties and a lesser number where the EU courts rely on the notion in their reasoning, the case law of the CJEU shows a very limited use, implicitly or explicitly, of the notion in “fundamental rights/EU values” cases. This arguably changed significantly in 2020 following the judgments issued in joined Cases C-558/18 and C-563/18, *Miasto Łowicz and Prokurator Generalny*, and Case C-78/18, *Commission v. Hungary (Transparency of Associations)*. Shortly after these two Court of Justice judgments, the Commission, in its first annual rule of law report published on 30 September 2020, explicitly referred to the chilling effect of attacks and disciplinary

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89 While the ECHR does not guarantee a right to have a case referred by a domestic court to the Court of Justice for a preliminary ruling, Article 6(1) ECHR (right to a fair trial) requires national courts of EU member states to give reasons for any decision refusing to refer a question for a preliminary ruling, especially where the applicable law allowed for such a refusal only on an exceptional basis. Where a national court of an EU Member State does not provide a clear explanation for the decision not to refer a party’s questions to the ECJ, Article 6(1) ECHR may be violated. See *Sanofi Pasteur v. France*, application no. 25137/16.

measures targeting judges as well as the chilling effect of the threats and attacks targeting journalists. In addition, there is evidence that both the Commission and national governments have relied on the concept of chilling effect in the context of a pending infringement action concerning Poland's new disciplinary regime for judges.

The concurrent use of chilling effect by the European Court of Human Rights and the European Court of Justice is as positive as it is mutually reinforcing. Indeed, the jurisdiction of the European Court of Human Rights remains primarily limited to assessing individual complaints relating to the ECHR it receives from individuals, and assessing them on a case by case basis. The European Court of Human Rights cannot find national law incompatible with the ECHR in the abstract. Instead, the European Court of Human Rights can formally only conclude that there has been a violation or not in each case, although a judgment finding a violation in a specific case may, in effect, require a revision or a repeal of the underlying law in order to guarantee non-repetition of the violation. By contrast, in enforcement actions lodged with it by the Commission, the European Court of Justice has the jurisdiction to establish that national law, including the bodies created by national law (e.g. Poland's Disciplinary Chamber), is not compatible with EU law in the abstract, while EU law itself also benefits from the principle of primacy over national law, including constitutional norms. The other side of the coin, however, is the more limited scope of application of EU law, which only applies to national measures of EU member states when they act within the scope of EU law, apart from the requirements relating to judicial independence which, while identical to those guaranteed under Article 47 of the EU Charter, apply to any national court which may hear points of EU law. At the end of the day, it is a welcome feature of the European supranational human rights framework to see the individual dimension of human rights being protected by the European Court of Human Rights on a case by case basis, while the European Court of Justice has the jurisdiction to assess the compatibility of national measures in the abstract, beyond instances where these measures are individually applied.

## 5.3 KEY RECOMMENDATIONS

To help prevent autocratic-minded authorities from achieving their self-censorship goals in the EU, this paper will first outline below how the Commission should systematically integrate the concept of chilling effect in its infringement framework of analysis, before offering more specific recommendations in relation to its possible use to build infringement actions, with the view of better protecting freedom of association, judicial independence, and media freedom.

### 5.3.1 General recommendations for the Commission in its capacity as Guardian of the Treaties

- Types of national measures to challenge using chilling effect:** The concept of chilling effect should be systematically considered and explicitly used to politically and, where possible, legally challenge two main types of national measures: (i) national measures whose vague or ambiguous content, specific or combined effects and/or arbitrary application can dissuade natural and/or legal persons *from exercising their EU rights* for fear of falling foul of these measures and (ii) national measures which are adopted and/or applied with the aim to dissuade natural persons *from fulfilling their professional obligations*, as for instance in the case of judges, prosecutors and lawyers;
- Rule of Law Report:** The first edition of the Commission's Rule of Law Report already positively demonstrates the Commission's readiness to make extensive references to the concept of chilling effect. The Commission must however go further, and better highlight how the relevant measures violate EU law, including secondary legislation instruments such as the new Rule of Law Conditionality Regulation, when (for instance) national measures create a chilling effect for judges which is not compatible with their independence and is therefore in violation of Article 19(1) TEU.

- **General new *Dassonville*-inspired**

**enforcement approach:** The Commission should adopt a *Dassonville*-like<sup>90</sup> enforcement approach to better protect fundamental rights/EU values—that is, it should pay special attention to all measures enacted by member states which are capable of dissuading, directly or indirectly, actually or potentially, natural or legal persons from exercising their EU rights (e.g. freedom of expression or freedom of association) or fulfilling their EU obligations (e.g. by dissuading a judge to refer matters of EU law to the Court of Justice or provide effective judicial protection by reviewing an irregularity vitiating a national judicial appointment procedure) *even* where they are *not* applied/enforced. The Commission should therefore not wait for relevant dissuasive measures to be applied/enforced, as a chilling effect can materialise without any application/enforcement (see e.g. Hungary’s special immigration tax, which applies to financial support to organisations carrying out “activities facilitating immigration”<sup>91</sup>). Indeed, the Court of Justice has already established in judicial independence cases that the “mere prospect” of being subject to disciplinary measures involving a body whose independence is doubtful, or the “mere prospect” of being subject of disciplinary proceedings for exercising an EU law right/obligation, is enough to violate EU judicial independence requirements;

- **The indirect, potential but also combined effect of relevant measures must be considered:**

The Commission and other relevant

actors must not only have regard to the content of the relevant measures but also consider their indirect, potential and combined effects, as the whole of arbitrary measures/proceedings/sanctions is always more than the sum of their parts when it comes to “autocratic legalism”.<sup>92</sup> Doing so will enable the Commission to more easily construe these measures as ones falling within the scope of EU law, which can be the subject of infringement actions;

- **Burden of proof:** As already established in Case C-78/18, in response to the claim that the Commission has not produced evidence that the law in dispute ‘has had effects in practice’ on the free movement of capital, it is enough for the Commission to produce a legal analysis of the disputed law to prove the existence of a failure to fulfil obligations. In turn, it is for the national authorities responsible for the measure restricting EU law to offer proof with regarding to justification. Looking beyond this case, it is submitted that the Commission should not seek to gather, or request from relevant parties, evidence of the chilling effect of relevant national measures. Indeed, “successful” national measures which aim to *dissuade* natural and legal parties from lawfully exercising their EU rights will result in natural and legal persons *preventively* adjusting their behaviour for fear of being subject to (arbitrary) proceedings and/or sanctions. To put it differently, one cannot expect natural and legal parties to run the risk of being subject to (arbitrary) proceedings and/or sanctions just to provide the Commission with

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90 Case 8/74, EU:C:1974:82. As neatly summarised by AG Sharpston in her Opinion in Case C-34/09, *Zambrano*, EU:C:2010:560, para. 70: “In *Dassonville*, the Court stated famously that ‘all trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-[Union] trade are to be considered as measures having an effect equivalent to quantitative restrictions’. The breadth of that formula has allowed the Court to scrutinise discriminatory and non-discriminatory national measures even when no goods have necessarily moved. The chilling effect of a national measure can be sufficient to trigger the application of what is now Article 34 TFEU (formerly Article 28 EC).”

91 The chilling effect of Hungary’s special immigration tax has been denounced by the Venice Commission and the OSCE-ODIHR, [joint opinion of Venice Commission \(no. 941/2018\)](#) and [OSCE-ODHIR \(no. NGO-HUN/336/2018\)](#), 17 December 2018, para. 20: “In conclusion, the special tax on immigration constitutes an unjustified interference with the rights to freedom of expression and of association of the NGOs affected. The imposition of this special tax will have a chilling effect on the exercise of fundamental rights and on individuals and organisations who defend these rights or support their defence financially. It will deter potential donors from supporting these NGOs and put more hardship on civil society engaged in legitimate human rights activities. For all these reasons, the provision as examined in the present opinion should be repealed.”

92 Kim Lane Scheppele, ‘Autocratic Legalism’ (2018) 85(2) *The University of Chicago Law Review* 545.

evidence. As argued above, it is enough for the Commission to offer a legal analysis which shows that a specific measure is capable of dissuading, directly or indirectly, actually or potentially, natural or legal persons from exercising their EU rights or fulfilling their EU obligations. The “mere prospect” test developed by the Court should help catch measures which have yet to be applied.

- **Best enforcement practice:** In a situation such as the one in Case C-78/18, the longer the Commission waits to act, the more irreparable damage is done. This means that the Commission ought to systematically consider submitting a request for interim measures to the ECJ—which the Commission has failed to do in Case C-78/18, with the result that “irreparable damage has been done during a period of three years during which Orbán has been able to subject NGOs it does not like to arbitrary, disproportionate and unlawful requirements”.<sup>93</sup> In addition, the Commission violates its Treaty obligations when it fails to request the Court of Justice to impose financial sanctions under Article 260 TFEU in a situation where national authorities flagrantly disregard the Court’s judgments,<sup>94</sup> such as the Court’s judgment in Case C-78/18.

- **Systemic infringement action:** Combined with accelerated proceedings and the use of interim measures, systemic infringement actions must be considered.<sup>95</sup> In other words, and to focus on issues analysed in this paper, instead of examining the chilling effect of multiple measures and/or practices in isolation, an infringement action could be based on a bundle of the said measures and/or practices which show the systemic nature of the national authorities’ attempt to dissuade natural and legal persons from exercising their EU rights.

### 5.3.2 Specific infringement recommendations to better protect civil society organisations, judges and journalists

- **Protecting the right to freedom of association and more broadly Europe’s civic space via the systemic use of infringement actions:** Regarding civil society organisations which are facing an “increasing number of challenges, which include regulatory constraints and difficulties in accessing funding”,<sup>96</sup> the Commission should build on the Court’s ruling in *Transparency*

93 P. Bard, J. Grogan and L. Pech, “The Democratic and Pluralist Society and its Enemies: The Court of Justice to the Rescue of Civil Society in the Member States”, RECONNECT blog, 23 June 2020.

94 Subsequently to the finalisation of this study, the Commission did finally activate Article 260 TFEU on 18 February 2021 due to Hungary’s persistent failure to comply with the ruling of the Court of Justice in Case C-78/18 “despite repeated calls from the Commission to do so as a matter of urgency”: European Commission, “NGO Law: Commission is calling on HUNGARY to implement the Court of Justice ruling on the Hungarian law on foreign-funded NGOs”, INF/21/441.

Hungary was given two months to reply to the concerns raised by the Commission. It is to be hoped that the Commission will not fall for cosmetic changes made to the law which would not remove in any way its chilling effect. The only acceptable course of action in this instance is the swift and total repeal of this authoritarian piece of legislation.

As the present author put it in an interview with Euractiv, “It is never too late to do the right thing and legally react when judgments of the ECJ are deliberately violated [...] However, we need the Commission to do so more promptly and in each single instance” as “Hungary is yet to implement other rulings of the EU’s top court, including one from December last year, which said the Hungarian authorities’ practice of preventing people from seeking protection on their territory by forcibly returning them to Serbia, otherwise known as “pushbacks”, was illegal [...] not reacting to open violations of ECJ judgments and interim orders is the surest way to see the EU legal order unravelling”: V. Maksimov, “Commission pushes Hungary to implement NGO judgment among worries it is ‘too little too late’”, *Euractiv.com*, 18 February 2021, <https://www.euractiv.com/section/justice-home-affairs/news/commission-pushes-hungary-to-implement-ngo-judgement-among-worries-it-is-too-little-too-late/>

95 K.L. Scheppele, D. Kochenov, B. 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” (2021) *Yearbook of European Law* 1.

96 European Commission, *Strategy to strengthen the application of the Charter of Fundamental Rights in the EU*, COM(2020)711 final, 2 December 2020, p. 10.

of *Associations* and challenge inter alia the chilling effect of any national measure, broadly understood, which interferes with the exercise of Charter rights—and in particular freedom of association—if the mere existence of “regulatory constraints”, or the mere prospect of the potential application of any national measure, can have a negative impact on donors and/or the activities of civil society organisation by limiting, even if only theoretically, donations from residents from other EU countries or limiting cooperation with organisations/individuals residing in other EU countries. In this respect, one may strongly regret not only the absence of any new infringement action but also the Commission’s incomprehensible failure to activate Article 260 TFEU, considering the open disregard by Hungarian authorities of the Court’s judgment in Case C-78/18 for more than seven months at the time of writing. It is therefore recommended that the Commission stop repeating its mistaken practice of favouring dialogue over formal enforcement. Instead, the Commission should undertake a review of the national legislation and regulatory constraints governing civil society organisations existing in each EU Member State<sup>97</sup> and assess them in light of the framework of analysis developed by the Court of Justice in Case C-78/18;

- **Smear campaigns targeting civil society organisations and human rights activists/defenders:** The Commission (or individual member states under Article 259 TFEU) should consider launching infringement actions based

on the concept of chilling effect to the extent that smear campaigns—regardless of whether they originate from “public authorities” broadly understood, i.e., elected officials, state officials, civil servants, public sector bodies but also, it is submitted, proxies such as state-funded media outlets or state funded NGO/GONGOs<sup>98</sup> (public authorities could then be investigated for violation of their positive obligation to protect freedom of association)—can be construed as unjustified restrictions on the exercise of freedom of association in breach of EU law. One may note that the European Court of Justice, in the context of European Arrest Warrants (EAWs), has already indicated that national judges can have regard to the *factual context* that form the basis of the EAW at issue, which includes any *statement* originating from *public authorities* which could infringe the suspect’s presumption of innocence and right to a fair trial. Drawing from the “Buy Irish Campaign” case, where the Court held that Ireland failed to fulfil its obligations under the Treaty by organising a campaign to promote the sale and purchase of Irish goods within its territory, it is submitted that any smear campaign organised or financed, directly or indirectly, by national public authorities whose aim and/or effect is to deter natural or legal persons from exercising their Charter rights within its territory is similarly incompatible with the Treaties;<sup>99</sup>

- **Smear campaigns targeting judges:** Regarding smear campaigns targeting judges originating from, paid for or secretly organised by public authorities—the situation in Poland behind

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97 See already the legal and practical restrictions identified by the EU FRA in this report *Challenges facing civil society organisations working on human rights in the EU*, 17 January 2018.

98 See the “Buy Irish Campaign” precedent, where the Court of Justice applied EU law to a formally private company which was however controlled by the Irish government seemingly to “escape any liability it may have under the provisions” of what is now the TFEU: Case 249/18, EU:C:1982:402, para. 15.

99 See most recently Joined Cases C-354/20 PPU and C-412/20 PPU, ECLI:EU:C:2020:1033, para. 61: “It is for that authority, in the context of that second step, to assess, where appropriate in the light of such an increase, whether, having regard to the personal situation of the person whose surrender is requested by the European arrest warrant concerned, the nature of the offence for which he or she is being prosecuted and the *factual context in which the arrest warrant was issued, such as statements by public authorities* (our emphasis) which are liable to interfere with the way in which an individual case is handled...”



exhibit A<sup>100</sup>—the Commission (or individual member states) should also consider launching infringement actions on the sole basis of the chilling effect these smear campaigns have on the EU principle of judicial independence. In this instance, there is not even a need to discuss and establish the eventual cross-border impact of such smear campaigns, due to the wide scope of application of the principle of effective judicial protection laid down in the second subparagraph of Article 19(1) TEU. Therefore the Commission could have launched an infringement action in respect of the Polish publicly financed billboard campaign, which was used to publicly smear all judges in Poland in 2017.<sup>101</sup> One could go as far as to argue that in this context, Article 19(1) TEU offers a bridge through which the European Commission could pursue the Council of Europe’s judicial and non-judicial findings in relation to threats or violations of the principle of judicial independence, as well as the treats and/or violations of judges’ human rights which in turn undermine judicial independence. In other words, it is submitted that an EU infringement action could be directly motivated by the non-implementation of European Court of Human Rights’ judgments regarding judges—such as for instance the judgment of *Baka v Hungary*—and which found a violation of their right to freedom of expression on inter alia chilling effect grounds. It is submitted that the sustained, long period of

non-implementation by Hungarian authorities of *Baka* is enough evidence to show that Hungary is (deliberately) seeking to dissuade judges from speaking up to defend judicial independence and as such, is therefore failing to fulfil its (positive) obligation to protect judicial independence under Article 19(1) TEU. Similarly, for this author, the persistent failure of Polish authorities to set up an independent public inquiry into the “troll farm” hosted by Poland’s Ministry of Justice, as demanded by the Parliamentary Assembly of the Council of Europe, could also be the subject of an infringement action under Article 19(1) TEU;

- **Smear campaigns targeting journalists:**

As correctly noted by the Commission itself, smear campaigns have become “frequent and overall intimidation and politically motivated interference have become commonplace”, while strategic lawsuits against public participation (SLAPPs) are “increasingly used against journalists and others involved in protecting the public interest”.<sup>102</sup> Could an infringement action be launched in relation to the chilling effect that smear campaigns or SLAPPs have on journalists and media organisations? The most problematical situation, from a legal basis point of view, concerns the protection of journalists, due to the primarily technical/economic nature of the EU *acquis* in this area.<sup>103</sup> Regarding SLAPPs, the best course of action would arguably be a revision of

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100 First denounced by the Commission in its Article 7(1) TEU reasoned proposal of December 2017, the situation has continued to seriously deteriorate with the Polish government going as far as running a secret “troll farm”: see PACE, *The functioning of democratic institutions in Poland*, report, Doc. 15025, 6 January 2020, para. 105; See European Parliament resolution of 17 September 2020 on the proposal for a Council decision on the determination of a clear risk of a serious breach by the Republic of Poland of the rule of law, PA\_TA-PROV(2020)0225, para. 32. For additional examples of smear campaigns paid for by Polish authorities or coordinated with state funded media outlets, see Judges for Judges and L. Pech, “Third Party Intervention in the Case of *Tuleya v. Poland*”, 11 December 2020.

101 see e.g. A. Sanders, and L. von Danwitz, Luc, “Defamation of Justice – Propositions on how to evaluate public attacks against the Judiciary”, *VerfBlog*, 31 October 2017.

102 European Commission, *On the European democracy action plan*, COM(2020) 790 final, 3 December 2020, pp. 12 and 14. See also for more background information and further references: European Parliament Legislative Train Schedule, Initiative against abusive litigation targeting journalists and rights defenders.

103 See e.g. Directive 2018/1808 of 14 November 2018 amending Directive 2010/13 on the on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive) in view of changing market realities.

the Rome II and Brussels Ia Regulations.<sup>104</sup> More ambitiously, an entirely new EU anti-SLAPPs regulation or directive could be put forward by the Commission.<sup>105</sup> Regarding smear campaigns, it is suggested to explore short term action in the form of an infringement case based on Directive 2019/1937 once its implementation period comes to an end on 17 December 2021. Indeed, this Directive aims to protect

against retaliation as a means of safeguarding freedom of expression and the freedom and pluralism of the media should be provided both to persons who report information about acts or omissions within an organisation ('internal reporting') or to an outside authority ('external reporting') and to persons who make such information available in the public domain, for instance, directly to the public through online platforms or social media, or to the media, elected officials, civil society organisations, trade unions, or professional and business organisations.<sup>106</sup>

While whistleblowers are important sources for journalists, journalists may also be the ones who directly blow the whistle on breaches of EU law by making relevant information available in the

public domain. One may note in passing that civil society organisations and judges could also fall within the personal scope of Directive of 2019/1937.<sup>107</sup> A smear campaign against them, in a situation where they have reported or made available information about breaches of EU law, could also therefore violate Directive 2019/1937. Beyond this, and leaving aside the concept of chilling effect, journalists could also be protected by enforcement actions targeting the obvious lack of independence in some countries of the national regulatory authorities or bodies established on the basis of EU law, and whose mission is inter alia to ensure respect of media pluralism.<sup>108</sup> In this respect, it would be good for the Commission to stop denying the obvious and using euphemistic language. To give a single instance, the lack of independence of Hungary's Media Council is flagrant yet the Commission only raised the issue of a risk to its independence in its 2020 rule of law country report.<sup>109</sup> A few months later, the same Media Council was instrumental in arbitrarily shutting down Klubradio, the main independent radio station operating in Hungary.<sup>110</sup> Instead of writing letters, the Commission ought to bring an infringement action to make sure that "requirements of EU law are respected while

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104 As indeed suggested by the Commission, *On the European democracy action plan*, op. cit., p. 15.

105 See the model EU directive proposed by Liberties using Articles 114 and 81(2)(e) and (f) TFEU as a legal basis, *Protecting Public Watchdogs across the EU: A proposal for an EU anti-SLAPP law*, 30 November 2020. The proposed model EU directive refers to the chilling effect of SLAPPs in its recitals and Article 6(2) (conditions for dismissal): "Without prejudice to the discretion afforded to courts by the procedural rules of the Member States, Member States shall ensure that the following elements are taken into account in the court's assessment pursuant to paragraph 1: [...] (xi) the actual or potential chilling effect on public participation on the concerned matter of public interest."

106 Recital 45 of Directive 2019/1937 of 23 October 2019 on the protection of persons who report breaches of Union law.

107 See Article 4 (personal scope). Regarding judges specifically, see also the UK Supreme Court judgment in *Gilham v Ministry of Justice* [2019] UKSC 44 (judges are entitled to claim the protection given to whistle-blowers under Part IVA of the Employment Rights Act 1996).

108 New Article 30(2) of Directive 2018/1808: "Member States shall ensure that national regulatory authorities or bodies exercise their powers impartially and transparently and in accordance with the objectives of this Directive, in particular media pluralism, cultural and linguistic diversity, consumer protection, accessibility, non-discrimination, the proper functioning of the internal market and the promotion of fair competition.

National regulatory authorities or bodies shall not seek or take instructions from any other body in relation to the exercise of the tasks assigned to them under national law implementing Union law. This shall not prevent supervision in accordance with national constitutional law."

109 Country Chapter on the rule of law situation in Hungary, SWD(2020) 316 final, 30 September 2020, p. 13.

110 Reuters, [EU asks Hungary not to take opposition radio off air: letter](#), 13 February 2021.

avoiding irreparable damage to the current holder of the frequency”.<sup>111</sup>

To conclude, Article 2 TEU values as concretised in different provisions of the Treaties and the EU Charter, must be interpreted as imposing on the EU institutions and its EU member states *negative* as well as *positive* obligations. Negatively, Article 2 TEU must be construed as imposing an obligation to refrain from creating a climate of distrust, fear or stigmatisation and from taking measures which

can have a chilling effect on specific categories of natural or legal persons or on society in general by discouraging the legitimate exercise of the rights provided for by EU. Positively, Article 2 TEU must be construed as imposing an obligation to create a favourable environment for the fulfilment of the values provided for in this Treaty provision, as well as an obligation to react when threats, attacks, smear campaigns, etc., aim to discourage journalists, judges, lawyers, etc., from exercising their rights and/or fulfilling their professional duties.

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111 European Commission’s head of communication networks unit quoted in Reuters article, *ibid.*

