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ARTICLE

Private Power, the Rule of Law and the European Union

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Abstract

Discussions related to the rule of law in the European Union have been dominated by a focus on rule of law infringements by public actors. However, in recent years scholars have begun exploring the relevance of the rule of law to private actors. That is the focus of this piece, which highlights that, because the core of the rule of law is about limiting the arbitrary exercise of power by those that possess it, and because private actors are increasingly able to harm individuals through the exercise of power in ways similar to public actors, obligations inspired by the rule of law should be extended by Member States and the Union to private actors. As will be seen, various areas of Union law are already underpinned by ideas related to the restraint of the exercise of arbitrary power by private actors vis-à-vis individuals. They simply do not go far enough. Thus, further reflection based on the principle of the rule of law is warranted in order to temper the exercise of such power.

Keywords Rule of law · Private power · European Union · Fundamental rights · Consumer protection

The European case law of recent years has demonstrated the key relevance of the principle of the rule of law to the 'functioning of the EU as a whole'.[1] Challenges to the rule of law by Member States have come centre stage in political debates,[2] the

[1] Commission, 'Rule of Law: Commission Launches Infringement Procedure' (*European Commission—European Commission*, 22 December 2021) <https://ec.europa.eu/commission/presscorner/detail/en/ip_21_7070> accessed 5 February 2023.

[2] European Parliament Resolution on the Commission's 2021 Rule of Law Report (2021/2180(INI)); European Parliament, 'Briefing: Rule of Law in Hungary and Poland: Plenary Debate and Resolution' (2 May 2022) <https://www.europarl.europa.eu/news/en/agenda/briefing/2022-05-02/6/rule-of-law-in-hungary-and-poland-plenary-debate-and-resolution> accessed 16 January 2023; European Parliament,

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press,[3] and academia.[4] Most referred to are the measures taken in Poland and Hungary connected to the national judiciaries. However, the Court of Justice (ECJ) and Treaties have long highlighted the importance of the rule of law. Already in 1986, the ECJ declared that the (then) 'European Economic Community is a Community based on the rule of law'.[5] According to Article 2 of the Treaty on European Union (TEU), the rule of law is one of the values on which the European Union (EU) is founded. It is thus not only a criterion for accession,[6] but is also given 'concrete expression'[7] throughout EU law. The latter has been made clear by the ECJ in its contemporary case law on judicial independence, according to which 'compliance by a Member State with the values enshrined in Article 2 TEU is a condition for the enjoyment of all of the rights deriving from the application of the Treaties to that Member State.'[8]

One trait common to the constitutional traditions of Europe is the lack of a definition of the rule of law by constitutions or by courts.[9] However, various actors have attempted to define the core tenets of the rule of law. In EU law, for instance, the definition of the rule of law for the purposes of the December 2020 Rule of Law

Footnote 2 (continued)

'Rule of Law: MEPs Debate Hungary's Progress in Addressing Commission's Concerns' (21 November 2022) <https://www.europarl.europa.eu/news/en/agenda/briefing/2022-11-21/6/rule-of-law-meps-debate-hungary-s-progress-in-addressing-commission-s-concerns> accessed 16 January 2023.

[3] Flora Garamvolgyi and Jennifer Rankin, 'Viktor Orbán's Grip on Hungary's Courts Threatens Rule of Law, Warns Judge' (*The Guardian*, 14 August 2022) <https://www.theguardian.com/world/2022/aug/14/viktor-orban-grip-on-hungary-courts-threatens-rule-of-law-warns-judge> accessed 16 January 2023; Editorial Board, 'Brussels Is Right to Press Poland on Rule of Law Reforms' (*Financial Times*, 19 October 2022) <https://www.ft.com/content/ff210b4e-e28d-4ab2-afec-d34c89f5c606> accessed 16 January 2023; Zoltan Simon, 'How EU Is Withholding Funding to Try to Rein In Hungary, Poland' *Bloomberg* (30 December 2022) <https://www.bloomberg.com/news/articles/2022-12-30/how-eu-is-withholding-funding-to-try-to-rein-in-hungary-poland> accessed 16 January 2023; Jan Cienski, 'Poland's Rule of Law Legislation Moves Forward — but Fights Remain' (*Politico*, 13 January 2023) <https://www.politico.eu/article/poland-european-union-rule-law-legislation-moves-forward-but-fights-remain/> accessed 16 January 2023.

[4] Laurent Pech and Kim Lane Scheppele, 'Illiberalism Within: Rule of Law Backsliding in the EU' (2017) 19 Cambridge Yearbook of European Legal Studies 3; Dimitry Kochenov and Petra Bárd, 'Rule of Law Crisis in the New Member States of the EU: The Pitfalls of Overemphasising Enforcement' [2018] RECONNECT Working Paper No. 1 <https://reconnect-europe.eu/wp-content/uploads/2018/07/RECONNECT-KochenovBard-WP_27072018b.pdf> accessed 16 January 2023; R Daniel Kelemen and Laurent Pech, 'The Uses and Abuses of Constitutional Pluralism: Undermining the Rule of Law in the Name of Constitutional Identity in Hungary and Poland' (2019) 21 Cambridge Yearbook of European Legal Studies 59; Koen Lenaerts, 'New Horizons for the Rule of Law Within the EU' (2020) 21 German Law Journal 29.

[5] Case 294/83 *Parti écologiste 'Les Verts' v European Parliament* [1986] EU:C:1986:166 [23].

[6] See Article 49 Treaty on European Union (TEU) [1992] OJ C 191/1and Case C-157/21 *Poland v Parliament and Council* [2022] EU:C:2022:98 [142].

[7] Case C-824/18 *AB and Others* [2021] ECLI:EU:C:2021:153 [108]; Case C-896/19 *Repubblika* [2021] EU:C:2021:311 [63].

[8] *Repubblika* (n 7) [63].

[9] Laurent Pech, 'The Rule of Law as a Constitutional Principle of the European Union' [2009] Jean Monnet Working Paper 04/09 70 <http://www.ssrn.com/abstract=1463242> accessed 5 February 2023.

Conditionality Regulation[10] is based on the existing case law of the Court of Justice (ECJ),[11] and.

> 'refers to the Union value enshrined in Article 2 TEU. It includes the *principles of legality* implying a transparent, accountable, democratic and pluralistic law-making process; *legal certainty*; prohibition of *arbitrariness* of the executive powers; *effective judicial protection*, including access to justice, by independent and impartial courts, also as regards fundamental rights; *separation of powers*; and *non-discrimination and equality before the law*.[12]

This Regulation 'provides the first comprehensive all-encompassing definition of the rule of law adopted by the EU legislator'.[13] Thus, as demonstrated by Pech, the rule of law is a well-established principle of EU law that the ECJ case law, the Commission, and the EU legislators have defined.[14]

This non-exhaustive list is united by what this principle seeks protection from – the arbitrary exercise of power. Likewise, 'Abhorrence of arbitrariness is a major theme that runs through all the rule of law writing through the centuries'[15] and can hence be considered the core of the rule of law.

But from whom does the rule of law protect? 'The ideal of "the rule of law, not of men"' calls upon us to strive to ensure that our law itself will rule (govern) us, not the wishes of *powerful individuals*'.[16] Still, in an era where private actors are increasingly powerful, we must ask: which 'powerful individuals'? This article argues that it is not just public but also private actors that hold sufficient power over individuals to trigger rule of law-related obligations. Indeed, individuals, corporations and other non-State actors may exercise power over various aspects of society, the economy, and politics, presenting numerous risks, including political influence, corruption, and lack of accountability. If the EU is to be considered based on the rule of law, it must at a minimum require Member States to preclude private actors from arbitrarily wielding their power over weaker individuals. The idea of

[10] Regulation 2020/2092 on a general regime of conditionality for the protection of the Union budget [2020] OJL 433I/1.

[11] See the footnotes to recital 3 ibid, which reiterates the Article 2(a) definition.

[12] Article 2(a) ibid (emphasis added). The Commission first presented this definition in Commission, 'A New EU Framework to Strengthen the Rule of Law' (2014) COM/2014/0158 final, though it added equality in the 2019 framework (Commission, 'Further Strengthening the Rule of Law within the Union State of Play and Possible next Steps' (2019) COM/2019/163 final(and non-discrimination in the Regulation 2020/2092. This definition reflects the case law of the ECJ (Case C-157/21 *Poland v Parliament and Council* (n 6) [290] and thus unsurprisingly has since been endorsed by the ECJ (ibid [291]). However, the Court (like the Regulation itself) left room for the inclusion of other principles for the purposes of defining the rule of law in the sense of Article 2 TEU (ibid [154] and [323]).

[13] Laurent Pech, 'The Rule of Law as a Well-Established and Well-Defined Principle of EU Law' (2022) 14 Hague Journal on the Rule of Law 107.

[14] ibid.

[15] Robert Stein, 'Rule of Law: What Does It Mean?' (2009) 18 Minnesota Journal of International Law 293, 298.

[16] Margaret Jane Radin, 'Reconsidering the Rule of Law' (1989) 69 Boston University Law Review 781, 781, emphasis added.

limiting the ability for private actors to arbitrarily exercise power they hold vis-à-vis others is already part of the underlying fabric of various areas of law: fundamental rights, consumer protection and competition law, and labour law, for instance. Thus, it appears that the rule of law is not just about the tethering of public power, despite widespread assumptions to the contrary.[17]

The article is structured as follows. Section 1 elaborates on the relationship between law, power, and arbitrariness. Sections 2 and 3 highlight two different rule of law narratives. Whereas the former establishes that the traditional rule of law narrative is about protecting the interests of private actors from *public* actors, Sect. 3 deals with the capacity of the rule of law to provide protection from the arbitrary use of private power, particularly by business actors in the areas of fundamental rights, consumer protection and competition law, and labour law. As will be seen, however, this does not mean that the law goes far enough to provide protection in these areas. Furthermore, in Sect. 4 it will be shown that there are areas falling outside the law or in which private actors are able to influence the law in ways that can still be conceived of as exercises of arbitrary power, suggesting that rule of law protection against such power is insufficient, highlighting the example of lobbying in this respect. Section 5 concludes.

Thus, it becomes apparent that the EU rule of law principle is much broader than generally portrayed, with its substance (non-arbitrariness) already inspiring how the law readjusts the balance of power between powerful and less powerful private actors and/or controls the exercise of power by the more powerful. Still, it is time to explicitly acknowledge this private dimension of the rule of law, which arguably requires the EU and Member States to provide far greater protection against the exercise of private power than is currently available. Just as the EU has a long way to go yet towards cleaning up the rule of law backsliding in the Member States, so too must it make increased efforts to remedy rule of law deficits in relationships between private parties.

1 The Rule of Law, Power, and Arbitrariness

This enunciation of various principles stemming from the rule of law as a definition for the rule of law is typical. Perhaps it is considered so obvious that it often goes without saying, yet these principles all go back to the issues of the ability of one party to exercise power arbitrarily over another. To preclude arbitrary exercises of power is why we need legality, legal certainty, effective judicial protection, the separation of powers, and non-discrimination and equality before the law. Otherwise, we would live in a society in which power could be wielded to trample over the rights and interests of others. Non-arbitrariness prevents this. Thus, as demonstrated on multiple occasions by Krygier, the problem that the rule of law seeks to address is

[17] E.g. Pech (n 9) 7.

power, particularly *arbitrary* uses thereof liable to interfere with the rights and interests of others,[18] including but not limited to fundamental rights and democracy.[19]

But what do we mean by 'power' and 'arbitrariness'? As the rule of law is concerned with 'citizens' interest in non-domination',[20] the type of power the rule of law is predominantly concerned with is power *over* – i.e. 'the power of the strong over the weak'.[21] This type of power stands in opposition to the other forms of power traditionally encompassed by power analyses – i.e. power *to,* power *with*, or power *within*. Hence, the rule of law concerns itself with the power of particular actors over weaker actors. In terms of what the *arbitrary* exercise of power would look like, one can look to the two forms identified by Krygier:

> It can refer to power at its *source* – to what extent is the power of the power-wielder subject, as Philip Pettit puts it, 'just to the *arbitrium*, the decision or judgement of the [power-wielding] agent; the agent was in a position to choose it or not choose it, at their pleasure'? We also speak of power being exercised arbitrarily where it is *received*, if those subject to it have no way of knowing how or when or why it will hit them, or with what. It is the job of rule-of-law institutions, among others, to diminish arbitrium in the exercise of power, at both ends.[22]

The arbitrary exercise of power: A case law illustration

As an illustration of both power and the arbitrary exercise thereof that has been deemed incompatible with the rule of law, one can look to the recent case law of the ECJ concerning the independence of national courts, where the Court confirmed that judicial independence 'gives concrete expression to the value of the rule of law'.[23] In

[18] Martin Krygier and Adam Winchester, 'Arbitrary Power and the Ideal of the Rule of Law' in Christopher May and Adam Winchester (eds), *Handbook on the Rule of Law* Edward Elgar (2018) 76: 'Many problems have been identified for the rule of law to solve, perhaps too many. However, one that has endured the centuries has to do with perversions and pathologies of power and how it might be rendered safe, and then, more positively, helpful, rather than loom as a perennial source of threat and fear over those subject to it.' See also Council of Europe Commitee of Ministers, 'The Council of Europe and the Rule of Law—An Overview' [2008] CM(2008)170 170 <https://www.coe.int/t/dc/files/Ministerial_Conferences/2009_justice/CM%20170_en.pdf> accessed 10 August 2022: "All these rule of law requirements under the ECHR pursue an important objective: to avoid arbitrariness and offer individuals protection from arbitrariness, especially in the relations between the individual and the state" [59]. See further on the relationship between the rule of law, power, and arbitrariness: John Adenitire, 'The Rule of Law for All Sentient Animals' (2022) 35 Canadian Journal of Law & Jurisprudence 1, 19; John Phillip Reid, *Constitutional History of the American Revolution* Univ of Wisconsin Press (1995) 645.

[19] E.g. in Case C-157/21 *Poland v Parliament and Council* (n 6) the Court highlighted in particular that other Article 2 TEU values and principles may 'form part of the very definition of the value of 'the rule of law' contained in Article 2 TEU' ([154]) (e.g. equality and non-discrimination" [324]) or be otherwise 'closely linked to a society that respects the rule of law' [154].

[20] Gianluigi Palombella, 'Non-Arbitrariness, Rule of Law and the "Margin of Appreciation": Comments on Andreas Follesdal' (2021) 10 Global Constitutionalism 139, 139.

[21] 'Quick Guide to Power Analysis' (2009) <http://www.powercube.net/wp-content/uploads/2009/11/quick_guide_to_power_analysis_external_final.pdf> accessed 16 January 2023.

[22] Martin Krygier, 'What About the Rule of Law?' (2013) 5 Constitutional Court Review 74, 87.

[23] Case C-216/18 PPU *LM* [2018] EU:C:2018:586[50]; Case C-192/18 *Commission v Poland (Ordinary Courts)* [2019] EU:C:2019:924 [98].

these cases, other State branches undermined the independence of national courts. A core issue was often whether judges were subject to non-circumscribed executive or legislative discretion (i.e. arbitrariness), as demonstrated in a working paper with [to be added after peer-review].

In sum, in the Polish preliminary references *Independence of the Supreme Court* and *Judges' Retirement Age*, measures providing for executive discretion to extend judicial terms that were not circumscribed by an independent advisory body constituted a failure to fulfil the judicial independence obligation contained in Article 19(1) TEU.[24] Likewise, in the *AK and Others* (Poland), *AB and Others* (Poland), and *Repubblika* (Malta) preliminary rulings the lawfulness of measures pertaining to judicial appointments also turned on the issue of executive discretion.[25]

It appears from this case law that measures are discretionary — thus facilitating arbitrary decision-making — where (i) the measures are not governed by objective and verifiable criteria and (ii) the decision-makers do not have to provide reasons for their decisions.[26] In *Independence of the Supreme Court* the judicial term extension was considered 'discretionary inasmuch as its adoption is not, as such, governed by any objective and verifiable criterion and for which reasons need not be stated.'[27] Similarly, in *Judges' Retirement Age* the Court highlighted that the term extension criteria were 'too vague and unverifiable' (and hence not based on objective criteria) and that 'the minister's decision is not required to state reasons'.[28] In *Repubblika*, the ECJ noted firstly, that the Prime Minister's exercise of their power to make judicial appointments was 'circumscribed by the requirements of professional experience which must be satisfied by candidates for judicial office, which [were] laid down in … the Constitution'[29]; hence, their decisions were subject to objective criteria. Next, even though the Prime Minister could appoint candidates not forwarded by the existing independent advisory body, this seemed remedied by the executive's 'obligation to state reasons'.[30] From these cases, one can observe that the Court's definition of discretion in this respect relates to the lack of objective criteria or duty to give reasons. However, an actor may save such executive discretionary measures

[24] Case C-619/18 *Commission v Poland (Independence of the Supreme Court)* [2019] EU:C:2019:531 [118] and [124]; Case C-192/18 *Commission v Poland (Judges' Retirement Age)* [2019] EU:C:2019:924 [123]–[124].

[25] Indeed, in the first two cases, the ECJ suggested to the national court that measures providing the Polish President with discretion to make Supreme Court appointments that were not circumscribed by an independent advisory body (*AK and Others* [para]) nor by the possibility of judicial review (*AB and Others* (n 7) [136]) were incompatible with judicial independence. By contrast, the Court suggested in the *Repubblika* reference from a Maltese court that the Prime Minister's discretion in judiciary appointments was sufficiently circumscribed by an advisory body so as to meet the requirements of judicial independence, as that advisory body was itself independent from the executive (*Repubblika* (n 7) [66]–[67]).

[26] *Independence of the Supreme Court* (n 25) [114]. These criteria were not fulfilled in *ISC* nor in *Judges' Retirement Age* (n 25)[122]. See similarly for judicial appointments *Repubblika* (n 7), where the Prime Minister's appointment decisions had to be made according to objective criteria [70] and entailed a duty to give reasons [71].

[27] *Independence of the Supreme Court* (n 25) [114] (emphasis added).

[28] *Judges' Retirement Age* (n 25)[122] (emphasis added).

[29] *Repubblika* (n 7) [70].

[30] *ibid* [71].

from constituting a breach of judicial independence where the measure can 'be challenged in court proceedings'.[31]

Nevertheless, even if the executive has discretion and their decision is not subject to judicial review, the measure may still be saved from constituting a breach of judicial independence by the presence of an advisory body. This will only be the cases where (i) that body is itself independent from the external influence of the executive or legislature, (ii) the 'opinion is delivered on the basis of criteria which are both objective and relevant', and (iii) the opinion 'is properly reasoned'.[32] Further, even where that advisory body is not independent, again the discretion of the executive and non-independence of the advisory body may be saved by the possibility of judicial review according to *AB and Others*, where the Court reasoned that if the advisory body in the appointment process was not independent, 'the existence of a judicial remedy… would be necessary in order to help safeguard the process of appointing the judges'.[33]

Based on the above, the EU rule of law principle requires that power be exercised at least according to objective and verifiable criteria and that the power-holder give reasons for their decisions. In the event that these requirements are not fulfilled, the relevant measure can only be compatible with the rule of law if certain guardrails are in place, such as an independent advisory body or the possibility of judicial review.

While this case law gives an idea of what the rule of law concretely requires in situations involving public actors, it tells us nothing of what it requires when private actors are involved. However, as we shall see in subsequent sections, the requirements laid down by the Court to protect the rule of law can inspire the creation of concrete obligations for private actors. The role of private actors under the rule of law narrative is the focus of the following two sections. Section 2 explores the 'traditional' rule of law narrative, which focuses on the protection of private (including business) actors from the arbitrary exercise of public power. By contrast, Sect. 3 explores the possibility of a rule of law principle that requires States to protect individuals from the arbitrary exercise of power by other private actors.

[31] *Independence of the Supreme Court* (n 25) [114]; *Judges' Retirement Age* (n 25) [122]. Although this was not the case in respect to the Polish judicial term extension measures (*Independence of the Supreme Court* (n 25) [114]; *Judges' Retirement Age* (n 25) [122]) nor judicial appointment (Joined Cases C-585/18, C-624/18 and C-625/18 *AK and Others* [2019] EU:C:2019:982 [145]; *AB and Others* (n 7) [128]) measures.

[32] *Independence of the Supreme Court* (n 25) [115]. In *Repubblika* (n 7), the appointment advisory body was deemed sufficiently independent [67], was found to use objective criteria, and publishes its assessments [67].

[33] *AB and Others* (n 7)[136].

2 The Traditional Rule of Law Narrative: Protection from Public Power

Traditional rule of law narratives focus on protecting subjects of a given legal order from the arbitrary use of power by public actors.[34] When private actors are part of this narrative, the discussion often relates to how States can use the rule of law to protect business actors from the arbitrary use of public power,[35] for the benefit of the economy as a whole. Like the Magna Carta was an ‘effort of nobles to use law to restrain kings’,[36] the rule of law is said to facilitate ‘successful conduct of trade, investment and business’.[37] This conception, therefore, frames the rule of law as placing duties on the State while granting rights to business actors.

On this reading, one associates the rule of law with the protection of business interests through legal certainty,[38] systems of contract law,[39] property rights,[40] and ‘effective justice systems’,[41] thereby facilitating a stable economic environment for business dealings, such as investment and contracts.[42] The protection of business is framed as the primary purpose of the EU Justice Scoreboard, before the interests of

[34] E.g. Regulation 2020/2092 recital: ‘The rule of law requires that all *public powers* act within the constraints set out by law [etc.]’ (emphasis added). See also the Council of Europe Committee of Ministers quote above in note 18. For scholars subscribing to this view, see e.g. House of Lords Select Committee on Constitution, ‘Sixth Report: Appendix 5: Paper by Professor Paul Craig – the Rule of Law’ <https://publications.parliament.uk/pa/ld200607/ldselect/ldconst/151/15115.htm> accessed 10 August 2022. This point that the rule of law narrative is traditionally on state actors has also been made by Julian A Sempill, ‘What Rendered Ancient Tyrants Detestable: The Rule of Law and the Constitution of Corporate Power’ (2018) 10 Hague Journal on the Rule of Law 219, 221 amongst others.

[35] E.g. Jeremy Waldron, ‘Are Sovereigns Entitled to the Benefit of the International Rule of Law?’ (2011) 22 European Journal of International Law 315, 324.

[36] Brian Z Tamanaha, *On the Rule of Law: History, Politics, Theory* Cambridge University Press (2004) 25.

[37] Tom Bingham, *The Rule of Law* Penguin (2011) 26–27. See also 69–70.

[38] E.g. European Commission for Democracy Through Law (Venice Commission), ‘Report on the Rule of Law’ [2011] Study No. 512/2009 16 [44]: ‘The principle of legal certainty is essential to the confidence in the judicial system and the rule of law. It is also essential to productive business arrangements so as to generate development and economic progress.’.

[39] See e.g. the World Bank Rule of Law indicators, available at The World Bank, ‘Worldwide Governance Indicators’ (2021) <http://info.worldbank.org/governance/wgi/Home/Documents> accessed 11 August 2022.

[40] Johanna del Pilar Cortés-Nieto and Giedre Jokubauskaite, ‘A Counter-Hegemonic Rule of Law?’ (2021) 17 International Journal of Law in Context 128, 128: ‘[T]he rule of law in its ‘narrow’ and simplistic form has been closely aligned with neoliberal rationality. This is because the rule of law is often invoked to protect property rights of transnational funders and investors, to create stable and predictable legal environments for their investments and to ensure that their contractual claims are immunised from domestic political contestation.’ See also O Lee Reed, ‘Law, the Rule of Law, and Property: A Foundation for the Private Market and Business Study’ (2000–2001) 38 American Business Law Journal 441, 441–446 on rule of law being underpinned by property rights and contract law.

[41] ‘The 2021 EU Justice Scoreboard’ [2021] COM(2021)389 3 <https://ec.europa.eu/info/sites/default/files/eu_justice_scoreboard_2021.pdf> accessed 11 August 2022.

[42] Joseph L Staats and Glen Biglaiser, ‘Foreign Direct Investment in Latin America: The Importance of Judicial Strength and Rule of Law’ (2012) 56 International Studies Quarterly 193, 193; Cortés-Nieto and Jokubauskaite (n 41) 128; William C Whitford, ‘Rule of Law’ (2000) 2000 Wisconsin Law Review 723, 734.

EU citizens.[43] Thus, the relevance of the rule of law to private actors is limited in the traditional rule of law narrative to thinking about how to protect private interests — especially business interests — from the arbitrary exercise of public power.

Yet private actors can themselves be powerful. Thus, we turn to a less conventional rule of law narrative: one of protection from private actors.

3 Rule of Law as a Protection Against Private Power

As meticulously demonstrated by Sempill, private actors can possess the same characteristics as those with which the traditional rule of law narrative takes issue with respect to public actors — tyranny, arbitrariness, slavishness, and corruption.[44] Thus, in recent years scholars have challenged the legitimacy of framing the rule of law as a principle limited to the 'tempering'[45] of public power.[46] On this reading, obligations based on the rule of law are passed on to those with the capacity to cause various types of harm through the arbitrary exercise of the power they possess in relation to another private party. It is then not only public actors that have rule of law-related obligations.

If we agree that, according to the principle of the rule of law, States should temper private power, what might this look like in the EU? Firstly, the rule of law in Article 2 TEU as given concrete expression throughout EU law would bind the Member States as signatories to the Treaties to ensure that both public and private power cannot be used arbitrarily on the domestic and EU levels. The rule of law therefore requires establishing *inter alia* legal provisions and institutions to temper public power. However, given the possibility of the arbitrary exercise of power by private parties, it should also entail establishing such provisions and institutions to temper private power. Thus, a State or the Union itself cannot be based on the rule

[43] 'The Scoreboard mainly presents indicators concerning civil, commercial and administrative cases, as well as certain criminal cases, in order to assist Member States in their efforts to create a more efficient investment, business and citizen-friendly environment': 'The 2021 EU Justice Scoreboard' (n 42) 2.

[44] Sempill (n 35).

[45] To use the word carefully selected by Krygier: Martin Krygier, 'Tempering Power' in Maurice Adams, Anne Meuwese and Ernst Hirsch Ballin (eds), *Constitutionalism and the Rule of Law: Bridging Idealism and Realism* CUP (2017); Martin Krygier, 'What's the Point of the Rule of Law The Baldy Center's 40th Anniversary Conference: Tempering Power' (2019) 67 Buffalo Law Review 743.

[46] Ioannis Kampourakis, Sanne Taekema and Alessandra Arcuri, 'Reappropriating the Rule of Law: Between Constituting and Limiting Private Power' (2022) 14 Jurisprudence 76; Martin Krygier, 'The Ideal of the Rule of Law and Private Power' CEU Democracy Institute Working Paper 2023/09 <https://democracyinstitute.ceu.edu/sites/default/files/article/attachment/2023-03/Martin%20Krygier%20-%20The%20Ideal%20of%20the%20Rule%20of%20Law%20and%20Private%20Power%20CEU%20DI%20WP%202023%2009.pdf> accessed 22 October 2023; Kinnari Bhatt, Jennifer Lander and Sanne Taekema, 'Introduction: The Rule of Law in Transnational Development Projects – Private Actors and Public Chokeholds' (2021) 17 International Journal of Law in Context 91; Adenitire (n 19); Chantal Mak, 'Mapping "Wild Zones" of Globalisation: On Private Actors and the Rule of Law' (2021) 17 International Journal of Law in Context 107; Gamze Erdem Türkelli, 'Private Actors in Development Projects: Reflections on Human Rights between Power and Resistance' (2021) 17 International Journal of Law in Context 114; Sempill (n 35).

of law in the sense of Article 2 TEU if private actors could cause harms equivalent to those prevented by the law in respect to public actors.

If it is accepted that the EU rule of law principle may bind Member States at the EU and national levels to ensure that private power over individuals is not exercised arbitrarily, lessons can be learned from the above ECJ case law example on judicial independence. Indeed, the rule of law would then require Member States to ensure that private parties exercise their power according to objective and verifiable criteria and that these actors give reasons for their decisions. A failure to fulfil either of these criteria may be saved by the presence of an independent advisory body or (more relevant in the case of private actors) by the possibility of judicial review.

As will be seen in the following section, the Member States acting at the Union level have already effectively taken steps towards enshrining a rule of law principle that protects individuals from the arbitrary exercise of power. This is different from saying that this protection is sufficient, however. Through various means, private actors still regularly exercise their powers arbitrarily in ways that affect the interests and alter the situation of individuals. Such deficiencies can only be addressed if the aforementioned duty of Member States and the Union to ensure private actors uphold the rule of law is itself complied with, by ensuring that rule of law considerations are formally incorporated into decision-making processes related to measures regulating private actors.

4 EU Law as Already Tempering the Power of Private Actors

As observed by Adenitire, the core facets of national legal systems already reflect the notion of the rule of law as constraining private power: 'Ordinary criminal law, tort law, contract law, and private law more generally fulfil the rule of law's basic idea of constraining arbitrary power between private persons.'[47] EU law, too, already provides protection from some of the most egregious consequences of the arbitrary exercise of private power. Indeed, the research underlying this piece identified various examples as being at their core about tempering private power or tempering both public and private power. These examples demonstrate that EU law already goes a considerable way to protecting individuals — as fundamental rights-holders, as consumers, and as workers — from the arbitrary exercise of private power. Indeed, European societies would look radically different without fundamental rights that bound private actors, consumer protection and competition law, and labour law. It would be a Union in which fundamental rights would not truly exist and consumers and workers could be subject to the most grievous forms of exploitation.

The Protection of Individuals as Individuals: Fundamental Rights,[48]

[47] Adenitire (n 19) 19.

[48] E.g. part of the Venice Commission's rule of law 'checklist' is that 'effective legal protection of individual human rights vis-à-vis infringements by private actors' be guaranteed. But it is the task of public actors to ensure this: Venice Commission, 'Rule of Law Checklist' (2016) 19 <https://www.venice.coe.int/images/SITE%20IMAGES/Publications/Rule_of_Law_Check_List.pdf> accessed 12 December 2021.

Fundamental rights are an important area in which Member States have laid down objective and verifiable criteria for the exercise of private power, coupled with the possibility of judicial review by independent bodies.

The basis for obligations on private parties to respect the fundamental rights of other private parties (i.e. in 'horizontal' situations) in the EU varies. At the most basic level, international law contains obligations for *States* to ensure that private actors respect the fundamental rights of individuals.[49] Positive obligations on private actors are largely absent from the ECJ's fundamental rights jurisprudence, instead preferring a state liability approach.[50] But in its contemporary case law the ECJ has confirmed the 'direct horizontality' of fundamental rights as general principles of EU law,[51] as well as that of certain provisions of the Charter.[52] The Court has otherwise resorted to 'indirect horizontality', requiring that national law be interpreted consistently with the protection of fundamental rights.[53] All of these avenues of fundamental rights protection in horizontal situations are at their core about tempering the power of private actors to impede these rights, whether it is achieved directly by binding those private actors by fundamental rights standards or indirectly by effectively obliging state actors to create laws and policies that constrain the ability of private actors to harm such rights. Thus, ideas related to the rule of law as a notion applicable to private power play a part in underpinning the scope of fundamental rights regimes. Moreover, many rights in vertical relationships require the State to protect private actors from other private parties, including both civil and political but also social and economic rights.[54]

However, whether EU and national law sufficiently temper private actors' ability to impede fundamental rights is another question. Gaps still exist in the horizontal protection of fundamental rights. Business actors continue to commit human rights violations across the EU Member States.[55] For instance, in a 2019 report the EU Fundamental Rights Agency (FRA) identified 155 incidents of fundamental rights abuses by business actors over a seven-year period.[56] Yet according to the FRA, challenges especially exist regarding access to effective remedies when violations

[49] See e.g. United Nations Committee on Economic, Social and Cultural Rights, 'General Comment No. 24 on State Obligations under the International Covenant on Economic, Social and Cultural Rights in the Context of Business Activities' [2017] UN Doc E/C.12/GC/24; United Nations Human Rights Committee, 'General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant' [2004] CCPR/C/21/Rev.1/Add. 13 [8].

[50] Eleni Frantziou, 'The Horizontal Effect of the Charter of Fundamental Rights of the EU: Rediscovering the Reasons for Horizontality' (2015) 21 European Law Journal 657, 664.

[51] ibid. See also Elise Muir, 'The Horizontal Effects of Charter Rights Given Expression to in EU Legislation, from Mangold to Bauer' (2019) 12 Review of European Administrative Law 185. The direct horizontality of fundamental rights in Member State constitutions also varies: Frantziou (n 56) 669–670.

[52] See the case law discussions by Muir (n 57) 190–199.

[53] Frantziou (n 56) 663–664.

[54] See e.g. Samuel L Bufford, 'Defining the Rule of Law' (2007) 46 Judges' Journal 16; Title I-V Charter of Fundamental Rights of the European Union [2016] OJ C202/389.

[55] European Union Agency for Fundamental Rights, 'Business-Related Human Rights Abuse Reported in the EU and Available Remedies' (2019) 7 <https://fra.europa.eu/sites/default/files/fra_uploads/fra-2019-business-and-human-rights-focus_en.pdf> accessed 12 January 2023.

[56] ibid.

by business actors do occur.[57] Victims must identify the relevant court, may fear stigmatisation or reprisals, and may be restricted for financial reasons from seeking judicial remedies.[58]

Moreover, the Venice Commission is of the opinion that 'The substance of the rule of law as a guiding principle for the future has to be extended… to activities of private actors whose power to infringe individual rights has a weight comparable to state power'.[59] One can envision a broad range of such 'activities'. However, this seems considerably circumscribed by the Venice Commission's consideration that such activities are limited to tasks that 'formerly have been the domain of state authorities'.[60] In the area of fundamental rights, there are plentiful private activities that were not formerly the domain of public authorities but that involve a private power comparable to state power in terms of the ability to infringe fundamental rights. For instance, and as seen in the following sections, private business actors may possess a significant degree of power over individuals when they engage with them as consumers and as workers.

The Protection of Individuals as Consumers: Consumer Protection and Competition Law

The consumer protection and competition law dimensions of the EU internal market facilitate the internal market by protecting the rule of law. Indeed, both areas are in essence about tempering the power of private actors vis-à-vis individuals as consumers. For consumer protection,[61] this has been confirmed numerous times throughout the case law in which the ECJ has stated that 'the system of protection introduced by [the Unfair Terms in Consumer Contracts Directive] is based on the idea that the consumer is in a weak position vis-à-vis the seller or supplier, as regards both his bargaining power and his level of knowledge'[62] Thus, Weatherill writes that, 'And so the directive aims to replace the formal balance that the contract establishes between the rights and obligations of the parties with an effective balance that reestablishes equality between those parties.'[63] The same can apply to the other core pieces of EU consumer contract legislation — the Consumer Rights

[57] European Union Agency for Fundamental Rights, 'Improving Access to Remedy in the Area of Business and Human Rights at the EU Level' (2017) <https://fra.europa.eu/sites/default/files/fra_uploads/fra-2017-opinion-01-2017-business-human-rights_en.pdf> accessed 12 January 2023.

[58] ibid 5–6.

[59] European Commission for Democracy Through Law (Venice Commission) (n 39).

[60] ibid.

[61] See e.g. 'The 2021 EU Justice Scoreboard' (n 42) 16: 'Effective enforcement of consumer law ensures that consumers benefit from their rights and that companies infringing consumer laws do not gain unfair advantage.'.

See also Articles 12, 114(3) and 169 TFEU.

[62] Case C-169/14 *Sánchez Morcillo and Abril Garcia* EU:C:2014:2099 [22] and caselaw cited therein.

[63] Stephen Weatherill, 'Consumer Protection' in Dennis Patterson and Anna Södersten (eds), *A Companion to European Union Law and International Law* John Wiley & Sons (2016) 290.

Directive, the Sale of Goods Directive, and the Unfair Commercial Practices Directive.[64][65] The CFR also establishes a commitment to consumer protection, providing that 'Union policies shall ensure a high level of consumer protection.'[66]

The protection of consumers as the consumer as the weaker party also underpins EU competition law. While competition law is part of the internal market structure and hence also protects market integration, the primary basis for contemporary enforcement is its consumer welfare objective. The EU consumer welfare objective protects both static and dynamic efficiency in a long-term sense. Effectively, all areas of competition law — prohibitions of anticompetitive agreement, abuses of dominance, and merger regulation — are concerned with market power. For instance, the idea underpinning Article 102 of the Treaty on the Functioning of the European Union (TFEU) – the abuse of dominance prohibition – is that where undertakings dominate a market, they are particularly well-placed to harm consumers. They may do so indirectly — e.g. by pushing competitors out of the market through practices such as loyalty rebates, margin squeezes or exclusive dealing — or directly — most notably through excessive pricing.

Both consumer protection and competition law are therefore about private actors and their power vis-à-vis consumers. Specifically, these legal areas constrain undertakings' ability to exercise power over individuals arbitrarily. The law itself lays down objective and verifiable criteria that preclude the possibility of undertakings exercising their powers arbitrarily vis-à-vis consumers and provides the possibility of judicial review, demonstrating how rule of law ideas already form part of the establishment and functioning of the internal market. Indeed, if markets are entirely lawless and undertakings are able to exercise power completely arbitrarily, the internal market idea falls apart.

Thus, EU consumer and competition law make a start at reigning in certain emanations of arbitrary power that may harm consumer interests in particularly egregious ways.

The Protection of Individuals as Workers: Labour Law

Finally, in the employment context the law also recognises that particularly stark power imbalances arise that need readjusting. Legislators understand the worker-employer relationship as a horizontal relationship of particular significance in this respect. Lawmakers have enshrined labour rights in various human rights documents, including the CFR. The Charter's Title IV (Solidarity) protects a range of

[64] Directive 2011/83/EU on consumer rights [2011] OJ L304/64; Directive (EU) 2019/771 on certain aspects concerning contracts for the sale of goods [2019] OJ L136/28; Directive 2005/29/EC concerning unfair business-to-consumer commercial practices in the internal market [2005] OJ L149/22. Ratti has drawn a parallel in respect to the GDPR, which gives expression to fundamental rights (GDPR r 1), in their argument that consumer protection and data protection law both 'aim to protect the weaker subject. In fact, data subjects and consumers are considered, and in most cases they are, much weaker than their counterparts, i.e. data controllers and traders': Matilde Ratti, 'Personal-Data and Consumer Protection: What Do They Have in Common?' in Mor Bakhoum and others (eds), *Personal Data in Competition, Consumer Protection and Intellectual Property Law: Towards a Holistic Approach?* Springer (2018) 379.

[65] Weatherill also made the same observation in respect to ex Directive 99/44 on the sale of consumer goods: Weatherill (n 70) 290.

[66] Article 38 Charter of Fundamental Rights of the European Union.

rights, such as the right of collective bargaining and action, fair and just working conditions, or protection against unjustified dismissal.[67] Thus, individuals are also protected as workers under EU labour law from certain arbitrary exercises of power by employers.

For instance, the changes brought to the Posted Workers Directive by Directive 2018/957 prevent workers from the posted State from being subject to lower rates of pay of a home State when they are posted to a host State,[68] where they are posted for longer than a month.[69] It likewise ensures equality of treatment e.g. for maximum work periods and minimum rest periods as well as minimum paid annual leave.[70] These EU rules prevent specific forms of exploitation of the power imbalance between workers and employers. The same is true of other directives of EU labour law – for example, the Directive on Transparent and Predictable Working Conditions. Under the latter, the employer is obliged to provide certain information: e.g. on the duration and conditions of the probationary period (if any), the amount of paid leave, notice periods for termination, and details related to remuneration and work pattern.[71]

Again, however, limits remain on how far EU or Member State law have been willing to go to protect workers from arbitrary exercises of power. When it comes to decisions that can fundamentally alter the workers' situations — such as redundancies and transfers of companies — worker participation rights are limited to information and consultation. For collective redundancies, employers must begin consultations 'in good time with a view to reaching an agreement'.[72] They must notify workers of inter alia the reasons for the redundancies and the number and categories of workers to be made redundant.[73] Similarly, for transfers of undertakings, where the transfer envisages measures related to employees, the employer must *consult* employee representatives with a view to reaching an agreement in good time.[74] Representatives of employees are to be *informed* inter alia of the date, reasons for, and implications of the transfer, as well as any measures envisaged related to employees.[75] The more general Directive 2002/14 establishing a general framework for

[67] Articles 28, 30 and 31 ibid.

[68] Article 3(1)(c) Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services (Posted Workers Directive) [1997] OJ L 18/1, as amended by Article 1(2)(a) Directive 2018/957 amending Directive 96/71/EC concerning the posting of workers in the framework of the provision of services (Text with EEA relevance) [2018] OJ L173/16, 957.

[69] Article 3(3) Posted Workers Directive, as amended.

[70] Article 3(1)(a)–(b) ibid, as amended.

[71] Article 4 Directive (EU) 2019/1152 of the European Parliament and of the Council of 20 June 2019 on transparent and predictable working conditions in the European Union [2019] OJ L 186/105.

[72] Article 2(1) Council Directive 98/59/EC of 20 July 1998 on the approximation of the laws of the Member States relating to collective redundancies [1998] OJ L225/16.

[73] Article 2(3)(b)(i) and (ii) ibid,

[74] Article 7(2) Directive 2001/23/EC on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses [2001] OJ L82/16, 23.

[75] Article 7(1) ibid.

informing and consulting employees also limits worker participation to information and consultation,[76] as the title suggests.

Beyond this, none of the Directives attempt to reign in the power of employers vis-à-vis employees in situations that can significantly affect their lives. Thus, like fundamental rights, consumer protection, and competition law, certain areas of labour law can be seen as being underpinned by a rule of law notion that protects individuals from the arbitrary exercise of *private* power. However, in some areas of EU labour law, such as collective redundancies and company transfers, the law only takes minor steps towards reigning in the ability to exercise this power.

These examples demonstrate that EU law already embodies the idea that the rule of law does require protection from private actors. This is not to say that EU law goes far enough in protecting individuals as fundamental rights holders, consumers, and workers from the arbitrary exercise of power. This can be attributed to the fact that rule of law considerations are not formally incorporated into the decision-making procedures leading up to such measures. Moreover, there are also areas in which power is held by private actors that extend beyond this remit and is wielded arbitrarily, such as in politics.[77] The following section focuses on this example and demonstrates that lobbying regulation in the EU focuses on transparency, but that this does not suffice to temper the arbitrary exercise of private power.

5 Areas of Arbitrary Private Power and the Rule of Law

Lobbying is an activity that can affect all three categories of individuals — as fundamental rights holders, consumers, or workers. It may thus stand in tension with the rule of law.[78] In the EU, there is also substantial room for lobbyists to arbitrarily exercise their capacity to lobby and powers that derive therefrom. Here it is argued that problems of arbitrary exercises of power may arise where corporations act outside or in breach of the law or are able to influence the law.

Corporate political activity (CPA) has been part of the European law-making process for decades. As forwarded with [to be added after peer-review], business actors played a pivotal role in the constitutionalisation of the internal market project. This constitutionalisation started with their use of the preliminary ruling procedure in the foundational years of the European Economic Community to force Member States to comply with the Treaty obligations of negative integration. In the 1980s and 1990s, business interests then played significant parts in securing the content of the Single European Act and thus the establishment of the internal market itself, and in convincing Member States to comply with the 1992 liberalisation agenda. Member

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[76] Article 4 Directive 2002/14/EC establishing a general framework for informing and consulting employees in the European Community [2002] OJ L80/29.

[77] Abram Chayes, 'The Modern Corporation and the Rule of Law' in Edward S Mason (ed), *The Corporation in Modern Society*Harvard University Press (1959) 26.

[78] See e.g. Stephen Holmes, 'Lineages of the Rule of Law' in Adam Przeworski and José María Maravall (eds), *Democracy and the Rule of Law* Cambridge University Press (2003) 44: 'To assert that "the rule of law" has nothing to do with special interest legislation is to admit, implicitly, that the rule of law has never existed anywhere at any time.'.

States did not establish formal procedures to ensure that certain private actors did not play an outsized role in the law-making process. They did not establish objective and verifiable criteria in this respect, and no reasons were given for decisions; this was not counter-balanced by the presence of an independent advisory body nor the possibility of judicial review. Thus, from its outset the very core of the European Union — the internal market — was based on the arbitrary wielding of substantial private power.

A few decades later, when considerable opacity still exists as to the role of powerful private actors in the EU decision-making process, how much has changed?

To be sure, the role of private actors in EU law-making and policymaking has become more formalised. But greater formalisation does not necessarily mean greater compliance with rule of law principles. Evidence still suggests that business actors play an outsized role in Commission Expert Groups, with Chalmers concluding 'that expert group membership is largely a function of superior resources'.[79] For instance, Gornitzka and Sverdrup found that 'groups representing business and enterprise are the most frequent participants in the Commission expert groups (present in 29 per cent of the groups)'.[80] What is the Commission doing to ensure that those private actors with superior resources are not able to exercise the power they have in Commission expert groups arbitrarily? At present, it appears that there is nothing: no requirements that these groups take decisions according to objective and verifiable criteria, no requirements to give reasons for their decisions. This room for arbitrariness is not safeguarded by the presence of an independent advisory panel, nor are their decisions amenable to judicial review.

The situation becomes starker when one looks at the mechanisms designed to address lobbying practices. Research undertaken by media outlets, civil society groups, and academics[81] assessing particular sectors has documented numerous instances of apparent influence by corporate actors over EU legislation. These actors

79 Adam William Chalmers, 'Getting a Seat at the Table: Capital, Capture and Expert Groups in the European Union' (2014) 37 West European Politics 976, 976.

80 Åse Gornitzka and Ulf Sverdrup, 'Societal Inclusion in Expert Venues: Participation of Interest Groups and Business in the European Commission Expert Groups' (2015) 3 Politics and Governance 7.

81 Academic: e.g. on the tobacco industry influence over the Tobacco Products Directive (Silvy Peeters and others, 'The Revision of the 2014 European Tobacco Products Directive: An Analysis of the Tobacco Industry's Attempts to "Break the Health Silo"' (2016) 25 Tobacco Control 108, 113–114; Anthony Chambers, 'EU Lobbying' 15 <http://civitas.org.uk/content/files/Anthony-Chambers-EU-lobbying.pdf> accessed 18 April 2022 and Impact Assessments (Katherine E Smith and others, '"Working the System"—British American Tobacco's Influence on the European Union Treaty and Its Implications for Policy: An Analysis of Internal Tobacco Industry Documents' (2010) 7 PLOS Medicine e1000202). On the pharmaceutical sector influence over the Supplementary Protection Certificate (SPC) Regulation: Govin Permanand, *EU Pharmaceutical Regulation* Manchester University Press (2006). On the farming lobby, see: Ewa Kiryluk-Dryjska and Agnieszka Baer-Nawrocka, 'Reforms of the Common Agricultural Policy of the EU: Expected Results and Their Social Acceptance' (2019) 41 Journal of Policy Modeling 607, 619; Zuzana Bednafiíková and Jifiina Jílková, 'Why Is the Agricultural Lobby in the European Union Member States so Effective?' (2012) 2 Ekonomie a management 26; Thomas Jonsson, 'Collective Action and Common Agricultural Policy Lobbying: Evidence of Euro-Group Influence, 1986–2003'; though it is has been argued they are increasingly less influential (e.g. Linda Courtenay Botterill, 'Valuing Agriculture: Balancing Competing Objectives in the Policy Process' (2004) 24 Journal of Public Policy 199, 215).

achieve such successes through lobbying. What does EU law do to ensure that, through lobbying, private actors are unable to wield their power over others arbitrarily? In essence, the Union institutions have sought to shine greater light on these processes that undermine the EU rule of law, particularly through the Transparency Register. But transparency does not necessarily mean less arbitrary decision-making where it does not entail greater accountability.

The Transparency Register rules are limited to disclosure. Commercial and non-commercial interests who lobby the Parliament, Council and Commission must be members of the Register. Indeed, according to the 2021 Interinstitutional Agreement, the Register covers 'activities carried out by interest representatives with the objective of influencing the formulation or implementation of policy or legislation, or the decision-making processes' of the aforementioned EU institutions 'or other Union institutions'.[82]

In terms of the information available on the Register, one gets only a superficial snapshot of the lobbying activities that take place. The Register website provides lists of meetings, contributions to public consultations and roadmaps, participation in EU 'structures and platforms' (i.e. Parliament and Commission groups) and other 'forums and platforms'. The disclosed activities are presumed to be 'legitimate and necessary'.[83] However, without more detailed information about the content of these interactions, who is to say whether that is in fact the case?

This limited information directly conflicts with the principle of openness articulated in the Treaties, according to 'which the Union's institutions, bodies, offices and agencies shall conduct their work as openly as possible.'[84] As highlighted in Regulation 1049/2001 regarding public access to documents and acknowledged by the ECJ, openness 'enables citizens to participate more closely in the decision-making process and guarantees that the administration enjoys greater legitimacy and is more effective and more accountable to the citizen in a democratic system'.[85] This principle is interlinked with the rule of law, in that in a system with a strong rule of law, openness allows the public to access information about the decision-making processes of those in power and to hold them accountable for their actions. This, in turn, helps to reinforce the rule of law by ensuring that individuals are not able to use their power to evade the law. On the flip side, a lack of transparency in government decision-making processes can prevent the public from holding officials accountable, which can undermine the rule of law.

To ensure that private actors are not exercising power arbitrarily, one might go even further than ensuring greater openness by limiting the range of lobbying

[82] Article 3(1) Interinstitutional Agreement of 20 May 2021 between the European Parliament, the Council of the European Union and the European Commission on a mandatory transparency register [2021] OJ L207/1.

[83] 'What Is the Transparency Register?' <https://ec.europa.eu/transparencyregister/public/staticPage/displayStaticPage.do?locale=en&reference=WHY_TRANSPARENCY_REGISTER> accessed 21 December 2022.

[84] Article 15(1) TFEU. See similarly Article 1 TEU.

[85] Recital 2 Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents [2001] OJ L145/43; Joined cases C-39/05 P and C-52/05 P *Turco* [2008] EU:C:2008:374 [45].

activities that can be engaged in, thus targeting not just *disclosure* but the *content* of lobbying itself. An EU founded on the rule of law that recognises the importance of this principle for governing the activities of private actors would require more than mere disclosure of lobbying activities. Tempering the capacity of private interests to exercise their power arbitrarily over others would mean either limiting their lobbying capacity in the first place or ensuring that equal opportunity exists to hear other voices.

6 Conclusion

In recent years, the rule of law has taken centre stage in EU constitutional law, in light of the trampling on this value by particular Member States. This context has given the ECJ ample opportunity to clarify what the rule of law requires, including non-discretionary decision-making unless circumscribed by particular guardrails. It has become clear from this case law and the definitions provided by EU policymakers that the EU rule of law is concerned with the arbitrary exercise of power. The traditional rule of law narrative frames the rule of law as being fundamental for the protection of private interests, including business interests, from the arbitrary exercise of *public* power. However, the issue of the compatibility of the exercise of *private* power with the rule of law is less discussed. Yet the arbitrary exercise of private power can do as much damage to individuals as that by public power and should therefore be considered of equal importance. The concentration of private power in particular areas is why EU law already makes a certain effort to constrain the arbitrary exercise of private power *vis-à-vis* individuals as fundamental rights holders, as consumers, and as workers. From these observations, a teleological interpretation of Article 2 TEU can be argued for, which would understand the EU rule of law as binding the EU and Member States to ensure that private actors cannot arbitrarily exercise power over individuals.

In light of the foregoing, it can be asked whether the EU or the Member States go far enough in fulfilling such obligations. In view of the deficits identified in this piece with respect to fundamental rights and the protection of consumers and workers, as well as the disproportionate and untransparent access granted by the EU to powerful private actors in the law-making process, the answer must be no. Thus, although rule of law-related ideas evidently inspire the existence of such rules in the first place, we can observe the effects of the lack of their formal incorporation into decision-making procedures leading up to such measures. In what other areas are there glaring deficits in the law in terms of its protection of individuals from the arbitrary exercise of private power, and how can these be remedied? Looking beyond protection from public power, scholars and public actors must more critically reflect and debate the obligations of the EU and Member States stemming from the rule of law.

Although the current level of protection may not go far enough to protect the interests of individuals, solutions can be inspired by the rule of law principle rooted in non-arbitrariness as discussed in this piece. In particular, when it appears that

private power may be capable of being exercised arbitrarily, it can be asked whether legislators can lay down objective criteria on which decisions must be based or whether they can oblige private powers to provide reasons for decisions to reduce this arbitrariness. If not, it can be pondered whether an independent body is capable of advising the relevant decision or whether the decision is subject to judicial review.

Only once the real risks associated with the concentration and arbitrary exercise of private power are addressed and recognised can the EU live up to its claim that it is based on the rule of law.

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