ARTICLES

RE-CONCEPTUALIZING AUTHORITY AND LEGITIMACY IN THE EU
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REVISITING ART. 2 TEU: A TRUE UNION OF VALUES?

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TABLE OF CONTENTS: I. Introduction. – II. Fundamental values and the Treaties of Lisbon. – II.1. Which values, and which status or role? – II.2. The EU's limited competences to act upon, and enforce, its values. – II.3. How common and deep are the Union's values? – III. Compliance with Art. 2 TEU at the stage of accession. – IV. Enforcement of Art. 2 TEU during membership of the Union. – IV.1. The use and non-use of Art. 7 TEU. – IV.2. The Commission's Rule of Law Framework. – IV.3. The Court of Justice's increasing role. – V. Concluding remarks.

ABSTRACT: The *Article* offers a critical assessment of Art. 2 TEU, from its genesis to its implementation so far. It examines the enforcement of the Union's foundational values both in the accession stage and during EU membership. Two main weaknesses related to Art. 2 TEU are highlighted in connection with the theme of this *Special Section*. First, there is an asymmetry between the nature of Art. 2 TEU's values, which are foundational for the whole EU project and architecture, and the limited competences conferred upon the Union to legislate with regard to these values and to enforce their respect. Second, the EU and the Commission in particular have followed a legalistic-technocratic assessment of compliance with rule of law principles rather than endorsing a broader view of Art. 2 that combines all of its values. Under such broader view, other values like democracy, justice and solidarity could be given the same rank as the rule of law, at the time of the accession process and once membership is acquired. It is submitted that this would help the Union to connect more strongly with the citizens of the acceding countries and to reconnect with those of the Member States.

KEYWORDS: Art. 2 TEU – Union of values – EU accession – EU membership – rule of law – EU competences.

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I. Introduction

This *Article* offers a critical assessment of Art. 2 of the Treaty on European Union (TEU), from its genesis to its implementation so far. The Article, inserted by the Treaty of Lisbon, lists the foundational values of the European Union (EU or Union): "respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities". It adds, in a second sentence, that these values are "common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail". This provision, which comes at the very beginning of the TEU and sums up the core values for which the EU stands, is clearly meant to be of fundamental importance.[1] It aims at underpinning the Union with a unique legitimacy for its citizens, namely the fact that it constitutes a "community of destiny" (*Schicksalsgemeinschaft*),[2] binding the States and peoples of Europe in a union of common shared values. If one of

[1] For other analyses of Art. 2 TEU and the Union's fundamental values, see *inter alia* M. Benlolo-Carabot, *La CJCE et la protection des valeurs fondamentales de l'ordre juridique communautaire*, in *Revue du marché commun et de l'Union européenne*, 2009, p. 380 *et seq*.; F. Benoit-Rohmer, *Valeurs et droits fondamentaux dans le traité de Lisbonne*, in E. Brosset, C. Chevalier-Govers, V. Edjaharian, C. Schneider (dir.), *Le traité de Lisbonne: reconfiguration ou déconstitutionnalisation de l'Union européenne*, Bruylant, 2009, p. 143 *et seq*.; D. Blumenwitz, D. Murswiek, G. H. Gornig (eds), *Die Europäische Union als Wertegemeinschaft*, Berlin: Duncker & Humblot, 2005; M. Claes, *Editorial Note: How Common Are the Values of the European Union?*, in *Croatian Yearbook of European Law & Policy*, 2019, p. vii *et seq*.; V. Constantinesco, *Les valeurs dans le Traité établissant une constitution pour l'Europe*, in S. Besson, F. Cheneval, N. Levrat (eds), *Des valeurs pour l'Europe?*, Bruxelles: Bruylant, 2008, p. 47 *et seq*.; V. Constantinesco, *Les valeurs de l'Union, quelques précisions et mises à jour complémentaires*, in L. Potvin-Solis (dir.), *Les valeurs communes dans l'Union européenne*, *Onzièmes Journées Jean Monnet*, Bruxelles: Bruylant, 2014, p. 47 *et seq*.; J.P. Jacqué, *Crise des valeurs dans l'Union européenne?*, in *Revue trimestrielle de droit européen*, 2016, p. 213 *et seq*.; M. Klamert, D. Kochenov, *Article 2 TEU*, in M. Kellerbauer, M. Klamert, J. Tomkin (eds), *The Treaties and the Charter of Fundamental Rights – A Commentary*, Oxford: Oxford University Press, 2019, p. 22 *et seq*.; S. Labayle, *Les valeurs européennes (1992/2002) – Deux décennies d'une Union de valeurs*, in *Revue Québécoise de droit international*, 2012, p. 39 *et seq*.; J. Lacroix, *Does Europe Need Common Values?*, in *European Journal of Political Theory*, 2009, p. 141 *et seq*.; P. Leino, R. Petrov, *Between "Common Values" and Competing Universals*, in *European Law Journal*, 2009, p. 654 *et seq*.; S. Labayle, *Les valeurs de l'Union européenne*, doctoral thesis, Université Laval-Québec – Aix-Marseille Université, 2017; K. Lenaerts, M. Desomer, *Bricks for a Constitutional Treaty of the European Union: Values, Objectives and Means*, in *European Law Review*, 2002, p. 377 *et seq*.; M. Potacs, *Wertkonforme Auslegung des Unionsrechts?,* in *Europarecht*, 2016, p. 164 *et seq*.; J. Rideau, *Les valeurs de l'Union européenne*, in *Revue des affaires européennes*, 2012, p. 329 *et seq*.; C. Tomuschat, *Common Values and the Place of the Charter in Europe*, in *Revue européenne de droit public*, 2002, p. 159 *et seq*.; A.T. Williams, *Taking Values Seriously: Towards a Philosophy of EU Law*, in *Oxford Journal of Legal Studies*, 2009, p. 549 *et seq*.

[2] The EU was described in this manner by the former German Minister of Foreign Affairs, H.-D. Genscher, *Die EU ist eine Schicksalsgemeinschaft*, in *Der Tagesspiegel*, 21 December 2010, www.tagesspiegel.de.

the Member States would disregard those values, the legitimacy of the whole edifice would be endangered.[3]

However, in line with the theme of this *Special Section*, the present *Article* argues that the purported legitimacy gains of Art. 2 TEU are being undercut by two serious flaws, one pertaining to the current set-up of the EU's founding Treaties, the other to the enforcement actions of the Union's institutions. First, there is an asymmetry between the nature of Art. 2 TEU's values, which are foundational for the whole EU project and architecture, and the limited competences conferred upon the Union to legislate with regard to these values and to enforce their respect.[4] Second, the EU's institutions, in particular the European Commission, has as of yet followed a rather fragmentary and legalistic-technocratic approach by focusing mainly on compliance with the rule of law, rather than endorsing a more comprehensive view on Art. 2 that combines all of its values together. Under such broader view, other values like democracy, justice and solidarity should be given the same rank and strength as the rule of law, both at the time of the accession process and once membership has been acquired. It is submitted that his would help the Union to connect more strongly with its citizens.[5]

The *Article* starts with a quick recap of how the Treaty of Lisbon has made the EU a union of values: what is the status and role of these fundamental values, and how should they be concretized and interpreted? What competences does the EU have to develop and legislate on them (Section II)? While a commitment to respect and promote these values is a prerequisite for EU membership pursuant to Art. 49 TEU, we will look into the practice of pre-accession monitoring of the Commission (Section III). Subsequently, we will examine the question of the enforcement of the Union's fundamental values during membership, looking at the problems related to Art. 7 TEU and the way in which the institutions, in particular the Commission and the CJEU have dealt in the recent past with the escalating rule of law crisis in a number of Member States (Section IV). In our concluding remarks we revisit our main findings in light of this special section's focus on the tension between authority and legitimacy (Section V).

[3] See C. HILLION, *Overseeing the Rule of Law in the EU. Legal Mandate and Means*, in C. CLOSA, D. KOCHENOV (eds), *Reinforcing Rule of Law Oversight in the European Union*, Cambridge: Cambridge University Press, 2016, p. 59 *et seq*., pp. 60-61; cf. the "all-affected principle" as discussed by J.-W. MÜLLER, *Should the EU Protect Democracy and the Rule of Law inside Member States*, in *European Law Journal*, 2015, p. 141 *et seq*., pp. 144-145.

[4] For this point, specifically with regard to human rights: J. WOUTERS, *From an Economic Community to a Union of Values: the Emergence of the EU's Commitment to Human Rights*, in J. WOUTERS, M. NOWAK, A.-L. CHANÉ, N. HACHEZ (eds), *The European Union and Human Rights: Law and Policy*, Oxford: Oxford University Press, forthcoming.

[5] This is also the central tenet of the RECONNECT Horizon 2020 project (www.reconnect-europe.eu), as indicated in the introduction to this *Special Section*.

II. Fundamental values and the Treaty of Lisbon

II.1. Which values, and which status or role?

From the viewpoint of the Union legal order, the importance of Art. 2 TEU can hardly be overstated. It is not just a solemn declaration, but a binding treaty clause and a provision of EU primary law that figures on top of the EU's constitution – in other words, a *Grundnorm* for European integration.[6] It commits both the Union, its institutions, and the Member States. As Jean-Claude Piris has observed, Art. 2 "is not only a political and symbolic statement. It has concrete legal effects".[7] Indeed, it is, first of all, a prerequisite for EU membership. Art. 49 TEU stipulates that "any European State which respects the values referred to in Article 2 and is committed to promoting them may apply to become a member of the Union". Second, a "serious and persistent breach" of these values by a Member State may lead to a suspension of rights resulting from EU membership: that is the so-called "nuclear sanction" laid down in Art. 7, paras 2, and 3, TEU, and which because of its heavy nature has never been applied in practice, at least until now (see below, Section IV). Last but not least, the promotion of the aforementioned values is one of the first objectives of the EU according to Art. 3, para. 1, TEU, and a duty of the EU institutional framework pursuant to Art. 13, para. 1, TEU.

Still, Art. 2 harbours a number of ambiguities. A first one is the splitting up of the provision over two sentences, which begs the question whether the values listed in them have a different status. Some commentators consider that only the values listed in the first sentence belong to the Union's fundamental values, whereas those mentioned in the second sentence that characterize European society[8] (pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men) would not be values but rather "evaluative characteristics".[9] This view should not be upheld. Given the fundamental role played in EU law by a number of the principles mentioned in the second sentence (in particular non-discrimination[10] and equality be-

[6] M. Potacs, *Wertkonforme Auslegung des Unionsrechts*, cit., pp. 165 and 176.

[7] J.C. Piris, *The Lisbon Treaty: A Legal and Political Analysis*, Cambridge: Cambridge University Press, 2010, p. 71.

[8] While M. Klamert, D. Kochenov, *Article 2 TEU*, cit., consider it ambiguous whether the values listed "are considered to form part of the 'society of the [Member States]' or the 'society of the Union' ", they consider it unlikely from a systematic point of view that "the Treaty would ascribe values to the [Member States]"; moreover, "such a reading would imply that the [Member States] cumulated would be said to constitute a single society".

[9] In German: *"wertende Merkmale"*: see M. Hilf, F. Schorkopf, *Commentary to Article 2 TEU*, in E. Grabitz, M. Hilf, M. Nettesheim (eds), *Das Recht der europäischen Union*, München: Beck, 2019, para. 43.

[10] See, in the case-law of the Court of Justice, in particular: judgment of 15 June 1978, case C-149/77, *Defrenne v. Sabena*, paras 26-27; judgment of 20 April 1996, case C-13/94, *P v. S and Cornwall County Council*, para. 19; judgment of 22 November 2005, case C-144/04, *Werner Mangold v. Rüdiger Helm*, paras 74-75; judgment of 11 July 2006, case C-13/05 *Chacón Navas*, para. 56; judgment of 19 January 2010, case C-555/07,

tween women and men[11]), it is submitted that they belong to the set of fundamental Union values as well. They all are part of the "European identity".[12]

This point may even be broadened. The fundamental values mentioned in Art. 2 TEU are not to be seen in clinical isolation from other crucial provisions of the EU's founding Treaties. It is submitted that one has to read them together with the core objectives of the EU as laid down in Art. 3 TEU. Such combined reading makes clear that the Union is premised also on other fundamental values, like "combat[ing] social exclusion", "promot[ing] social justice and protection", "promot[ing] solidarity between generations", "the protection of the rights of the child", and "respect[ing the Union's] rich cultural and linguistic diversity and ensur[ing] that Europe's cultural heritage is safeguarded and enhanced".[13] Further down the Treaties, it becomes clear that sustainable development constitutes a fundamental principle as well.[14] Most of these points are additions which the Treaty of Lisbon has made to the texts of the earlier Treaties.[15] They highlight the centrality, to quote Piris again, of "respecting human values and caring for the well-being of the people".[16]

As to the status and role of the said values, commentators tend to distinguish between values which are longstanding principles of EU law – such as human rights, non-

Seda Kücükdeveci v. Swedex GmbH & Co. KG, para. 21; judgment of 26 September 2013, case C-476/11 *HK Danmark v. Experian A/S*, para 19; judgment of 18 July 2013, case C-356/12 *Wolfgang Glatzel v. Freistaat Bayern*, para. 43; judgment of 7 November 2019, Joined Cases C-80/18 to C-83/18 *UNESA*, para. 47.

[11] The list of CJEU cases is too long to reproduce. See European Commission*, Compilation of Case-Law on the Equality of Treatment between Women and Men and on Non-Discrimination in the European Union*, 2010, op.europa.eu. For a more comprehensive and more up-to-date overview, see M. SCHONARD, *Equality Between Men and Women*, European Parliament Fact Sheets on the European Union, www.europarl.europa.eu.

[12] For this purpose, one can go back as far as the "Declaration on European Identity" adopted by the heads of state and government of the then nine Member States in Copenhagen on 20 November 1973 (Bulletin of the European Communities no. 12/1973, p. 118). The Declaration states notably: "The Nine wish to ensure that the cherished values of their legal, political and moral order are respected, and to preserve the rich variety of their national cultures. Sharing as they do the same attitudes to life, based on a determination to build a society which measures up to the needs of the individual, they are determined to defend the principles of representative democracy, of the rule of law, of social justice — which is the ultimate goal of economic progress — and of respect for human rights".

[13] See on this *inter alia* O. CALLIGARO, *From "European Cultural Heritage" to "Cultural Diversity"? The Changing Core Values of European Cultural Policy*, in *Politique Européenne*, 2014, p. 60 *et seq*.

[14] See ninth recital, preamble TEU; Art. 3, paras 3 and 5 TEU; Art. 21, para 2, let. f), TEU; Art. 11 TFEU; third recital, preamble, and Art. 37 Charter of Fundamental Rights of the European Union (Charter). In opinion 2/15 of 16 May 2017, para. 147, the Court of Justice derived from the aforementioned TEU and TFEU provisions (combined with Art. 3, para. 5, TEU, Art. 21, para. 3, TEU, Art. 9 TFEU and Art. 205 TFEU) that "the objective of sustainable development henceforth forms an integral part of the common commercial policy".

[15] L.S. ROSSI, *Does the Lisbon Treaty Provide a Clearer Separation of Competences Between EU and Member States?*, in A. BIONDI, P. EECKHOUT, S. RIPLEY (eds), *EU Law after Lisbon*, Oxford: Oxford University Press, 2012, p. 85 *et seq*., pp. 90-91.

[16] J.C. PIRIS, *The Lisbon Treaty: A Legal and Political Analysis*, cit., p. 73.

discrimination and equality of women and men – and those which are rather "programmatic" in nature – such as freedom, pluralism or tolerance.[17] It is not certain that this distinction is helpful. What to do, for instance, with human dignity, justice and solidarity? It is submitted that these values and their interpretation need to be linked to those instances of secondary EU law where they have been elaborated upon and to the CJEU (and where suitable, national) case-law which refers to them. Apart from such "bottom-up" operationalisation, it can also be submitted that other EU law provisions must be interpreted in conformity with said values ("top-down" impact through value-consistent interpretation).[18]

A terminological remark may be in order here. There are some differences between the current Art. 2 TEU, on the one hand, and the terminology used in the EU's Charter of Fundamental Rights (Charter), on the other. One may point to the second recital of the Charter's preamble, which stresses that "the Union is founded on the indivisible, universal values of human dignity, freedom, equality and solidarity; it is based on the principles of democracy and the rule of law". Although the formulation of this recital makes a distinction between "indivisible, universal values" on the one hand, and "principles" on the other hand, it seems a somewhat pointless undertaking to try to distinguish systematically between "values" and "principles": thus, in the wording of the 1997 Treaty of Amsterdam, the Union was "founded on the *principles* of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law" (emphasis added), whereas the Treaty of Lisbon has elevated all of these into *values*.[19]

II.2. The EU's limited competences to act upon, and enforce, its values

While at first sight Art. 2 TEU may be very impressive and indicate the transformation of a primarily economic integration project into a more political union based on fundamental values[20], when reading through the Treaties, it becomes clear that the constitutional design has its shortcomings. First of all, there is a striking asymmetry between the proclamation of the values in Art. 2 and the Union's competences to act upon these values. The provisions of the Treaty on the Functioning of the European Union (TFEU) on competences do not mention the values of Art. 2 at all. It follows that the Union can only act on them in a *functional* manner, through the still mainly socio-economic policy powers it has been

[17] See M. Klamert , D. Kochenov, *Article 2 TEU*, cit.

[18] This has been argued convincingly by M. Potacs, *Wertkonforme Auslegung des Unionsrechts?*, cit. See the detailed overview of each of the values, referring to CJEU and national case-law, with J. Rideau, *Union européenne – Nature, valeurs et caractères généraux*, in *Jurisclasseur Europe Traité*, 2015, paras 27 *et seq*.; Id., *Les valeurs de l'Union européenne,* cit.

[19] H. Blanke, S. Mangiameli, *Article 2 [The Homogeneity Clause]*', in H. Blanke, S. Mangiameli (eds), *The Treaty on European Union (TEU): A Commentary*, Berlin-Heidelberg: Springer, 2013, p. 109 *et seq*., para. 7; M. Hilf, F. Schorkopf, *Commentary to Article 2 TEU*, cit., para. 11.

[20] For an analysis of this gradual transformative process, see J. Wouters, *From an Economic Community to a Union of Values,* cit.

endowed with.[21] This imbalance is not unique to Art. 2. Also with regard to the EU's commitment to human rights, an illustration of it can be found in Art. 6, para. 1, and 2, TEU regarding the Charter and the Union's future accession to the European Convention on Human Rights (ECHR). Concerning the Charter, the Treaty emphasizes that it "shall not extend in any way the competences of the Union as defined in the Treaties"[22]; on the EU's accession to the ECHR, it is stipulated that this "shall not affect the Union's competences as defined in the Treaties". In other words, the human rights *responsibilities* of the Union do not lead to any increase in the latter's human rights *powers*.

A similar asymmetry can be found with regard to the question of the *enforcement* of the Union's fundamental values. While Art. 13, para. 1, TEU proclaims that the EU's institutional framework "shall aim to promote its values", the Treaties do not, with the exception of the unwieldy Art. 7 TEU (on which *infra*, Section IV), contain any specific enforcement mechanism in this respect.

II.3. How common and deep are the Union's values?

One can develop another line of critical reflections on the substance of the fundamental values laid down in Art. 2 TEU. What is their actual meaning and scope? How "common" are they really – and not just on paper – between all the Member States?[23]

As to the scope of the values, it should be observed that, with the exception of human rights, the Treaties do not define, elaborate or operationalize them further. With regard to human rights, there is the Charter, which since the Treaty of Lisbon has the force of primary EU law,[24] and which is becoming ever more widely applied and interpreted, in particular by the European Court of Justice. However, as evidence by Eurobarometer surveys,[25] the Charter is not widely known and understood. Even within certain Directorates

[21] On the legitimacy problems of the EU's structural subordination of values to internal market considerations, see notably G. Davies, *Democracy and Legitimacy in the Shadow of Purposive Competence*, in *European Law Journal*, 2015, p. 2 *et seq*.

[22] See also Art. 5, para. 2, Charter: "The Charter does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks as defined in the Treaties". Cf. also Declaration (No. 1) concerning the Charter of Fundamental Rights of the European Union, para. 2.

[23] This question has been examined as part of the FRAME project. FRAME – an acronym for "Fostering Human Rights Among EU (internal and external) Policies" – was a very large FP7 project about the role of human rights in EU internal and external policies, coordinated by the Leuven Centre for Global Governance Studies at KU Leuven, working together with 18 other partners. Its findings indicate that the actual common understanding and depth of the values remains rather limited: A. Timmer, B. Majtényi, K. Häusler, O. Salát, *EU Human Rights, Democracy and Rule of Law: From Concepts to Practice*, 2014, www.fp7-frame.eu.

[24] Art. 6, para. 1, TEU.

[25] In a recent Eurobarometer, 57 per cent of respondents (EU citizens from the then 28 Member States) had never heard of the Charter. Only 12 per cent were aware of the existence of the Charter *and* also knew what it was: Survey requested by European Commission, *Special Eurobarometer 487b – March 2019: Awareness of the Charter of Fundamental Rights of the European Union*, June 2019, op.europa.eu, p. 5.

General of the Commission there is not yet a sufficient knowledge and awareness of the implications of the fundamental rights laid down in the Charter for EU policies (e.g. when the EU is funding agricultural or cohesion projects).[26] The scope of application of the Charter is also a matter of confusion: it is not obvious for citizens to receive and properly understand the message that the Charter is "addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law" (Art. 51, para. 1, Charter);[27] in other words, that its scope of application is limited to the scope of application of EU law itself.[28] It means that for most day-to-day situations the relevant sources of human rights will not be the Charter, but rather the ECHR, fundamental rights laid down in national constitutional systems, and applicable international human rights instruments. For the other values there is not even any Treaty guidance at all.

It is therefore submitted that, when searching for a shared (between the EU and its Member States) understanding of the values of Art. 2, one will have to put national traditions and interpretations in the Member States together with the practice of the two European supranational courts, the CJEU in Luxembourg and the European Court of Human Rights (ECtHR) in Strasbourg. Even then, in spite of their very active output of case-law, these two courts do not cover the whole field. For instance, for the protection of national minorities one should notably have recourse to the practice under an entirely different Council of Europe Convention, the 1995 Framework Convention on National Minorities.[29] And for such issues like children's rights, the rights of women, the prohibition of torture and the rights of disabled persons, one should rather turn to the practice under the United Nations human rights treaties concerned, to which all EU Member States are a contracting party. If anything, these elements show that Europe's value system is in essence multi-layered: it contains elements of national constitutional law, EU and Council of Europe law, and international human rights law, that constantly interact

[26] See for example the inquiry of the European Ombudsman concerning the respect for fundamental rights in the implementation of the EU cohesion policy: E. O'Reilly, *Decision of the European Ombudsman Closing Her Own-Initiative Inquiry OI/8/2014/AN Concerning the European Commission*, 11 May 2015.

[27] According to the abovementioned Eurobarometer, only 7 per cent of respondents correctly identified when the Charter applies: Survey requested by European Commission, *Special Eurobarometer 487b*, cit., p. 30.

[28] See European Parliament, Report on the implementation of the Charter of Fundamental Rights of the European Union in the EU institutional framework, 30 January 2019, 2017/2089 (INI).

[29] On the relationship between this Convention and EU law, see D. Kochenov, T. Agarin, *Expecting Too Much? European Union's Minority Protection Hide-and-Seek*, in *European Non-Discrimination Law Review*, 2017, p. 7 *et seq*.; A. Van Bossuyt, *L'Union européenne et la Protection des Minorités: une Question de Volonté Politique*, in *Cahiers de Droit Européen*, 2010, p. 425 *et seq*.

with each other.[30] Fortunately, the Treaties show a great openness towards international law[31], which however is not always shared by the CJEU.[32]

From the above it transpires that the Union of values is essentially of a multi-layered, multi-level nature. This implies a need for openness for the mutual interactions between international law, EU law and national constitutional law. As the Union has come to encompass an increasingly diverse set of Member States, with somewhat diverging historical trajectories, the multi-layered Union of values has become increasingly a challenge to maintain. The EU's fundamentals have begun to come under fire and the Union has been confronted with the serious shortcomings of its competences and enforcement tools regarding Art. 2 TEU. This is the case both at the stage of accession and for the Union's current Member States.

III. Compliance with Art. 2 TEU at the stage of accession

Surprisingly, there is only scattered reference to Art. 2 TEU in the practice of the Union's accession process. One has the impression that the well-known Copenhagen criteria[33] and the absorption of the *acquis* are given much more weight than the values laid down in Art. 2 TEU. This already starts at an early stage, the so-called "screening" of candidate countries by the Commission. At this stage, "the Commission carries out a detailed examination, together with the candidate country, of each policy field (chapter), to determine how well the country is prepared. The findings by chapter are presented by the Commission to the Member States in the form of a screening report. The conclusion of

[30] As illustrated by the *Kadi* cases before the CJEU, the different levels may also clash and further clarification is sometimes asked from (European) courts. See L.I. Gordillo, *Interlocking Constitutions: Towards an Interordinal Theory of National, European and UN Law*, Oxford: Hart Publishing, 2012.

[31] See in particular Art. 3, para. 5, TEU's emphasis that the Union "shall contribute [...] to the strict observance and the development of international law, including respect for the principles of the United Nations Charter". See also Art. 21, para. 1, and Art. 21, para. 2, let. b), TEU. On these, and other values in the EU's external relations, see *inter alia* M. Cremona, *Values in EU Foreign Policy*, in M. Evans, P. Koutrakos (eds), *Beyond the Established Legal Orders: Policy Interconnections Between the EU and the Rest of the World*, Oxford: Hart Publishing, 2011, p. 275 *et seq*.

[32] See *inter alia* J. Wouters, *The Tormented Relationship between International Law and EU Law*, in P.H.F. Bekker, R. Dolzer, M. Waibel (eds), *Making Transnational Law Work in the Global Economy. Essays in Honour of Detlev Vagts*, Cambridge: Cambridge University Press, 2010, p. 198 *et seq*.

[33] See the first of the criteria established by the Copenhagen European Council of 21-22 June 1993, which requires for membership that "the candidate country has achieved stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities". For EU accession negotiations to be launched, a country must already satisfy this criterion. For the argument that the Copenhagen political criteria, except minority protection, were already firmly established by 1973, see R. Janse, *The Evolution of the Political Criteria for Accession to the European Community, 1957-1973*, in *European Law Journal*, 2018, p. 57 *et seq*.

this report is a recommendation of the Commission to either open negotiations directly or to require that certain conditions – opening benchmarks – should first be met".[34]

But how thorough is the screening concerning the components of Art. 2 TEU? Here the Commission's screening after Serbia requested to become an EU Member State in 2009 is revealing. The 2011 Commission Opinion on Serbia's application for EU membership does start by recalling Arts 49 and 2 TEU, but concretely it only applies the Copenhagen criteria as political conditions: the assessment is based on the Copenhagen criteria "relating to the stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities, as well as on the conditionality of the Stabilisation and Association Process".[35] However, in doing so, the Commission misses out on other values/principles laid down in Art. 2 TEU: human dignity, freedom, pluralism, non-discrimination, tolerance, justice, solidarity, equality of women and men.

The same finding seems to hold for the Commission's regular assessment reports during accession negotiations. For instance, the Commission's 2016 report on Turkey is very explicit on democracy, rule of law and human rights, including the rights of minorities, but one fails to find references to the other values of Art. 2 TEU. Admittedly, the 2016 report, written after the attempted *coup d'état* and the many restrictive measures subsequently taken by the Turkish authorities, is already so negative on human rights that one cannot imagine the values of human dignity and tolerance to be met:

> "Gender-based violence, discrimination, hate speech against minorities, hate crime and violations of human rights of lesbian, gay, bisexual, transgender and intersex (LGBTI) persons continue to be a source of a serious concern. There has been serious backsliding in the past year in the area of freedom of expression. Selective and arbitrary application of the law, especially of the provisions on national security and the fight against terrorism, is having a negative impact on freedom of expression. [...] Freedom of assembly continues to be overly restricted, in law and practice".[36]

In the most recent Communications of the Commission on EU Enlargement Policy, there seems to be a slightly positive evolution, but a clear benchmarking with regard to a number of fundamental values of Art. 2 TEU is still largely absent. With regard to Serbia, for instance, in the Commission's 2019 Communication, no explicit mention is made of Art. 2 TEU. It is merely noted that "the EU's founding values include the rule of law and respect for human rights".[37] The emphasis is fully placed on the functioning of the

[34] European Commission, *Steps towards joining*, ec.europa.eu.

[35] Communication COM (2011) 668 final of 12 October 2011 from the Commission, *Opinion on Serbia's application for membership of the European Union*, p. 5.

[36] Communication COM(2016) 715 final of 9 November 2016 from the Commission on EU Enlargement Policy, p. 17; see also Commission Staff Working Document SWD (2016) 366 final of 9 November 2016, *Turkey 2016 Report*, p. 7.

[37] Emphasis added.

judicial system and the fight against corruption, while issues such as police conduct, the prison system, freedom of expression, non-discrimination, equality between women and men, rights of the child, rights of persons with disabilities, rights of LGBTI persons and protection of national minorities are touched upon under the heading of "Fundamental rights". No mention is made of human dignity, pluralism, tolerance (mentioned once in relation to non-discrimination) and solidarity.[38] An identical approach was adopted with regard to Albania[39], Montenegro[40] and North Macedonia.[41]

The findings above beg the question: if the respect for, and the commitment to promote, these values is already given so little attention at the stage of accession, how can it be properly enforced during a country's membership? In that regard it is worth also reflecting on what are the implications of identifying the rule of law as *primus inter pares* among the principles enshrined in Art. 2. It could be argued that the focus, during the accession process, on the rule of law, along with the closely related democracy, human rights and the protection of minorities, is a result of how these are seen as playing a particular role in shaping the EU as a polity, once candidates for membership enter the Union. Even then, however, as indicated above, the Union has only a limited competence to legislate in these areas, which contributes to the asymmetry between the foundational nature of these values and the rather "impressionistic" sketching of such principles.[42]

Nevertheless, the current screening practice should already be an advance compared to the earlier one. The ineffectiveness of the screening processes under Chapters 23 and 24[43] had become apparent when Romania and Bulgaria were granted membership in 2007, while a number of issues persisted in as far as the solidity of democracy and rule of law were concerned. The Co-operation and Verification Mechanism (CVM) was set up in

[38] Commission Staff Working Document SWD (2019) 219 final of 29 May 2019, *Serbia 2019 Report*, p.13 *et seq*.: The remainder of the report (which counts over 100 pages) focuses on the implementation of the *acquis* of substantive EU law.

[39] Commission Staff Working Document SWD (2019) 215 final of 29 May 2019, *Albania 2019 Report*, p. 14 *et seq*.

[40] Commission Staff Working Document SWD (2019) 217 final of 29 May 2019, *Montenegro 2019 Report*, p. 15 *et seq*.

[41] Commission Staff Working Document SWD (2019) 218 final of 29 May 2019, *North Macedonia 2019 Report*, p. 14 *et seq*.

[42] L. PECH, *The EU as a Global Rule of Law Promoter: The Consistency and Effectiveness Challenges,* in *Europe-Asia Journal*, 2016, p. 7 *et seq*., pp. 7-8, p.14.

[43] Chapter 23 is on the "Judiciary and Fundamental Rights". It encompasses all domains that are essential to maintaining the Union as an area of freedom, security and justice. This includes impartiality and integrity of the courts; guarantees for fair trial procedures; prevention and deterrence of corruption; respect of EU citizens' rights and fundamental rights (EU Charter). Chapter 24 is on "Justice, Freedom and Security". The focus here is on ensuring that the prospective Member States have at their disposal the necessary administrative capacity within law enforcement agencies, in order to implement common rules in a number of areas (border control, visas, external migration, asylum, police cooperation, the fight against organised crime and against terrorism, cooperation in the field of drugs, customs cooperation and judicial cooperation in criminal and civil matters). An essential part of this is the *acquis* on the Schengen Area.

order to support the alignment of these new Member States with the rest of the EU: the political developments that peaked with the authoritarian features of the Ponta government in Romania and the rise of corruption and organised crime in Bulgaria became proof of the challenges of ensuring post-accession compliance.[44] The burgeoning crisis of rule of law and democracy in the EU led the Commission to announce a "new approach to negotiations in the rule of law area [which] introduces the need for solid track records of reform implementation to be developed throughout the negotiations process. Reforms need to be deeply entrenched, with the aim of irreversibility".[45]

Among the new developments, this approach entailed *i*) prioritising Chapters 23 and 24, *ii*) improving EU guidance and benchmarks, *iii*) the assessment of progress in implementation on the ground, *iv*) the fact that insufficient action taken in Chapters 23 and 24 prevents progress in other areas ("benchmarking"), and (v) greater transparency and inclusiveness.

While this evolution did constitute a step forward, particularly when it comes to democracy and the rule of law, it did not bring about a fundamental shift in the EU's approach to monitoring and assessing pre-accession compliance of Art. 2 TEU. Despite the improved clarity in the EU's strategy, at the root of the shortcomings of the enlargement process are the challenges that come with the reform processes in prospective Member States. Serbia and Montenegro are the current frontrunners for accession to the EU, however, in both instances, shortcomings in the areas of democracy and the rule of law are still the major obstacle, which the Union does not appear to have become more effective at tackling. The Commission's 2018 Enlargement Strategy noted that "[a]n even stronger focus on meeting the interim benchmarks in the rule of law area is vital. These requirements and conditions are already clearly spelt out by the Commission in its regular reporting. The countries' leaders must now tackle the existing challenges forcefully and with clearer commitment".[46] In Montenegro "corruption is widespread and remains an issue of concern" and "on fundamental rights [...] more efforts are still needed in strengthening the institutional framework and effective protection of human rights". On freedom of expression, recent developments challenging the independence of public media bodies raise concerns.[47] Serbia faces much the same challenges, even if it has made significantly less progress overall.

[44] L. Toneva-Metodieva, *Beyond the Carrots and Sticks Paradigm: Rethinking the Cooperation and Verification Mechanism Experience of Bulgaria and Romania*, in *Perspectives on European Politics and Society*, 2014, p. 534 *et seq*.; European Commission, *Cooperation and Verification Mechanism for Bulgaria and Romania*, ec.europa.eu.

[45] Communication COM (2012) 600 final of 10 October 2012 from the Commission, *Enlargement Strategy and Main Challenges 2012–2013*, p. 3.

[46] Communication COM (2018) 65 final of 6 February 2018 from the Commission, *A Credible Enlargement Perspective for and Enhanced EU Engagement with the Western Balkans*, p. 8.

[47] Communication COM (2018) 450 final of 17 April 2018 from the Commission, *2018 Communication on EU Enlargement Policy*, p. 6, p. 15.

What remains unclear is how the scenarios that one has seen developing in Romania, Hungary and Poland will be materially prevented. While current crises of democracy and the rule of law in recently acceded Member States have put into motion post-accession compliance mechanisms, it is apparent from the EU's focus on the Western Balkans that at the heart of the enlargement strategy lies not the diffusion of the EU's fundamental values, but geopolitical interest. Recent events, particularly in relation to Russia's influence in the Eastern neighbourhood, have made the EU ever more aware of the importance of ensuring stability in the region, for primarily geopolitical benefits, even though also economic and ideational factors come into play.[48]

The EU's 2016 Global Strategy is explicit in stating that "[i]t is in the interests of our citizens to invest in the resilience of states and societies [...]. Under the current EU enlargement policy, a credible accession process grounded in strict and fair conditionality is vital to enhance the resilience of countries in the Western Balkans and of Turkey".[49] All of this, however, undermines the credibility of the logic of conditionality, as the process tends to be politically driven rather than truly merit-based. An aspect that leads us back to the superficiality of the scrutiny of the Copenhagen criteria, which has been highlighted as far as the rule of law is concerned by, among others, Martin Mendelski.[50]

What emerges in this analysis of rule of law promotion in South Eastern Europe is that the EU is able to positively affect *i*) the implementation of the *acquis* and *ii*) judicial capacity (i.e. institutional efficiency and effectiveness). However, the effects on legal quality (formal legality) and the unbiased enforcement of the law (judicial impartiality) not only appear to be unaffected, but even show signs of worsening.[51]

Accession reforms tend to be assessed by their outcome, not the processes and the behaviour of the actors involved.[52] In other words, the geopolitical pressures seem to unduly accelerate shifts in policy and institutional arrangements, often without rooting them in a concrete and far-reaching change in the principles and values that should provide the foundations for the lasting impact of pre-accession reforms. It can be sub-

[48] A. MORAVCSIK, M.A. VACHUDOVA, *National Interests, State Power, and EU Enlargement*, in *East European Politics and Societies*, 2003, p. 42 *et seq*. For comprehensive critique of conditionality in the European Neighbourhood policy, please refer to: D. KOCHENOV, E. BASHESKA, *ENP's Values Conditionality from Enlargements to Post-Crimea*, in S. POLI (ed.) *The EU and Its Values in the Neighbourhood,* Abington-New York: Routledge, 2016, p. 145 *et seq*.

[49] European External Action Service, *Shared Vision, Common Action: A Stronger Europe. A Global Strategy for the European Union's Foreign and Security Policy*, June 2016, eeas.europa.eu, p. 9.

[50] M. MENDELSKI, *The EU's Pathological Power: The Failure of External Rule of Law Promotion in South Eastern Europe,* in *Southeastern Europe*, 2015, p. 318 *et seq*.

[51] *Ibid*., p. 340.

[52] See on Bulgaria: G. DIMITROV, K. HARALAMPIEV, S. STOYCHEV, L. TONEVA-METODIEVA, *The Cooperation and Verification Mechanism: Shared Political Irresponsibility*, Sofia: St. Kliment Ohridski University Press, 2013. On Kosovo: A. L. CAPUSSELA, *State-Building in Kosovo: Democracy, Corruption and the EU in the Balkans*, London: I.B. Tauris, 2014.

mitted that a more comprehensive approach to the other values contained in Art. 2 TEU (human dignity, freedom, pluralism, non-discrimination, tolerance, justice, solidarity, equality of women and men) may well hold the key to an accession process that is able to effectively prevent the kind of backsliding we are now confronted with.[53] As noted above, these are areas that are clearly neglected by the EU's current approach, but if engaged with, could provide more coherence between the EU's values and developments in the (candidate) Member States.

IV. Enforcement of Art. 2 TEU during membership of the Union

That leads to the enforcement of the fundamental values of Art. 2 TEU within the membership of the EU. One may recall that a somewhat bewildering first test-case of such enforcement took place at the beginning of this millennium, when Austria for the first time had a coalition government with a party from the far right in it, and the other 14 then Member States acted collectively, but outside of the structures of the Treaties, to safeguard the respect of fundamental rights and freedoms. For this initiative, the procedure of the new Art. 7 TEU (in its Amsterdam Treaty version) was not followed: rather, the sanctions constituted diplomatic retorsions. The episode showed the impracticability of international law tools within the EU setting and ended with the removal of the sanctions after a committee of experts found no alarming indications on breaches of EU values in Austria.[54]

Hereafter we explore *i*) the practical use and limits of Art. 7 TEU, *ii*) the Commission's Rule of Law Framework, and *iii*) the increasing role of the CJEU in upholding the Union's fundamental values *vis-à-vis* Member States.

[53] D. Kochenov makes a similar argument, by highlighting how the focus on technical issues has gravely hampered the enforcement of Art. 2, in *The Acquis and Its Principles: The Enforcement of the 'Law' versus the Enforcement of 'Values' in the European Union*, in A. Jakab, D. Kochenov (eds), *The Enforcement of EU Law and Values*, Oxford: Oxford University Press, 2017, p. 9 *et seq*.

[54] On this episode and the many issues it raised, see *inter alia* E. Bribosia, *Le Contrôle par l'Union Européenne du Respect de la Démocratie et des Droits de l'Homme par ses États Membres : à Propos de l'Autriche*, in *Journal des tribunaux. Droit européen*, 2000, p. 61 *et seq*.; W. Hummer, W. Obwexer, *Die Wahrung der „Verfassungsgrundsätze" der EU: Rechtsfragen der „EU-Sanktionen" gegen Österreich*, in *Europäische Zeitschrift für Wirtschaftsrecht*, 2000, p. 485 *et seq*.; P. Kainz, *Als Österreich isoliert war: eine Untersuchung zum politischen Diskurs während der EU-14-Sanktionen*, Berlin: Lang, 2006; M. Merlingen, C. Mudde, U. Sedelmeier, *The Right and the Righteous? European Norms, Domestic Politics and the Sanctions Against Austria* in *Journal of Common Market Studies*, 2001, p. 59 *et seq*.; P. Pernthaler, P. Hilpold, *Sanktionen als Instrument der Politikkontrolle: der Fall Österreich*, in *Integration*, 2000, p. 105 *et seq*.; E. Regan, *Are EU Sanctions Against Austria Legal?*, in *Zeitschrift für öffentliches Recht*, 2000, p. 323 *et seq*.; T. Schönborn, *Die Causa Austria: zur Zulässigkeit bilateraler Sanktionen zwischen den Mitgliedstaaten der Europäischen Union*, Berlin: Lang, 2005; F. Schorkopf, *Verletzt Österreich die Homogenität in der Europäischen Union? Zur Zulässigkeit der „bilateralen" Sanktionen gegen Österreich*, in *Deutsches Verwaltungsblatt*, 2000, p. 1036 *et seq*.; I. Seidl-Hohenveldern, *The Boycot of Austria Within the European Union. Defence of European Values and Democracy*, in *Studi di diritto internazionale in onore di Gaetano Arangio-Ruiz*, Napoli: Ed. Scientifica, 2004, p. 1425 *et seq*.

IV.1. The use and non-use of Art. 7 TEU

Focusing instead on Art. 7 TEU, which was introduced by the Amsterdam Treaty and successively refined by the Nice Treaty (which added the preventative procedure of the first paragraph, based upon the establishment that there is a "clear risk of a serious breach" of the values laid down in Art. 2 TEU) and by the Treaty of Lisbon, it is sobering to find out that in the 21 years of its existence the Article has largely remained dead letter. The threshold for the activation of Art. 7 is rather high, which, combined with the political inclination of avoiding this kind of confrontation as far as possible, gives some indication of what has prevented its activation. The Commission, in its Communication on the new provision in 2003, clarified that "[t]he risk or breach identified must [...] go beyond specific situations and concern a more systematic problem. This is in fact the added value of this last-resort provision compared with the response to an individual breach". It added that "[i]ndividual fundamental rights breaches must be dealt with through domestic, European and international court procedures".[55]

It remains puzzling why the Barroso Commission failed to trigger this procedure *vis-à-vis* Hungary in order to prevent it from moving toward an "illiberal State" since Viktor Orban was elected in 2010. While this may have had to do with a lack of political courage (see *infra*, Section IV.2), it also again highlights how the lack of broader Union competences on matters covered by Art. 2 TEU prevents the Commission from bringing infringement cases against Member States that violate its provisions. While meritorious for single cases of violations, the reliance on the lack of implementation and/or infringement of substantive EU law significantly undercuts the effectiveness and scope of the EU's action in the face of systemic rule of law backsliding. By stating his plans "to abandon liberal methods and principles of organising a society" and that the "new state that we are building is an illiberal state", Orban was clearly going against the values of Art. 2 TEU.[56] However, the Barroso Commission limited itself to the use of infringement procedures under Art. 258 TFEU (see below). For instance, it responded to the forced retirement of Hungarian judges with an infringement procedure based on age discrimination, indicative of the limitations of this tool.[57]

[55] Communication COM (2003) 606 final of 15 October 2003 from the Commission on Article 7 of the Treaty on European Union – Respect for and promotion of the values on which the Union is based, p. 7. The Commission concluded that it was "convinced that in this Union of values it will not be necessary to apply penalties pursuant to Article 7", p. 12.

[56] I. Traynor, *Budapest Autumn: Hollowing out Democracy on the Edge of Europe*, in *The Guardian*, 29 October 2014, www.theguardian.com.

[57] Court of Justice, judgment of 6 November 2012, case C-286/12, *Commission v. Hungary*. Even regarding the use of infringement procedures against Hungary the Commission may not have been fully consistent. For instance, the Commission backed away from starting an infringement case regarding the Hungarian government's 12 billion Euros Paks II nuclear contract with the state-run Russian nuclear agency, even though EU procurement rules may have been violated: see Energy Reporters, *EU avoided row over Hungary's Russian nuclear deal: leaks*, 12 January 2020, www.energy-reporters.com.

IV.2. The Commission's Rule of Law Framework

Barroso pushed the issue of rule of law, which he had voiced for the first time in his 2012 State of the Union address, to the end of his mandate. Only in its last year of operation, in 2014, the Barroso Commission adopted a mechanism, the "Rule of Law Framework" for addressing "systemic threats" to the rule of law in EU Member States. The so-called "pre-Article 7" procedure was aimed at improving the EU's scope of action when dealing with Art. 2 TEU breaches, in particular with regard to rule of law backsliding. A three-stage dialogue between the Commission and the Member State in breach of Art. 2 TEU is foreseen: *i*) a Commission assessment; *ii*) a Commission recommendation; and *iii*) a follow-up to the Commission recommendation. If this process fails to achieve the necessary changes, Art. 7 TEU may be activated.[58] While this development was seen as a positive step forward in strengthening the EU's capacity in tackling structural incompatibility with Art. 2 TEU, the flexibility that comes with a dialogue-based procedure is also its greatest weakness, since the Commission cannot truly enforce compliance.[59] The new framework also left significant leeway as to the Commission's "political" assessment, a feature that immediately came into play in 2015, when the European Parliament had called on the Commission to launch the new rule of law framework procedure against Hungary, but it refused to do so on the grounds that there was no "systemic threat" to the rule of law.[60]

The failure of the Barroso Commission to tackle the rule of law problems in Hungary has to be assessed critically. Was it because between 2010 and 2012 the EU was so much pre-occupied with the Eurozone sovereign debt crisis? Or rather because Orban's party, Fidesz, belongs to the European People's Party, the largest political group in the European Parliament, and hence could count on protection from some powerful national leaders? In fact, the ambivalence towards Hungary remained also with the Juncker Commission, with First Vice-President Timmermans noting still in late 2017 that "the situation in Hungary is not comparable to the situation in Poland", as the latter had already been targeted by the pre-Article 7 procedure.[61] This despite the fact that a number of infringement procedures had been initiated against Hungary, in particular on the violation of various asylum directives[62], on forbidding the sale of land to foreign per-

[58] Communication COM(2014) 158 final of 11 March 2014 from the Commission, *A New EU Framework to Strengthen the Rule of Law*.

[59] For an in-depth analysis, see D. Kochenov, L. Pech, *Better Late than Never? On the European Commission's Rule of Law Framework and Its First Activation*, in *Journal of Common Market Studies*, 2016, p. 1062 *et seq*.

[60] European Parliament, Debates on 2 December 2015, statement of Věra Jourová, O-000140/2015, www.europarl.europa.eu.

[61] For a convincing critique of this statement: K.L. Scheppele, L. Pech, *Why Poland and not Hungary?*, in *Verfassungsblog*, 8 March 2018, verfassungsblog.de.

[62] Court of Justice: judgment of 2 April 2020, joined cases C-715/17, C-718/17 and C-719/17, *Commission v. Poland and Others*; case C-808/18, *Commission v. Hungary*, in progress; case C-821/19, *Commission v.*

sons[63] and the unequal treatment of Roma children in the Hungarian education system[64], on restrictions on the financing of civil society organisations from abroad[65], and against the Hungarian Higher Education Law, which aimed to close down the Central European University.[66] In the proceedings brought against Hungary with regard to the Asylum Procedure Directive the Commission alleged for the first time a violation of the EU's Charter of Fundamental Rights.[67]

The tide only began to turn with the first European Parliament resolution adopted on the situation in Hungary on 17 May 2017. Here it was recognised that "the developments in Hungary have led to a serious deterioration of the rule of law, democracy and fundamental rights over the past few years which could represent an emerging systemic threat to the rule of law in this Member State".[68] In doing so, the process for presenting a proposal that would trigger Art. 7, para. 1, TEU began, leading finally to the European Parliament's adoption of a "reasoned proposal" on 12 September 2018.[69] The power to determine that there is a clear risk of a serious breach of the values referred to in Art. 2 TEU rests, however, with the Council, which must vote with a majority of four fifths of its Members, after a rather lengthy assessment process. The first hearings in respect of Hungary were organized in September and December 2019. They received considerable critique, both from the European Parliament[70] and scholars.[71] As mentioned before in relation to pre-accession conditionality, enforcing compliance under Art. 7 TEU too remains a political process. Firstly, in the context of the European Parliament, where the prominence of the EPP for a long time prevented taking the necessary steps. Secondly, when it comes to the Member States themselves, where there is little appetite for establishing a prece-

Hungary, in progress. See the Opinion of AG Sharpston delivered on 31 October 2019, cases C-715/17, C-718/17 and C-719/17, *European Commission v. Poland*, *Hungary* and the *Czech Republic*.

[63] See Court of Justice, judgment of 21 May 2019, case C-235/17, *Commission v. Hungary*.

[64] See Court of Justice, case C-66/18, *Commission v. Hungary*, in progress.

[65] See Court of Justice, case C-78/18, *Commission v. Hungary (Transparency of associations)*, in progress; see the Opinion of AG Campos Sánchez-Bordona delivered on 14 January 2020, case C-78/18, *Commission v. Hungary (Transparency of associations)*.

[66] See Court of Justice, case C-66/18, *Commission v. Hungary*, in progress.

[67] G. HALMAI, *The Possibility and Desirability of Economic Sanction: Rule of Law Conditionality Requirements Against Illiberal EU Member States*, in *EUI Working Papers*, LAW no. 6, 2018, pp. 5-6.

[68] European Parliament Resolution of 17 May 2017 on the situation in Hungary.

[69] European Parliament Resolution of 12 September 2018 on a proposal calling on the Council to determine, pursuant to Article 7(1) of the Treaty on European Union, the existence of a clear risk of a serious breach by Hungary of the values on which the Union is founded. See J. RANKIN, *MEPs Vote to Pursue Action Against Hungary over Orbán Crackdown*, in *The Guardian*, 12 September 2018, www.theguardian.com.

[70] European Parliament Resolution of 16 January 2020 on ongoing hearings under Article 7(1) of the TEU regarding Poland and Hungary.

[71] L. PECH, *From "Nuclear Option" to Damp Squib?,* in *Verfassungsblog*, 13 November 2019, verfassungsblog.de.

dent for the EU's "interference" in domestic affairs. This hardly seems to constitute the most effective approach to reaching compliance with Art. 2 TEU.

In the case of Poland, since January 2016 the Juncker Commission started to apply the pre-Article 7 procedure in light of the Polish government's reform of the constitutional court and of public media. Meant to be in the first instance a dialogue mechanism, there seems to have been very little genuine dialogue between the Commission and the Polish government. The opposition from the government was unequivocal from the start of the process, with prime minister Kaczyński accusing the EU of acting beyond the scope of the Treaties.[72] In April 2016 the European Parliament adopted a resolution in support of the Commission's action, noting that "the political and legal dispute concerning the composition of the Constitutional Tribunal and new rules on its operation [...] have given rise to concerns regarding the ability of the Constitutional Tribunal to uphold the constitution and guarantee respect for the rule of law".[73] The Commission Recommendation on the curtailment of independence of the constitutional court issued in July 2016 was ignored, as were the following three, in December 2016, and July and December 2017.[74] The Commission finally submitted a reasoned proposal on 20 December 2017 in accordance with Art. 7, para. 1, TEU, aimed at the "determination of a clear risk of a serious breach" noting that "after two years of dialogue with the Polish authorities which has not led to results and has not prevented further deterioration of the situation, it is necessary and proportionate to enter into a new phase of dialogue formally involving the European Parliament and the Council".[75] While the Council has organized three hearings in respect of Poland between June and December 2018, it has since then excelled in doing as little as possible, with the situation of the rule of law in Poland becoming ever worse.[76]

Among the more recent threats to Art. 2 TEU are those that have emerged in Romania, which, as indicated above, has been under the EU's CVM since its accession. The 2019 CVM Report for Romania highlights a number of areas of concern, where the Commission confirmed "backtracking from the progress made in previous years". It has moreover formally warned the Romanian authorities in May 2019 that "if the necessary improvements were not made shortly, or if further negative steps were taken, the

[72] J. Cienski, M. De La Baume, *Poland and Commission Plan Crisis Talks*, in *POLITICO*, 30 May 2016, www.politico.eu.

[73] These relate, among other things, to the examination of cases and the order thereof, the raising of the attendance quorum and the majorities needed to pass decisions of the Tribunal. See: European Parliament Resolution f 13 April 2016 on the situation in Poland.

[74] G. Halmai, *The Possibility and Desirability of Economic Sanction*, cit., p. 10.

[75] Commission Proposal of 20 December 2017 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, COM(2017) 835 final, p. 39.

[76] See L. Pech, P. Wachowiec, *1460 Days Later: Rule of Law in Poland R.I.P. (Part I)*, in *Verfassungsblog*, 13 January 2020, verfassungsblog.de.

Commission would take steps under the rule of law framework".[77] Some of the most worrying developments in recent years include the dismissal of anti-corruption agency chief Laura Kovesi in 2018, who had been very successful. In 2017, concerns were raised by the Commission with regard to the amendments to safeguards that guarantee the independence of the judiciary.[78] A constitutional referendum on redefining marriage as exclusively between a man and a woman held on 6-7 of October 2018 was further evidence of the pressure on the fundamental values of Art. 2 TEU.[79]

The challenges highlighted in the pre-accession phase (see *supra*, section III) are compounded by the reduced leverage the EU is able to exercise on its Member States, in what remains a highly political process. The double standards that have emerged when it comes to action towards Poland and Hungary, but also the general lack of "bite" in the rule of law framework, is driven by either party-political concerns (in the case of Fidesz's membership of the EPP) or geopolitical national interests (in the case of Poland, as an ally against Russian influence).[80] These are the dynamics that have shaped a legalistic approach which has turned out to be rather ineffective, encouraging a reflection on the appropriateness of a narrow focus on judicial mechanisms rather than the quality of the rule of law and the other fundamental values laid down in Art. 2 TEU. Admittedly, there are advantages to circumscribing the EU's approach in such manner, firmly rooted in the Treaties and seeking to depoliticise controversial issues.[81] Such an approach, however, appears to clash with the far deeper implications of the "crisis of the liberal order". As highlighted by Paul Blokker, a broader understanding is needed of the underpinnings of the rule of law, which takes due consideration of citizens' acceptance of constitutional democracy, the elite's commitment to the rule of law, the localised challenges that surround "legal transplants" (e.g. in post-communist countries), and the strengthening of democratic oversight through the societal empowerment of civic participation.[82] Without due consideration of these dimensions, achieving long-lasting change appears to be wishful thinking.

[77] Communication COM(2019) 499 final of 22 October 2019 from the Commission, *Report on progress in Romania under the Cooperation and Verification Mechanism*, p. 17.

[78] C. LACATUS, *Is Romania at Risk of Backsliding over Corruption and the Rule of Law?*, in *LSE EUROPP*, 27 November 2017, blogs.lse.ac.uk.

[79] S. WALKER, *Romanians to Vote in Referendum LGBT Groups Say Is Fuelling Hate*, in *The Guardian*, 5 October 2018, www.theguardian.com.

[80] J. SARGENTINI, A. DIMITROVS, *The European Parliament's Role: Towards New Copenhagen Criteria for Existing Member States?*, in *Journal of Common Market Studies*, 2016, p. 1085 *et seq*.

[81] A. MAGEN, *Cracks in the Foundations: Understanding the Great Rule of Law Debate in the EU*, in *Journal of Common Market Studies*, 2016, p. 1050 *et seq*.

[82] P. BLOKKER, *EU Democratic Oversight and Domestic Deviation from the Rule of Law: Sociological Reflections*, in *SSRN Scholarly Paper*, 27 October 2015, papers.ssrn.com.

IV.3. The Court of Justice's increasing role

It should be mentioned, finally, that over the past few years, the CJEU became an important player in the rule of law debate. On 20 November 2017, the Court gave an order for *interim* relief in the case between the Commission and Poland regarding the chopping of the famous Bialowieska forest. In a rather exceptional Grand Chamber setting, the Court not only granted the *interim* relief requested by the Commission but also, for the first time, declared its jurisdiction to impose penalty payments in such procedures. The most fascinating aspect of the order is hidden away in para. 102 and makes a surprise link with Art. 2 TEU:

> "The purpose of seeking to ensure that a Member State complies with interim measures adopted by the Court hearing an application for such measures by providing for the imposition of a periodic penalty payment in the event of non-compliance with those measures is to guarantee the effective application of EU law, such application being an essential component of the rule of law, a value enshrined in Article 2 TEU and on which the European Union is founded".[83]

Commentators were quick to observe that, with its reference to Art. 2 TEU, the Court of Justice has shown its teeth and has pointed very subtly to the nuclear option.[84]

Of still more fundamental importance is the judgment which the CJEU rendered on 25 July 2018 in the *LM* case.[85] The case concerned preliminary questions regarding the EU Arrest Warrant Framework Decision by the Irish High Court. Three European arrest warrants had been issued by Polish courts against a person, notably for drugs trafficking. When this person was arrested in Ireland, he objected to his surrender to Poland, as this would expose him to a real risk of a flagrant denial of justice in light of Poland's systemic issues from the viewpoint of the rule of law. In what is doubtlessly a landmark judgment, the CJEU's Grand Chamber made the following considerations of principle:

> "[T]he requirement of judicial independence forms part of the essence of the fundamental right to a fair trial, a right which is of cardinal importance as a guarantee that all the rights which individuals derive from EU law will be protected and that the values common to the Member States set out in Article 2 TEU, in particular the value of the rule of law, will be safeguarded.
> Indeed, the European Union is a union based on the rule of law in which individuals have the right to challenge before the courts the legality of any decision or other national measure relating to the application to them of an EU act [...].

[83] Court of Justice, judgment of 17 April 2018, case C-441/17 R, *Commission v. Poland*, para. 102.

[84] D. Sarmiento, *Provisional (And Extraordinary) Measures in the Name of the Rule of Law*, in *Verfassungsblog*, 24 November 2017, verfassungsblog.de.

[85] Court of Justice, judgment of 25 July 2018, case C-216/18 PPU, *LM*. The judgment builds on the previous judgment in Court of Justice, judgment of 27 February 2018, case C-64/16, *Associação Sindical dos Juízes Portugueses*.

> In accordance with Article 19 TEU, which gives concrete expression to the value of the rule of law affirmed in Article 2 TEU, it is for the national courts and tribunals and the Court of Justice to ensure the full application of EU law in all Member States and judicial protection of the rights of individuals under that law [...].
> The very existence of effective judicial review designed to ensure compliance with EU law is of the essence of the rule of law [...].
> It follows that every Member State must ensure that the bodies which, as 'courts or tribunals' within the meaning of EU law, come within its judicial system in the fields covered by EU law meet the requirements of effective judicial protection [...]".[86]

The above case is significant as the CJEU, in pointing to a possible violation of the right to fair trial, and identifying independence and impartiality of the judiciary as essential conditions for the rule of law, makes a link to the values of Art. 2 TEU. However, there are a number of *caveats* in place, which limit the potential suspension of mutual trust among Member States. In the Court's judgment, on the basis of the European Arrest Warrant Framework Decision, such a decision is reserved to the European Council, as it is Art. 7, para. 2, and not Art. 7, para. 1, which is identified as the appropriate procedure for this to take place. It is also further stated that even when, as is the case in the proceedings, the Member State issuing the European arrest warrant has been subject to a reasoned proposal of the Commission, pursuant to Art. 7, para. 1, the suspension can occur only on a case-by-case basis. In other words, the burden is on the defendants to "assess specifically and precisely whether, in the particular circumstances of the case, there are substantial grounds for believing that, following his surrender to the issuing Member State, the requested person will run that risk".[87] It would seem from this case that the CJEU is itself very much bound by the constraints and limitations of Art. 7 TEU in addressing Art. 2 TEU violations.[88]

Apart from the option for national courts to request a preliminary ruling from the CJEU, as indicated above, the Commission can make use of its power to start infringement proceedings under Art. 258 TFEU, in order to enforce compliance with the rule of law or other Art. 2 values, but only if a related and specific provision of EU law can be identified.[89] With regard to the rule of law, this provision has been found in Art. 19 TEU on effective judicial protection, as also explained above in the *LM* case. The Commission

[86] *LM*, cit., paras 48-52.

[87] *Ibid*., paras 68 and 70.

[88] For a critical analysis, see W. VAN BALLEGOOIJ, P. BARD, *The CJEU in the Celmer Case: One Step Forward, Two Steps Back for Upholding the Rule of Law Within the EU*, in *Verfassungsblog*, 29 July 2018, verfassungsblog.de.

[89] For arguments in favour of a more "systemic" use of infringement actions, see K.L. SCHEPELE, *The Case for Systemic Infringement Actions*, in C. CLOSA, D. KOCHENOV (eds), *Reinforcing Rule of Law Oversight in the European Union*, Cambridge: Cambridge University Press, 2016, p. 105 *et seq*.; O. DE SCHUTTER, *Infringement Procedures as a Tool for the Enforcement of Fundamental Rights in the European Union*, in *Open Society*, European Policy Institute, October 2017, www.opensocietyfoundations.org.

has very recently brought several successful cases on this basis, denouncing the status of the Polish judiciary independence. Both the Polish Law on the Supreme Court[90] and the Polish Law on Ordinary Courts[91] have been deemed incompatible with the principle of effective judicial protection, by introducing a compulsory retirement age for judges and at the same time granting respectively the Polish President and the Minister of Justice the discretionary power to extend the period of judicial activity of the otherwise forcefully retired judges.[92] Other (secondary) EU law provisions have also been relied upon to guarantee the Art. 2 TEU values, for example in the case against Hungary mentioned above, where the Equal Treatment Directive 2000/78 was instrumentalised to contest a similar rule on compulsory retirement of hundreds of Hungarian judges.[93]

V. Concluding remarks

Will Art. 2 TEU and the fundamental values it represents, be better enforced in the future? In its recent case law, the Court of Justice gives hopeful signals. But there is only so much that the Court can do. Whether the Commission, the European Parliament and the Council will follow suit is another matter. This article made a critical analysis of Art. 2 and the past and present challenges to upholding the fundamental values that are the basis for the EU's constitutional design. At the core of these challenges is the asymmetry between the declared foundational nature of these values – aimed at ensuring the Union's legitimacy *vis-à-vis* its citizens – and the limited authority of the Union to act through its primarily socio-economic powers and with regard to the enforcement of the respect of these values, thereby negatively affecting the Union's legitimacy *vis-à-vis* its citizens. Key shortcomings were identified in the enforcement of Art. 2 TEU, both in the pre-accession phase, and within the EU's membership. When it comes to pre-accession, the Commission seems to rely on a rather legalistic approach to the values laid down in Art. 2 TEU. This is a matter both of scope (the rule of law is particularly prominent, while many other areas are absent) and nature of the assessment, which tends to focus on technical implementation and institutional capacity. By allowing the Member States to make political rather than merit-based decisions on the pace of enlargement, it also runs counter to the logic of conditionality and lays the ground for the current backsliding. This is a process that is shaped by geopolitical goals, as is the enforcement of Art. 2 *vis-à-vis* the EU's current Member States, with the mechanisms available either lacking

[90] Court of Justice, judgment of 24 June 2019, case C-619/18, *Commission v. Poland*.

[91] Court of Justice, judgment of 5 November 2019, case C-192/18, *Commission v. Poland*.

[92] See also M. Coli, *The Judgment of the CJEU in Commission v. Poland II (C-192/18): The Resurgence of Infringement Procedures as a Tool to Enforce the Rule of Law?*, in *Diritti Comparati*, 21 November 2019, www.dirritticomparati.it.

[93] Court of Justice, judgment of 6 November 2012, case C-286/12, *Commission v. Hungary*.

"teeth" – i.e. the relatively new rule of law mechanism[94] – or proving too cumbersome procedurally (Art. 7 TEU). It is submitted that a process less defined by political and national interests, but informed by an approach that encompasses all values of Art. 2 TEU in a comprehensive manner, is essential in confronting the current crisis of the liberal order and in restoring trust between the Union and its citizens.

[94] In 2019, the Commission announced the launch of a Rule of Law Review Cycle and its intention to publish an Annual Rule of Law Report in support of this process: Communication COM(2019) 343 final of 17 July 2019 from the Commission, *Strengthening the rule of law within the Union. A blueprint for action*. The monitoring would, in contrast to the Rule of Law Framework, cover all EU Member States. The Council on its turn wants to undertake a yearly stocktaking exercise concerning the "state of play and key developments as regards the rule of law" based on the future Commission's Annual Rule of Law Reports. It remains to be seen if these developments can contribute to the deepening of the rule of law commitment of all Member States, and whether any of these mechanisms can serve as an example or be broadened to include the observance of other Art. 2 TEU values.