Comment

Trust the Treaties! Protecting EU Values Does Not Require Treaty Change

I. Treaty Change to Protect EU Values: Revival or Repose?

For some time now, a familiar rumour has been running through the European discourse. In media columns or expert fora, in national cabinets or on the corridors of Berlaymont … all around the European Union one can hear a soft, cautious but growing whisper: Treaty reform.

Considering past experiences, this comes as a surprise. After the Constitutional Treaty was rejected in two national referenda and eventually revamped in the guise of the Lisbon Treaty, the negotiators appeared to be fed up with any future Treaty change. Being the outcome of a highly conflictual process stretching over nearly a decade, the current Treaty framework – Treaty on European Union (TEU) and Treaty on the Functioning of the European Union (TFEU) – contains a difficult compromise between centripetal and centrifugal forces. For the foreseeable future, this compromise seemed to mark an endpoint of the integration process. This was suggested not least by several constitutional courts, which begrudgingly accepted the Lisbon Treaty but indicated limits in almost every area not transferred to the European Union (EU) level: thus far and no further! As a result, it was a commonly held view that future developments of the Union would rather be achieved in an incremental fashion *à droit constant*. And indeed, the current Treaty framework has served us well. Consider only the past decade. The Treaties were robust and flexible enough to allow for far-reaching responses to a

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financial, migration, values, and pandemic crisis.[1] Certainly, the Treaties are not perfect. But, hand to heart, which constitution really is?

So, is this as good as it gets? Not quite it seems. In view of possible enlargement rounds in Eastern Europe, the will to reform the Union seems to have been rekindled. In a joint declaration the institutions summoned the Conference on the Future of Europe, a new format that aimed at identifying wishes in European society.[2] Reactions to the final report were ambivalent. The Council's General Secretariat, on the one hand, ascertained that the overwhelming majority of proposals could be implemented within the current Treaty framework (nearly 95 %).[3] The Parliament, on the other hand, called for a Convention to revise the Treaties[4] and submitted a highly ambitious proposal.[5] This has placed the issue of Treaty change on the official agenda again.

The Parliament's proposal emerges from a thick discursive context of ideas by stakeholders, think tanks, and academics.[6] Their common aim is to make the EU fit for the new geopolitical situation, in particular for future rounds of enlargement. Specific attention is being paid to the Union's founding values set out in Article 2 TEU: democracy, the rule of law, and human rights. Strengthening their protection has been described as 'the mother of all internal "reforms" to prepare the Union for further enlargement'.[7] And indeed, it seems like a necessary step, considering that the departure of some Member States from these values, such as Hungary and formerly Poland, poses an existential threat to the Union. Improving the protection of these values has

1 Daniel Calleja and Clemens Ladenburger, 'The Future of European Union Law', in: Commission Legal Service (ed.), *70 Years of EU Law* (Publications Office of the European Union 2022), 377-388.

2 Joint Declaration on the Conference on the Future of Europe Engaging with citizens for democracy – Building a more resilient Europe 2021/C 91 I/01.

3 Conference on the Future of Europe, 7 December 2023, 16054/23, AG 157, INST 475, paras 11 and 13.

4 Resolution of 9 June 2022 on the call for a Convention for the revision of the Treaties (2022/2705(RSP)).

5 European Parliament, Resolution of 22 November 2023 on proposals of the European Parliament for the amendment of the Treaties (2022/2051(INL)).

6 See only recently, Report of the Franco-German Working Group on EU Institutional Reform, Sailing on High Seas (18 September 2023); Elise Muir, 'Winds of Treaty Change?', MJ 30 (2023), 543-553; Paolo Ponzano, 'Reforme des Traités européens: nécessaire mais introuvable', Revue du droit de l'Union européenne 4/2023, 3-10; Bruno de Witte, 'Towards a Reform of the European Treaties?', Quaderni costituzionali 3/2024, 727-729; Edgar Lenski, 'Die Reform der Europäischen Union als strategische Notwendigkeit', KritV 107 (2024), 233-245; Petra Bárd, Dimitry V. Kochenov, Jan Wouters and Laurent Pech, 'Treaty Changes for a Better Protection of EU Values in the Member States', ELJ (2025) (forthcoming).

7 Editorial Comments, 'Another "Big Bang" Enlargement? Three Candid Suggestions to Start Preparing', CML Rev. 61 (2024), 899-912 (904).

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thus become part and parcel of every amendment project. This comment suggests a different view. As far as the protection of EU values is concerned, the Treaty change discourse should be laid to rest again. With other words: trust the current Treaties!

II. Flaws of Treaty Change

The proposals currently under consideration suffer from several flaws: they are unrealistic, unnecessary, and unproductive. Either the drafts are over-ambitious and suffer from a lack of political realism or they underestimate the potential of the current Treaties and thus exhibit a lack of legal imagination. Eventually, this discourse might even jeopardise current action to protect the Union's values.

1. Unrealistic

Let's take a step back. The Treaty change discourse concerning the protection of EU values started already in the aftermath of Lisbon. In 2013, then Commissioner for Justice Viviane Reding made far-reaching proposals. Hungary had just started its descent towards an 'illiberal democracy', Poland had not yet come under *PiS* rule – put differently: the world had a very different outlook. Still, she suggested

> 'lowering the very high thresholds for triggering at least the first stage of the Article 7 procedure […] or abolishing Article 51 of our Charter of Fundamental Rights, so as to make all fundamental rights directly applicable in the Member States.'[8]

Since then, much has changed – but the proposals largely remained the same. First, many call for amending the Article 7 TEU procedure. Its first step allows the Council to identify the risk of a breach of EU values in a Member State by four-fifths majority (Article 7(1) TEU). The second step, the determination of said breach, requires unanimity (Article 7(2) TEU). Only then can the Council – in a third step – adopt certain sanctions, such as the suspension of voting rights. In light of these majority requirements, it was hardly surprising that the proceedings initiated against Poland and Hungary lingered on for years without ever being put to a vote. To over-

8 Viviane Reding, The EU and the Rule of Law – What Next?, SPEECH/13/677 (4 September 2013).

come this obstacle, the Franco-German Working Group advised shifting the unanimity in Article 7(2) TEU to a four fifths majority.[9] The Parliament's proposal goes even further: the determination of a risk under Article 7(1) TEU shall be adopted by qualified majority within six months after triggering the procedure. Instead of the second step, the Members of the European Parliament opted for an involvement of the Court of Justice in Luxembourg to determine a breach of Article 2 TEU. Only then shall the Council – again by qualified majority – decide on appropriate sanctions, including suspension of EU payments, voting rights, or the right to hold the Council presidency.[10]

Second, there are several calls for expanding the scope of the EU Charter of Fundamental Rights. According to its current Article 51(1), the Charter applies to the Member States only when they are 'implementing' EU law. The calls for expanding EU fundamental rights to situations beyond their current confines – with other words: to make them generally applicable in the Member States – predate even the Charter itself.[11] In this spirit, some have developed creative proposals to expand the Charter's scope without any Treaty amendment.[12] Others have suggested a new provision allowing individuals to challenge systemic human rights deficiencies occurring in the Member States directly before the Court of Justice.[13] Viviane Reding went even a step further advocating to abolish Article 51 'so as to make all fundamental rights directly applicable in the Member States'.[14] This was later embraced by the European Parliament[15] and taken up by the Conference on the Future of Europe. Pursuant to the 25th recommendation of the final report the Charter 'should be made universally applicable and enforceable'.[16]

9 Report of the Franco-German Working Group (n. 6), 17. See also Bárd, Kochenov, Wouters and Pech (n. 6); Jan Wouters et al., 'Report addressed to the European Parliament and the Commission on policy recommendations and on Treaty changes and amendments to the EU Charter of Fundamental Rights', Reconnect (26 May 2022), 37.

10 European Parliament (n. 5), Amendments 9-12.

11 See already AG Jacobs in: *Christos Konstantinidis v. Stadt Altensteig*, judgment of 30 March 1993, case no. C-168/91, para. 46.

12 See e. g. András Jakab and Lando Kirchmair, 'Two Ways of Completing the European Fundamental Rights Union: Amendment to vs. Reinterpretation of Article 51 of the EU Charter of Fundamental Rights', Cambridge Yearbook of European Legal Studies 24 (2022), 239-261; Armin von Bogdandy et al., 'Reverse Solange – Protecting the Essence of Fundamental Rights against EU Member States', CML Rev. 49 (2012), 489-519.

13 Ferdinand von Schirach, *Jeder Mensch* (Luchterhand 2021), Art. 6.

14 Reding (n. 8).

15 European Parliament, Resolution of 25 October 2016 with recommendations to the Commission on the establishment of an EU mechanism on democracy, the rule of law and fundamental rights (2015/2254(INL)), para. 20.

16 Conference on the Future of Europe, Report on the final outcome (May 2022).

This claim made it even into the coalition agreement of the former German government.[17]

Beyond these two avenues, the wish list in legal scholarship is as diverse as it is farfetched. At a substantive level it has been suggested to amend Article 2 TEU by adding that the Union shall be competent 'as far as necessary' for the enforcement of these values or to adopt a 'Charter of EU Fundamental Values' specifying each value.[18] Others have advocated for a 'European Charter for Democracy', which should define 'the common denominators of European democracy that build on Article 2 TEU'.[19] At the procedural level, some have proposed an expulsion mechanism in case of violations of EU values.[20]

Leaving the merits of such approaches aside, they have one obvious flaw: Treaty amendments require the unanimous consent of all Member States (Article 48 TFEU). In an EU of 27 Member States, any reform that leads to tighter control of the Member States' constitutional structures seems to be no more than a pie in the sky – at least for the foreseeable future.[21] The Parliament's bold proposal will unlikely increase the pressure. Throughout the history of European integration, it often came up with innovative bids for Treaty change that seldom materialised.[22]

2. Unnecessary

At the same time, many participants of the debate seem to underestimate the potential of the current Treaties. This applies especially to remedies before the Court of Justice. In 2013, Viviane Reding suggested 'to expand the role of the Court […] by creating a new specific procedure to enforce the rule of law principle of Article 2 TEU against Member States'.[23] Similarly, the

17 Mehr Fortschritt wagen – Koalitionsvertrag 2021-2025, 105: 'Wir wollen, dass die Rechte aus der EU-Grundrechtecharta vor dem EuGH künftig auch dann eingeklagt werden können, wenn ein Mitgliedstaat im Anwendungsbereich seines nationalen Rechts handelt.'

18 Inke Böttge, 'Rearranging the Puzzle: How Treaty Change Can Strengthen the Protection of EU Values', Croatian Yearbook of European Law and Policy 19 (2023), 39-78 (66, 73). On the development of Article 2 TEU into 'a legal basis for legislative measures to be adopted under the ordinary legislative procedure', see already European Parliament (n. 15), para. 20.

19 Paul Nemitz, 'Acting Before it is Too Late: Promoting Democracy and the Rule of Law in the Member States of the EU' in: Allan Rosas et al. (eds), *The Rule of Law's Anatomy in the EU* (Hart 2023), 123-138 (133 ff.).

20 See e. g. Wouters et al. (Fn. 9), 38 f. or Tom Theuns, 'The Need for an EU Expulsion Mechanism: Democratic Backsliding and the Failure of Article 7', Res Publica 28 (2022), 693-713.

21 See also Editorial (n. 7), 900.

22 See the 'Spinelli' and 'Herman' drafts, Draft Treaty establishing the European Union [1984] OJ C77/ 33 and Second Report of the Committee on Institutional Affairs on the Constitution of the European Union (9 February 1994), European Parliament, Session Doc. A3- 0064/ 94.

23 Reding (n. 8).

European Parliament's mechanism on democracy, the rule of law and fundamental rights – the 'European Pact for Democracy, the Rule of Law and Fundamental Rights in the EU (DRF) pact – submitted that a future Treaty revision should allow national courts to refer violations of Article 2 TEU to the Court of Justice.[24] Certainly, these statements occurred before the Court rendered the values in Article 2 TEU operational. With the 2018 judgment in *Associação Sindical dos Juízes Portugueses* and the wave of decisions in its aftermath, however, it became quickly apparent that violations of EU values can be litigated before the Court of Justice.[25] Still, the Parliament invited in 2021 the 'Conference on the Future of Europe to consider strengthening the role of the CJEU in protecting the Union's founding values'.[26] In the same vein, Olaf Scholz called in his 2022 speech at Charles University in Prague for 'a new way to launch infringement proceedings when there are breaches of what unites us at the very core: our fundamental values'.[27]

A *new* way? What Scholz formulated as a wish is already a reality. In its rule of law conditionality judgments, the Court emphasised that 'Article 2 TEU is not merely a statement of policy guidelines or intentions, but contains values which […] are given concrete expression in principles containing legally binding obligations for the Member States'.[28] On this basis, the Commission initiated proceedings against Hungary for the violation of LGBTIQ* rights and the so-called 'sovereignty bill' based on Article 2 TEU.[29] As the process in Article 48 TFEU is extremely cumbersome and costly, there is no need for purely declaratory Treaty revisions. Thus, any reform that simply codifies the status quo seems unnecessary.

3. Unproductive

Still, the envisaged amendments would certainly render the Union's responses to illiberal developments in the Member States more effective.

24 European Parliament (n. 15), para. 20.

25 On the pathbreaking *ASJP* judgment, see Luke Dimitrios Spieker, *EU Values Before the Court of Justice* (Oxford University Press 2023), 19 ff.

26 European Parliament, Resolution of 24 June 2021 on the Commissions 2020 Rule of Law Report (2021/2025(INI)), para. 55.

27 Speech by Federal Chancellor Olaf Scholz at the Charles University in Prague, 29 August 2022, <https://www.bundesregierung.de/breg-de/aktuelles/scholz-rede-prag-karls-uni-2079410>, last access 14 January 2025.

28 *Hungary v. Parliament and Council*, judgment of 16 February 2022, case no. C-156/21, ECLI:EU:C:20233:97, para. 232.

29 See the pending case *European Commission v. Hungary*, case no. C-769/22 and 'February infringement package: key decisions', INF/24/301, 7 February 2024.

Further, the incremental, court-driven developments are far-reaching. Hence, it is hardly surprising that there has been growing criticism not only from Member States like Hungary, but also from legal scholarship.[30] An explicit Treaty amendment would provide additional legitimacy for these steps and fend off much of these objections.

At the same time, the Treaty revision process has severe downsides. Leaving aside the fact that most, if not all, amendments suggested before will not gain the unanimous support of the Member States, proposing Treaty changes entails certain risks. On the one hand, calling for amendments in areas, where such practice is already reality, might question the legitimacy of current action. The Court of Justice is limited to its judicial function. It can only interpret, but not amend primary law. Considering that a future Treaty amendment must feature a stronger role for the Court, for instance by bringing Article 2 TEU expressly into the ambit of its jurisdiction, could lead to the perception that the Court has overstretched its mandate. As Jean-Paul Jacqué stressed: 'on ne révise pas pour le plaisir de réviser'.[31] Thus, Treaty amendments are usually constitutive, not declaratory. If the institutions consider an amendment necessary, they do not see the Court's jurisprudence covered by the current Treaty framework. This might fuel resistance among non-compliant Member States. On the other hand, the revision discourse might become a distraction. When shifting the view to amending the Treaties, we lose sight of what can be achieved within the currently existing framework. In this sense, the EU – and its academic interlocutors – could fall into the same trap as 'a home repair DIYer who constantly goes to the hardware store to buy new tools, rather than actually getting started on projects'.[32]

III. Improvements *à droit constant*

As far as the protection of European values is concerned, the Treaty change discourse is neither realistic nor productive. However, this is no reason to despair. The existing Treaties are a robust and flexible framework that allows for swift reactions to unprecedented challenges. The past decade of crises demonstrated as much. The financial, migration, values, and pandemic crisis

30 See e. g. Matteo Bonelli and Monica Claes, 'Crossing the Rubicon?', MJ 30 (2023), 3-14; Benedikt Riedl, 'ECJ Encroachment on Domestic Judicial Autonomy?', European Public Law 30 (2024), 157-186; Martin Nettesheim, 'European "Frankenstein Constitutionalism": TEU Article 2 as a Federal Homogeneity Clause', AJIL Unbound 118 (2024), 167-171.

31 Jean-Paul Jacqué, 'De la révision des traités', RTDE 60 (2024), 115-118 (116).

32 Daniel Kelemen, 'Curing the Virus of Autocracy in Europe: Q+A with Daniel Kelemen', UCL European Institute, 7 December 2020.

– all these challenges were processed within the confines of the current Treaty framework, sometimes by interpreting the respective provisions in a dynamic or creative way. As such, we should recentre the debate: moving away from possible Treaty changes and rather towards improvements *à droit constant*. In this spirit, the Commission has indicated its support for Treaty change 'if and where it is needed', while underlining that improvements can be achieved by 'using to the full the potential of the current Treaties'.[33] In my view, there is room for improvement in five directions.

1. Interlinking Instruments

First, the already existing instruments should be better linked. Today, the protection of EU values operates at three-levels, from *monitoring* over *determination* to *sanction*. First, the Commission has developed elaborate monitoring instruments, such as the annual rule of law reports or the EU Justice Scoreboard. These are compiled based on submissions from various stakeholders and enable the early identification of potential breaches in the Member States. If such a risk is identified, the Commission can, at a second level, initiate infringement proceedings and ask the Court to determine a breach of the common values. If a Member State refuses to comply with such a judgment, the European institutions can increase the pressure either by bringing another case before the Court under Article 260(2) TFEU and request penalty payments or by freezing EU funds. The disbursement of EU funds can be made conditional upon the achievement of certain conditions, which could include compliance with judgments by the Luxembourg court.

Currently, there are three instruments that provide the basis for freezing funds.[34] First, the rule of law conditionality regulation allows to freeze payments when breaches of the rule of law risk affecting the EU's financial interests.[35] Judgments by the Court of Justice can be taken into account when assessing such breaches (see Recital 16). Second, there is the Recovery and Resilience Facility as part of 'Next Generation EU', which aims at overcoming the impact of the pandemic and which is linked to country specific, negotiated milestones. In the case of Poland this included compliance with

33 Communication on Pre-Enlargement Reforms and Policy Reviews, Brussels, 20 March 2024, COM/2024/146 final. See also Bárd, Kochenov, Wouters and Pech (n. 6) calling 'not for a revolution in procedure but for a renaissance in commitment'.

34 In detail, see e. g. Eulalia Rubio et al., 'The Tools for Protecting the EU Budget from Breaches of the Rule of Law', European Parliament, PE 747 – April 2023.

35 Regulation 2020/2092 on a general regime of conditionality for the protection of the Union budget.

judgments by the Court of Justice. And third, the Common Provisions Regulation concerning the management of cohesion funds contains so-called horizontal enabling conditions that Member States must fulfil before the disbursement of the funds. These enabling conditions relate, inter alia, to compliance with the Charter.[36]

These instruments provide the Union with much leverage when it comes to protecting its values. Besides several successful infringement proceedings against Poland and Hungary, the Union suspended over 137 billion Euro for Poland and over 21 billion Euro for Hungary (in detail, see Section 4). However, there is one central shortcoming. Rule of law reports, infringement proceedings, and the freezing of EU funds are only loosely connected.[37] In my view, the Commission should establish stronger links and bring these measures into a clear chronological order. Already at the stage of the rule of law reports, it should clearly articulate an assessment of possible breaches. If such a risk is identified, it should immediately trigger an infringement procedure. Should the Court determine a breach and should the Member State fail to comply, the Commission should not only bring an action under Article 260(2) TFEU, but immediately assess the conditions to freeze EU funds too. Even though these procedures have a different thrust – enforcement under Article 260(2) TFEU and the protection of the Union's financial interests under the conditionality regimes – they can both be triggered by the non-compliance with judgments by the Court of Justice. In this sense, the Commission could introduce an automaticity that increases predictability, transparency, and legal certainty and that counters possible allegations of shady 'deals' (see below, Section 4). Such an understanding could easily be articulated in form of a communication and eventually become a 'constitutional practice'.

2. Accelerating Action

Second, the Commission must accelerate its procedures.[38] Infringement proceedings to protect EU values simply take too long. Examples include the infringement proceedings concerning the Polish disciplinary regime for

36 Art. 9(1), 15(1) and Annex III of Regulation 2021/1060.

37 See also Bárd, Kochenov, Wouters and Pech (n. 6).

38 This has been repeatedly stressed, see only Kim Lane Scheppele, 'The Treaties without a Guardian: The European Commission and the Rule of Law', Columbia Journal of European Law 29 (2023), 93-183 or Laurent Pech, Patryk Wachowiec and Dariusz Mazur, 'Poland's Rule of Law Breakdown: A Five-Year Assessment of EU's (In)Action', Hague Journal on the Rule of Law 13 (2021), 1-43 (22 f.).

judges (adopted in December 2017, action before the Court in December 2019), the muzzle law (adopted in February 2020, action before the Court in April 2021) or – even more striking – concerning the captured Polish Constitutional Tribunal. The latter infringement proceedings were opened in December 2021, but concern to a large extent the tribunal's capture in December 2015. The decision to refer the matter to the Court was taken in March 2023, so again more than a year after opening the proceedings.[39] Even though these procedures are extremely urgent they exceed the Commission's own guidelines, which set the deadlines for the Member States' compliance after a letter of formal notice and reasoned opinion each at two months.[40] In any case, the Court has accepted that 'very short periods may be justified in particular circumstances, especially where there is an urgent need to remedy a breach'.[41] This might even justify a deadline of one week (!) in both stages of the pre-litigation procedure.[42] Against this backdrop, the previously mentioned delays are difficult to justify.

3. Hitting Harder

Third, the Commission should hit harder. Before the Court has rendered its decision, it should request interim measures under Article 279 TFEU and daily penalty payments in case the order is not complied with. This possibility was admitted by the Court of Justice in the *Białowieża forest* and *Turów mine* cases.[43] The full potential of such penalty payments was later revealed in the fourth rule of law related infringement procedure against Poland,

39 'The European Commission decides to refer Poland to the Court of Justice of the European Union for violations of EU law by its Constitutional Tribunal', IP/23/842, 15 March 2023. The application was lodged on 17 July 2023, see *European Commission v. Republic of Poland*, case no. C-448/23.

40 See e. g. Bernhard Schima, 'Article 258 TFEU', in: Marcus Klamert, Marcus Klamert and Jonathan Tomkin (eds), *The EU Treaties and Charter of Fundamental Rights* (2nd edn, Oxford University Press 2024), paras 21, 23.

41 *Commission v. Belgium*, judgment of 2 February 1988, case no. C-293/85, ECLI:EU:C:1988:40, para. 14. More recently, see *Commission v. Poland, Hungary and the Czech Republic*, judgment of 2 April 2020, case nos C-715, 718 and 719/17, ECLI:EU:C:2020:257, para. 92.

42 See *Commission v. Austria*, judgment of 15 November 2005, case no. C-320/03, ECLI:EU:C:2005:684, para. 33.

43 *Commission v. Poland (Białowieża Forest)*, order of 20 November 2017, case no. C-441/17 R, ECLI:EU:C:2017:877 and *Czech Republic v. Poland (Turów Mine)*, order of 20 September 2021, case no. C-121/21 R, ECLI: EU:C:2021:752. For a critical evaluation, see Karol Piwoński, 'How Much is Too Much? On the Need to Regulate the CJEU's Power to Order Financial Penalties Under Article 279 TFEU', in: Darren Harvey et al. (eds), *Reforming the EU Treaties* (Nomos 2023), 125-172.

where the Court imposed a daily penalty payment of 1 Million Euro until the Polish government complies with its interim order.[44]

After the final judgment, the Commission should closely monitor the concerned Member State's compliance and initiate a second infringement proceeding under Article 260(2) TFEU. While the Court decided merely one case on the basis of Article 260(2) TFEU in 2022,[45] there seems to be a growing awareness in this respect. The latest judgment against Hungary could provide a further impulse.[46] Already in December 2020, the Court had ascertained Hungary's disregard for central provisions of the Union's common asylum policy.[47] As Hungary did not comply with this ruling, the Commission launched proceedings under Art. 260 TFEU requesting a humble lump sum of 1 Million Euro and a daily penalty payment of 16,000 Euro.[48] The Court exceeded this amount many times over ordering a record lump sum of 200 Million Euro – nearly 200 times what the Commission had sought – and a daily penalty payment of 1 Million Euro.[49] This example shows that the Commission can and should be much bolder in suggesting lump sums and penalty payments. Further, it should immediately recover the amounts through offsetting.[50] This is established practice for lump sums and penalty payments ordered by the Court of Justice.[51]

4. Enhancing Transparency

Fourth, there is a need for greater transparency. Decisions on freezing and releasing EU funds are made in rather opaque procedures that give rise to accusations of shady 'deals' with veto-prone Member States. This applies

44 *Commission v. Poland*, order of 27 October 2021, case no. C-204/21 R, ECLI:EU:C:2021:878.

45 See <commission.europa.eu/law/application-eu-law/implementing-eu-law/infringement-procedure/2022-annual-report-monitoring-application-eu-law_en>, last access 14 January 2025.

46 *Commission v. Hungary*, judgment of 13 June 2024, case no. C-123/22, ECLI:EU:C:2024:493.

47 *Commission v. Hungary*, judgment of 17 December 2020, case no. C-808/18, ECLI:EU:C:2020:1029.

48 *Commission v. Hungary* (n. 47), para. 1.

49 *Commission v. Hungary* (n. 47), para. 132. In detail Gavin Barrett, 'Rule of Law Chickens Coming Home to Roost', Verfassungsblog, 21 June 2024.

50 Art. 101 and 102 of Regulation 2018/1046.

51 Art. 29(2) and 31 of Commission Decision C(2018)5119 final of 3 August 2019. In detail Pekka Pohjankoski, 'Rule of Law with Leverage', CML Rev. 58 (2021), 1341-1364 (1358 ff.). This practice was only recently confirmed by the General Court, see *Poland v. Commission*, judgment of 29 May 2024, case nos T-200/22 and T-314/22, ECLI:EU:T:2024:329.

with increasing intensity to the three conditionality regimes. While the rule of law conditionality regulation follows a relatively open process,[52] the conditions for the disbursement of the funds under the Recovery and Resilience Facility are already much trickier to identify.[53] The lack of transparency becomes particularly evident in the freezing of EU funds under the Common Provisions Regulation, which constitute the biggest chunk of EU funding. Already in September 2021, it was reported that the Commission was looking into possible links between compliance with the Charter and the Common Provisions Regulation.[54] Starting from October 2022, the Commission then decided to put words into deeds and freeze these funds with regard to Poland until compliance with certain judgments by the Court is guaranteed.[55] This was a monumental decision: over 75 billion Euro – approximately 10 % of Poland's gross domestic product (GDP)! – were put on hold. Yet, the Commission did not even issue a press release, leaving journalists, scholars, politicians, and even EU officials confused. The public was informed only through fuzzy press reports.[56] Similar uncertainty concerned the freezing of funds for Hungary.[57] On 22 December 2022, the Commission took a range of implementing decision to suspend the financing of Hungary's programmes under the Common Provisions Regulation – 22 billion Euro in total.[58] Even

52 See Council of the EU, 'Rule of Law Conditionality Mechanism: Council Decides to Suspend €6.3 billion Given only Partial Remedial Action by Hungary', 12 December 2022.

53 These were set out in Council implementing decisions and are publicly available, see Council Implementing Decision on the approval of the assessment of the recovery and resilience plan for Hungary, ST 15447 2022 INIT, 5 December 2022 and Council Implementing Decision on the approval of the assessment of the recovery and resilience plan for Poland, ST 9728 2022 INIT, 14 June 2022. The milestones, which need to be fulfilled before releasing the funds, can be found in detailed annexes, see Annex ST 15447 2022 ADD 1 (for Hungary) and Annex ST 9728 2022 ADD 1 (for Poland).

54 See e. g. Sam Fleming and Henry Foy, 'Poland and Hungary Face Threat to EU Regional Aid over Human Rights Concerns', Financial Times, 22 September 2021.

55 This happened by way of individual implementing decisions regarding each fund, see for an example, Commission Implementing Decision approving the programme 'European Funds for Eastern Poland 2021-2027', C(2022)7157, 6 October 2022, which simply states in its Art. 3 that the horizontal enabling condition of compliance with the Charter is not fulfilled, without any further explanation.

56 See e. g. Sam Fleming, Henry Foy and Raphael Minder, 'Rule of Law Stand-Off Threatens New EU Funding to Poland', Financial Times, 16 October 2022.

57 Kim Lane Scheppele and John Morijn, 'What Price Rule of Law?', in: Anna Södersten and Edwin Hercock (eds), *The Rule of Law in the EU: Crisis and Solutions* (SIEPS 2023), 39-45 (41 ff.).

58 The individual decisions are listed here, Hungarian Helsinki Committee et al., Assessment of Compliance by Hungary with Conditions to Access European Union Funds, April 2023, <helsinki.hu/en/wp-content/uploads/sites/2/2023/04/HU_EU_funds_assessment_Q1_2023.pdf>, last access 14 January 2025, 46. They all contain an Art. 3(2), which features requirements of improving judicial independence and compliance with the Charter.

though the Commission issued a press release,[59] it was completely unclear if, when, and how many funds were frozen.

Such a practice seems highly problematic in three respects. First, especially the decisions under the Common Provisions Regulation are taken by the Commission without any involvement of other institutions. Hence, there is little democratic accountability as astonished questions by Parliamentarians aptly demonstrate.[60] Second, one may wonder whether such an approach might conflict with the rule of law, especially with the duty to state reasons established under Article 296 TFEU and Article 41 of the Charter. Unlike Commission decisions in competition or state aid law, which are addressed to specific undertakings, the decisions to freeze EU funds are of great interest not only to the respective Member States, but also to their citizens as ultimate beneficiaries. And third, the previously mentioned decisions are at odds with the principle of transparency.[61] Both Articles 1(2) and 10(3) TEU stipulate that decisions should be taken 'as openly and as closely as possible to the citizen'. Similarly, Article 15 TFEU requires that each institution 'shall ensure that its proceedings are transparent'. If a legal scholar, such as this author, must do detective work to *find* the relevant decisions in the first place, let alone *understand* them, these standards are most likely not met.

The Commission has tried to remedy these flaws by providing more detailed information in the context of unfreezing these funds.[62] However, also the release has been subject to legitimate criticism, in particular with regard to Hungary. On 13 December 2023, the Commission decided in close proximity to the European Council meeting negotiating Ukraine aid to release 10 billion Euro of funds under the Common Provisions Regulation.[63]

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59 European Commission, 'Investing in a Fair Climate and Digital Transition while Strengthening Hungary's Administrative Capacity, Transparency and Prevention of Corruption', IP/22/7801, 22 December 2022.

60 See MEP Daniel Freund's question to Marc Lemaître, who was Director-General for Regional and Urban Policy at that time, <x.com/daniel_freund/status/1584940214870769664?s=20&t=1aX6gxubamBigi4EUHxAZQ>, last access 14 January 2025.

61 See also the European Court of Auditors, 'Special Report 03/2024: The Rule of Law in the EU – An Improved Framework to Protect the EU's Financial Interests, but Risks Remain', para. 101, 50, 52.

62 After the elections in Poland and the new government's commitment to comply, the Commission decided to release these funds, see European Commission, 'Poland's Efforts to Restore Rule of Law Pave the Way for Accessing up to €137 billion in EU Funds', IP/24/1222, 29 February 2024. See also the Q&A under <ec.europa.eu/commission/presscorner/detail/en/qanda_24_1223>, last access 14 January 2025.

63 European Commission, 'Commission Considers that Hungary's Judicial Reform Addressed Deficiencies in Judicial Independence, but Maintains Measures on Budget Conditionality', IP/23/6465, 13 December 2023.

In lack of any publicly available documents,[64] many suspected a shady deal: Orbán lifting his veto in exchange for releasing these funds.[65] The European Parliament even launched an action for annulment alleging not only a violation of the duty to state reasons, but also a misuse of powers due to a trade-off with Hungary.[66]

5. Broadening Focus

Finally, it seems that we will have to broaden our focus to better protect the Union's values. This applies in at least three respects. *Substantively*, we have realised that the protection of EU values goes far beyond the rule of law in the formal sense. In this spirit, the institutions started to expand the scope of their actions, for instance by going after violations of democratic values in Hungary.[67]

This substantive insight needs to be reflected *procedurally* by developing a stronger toolbox for the protection of democracy, civil society, press, and academia.[68] The EU has already adopted promising legislation in this respect, such as the Anti-SLAPP Directive or the European Media Freedom Act.[69] However, there is room for improvement both at the level of monitoring and sanctioning. On the one hand, the rule of law reports should be extended to cover also the value of democracy. These reports are based on the Commission's general monitoring power under Article 17 TEU in combination with Articles 2, 3(1) and 7 TEU. Hence, they could easily be extended to the value of democracy.[70] On the other hand, the current conditionality regime, especially under the Common Provisions Regulation, is limited to respecting Charter rights, which cannot cover all threats to the democratic process. For that reason, the Finish and Swedish Ministers for European Affairs called in a

64 Meanwhile, the Commission's decision has been made available, see Commission Decision C(2023) 9014 final/2.

65 Eventually, such a deal was indicated by the Commission itself, see Eddy Wax, 'Commissioner Hints at EU "Deal" to Unfreeze Hungary's Billions', Politico, 12 July 2024.

66 See pending case *Parliament v. Commission*, case no. C-225/24.

67 See the infringement procedure against the 'sovereignty bill, Fn. 29.

68 On the importance of such institutions, see Barbara Grabowska-Moroz and Olga Śniadach, 'The Role of Civil Society in Protecting Judicial Independence in Times of Rule of Law Backsliding in Poland', Utrecht Law Review 17 (2021), 56-69.

69 In detail on such measures, see Communication on Defence of Democracy, COM/2023/630 final.

70 Petra Bárd and Laurent Pech, *The Commission's Rule of Law Report and the EU Monitoring and Enforcement of Article 2 TEU Values* (European Parliament, February 2022, PE 727.551), 26.

joint letter for extending the current conditionality regime to all the values mentioned in Article 2 TEU.[71]

Third, the broadening of focus has a *temporal* dimension too. The Union should not only *react* to violations of its values but engage in *preventive* as well as *successive* support. Following a phrase often associated with Jean Monnet – 'si c'était à refaire, je recommencerais par la culture' – the Union should aim at promoting and rooting a culture that cherishes its common values.[72] Possible avenues could include civic education,[73] so-called 'mainstreaming' (ensuring compliance in all EU policy areas),[74] or a better communication of relevant actors.[75] Successive support is required once a former, illiberal government has been voted out of office. As evidenced in Poland, restoring the democratic rule of law and rebuilding society's trust in constitutional checks and democratic institutions is a pressing task. The new government faces constitutional obstacles and opposition not only by the president but also by the captured constitutional tribunal.[76] The Union's law and institutions can and must support the new government in overcoming these deadlocks and achieving the democratic transition.[77]

These are tasks not only for EU officials, but for legal scholars as well. Developing ways of anchoring the Union's common values in European society and supporting democratic transitions should become a top priority. To succeed, however, we need to embrace creative realism as our guiding star. For now, this means setting aside debates on potential Treaty changes to better protect our shared values.

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71 'Sweden and Finland Want to Apply Conditionality Linked to Rule of Law to all EU Funding', Bulletin Quotidien d'Europe No. 13489, 25 September 2024.

72 On promoting a rule of law culture, Monica Claes, 'Safeguarding a Rule of Law Culture in the Member States: Engaging National Actors', Columbia Journal of European Law 29 (2023), 214-226 (223 ff.).

73 Kris Grimonprez, *The European Union and Education for Democratic Citizenship* (Nomos 2020).

74 Werner Schroeder, 'Transition 2.0 and Rule of Law-Mainstreaming in the European Union', in: Michal Bobek, Adam Bodnar, Armin von Bogdandy and Pál Sonnevend (eds), *Transition 2.0* (Nomos 2023), 535-562 (557 ff.).

75 On building trust in the judiciary, see at the Member State level Francesco Viganò, 'Protecting Judicial Independence by Strengthening Public Confidence in the Judiciary', in: Filipe Marques and Paulo Pinto de Albuquerque (eds), *Rule of Law in Europe* (Springer 2024), 47-54 and Silvia Steininger, 'Creating Loyalty', Global Constitutionalism 11 (2022), 161-196.

76 See e. g. Armin von Bogdandy and Luke Dimitrios Spieker, Viewpoint: 'Democracy Can Be Dismantled more Quickly than It Can Be Restored', MaxPlanckResearch 1/2024, 14-19.

77 On possible ways ahead, see Michal Bobek, Adam Bodnar, Armin von Bogdandy and Pál Sonnevend (eds), *Transition 2.0* (Nomos 2023).