IV.
Deepening the European Dimension

Reversing a Member State's Regression and Restoring (its) Union Membership

– EU law as mandatory toolbox of 'Transition 2.0' –

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Abstract

Since it concerns Member States of the European Union, the process referred to as 'Transition 2.0' is necessarily embedded in EU law. As EU members, transitioning States must restore their constitutional democracies in compliance with the relevant requirements of the Union as common legal order, particularly as they derive from Article 2 TEU. Such a compliance is critical to rebuild trust in the transitioning States' ability to participate in the EU. The paper discusses the significance of the duty of 'non-regression' in structuring the process of transition, and envisages its possible operationalisation in terms of obligations binding the transitioning States, the other Member States and EU institutions, respectively.

Keywords: EU membership conditions – non-regression – transition – sincere cooperation – reparation – mutual trust

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I. Introduction

As is well-established, EU membership requires all Member States' continued compliance with the fundamental norms of the EU legal order,[2] and primarily with its founding values of, among others, democracy, rule of law and fundamental rights. Enshrined in Article 2 TEU, these values have been 'identified and (…) shared by the Member States [and] define the very identity of the (…) Union as a common legal order'.[3]

From this vantage point, the present chapter argues that more than repairing a Member State's damaged constitutional democracy, 'Transition 2.0'[4] aims at restoring that State's full compliance with those shared values, and more generally with the essential canons of the EU constitutional order. Such renewed compliance is necessary for the transitioning State to rebuild trust in its membership,[5] and thus to recover and keep all of the rights associated thereto.

More specifically, the paper conceives of Transition 2.0 as a particular operationalisation of all Member States' duty of 'non-regression' from the commitments conditioning their EU membership, and in particular from their pledge to protect and promote the values of Article 2 TEU.[6] In the specific context of Transition 2.0, the duty of non-regression entails a requirement for the transitioning State to *reverse* its 'regression' and nullify the effects thereof as a condition fully to operate as a Member (again).

Thus understood, the duty of non-regression also generates obligations for EU institutions and other Member States as co-custodians of the EU

2 ECJ, *Repubblika*, judgment of 20 April 2021, case no. C-896/19, ECLI:EU:C:2021:311; ECJ, *Commission v. Poland ('Muzzle Law')*, judgment of 5 June 2023, case no. C-204/21, ECLI:EU:C:2023:442, para. 68. Also in this sense, see e.g., ECJ, *Commission v Italy*, judgment of 7 February 1973, case no. 39/72, ECLI:EU:C:1973:13, para. 24; ECJ, *Commission v UK*, judgment of 7 February 1979, case no. 128/78, ECLI:EU:C:1979:32, para. 12.

3 ECJ, *Hungary v EP and Council (Conditionality ruling (I))*, judgment of 16 February 2022, case no. C-156/21, ECLI:EU:C:2022:97, para. 127; ECJ, *Poland v. Council and EP (Conditionality ruling (II))*, judgment of 16 February 2022, case no. C-157/21, ECLI:EU:C:2022:98, para. 145.

4 On that notion, see e.g. the Editors' Preface, in this volume.

5 See in this sense: ECJ, *EU Accession to the ECHR*, Opinion of 18 December 2014, no. 2/13, EU:C:2014:2454, paras 166 to 168; ECJ, *Associação Sindical dos Juízes Portugueses ('ASJP')*, case no. C-64/16, judgment of 27 February 2018, EU:C:2018:117, para. 30; and ECJ, *Repubblika* (n. 2), para. 62.

6 ECJ, *Repubblika* (n. 2).

legal order. As the Court of Justice recalled, the EU 'must be able to defend [its values], within the limits of [its] powers as laid down by the Treaties'.[7] From the moment a Member State's regression is established, and as long as that State intends to remain a member of the Union, those custodians must help or, if need be, force the transitioning State fully to comply with its EU obligations again, so as to restore trust in its membership and in turn the functioning of the Union.[8] Not ensuring that a State's regression is *effectively* reversed would make EU institutions (and other Member States) complicit in the erosion of Union's values, jeopardizing the mutual trust underpinning the common legal order and the latter's sustainability.

That said, the form and degree of the EU's engagement, and the deployment of available EU transition tools to reverse a Member State's regression, hinge on the latter's conduct and in particular on whether, and how far it readily engages to repair its membership. Moreover, the modalities of Transition 2.0 also depend on the gravity of the Member State's (past) breaches of its membership obligations (especially of those stemming from Article 2 TEU), and thus on the degree of ensuing damage done to its membership.

The discussion proceeds as follows. Having established Transition 2.0 as a process necessarily embedded in EU law (II), the paper establishes the significance of the duty of non-regression in structuring the transitioning State's reparation of its constitutional democracy as membership prerequisite (III). The discussion then turns to the possible operationalisation of that duty by exploring how 'regression' may be legally established for the purpose of Transition 2.0, and what EU legal mechanisms may then be mobilised to assist the State in accomplishing that transition (IV).

II. Transition 2.0: A Process Embedded in EU Law

For a Member State, the process of repairing its constitutional democracy must cohere with the imperatives of EU membership, particularly respect for democracy, the rule of law and fundamental rights as values common to all Member States (1). This is a condition for the State to operate within the

7 ECJ, *Conditionality ruling (I)* (n. 33), para. 127; ECJ, *Conditionality ruling (II)* (n. 3), para. 145.

8 See in this sense: ECJ, *EU Accession to the ECHR* (n. 5), para. 168; ECJ, *ASJP* (n. 5), para. 30; and ECJ, *Repubblika* (n. 2), para. 62.

EU legal order based on mutual trust, and to continue to enjoy all its rights as a member of the Union (2).

Restoring a Member State's constitutional democracy as EU law requirement

At one level, Transition 2.0 may be envisaged as a process whereby a State restores its constitutional democracy following a shift in political leadership,[9] or indeed a change of regime.[10] It is the (explicit) undertaking to repair and compensate for the multi-layered damage (individual, systemic, reputational) resulting from the State's previous (in)actions that marks the start of the transition process. The latter may be carried out in consideration of a variety of moral and political imperatives, including the quest for justice and reconciliation,[11] while legally, the transition proceeds by reference to national constitutional norms (unless the constitution has itself been captured by the previous leadership and needs reparation), international standards of democracy and rule of law, contained in documents such as the European Convention of Human Rights (ECHR), other Council of Europe's sources (e.g. European Commission for Democracy through Law – the Venice Commission,[12] reports of the Group of States against Corruption (GRECO)) and, last but not least, in consideration of EU law.

Indeed, and because it concerns EU Member States, Transition 2.0 presupposes that their respective constitutional democracies be restored specifically in line with the requirements of EU membership in this domain, and in particular as they derive from Article 2 TEU.[13] To be sure, a Member State's constitutional democracy is deeply imbricated with the functioning of the EU. As has become clear, a member's democratic and rule of law

9 Further, see the respective chapters of e.g. Matej Avbelj, Jiří Přibáň, Maryhen Jiménez and Dario Castiglione, Diego García-Sayan, András Jakab, Mirosław Wyrzykowski and Adam Bodnar in this volume.

10 Hungary has been characterized as 'a hybrid regime of electoral autocracy'; see European Parliament resolution of 15 September 2022 'on the proposal for a Council decision determining, 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', < https://www.europarl.europa.eu/doceo/document/TA-9-2022-0324_EN.pdf >.

11 See the various contributions to the *Verfassungsblog* symposium *Restoring Constitutionalism*, https://verfassungsblog.de/category/debates/restoring-constitutionalism/.

12 See the chapter of Angelika Nußberger in this volume.

13 See the respective chapters of Armin von Bogdandy and Luke Dimitrios Spieker, Kim Scheppele, Maciej Taborowski, Paweł Filipek, Sara Iglesias Sánchez and Werner Schroeder in this volume.

recession legally and factually undermines its effective compliance with EU norms, thereby damaging trust in its membership and in turn the operation of the EU legal order as a whole.[14] Conversely, transitioning (back) to constitutional democracy must be such as to restore the credibility of the State's membership in the EU, and ultimately the latter's functioning. Insofar as the State concerned intends to remain a member of the EU, its transition requires that it (re)aligns its system (constitutional, administrative, judicial, political) and its conduct,[15] with the agreed terms of the social contract inherent in EU membership,[16] to which it has voluntarily subscribed when joining.

Admittedly a State's renewed adherence to international and European (e.g. Council of Europe) standards of rule of law and democracy will help it fulfil (some of) the legal prerequisites for EU membership. The authentication of a State's restored constitutional democracy by international/European bodies (e.g. the Venice Commission, the European Court of Human Rights) will contribute to the EU process of (re)validation of the transitioning State's membership, the way such authentication contributes to the EU institutions' and Member States' assessment of Candidate States' readiness to join the Union,[17] notably in terms of respecting the rule of law, democracy, and fundamental rights. For example, an authoritative retreat from the 'decision' by Poland's contested 'Constitutional Tribunal' that found the provisions of the European Convention on Human Rights (ECHR) incompatible with Poland's Constitution, as well as measures to realign the operation of the Polish judiciary with the rule of law requirements deriving

14 European Commission, *2022 Rule of Law Report – The rule of law situation in the European Union*, COM(2022) 500 final, 1. Further, see e.g., Carlos Closa, 'Reinforcing EU Monitoring of the Rule of Law: Normative Arguments, Institutional Proposals and the Procedural Limitations' in: Carlos Closa and Dimitry Kochenov (eds), *Reinforcing Rule of Law Oversight in the European Union* (Cambridge: Cambridge University Press, 2016), 15–35.

15 On this notion, and obligations associated therewith, see ECJ, *Commission v Germany (COTIF II)*, judgment of 9 January 2019, case no. C-620/16, ECLI:EU:C:2019:256. The Preamble of the 2020 Conditionality Regulation (Regulation 2020/2092 on a general regime of conditionality for the protection of the Union budget [2020] OJ L433I/1) also underscores that both 'the laws *and practices* of Member States should continue to comply with the common values on which the Union is founded' (emphasis added).

16 Michael Dougan and Christophe Hillion, 'The EU's Duty to Respect Hungarian Sovereignty: An Action Plan', CMLRev 59 (2022), 181–202.

17 In this regard, see European Commission, *2022 Communication on EU Enlargement Policy,* COM(2022) 528; and the references contained therein.

from the ECHR, decisions of the ECtHR, and/or the Venice Commission, will contribute to establishing the State's compliance with EU membership obligations too. Conversely, repairing Poland's membership would be hampered should its State authorities persistently flout their obligations under, e.g., the ECHR.[18]

That said, a Member State's renewed observance of its own constitutional norms and international commitments (e.g. ECHR) to rebuild its constitutional democracy might not suffice to re-establish compliance with the specific EU prerequisites,[19] and to restore mutual trust.[20] Recall that some of those membership requirements were declared inconsistent with Poland's Constitution by that same 'Constitutional Tribunal' which challenged the constitutionality of the ECHR,[21] eventually prompting a Commission's infringement procedure.[22]

Transition 2.0 entails more than a State's self-correction by reference to national and international standards, and based on modalities of its choosing and applied at its own discretion. While membership results from the individual and sovereign decision of a State (and its citizens),[23] its conception and development as an 'equilibrium between rights and

18 In this regard, see decisions of the Council of Europe's Committee of Ministers on the execution of the European Court's judgments: https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=0900001680ab81eb. On the significance of the decisions of international courts for establishing compliance with EU requirements, see ECJ, *Getin Noble Bank*, judgment of 29 March 2022, case no. C-132/20, ECLI:EU:C:2022:235, para. 72.

19 See, in this regard, European Commission, *Reasoned proposal in accordance with article 7(1) of the Treaty on European Union regarding the rule of law in Poland – proposal for a Council decision on the determination of a clear risk of a serious breach by the Republic of Poland of the rule of law*, COM(2017) 835 final, 1.

20 ECJ, *EU Accession to the ECHR* (n. 5), para. 168; ECJ, *Conditionality ruling (I)* (n. 3), para. 125; ECJ, *Conditionality ruling (II)* (n. 3), para. 143.

21 TK, *Assessment of the conformity to the Polish Constitution of selected provisions of the Treaty on European Union*, judgment of 7 October 2021, Case no. K3/21, <https://trybunal.gov.pl/en/hearings/judgments/art/11662-ocena-zgodnosci-z-konstytucja-rp-wybranych-przepisow-traktatu-o-unii-europejskiej>.

22 European Commission, Press Release: "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", https://ec.europa.eu/commission/presscorner/detail/en/ip_23_842; on that TK decision, see e.g. Christophe Hillion, 'Last station before Polexit', *EU Law Live*, 28 October 2021: <https://eulawlive.com/op-ed-last-station-before-polexit-by-christophe-hillion/>.

23 ECJ, *Wightman*, judgment of 10 December 2018, case no. C-621/18, ECLI:EU:C:2018:999.

obligations flowing from [any States] adherence' to the Union,[24] are the outcome of a joint (on-going) exercise of articulation and validation by Member States and institutions.[25] Membership does not entail, nor result from, a right for each Member State unilaterally to determine, let alone modify, its definition at will.[26] The latter is articulated, e.g., in EU Treaty provisions, the EU Charter of Fundamental Rights, and further elaborated through secondary legislation, the case law of the Court of Justice, and indeed enriched through the 'EU member-state-building policy' developed in the context of the Union's enlargement policy. The ensuing requirements of EU membership, and chiefly the values of Article 2 TEU, have thus been identified and endorsed by the community of Member States,[27] and must serve as a baseline for Transition 2.0,[28] understood as restoration of a Member State's constitutional democracy as part and parcel of the EU constitutional order.

The argument is not that the EU imposes a comprehensive definition of constitutional democracy on its Member States, and in particular on transitioning members. As recalled by the President of the Court of Justice in extrajudicial writings: 'it is (…) for each Member State to choose the model that best reflects the choices made by its own people, provided that

24 ECJ, *Commission v Italy* (n. 2).

25 In this sense, see the wording of Article 49 TEU.

26 Cf. the controversial renegotiations of the UK terms of its EU membership: 'A new Settlement for the United Kingdom within the European Union', 23 February 2016, OJ 2016 C 69 I/1. For a critic of the settlement: see Denys Simon and Anne Rigaux, 'Le "paquet britannique" – petits arrangements entre amis, ou du compromis à la compromission', Europe: actualité du droit communautaire 26 (2016), 8–13.

27 Consider the admissibility conditions articulated by the Member States since the conclusions of the 1969 Hague Summit (https://www.cvce.eu/obj/final_communique_of_the_hague_summit_2_december_1969-en-33078789-8030-49c8-b4e0-15d053834507.html, pt. 13), i.e. prior to the first enlargement of the then EEC. Further Christophe Hillion, 'EU enlargement' in: Paul Craig and Gráinne de Búrca (eds), *Evolution of EU Law* (2nd edn, Oxford: OUP 2011), 187–216; Paul Craig, 'EU Membership: Formal and Substantive Dimensions', CYELS 22 (2020), 1–31.

28 The Court has indeed held that 'by reason of their membership of the European Union, [the Member States] accepted that relations between them as regards the matters covered by the transfer of powers from the Member States to the European Union are governed by EU law, to the exclusion, if EU law so requires, of any other law'; ECJ, *Commission v Council (Hybrid Act)*, judgment of 28 April 2015, case no. C-28/12, ECLI:EU:C:2015:282, para 40. See also ECJ, *EU Accession to the ECHR* (n. 5).

those choices comply with the EU's founding values'.[29] In this respect, the EU (i.e. common institutions and other Member States) must instead ascertain that the transition which a Member State's authorities undertake, its modalities and the eventual (legal and political) settlement it reaches, ultimately meet the legal requirements of EU membership, and the functional imperatives of the Union as 'common legal order'.

Restoring a Member State's constitutional democracy to re-establish mutual trust in the Union

Indeed, Transition 2.0 has a functional dimension too. It aims at fixing the State's damaged capacity fully to operate as a member of the EU as common legal order, and in which national systems are deeply intertwined. As the Court of Justice often recalls:

> [the] essential characteristics of EU law have given rise to a structured network of principles, rules and mutually interdependent legal relations linking the EU and its Member States, and its Member States with each other, which are now engaged, as is recalled in the second paragraph of Article 1 TEU, in a 'process of creating an ever closer union among the peoples of Europe'.
>
> This legal structure is based on the fundamental premiss that each Member State shares with all the other Member States, and recognises that they share with it, a set of common values on which the EU is founded, as stated in Article 2 TEU. That premiss implies and justifies the existence of mutual trust between the Member States that those values will be recognised and, therefore, that the law of the EU that implements them will be respected.[30]

As it concerns Member States whose constitutional democracy has been damaged, Transition 2.0 aims at re-establishing that 'fundamental premiss'.

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29 See ECJ, *Euro Box Promotion*, judgment of 21 December 2021, Joined cases no. C-357/19, C-379/19, C-547/19, C-811/19 and C-840/19, ECLI:EU:C:2021:1034; ECJ, *RS (Effet des arrêts d'une cour constitutionnelle)*, judgment of 22 February 2022, case no. C-430/21, ECLI:EU:C:2022:99. See also: Koen Lenaerts, 'The Rule of Law and the constitutional identity of the European Union'; Sofia, 5 March 2023, https://evropeiskipravenpregled.eu/the-rule-of-law-and-the-constitutional-identity-of-the-european-union/); and from the same author: 'On Checks and Balances: the Rule of Law within the EU', Columbia Journal of European Law 29 (2023), 15–63.

30 ECJ, *EU Accession to the ECHR* (n. 5), paras. 166–168. See also ECJ, *Conditionality ruling (I)* (n. 3), see also Lenaerts, 'On Checks and Balances' (n. 29).

The process must help regain the confidence of other Member States' authorities in the transitioning States' renewed and effective compliance with the common values underpinning the EU legal order, as a condition for restoring the mutual trust that underpins the integration process.[31] It entails re-instating the full effectiveness of EU law within its own system.[32]

In sum, reparation of a State's constitutional democracy in the context of Transition 2.0 must be carried out, and gauged by reference to 'the specific and essential characteristics of EU law, which stem from the very nature of EU law and the autonomy it enjoys in relation to the laws of the Member States and to international law'.[33] More than the State authorities' autonomous intention to re-democratise their system, the transition at hand involves the obligation to repair its own system as EU member, as much as a State, in line with the shared canons of the EU constitutional order. It requires it to subscribe to the essential and accepted equilibrium between rights and duties inhering in EU membership, which guarantees the equality of all members and Union citizens before EU law.[34] In this way, the end goal of Transition 2.0 is the renewal of the Member State's capacity to be trusted by its peers and by EU citizens.

III. Transition 2.0: A Requirement Based on the Duty of 'Non-Regression'

From an EU (law) perspective, it is the establishment of a Member State's failure to respect the founding values of the EU, as prerequisites for membership, which triggers the mandatory process of transition. This section discusses the significance in that context of the judicial notion of 'non-regression' (1). It will be suggested that more than 'mere' continued respect for the values of Article 2 TEU, that duty also requires the Member States' continued fulfilment of all membership commitments more generally (2).

31 And by extension, by third states and their nationals having rights in (relation to) the EU legal order. See in this sense Christophe Hillion, 'The EU external action as mandate to uphold the rule of law outside *and* inside the Union', Columbia Journal of European Law 29 (2023), 229–280.

32 ECJ, *Conditionality ruling (I) and (II)* (n. 3).

33 ECJ, *Conditionality ruling (I)* (n. 3), para 125.

34 See in that sense the arguments of the European Commission in its pending infringement action against Poland: https://ec.europa.eu/commission/presscorner/detail/en/ip_23_842; see also: ECJ, *Commission v Italy* (n. 2); ECJ, *Commission v United Kingdom* (n. 2).

A duty intrinsic to EU membership

A State's EU membership has been envisaged as 'the enjoyment of all of the rights deriving from the application of the Treaties to that Member State'.[35] Such an 'enjoyment' is conditioned on the State's 'compliance (…) with the values enshrined in Article 2 TEU'.[36] While a 'prerequisite' to become member of the EU, the duty to comply with those values continues to apply post-accession. A Member State cannot regress from its pledge to respect the values of Article 2 TEU, nor from the commitment to promote them.[37] Speaking about the rule of law as one of those EU values, the Court of Justice thus found that:

> A Member State cannot therefore amend its legislation in such a way as to bring about a reduction in the protection of the value of the rule of law (…) The Member States are thus required to ensure that, in the light of that value, any regression of their laws on the organisation of justice is prevented, by refraining from adopting rules which would undermine the independence of the judiciary [as essential element of the rule of law].[38]

The Court has further articulated the Member States' obligation of continued compliance with *all* the values of Article 2 TEU. Adjudicating in plenum, it thus recalled that:

> under Article 49 TEU, respect for those values is a prerequisite for the accession to the European Union of any European State applying to become a member of the European Union (…) compliance by a Member State with the values contained in Article 2 TEU is a condition for the enjoyment of all the rights deriving from the application of the Treaties to that Member State (…). Compliance with those values *cannot be reduced*

35 ECJ, *Repubblika* (n. 2), para. 63; ECJ, *Commission v Poland (Muzzle Law)* (n. 2), para. 68.

36 Ibid; ECJ, *Asociația 'Forumul Judecătorilor din România'*, judgment of 18 May 2021, case no. C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19, EU:C:2021:393, para. 162; ECJ, *Euro Box Promotion* (n. 29), para. 162; ECJ, *Conditionality ruling (I)* (n. 3), para. 126; ECJ, *Conditionality ruling (I)* (n. 3), para. 144.

37 ECJ, *Conditionality ruling (I)* (n. 3), para 124.

38 Ibid.

> *to an obligation which a candidate State must meet in order to accede to the European Union and which it may disregard after its accession.*[39]

Conceived as an obligation of result which cannot vary from one Member State to the other,[40] the requirement that Member States continue to comply with the values of Article 2 TEU is inherent in Article 49 TEU. According to that provision, the aspirant State must not only 'respect' the values of Article 2 TEU as a prerequisite for accession, but it must also be 'committed to promoting' them, implying a long-term engagement beyond the point of accession. Such a commitment is indeed a condition for the successful negotiations and ratification of the Treaty of Accession by all the Member States.

The twofold duty (viz. to comply and commit) coheres with the EU's own prominent value-promotion mandate enshrined in Article 3(1) TEU,[41] which frames the tasks and operation of its institutional framework, as stipulated in Article 13(1) TEU. That EU mandate in turn generates obligations for all Member States. In particular, they are bound by positive and negative duties stemming from the said principle of sincere cooperation, to secure that the Union effectively fulfils its primary task of promoting its values, as 'identified' and 'shared by the Member States'.[42]

The ensuing duty of non-regression, which the Court of Justice stated in its *Repubblika* ruling, amounts to a specific application of that same principle of sincere cooperation in the EU value-promotion mandate. Borrowing the terminology of the last paragraph of Article 4(3) TEU which establishes that principle, the Court held that Member States must 'refrain from' adopting measures that would reduce the protection of EU values. Such measures would jeopardise the very first task the Union is entrusted with, and which the Court has since conceived as encompassing the capacity for the EU to 'defend' those values.[43]

The Court's notion that a Member State cannot regress from its commitment to protect those values is also intrinsic to the provisions of Article 7

39 ECJ, *Conditionality rulings (I)* and *(II)* (n. 3) (emphasis added), see also ECJ, *Commission v Poland (Muzzle Law)* (n. 2), para. 68.

40 ECJ, *Conditionality ruling (II)* (n. 3), para 265; ECJ, *Commission v Poland (Muzzle Law)* (n. 2), para. 73.

41 Further Christophe Hillion, 'Overseeing the rule of law in the European Union Legal mandate and means' in: Closa and Kochenov (n. 14), 59–81.

42 ECJ, *Conditionality ruling (I)* (n. 3), para 127; ECJ, *Conditionality ruling (II)* (n. 3), para 145.

43 Ibid.

TEU. Like Article 49 TEU, it contains an explicit reference to Article 2 TEU, and expressly connects any Member State's continued value-compliance with the enjoyment of its membership rights. Thus, Article 7(3) TEU makes it clear that a Member State's characterised breach of the values of Article 2 TEU may result in the EU's suspension of some of 'the rights deriving from the application of the Treaties to that Member State.'

Repubblika confirmed and mainstreamed that basic quid pro quo inherent in Article 49 TEU, and in the procedure of Article 7 TEU. It is indeed noticeable that the Court of Justice also used the language of the latter provision when establishing that: 'compliance by a Member State with the values enshrined in Article 2 TEU is *a condition for the enjoyment of all of the rights deriving from the application of the Treaties to that Member State*' (emphasis added).[44] The Court thereby made it plain that any Member State's weaker fulfilment of the fundamental conditions to belong to the Union (even before it amounts to a systemic breach of values in the sense of Article 7 TEU), mechanically affects its capacity to enjoy the ensuing membership rights, particularly that of being trusted by other Member States.

A duty to be interpreted and applied broadly

In the same ruling, and subsequent case law,[45] the Court of Justice has envisaged the notion of 'non-regression' as the Member States' duty of continued compliance with the conditions of membership: viz. to respect and commit to promote the values of the EU (i). As mentioned above, the Court has emphasised that Member States must thereupon refrain from adopting measures that lead to 'a *reduction* in the protection of the value of [e.g.] the rule of law' (emphasis added).[46] Arguably, that obligation also relates to the broader commitments that Member States make upon accession (ii).

44 ECJ, *Repubblika* (n. 2), para. 63; see also: ECJ, *Euro Box Promotion* (n. 29), para. 162; ECJ, *Commission v Poland (Muzzle Law)* (n. 2), para. 74.

45 ECJ, *Asociația 'Forumul Judecătorilor din România'* (n. 36); ECJ, *Commission v Poland (Disciplinary regime for judges)*, judgment of 15 July 2021, C-791/19, ECJ, Joined Cases C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19, EU:C:2021:596; ECJ, *Euro Box Promotion* (n. 29).

46 ECJ, *Asociația 'Forumul Judecătorilor din România'* (n. 36).

1. Non-regression from the fundamental commitment to respect and promote EU values

The moment of accession constitutes the point at which a State voluntarily commits itself to respect and to promote the values of the Union. To quote the President of the European Court of Justice, this point amounts to 'a "constitutional moment" for the State concerned since, at that very moment, the legal order of the new Member State *is deemed by the "Masters of the Treaties" to uphold the values on which the EU is founded*'.[47] Then, 'from the moment of accession onwards (…) the Member State in question commits itself to respecting those values for as long as it remains a member of the EU. That *ongoing commitment* means that there is "no turning back the clock" when it comes to respecting the values contained in Article 2 TEU' (emphasis added).[48] As suggested above, that commitment concerns each and every Member State, irrespective of the timing of its membership.

In *Repubblika*, the Court evaluated the compatibility of the revised Maltese rules of appointment of judges with the standards of judicial independence which the EU judicature had articulated, notably in its case law concerning the Member States' obligation to provide effective judicial protection under Article 19(1) TEU, by reference to the value of the rule of law included in Article 2 TEU.[49] Had the national rules under review failed to meet those standards, Malta would have been in breach of its EU obligation under Article 19(1) TEU.[50] Moreover, it would have also breached its duty of non-regression, understood as a structural obligation for Member States

47 See in this sense, Lenaerts (n. 29), 51.

48 Ibid. See also. ECJ, *Commission v Poland (Muzzle Law)* (n. 2), paras 66–68.

49 See in particular: ECJ, *ASJP* (n. 5). For an analysis of the case law articulating those standards, see e.g. Dimitrios Spieker, *EU Values before the Court of Justice. Foundations, Potential, Risks* (Oxford: Oxford University Press, 2023); Laurent Pech and Dimitry Kochenov, *Respect for the Rule of Law in the Case Law of the European Court of Justice: A Casebook Overview of Key Judgments since the Portuguese Judges Case* (Stockholm: Swedish Institute for European Policy Studies), Report 2021:3.

50 Which was subsequently the case of Poland (in ECJ, *Commission v Poland (Disciplinary regime for judges)* (n. 45)). The Court found that by 'failing to guarantee the independence and impartiality of the Disciplinary Chamber which is called upon to rule (…) in disciplinary cases concerning judges of the Sąd Najwyższy (Supreme Court) and (…) in disciplinary cases concerning judges of the ordinary courts and by thereby undermining the independence of those judges *at, what is more, the cost of a reduction in the protection of the value of the rule of law in that Member State for the purposes of the* [Repubblika] *case-law of the Court* (…), the Republic of Poland has failed to fulfil its obligations under the second subparagraph of Article 19(1) TEU' (para. 113, emphasis added).

to *continue* respecting and promoting the values of Article 2 TEU. In other words, it would have violated the EU substantive rule of law standards, *and* regressed from its structural commitments on which its EU membership is predicated.

The Member State's obligation not to regress, understood as a duty not to reduce the protection of e.g. the common values enshrined in Article 2 TEU once it has voluntarily joined the Union, does not mean that its legal situation, including its constitutional arrangements, have to remain as they were upon entry, on the ground that they were then deemed to have fulfilled the membership requirements. In line with Article 4(2) TEU, Member States are free to decide on, and develop their own constitutional rules, but on the condition that these do not depart from, and indeed cohere with, the values contained in Article 2 TEU, as jointly articulated within the Union.[51]

Admittedly, the Court did mention Malta's rules relating to judicial appointment as applicable when the country acceded, and which the contested new rules replaced. That reference does not however mean that the Court would systematically go back to the State's entry rules as substantive baseline to establish whether there is a 'reduction' in the protection of the rule of law. As it has been compellingly argued, this would deter constitutional innovation, and would otherwise generate a highly unequal application of the duty of non-regression to Member States depending on the timing of their admission to the Union, and the applicable accession conditionality and related standards if any, at the time of the ratification of the Treaty establishing their membership.[52]

Determining whether there is a 'reduction' in the protection of the values of Article 2 TEU (e.g. of the rule of law) that is contrary to the duty of non-regression, thus supposes a comparison between those new rules and the ones they are deemed to replace, which may have been amended since the State in question joined the Union. To quote the Court's President again: 'the level of value protection provided for by a Member State when it joined the EU is *a starting point* and *the trend of constitutional reforms must always be towards strengthening that protection*' (emphasis added).[53] Constitutional innovation is thus not dissuaded but rather encouraged

51 The Court confirmed that notion in its *Conditionality rulings (I) and (II)* (n. 3), and in ECJ, *Commission v Poland (Muzzle Law)* (n. 2), paras 72ff.

52 Further on this point, see Julian Scholtes, 'Constitutionalising the end of history? Pitfalls of a non-regression principle for Article 2 TEU', EuConst 19 (2023), 59–87.

53 Lenaerts (n. 29), 51.

for the purpose of enhancing the common protection of the values that Member States subscribe to when joining, and jointly articulate thereafter in the Union. Indeed, a Member State's constitutional status quo might end up being regressive if the level of protection within the Union has increased in the meantime, be that through the case law of the Court, secondary legislation or the elaboration of the EU membership law in the context of the EU enlargement process.

Arguably, the notion of regression is the converse of the structural evolution inherent in the integration process envisaged in Article 1(2) TEU, premised on an *increasing* safeguard of the values at the EU level in accordance with Articles 3(1) and 13(1) TEU,[54] and at national level in line with Article 4(3) TEU, as a basis for deepening the mutual trust among Member States, which is functionally essential to the process of an ever closer union among the peoples of Europe.[55] Regression encapsulates a retreat from this dynamic process of integration, which the duty articulated by the Court in *Repubblika* and subsequent case law aims at preventing and, if need be, reversing.[56]

What the duty of non-regression thus seems to entail is that whenever a Member State modifies its laws, as they existed by the time of accession or as modified since, it must not only comply with the substantive obligations stemming from, e.g., the values of Article 2 TEU, as identified and incrementally enunciated, but it must also conform to the structural obligation not to regress from its membership-based commitment to respect and promote the values of Article 2 TEU.[57] If this interpretation is correct,

54 See the chapter of Werner Schröder in this volume, and from the same author: 'an active EU rule of law policy' in: Allan Rosas, Pekka Pohjankoski and Juha Raitio (eds), *The Rule of Law's Anatomy in the EU: Foundations and Protections* (Oxford: Hart, 2023), 105-122.

55 Without prejudice to the Court of Justice's *Melloni* case law: ECJ, *Melloni*, judgment 26 February 2013, case no. C-399/11, ECLI:EU:C:2013:107.

56 Arguably, the 'New Settlement' for the UK' (n. 26) would have been tantamount to the regression to which the Court refers in its *Repubblika* ruling (n. 2). In effect, by establishing e.g. that the UK 'is not committed to further political integration into the European Union', and that 'the references to ever closer union would not apply to the United Kingdom' (Section C, pt. 1), the arrangement would have amounted to a regression from the UK commitment to the very aims of the Union, stemming from its membership. The Court of Justice has partly confirmed the incompatibility between some aspects of the New Settlement and EU law in ECJ, *Commission v Austria*, judgment of 16 June 2022, case no. 328/20, ECLI:EU:C:2022:468.

57 See in this sense: ECJ, *Inter-Environnement Wallonie*, judgment of 18 December 1997, case no. 129/96, para. 45.

it may be wondered whether the latter obligation would be breached if the revised rules, e.g. on judicial appointments, though still compatible with the standards of Article 2 TEU, entailed a reduction in the protection thereof compared to what they were before in the Member State concerned.

Both of these obligations are particularly relevant in the context of Transition 2.0. As an application of the duty of non-regression, such a transition involves a Member State's duty to reverse any established reduction in their protection of the common values, and a renewed protection in line with the evolving standards that operationalise these values in the EU legal order. Based on the above understanding of the duty of non-regression, reversing a Member State's reduced protection does not require from the State's authorities that they return to the status quo ante, in the sense of the legal situation applicable upon the moment of the state's accession, nor to the standards in place before the regression started. Such a return could also amount to another form of regression if, in the meantime, the protection of values has been further strengthened at the EU level since. The evolving understanding of the requirements of membership, and specifically of the obligations deriving from the values of Article 2 TEU, therefore have a ratchet effect: in reversing their regression, transitioning Member States must ensure that their laws and practices conform to the developing standards operationalising EU values, and more generally to the evolving and arguably hardening membership obligations.[58]

2. Non-regression from membership commitments

As recalled earlier, membership is contingent on Member States' fulfilment of other requirements. It presupposes compliance with wider, multi-layered obligations based on the founding EU Treaties,[59] as interpreted by the Court of Justice, and articulated by institutions and the existing community of members. Compliance with such requirements is indeed essential for a State to secure the full application of EU law and thus to secure the principled equality of Member States before the Treaties, as envisaged in Article 4(2) TEU. As such, these requirements equally ought to be considered as conditions for any Member State's continued enjoyment of membership

58 Mathieu Leloup et al., 'Opening the Door to Solving the "Copenhagen Dilemma"? All Eyes on *Repubblika v Il-Prim Ministru*', European Law Review 46 (2021), 692.

59 Paul Craig, 'EU Membership: Formal and Substantive Dimensions', CYELS 22 (2020), 1–31.

rights, and in turn for the purpose of a successful Transition 2.0, a process aimed at restoring mutual trust in the EU.

Such obligations can be deduced not only from the very terms of Article 49(1) TEU, which refer to Article 2 TEU, but also from those contained in the accession conditionality, as articulated notably by the European Council.[60] Conditions for a State to become a Member State, as encapsulated in the so-called 'Copenhagen criteria' and as subsequently elaborated in the EU 'Pre-accession Strategy',[61] underscore that membership presupposes, in particular, the State's 'ability to take on and implement effectively the obligations of membership, *including adherence to the aims of political, economic and monetary union*' (emphasis added).[62]

The EU pre-accession strategy includes operational standards which the aspirant State must meet to fulfil those criteria. Such standards have been, and still are, regularly and systematically endorsed by the Member States, as conditions for admission, and indeed as evolving EU membership law.[63] Arguably, 'the enjoyment of all of the rights deriving from the application of the Treaties to that Member State presupposes continued 'compliance' with those prerequisites too: they '*cannot* [either] *be reduced to an obligation which a candidate State must meet in order to accede* to the European Union and which it may disregard after its accession' (emphasis added).[64]

In this way, the decisions of Poland's contested 'Constitutional Tribunal', in which it held various fundamental provisions of the EU Treaties incompatible with the national Constitution, is tantamount to a regression on

60 Since the Treaty of Lisbon, Article 49(1) TEU stipulates that '[t]he conditions of eligibility agreed upon by the European Council shall be taken into account'.

61 Further see Marc Maresceau, 'Pre-Accession' in: Marise Cremona (ed.), *The Enlargement of the European Union* (Oxford: Oxford University Press 2003), 9–42.

62 European Council, Copenhagen, June 1993. On the significance of those accession criteria, see: ECJ, *Getin Noble Bank* (n. 18), para 104; ECJ, *Commission v Poland (Muzzle Law)* (n. 2), para. 65.

63 See further Hillion (n. 27).

64 To be sure, the Court has envisaged States' compliance with the values of Article 2 TEU, as '*a* prerequisite', 'a precondition' for the accession of any applicant, and '*a* condition for the enjoyment of all the rights', not 'the' prerequisite, precondition or condition (see: ECJ, *Repubblika* (n .2), para. 63). Other conditions for that enjoyment are thus conceivable, and in particular the State's 'ability to take on and implement effectively the obligations of membership, including adherence to the aims of political, economic and monetary union'.

the State's membership commitments. Those decisions eventually led the Commission to commence infringement proceedings against Poland.[65]

In sum, it is by reference to the State's duty not to reduce its fulfilment of the prerequisites for EU membership that Transition 2.0 can be legally envisaged and structured. It is the regression therefrom that triggers the transition process, and it is the transitioning State's certified renewed compliance with those fundamental conditions of membership, as endorsed by the Masters of the Treaties, as articulated in EU law and the Court's case law, that constitutes the finish line of Transition 2.0. As held by the Court: 'mutual trust is itself based (…) on the commitment of each Member State to comply with its obligations under EU law *and* to continue to comply (…) with the values contained in Article 2 TEU, which include the value of the rule of law' (emphasis added).[66] The next point is then to unpack the EU law of transition (2.0) by determining how regression may be established, then to map out how it should be reversed.

IV. Transition 2.0: A Legal Toolkit to Repair Membership

Regression may result from a Member State's disregard for EU substantive obligations whose compliance is essential for membership. It may also stem from its failure to remedy such breaches, e.g. by refusing to follow decisions from the ECJ, thus disregarding (some of) the structural obligations of membership. Regression may thus be established (1), and addressed (2), in several manners.

Establishing a Member State's regression

Article 7 TEU sets out a specific procedure to establish that a Member State is retreating from its membership commitments (i). The Court of Justice has acknowledged other legal avenues to that effect (ii).

1. Under Article 7 TEU

The procedure of Article 7 TEU has not proven itself a decisive tool to prevent, let alone sanction, Member States' regression from compliance

65 https://ec.europa.eu/commission/presscorner/detail/en/ip_23_842; although at the time of writing, the case has not yet been registered at the Court of Justice.

66 ECJ, *Conditionality ruling (II)* (n. 3), para 147.

with the values of Article 2 TEU.[67] Approaching it as an elaborate legal framework for the EU to bring a Member State back to constitutional democracy and operational membership might make it more relevant. The provision in effect sets out a useful template to structure Transition 2.0 as an EU-embedded process, and in particular for the EU (qua institutions and other Member States) both to establish a Member State's unlawful regression, and then to assist it in reversing it, in line with the canons of EU law.[68]

Under the procedure of Article 7(1) TEU, the EU Council has the power to establish that a Member State is taking a regressive course, i.e. that there is 'a clear risk of a serious breach by [that] Member State of the values referred to in Article 2'. The initiation of the procedure by the Commission, the European Parliament or a third of Member States, in itself puts the Member State in question under a specific observation from its peers, even prior to the Council's formal determination of the 'clear risk'. Since the activation of the procedure of Article 7(1) TEU, by the Commission in the case of Poland, and by the European Parliament in the case of Hungary,[69] the two Member States concerned have indeed been subject to (ir)regular hearings within the General Affairs Council.[70] The mere

67 See e.g. Daniel Kelemen, 'Article 7's place in the EU rule of law toolkit' in: Anna Södersten and Edwin Hercock (eds), *The Rule of Law in the EU: Crisis and Solutions* (Stockholm: SIEPS 2023), 12–16. Further on Article 7 TEU, see Wojciech Sadurski, 'Adding Bite to a Bark: The Story of Article 7, EU Enlargement and Jorg Haider', Columbia Journal of European Law 16 (2010), 385; Leonard Besselink, 'The Bite, the Bark and the Howl Article 7 TEU and the Rule of Law Initiatives' in: András Jakab and Dimitry Kochenov (eds), *The Enforcement of EU Law and Values: Ensuring Member States' Compliance* (Oxford: OUP 2016), 128; Clemens Ladenburger and Pierre Rabourdin, 'La constitutionalisation des valeurs de l'Union – commentaires sur la genèse des articles 2 et 7 du Traité sur l'Union européenne', Revue de l'Union européenne 657 (2022), 231.

68 See section IV.2, below.

69 European Commission, 'Reasoned proposal in accordance with Article 7(1) of the Treaty on European Union regarding the rule of law in Poland', Brussels, 20.12.2017, COM(2017) 835 final; 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', 2017/2131(INL).

70 On the ad hoc organization of the hearings of the two Member States presently subject to this procedure, see: https://data.consilium.europa.eu/doc/document/ST-10641-2019-REV-2/en/pdf. For a critical appraisal on the hearings, see e.g., European Parliament, 'Resolution of 5 May 2022 on ongoing hearings under Article 7(1) TEU regarding Poland and Hungary', 2022/2647(RSP). On the effect of that activation,

initiation of procedure has thereby triggered a transition phase, albeit of a (very) low intensity, which in principle may last until the reasoned opinion by the institution that submitted it is withdrawn, or by a Council negative decision in relation to that submission.[71] In the views of Jessika Roswall, Minister for EU Affairs of Sweden in charge of holding the hearings during the 2023 Swedish presidency of the EU Council: 'The Article 7 procedures regarding Poland and Hungary are continuing. Hearings are a useful tool in this process. They allow Member States to get a detailed picture of the reforms undertaken by the respective governments, the implementation process and the issues that still need to be addressed'.[72]

By contrast, a decision under Article 7(2) TEU would plainly establish that a Member State has failed to comply with EU values as prerequisites for membership. That decision, to be taken by the European Council on the initiative of the Commission or several Member States, would recognise that the Member State in question has systematically regressed ('persistent and serious breach' of the values of Article 2 TEU), thereby preventing it from operating in the common legal order based on mutual trust, and thus from enjoying all the rights deriving from membership. Such a decision triggers a process of transition of higher intensity – compared to the one envisaged in Article 7(1) TEU – within which the State needs to take appropriate measures to restore compliance with the values of Article 2 TEU as articulated in EU law, and in turn to regain other Member States' confidence, for the State in question to recover its full membership rights (Article 7(4) TEU).[73] Before taking its decision under Article 7(2) TEU, the European Council invites the Member State in question to submit its observations. It may then react and indeed disagree with the allegations, and face the prospect of a formal suspension of some of its membership rights (Article 7(3) TEU). Alternatively, it may acknowledge that its membership has been damaged and indicate which course of action it intends to take to

and on the usefulness of keeping that procedure open as long as the regressive course has not been fully reversed, see Kelemen (n. 67).

71 On the effects of the initiation of the procedure of Article 7(1) TEU, see Protocol (no 24) on asylum for nationals of member states of the European Union, annexed to the TEU (OJ [2016] C 202/304); ECJ, *Hungary v Parliament*, judgment of 3 June 2021, case no. C-650/18, ECLI:EU:C:2021:426, paras 39ff, ECJ, *LM*, judgment of 25 July 2018, case no. C-216/18, EU:C:2018:586, para. 79.

72 https://www.consilium.europa.eu/en/meetings/gac/2023/05/30/.

73 ECJ, *Conditionality Ruling II* (n. 3), para. 209.

stop and reverse its regressive course. That latter scenario, might then open for a more cooperative Transition 2.0.[74]

2. Outside Article 7 TEU

The Court of Justice has confirmed that a Member State's breach of the values of Article 2 TEU, as regression from its membership commitments, can be established in other ways. This in turn means that the duty to reverse may be triggered outside the context of Article 7 TEU. In its seminal *conditionality* rulings, the Court indeed recalled that:

> In addition to the procedure laid down in Article 7 TEU, numerous provisions of the Treaties, frequently implemented by various acts of secondary legislation, grant the EU institutions the power to examine, determine the existence of and, where appropriate, to impose penalties for breaches of the values contained in Article 2 TEU committed in a Member State.[75]

In particular, the Court has established that EU primary law contains several provisions that 'give concrete expression' to the values of Article 2 TEU, and which stipulate specific requirements to secure compliance therewith. For instance, the second subparagraph of Article 19(1) TEU, which 'gives concrete expression to the value of the rule of law contained in Article 2 TEU, requires Member States (…) to establish a system of legal remedies and procedures ensuring that the right of individuals to effective judicial protection is observed in the fields covered by EU law'.[76] Similarly, 'Article 10(1) TEU provides that the functioning of the Union is to be founded on the principle of representative democracy, which gives concrete form to the value of democracy referred to in Article 2 TEU'.[77] In its *Conditionality* rulings, the Court added that other provisions like:

74 Further on the legal modalities of 'Transition 2.0' based on Article 7 TEU, see section IV.2.ii., below.

75 ECJ, *Conditionality ruling (I) and (II)* (n. 3), at paras 159 and 195, respectively.

76 ECJ, *Conditionality ruling (I) and (II)* (n. 3); see also ECJ, *ASJP* (n. 5); ECJ, *A.B. and Others (Appointment of Judges to the Supreme Court – Actions)*, judgment of 2 March 2021, case no. C-824/18, EU:C:2021:153.

77 ECJ, *Oriol Junqueras Vies*, judgment of 19 December 2019; case no. C-502/19, ECLI:EU:C:2019:1115, para. 63. On the significance of Article 10 TEU in the context of the transition, see the chapter of Pál Sonnevend in this volume.

> Articles 6, 10 to 13, 15, 16, 20, 21 and 23 of the Charter *define the scope of the values* of human dignity, freedom, equality, respect for human rights, non-discrimination and equality between women and men, contained in Article 2 TEU (…) [while] Articles 8 and 10, Article 19(1), Article 153(1)(i) and Article 157(1) TFEU define the scope of the values of equality, non-discrimination and equality between women and men and allow the EU legislature to adopt secondary legislation intended to implement those values.[78]

On that basis, the Court could then review the Member States' '[c]ompliance with [the] requirement [of e.g. Article 19(1) TEU] *inter alia* in an action for failure to fulfil obligations brought by the Commission under Article 258 TFEU'[79] – a review which it may also perform in an action brought by a Member State under Article 259 TFEU. A Court's decision may therefore establish a Member State's breach of provisions 'giving concrete expression' to the values of Article 2 TEU, or of those defining the scope thereof,[80] and thus acknowledge the existence of a regression in the protection of those values, in turn triggering a mandatory transition.[81]

The existence of a regression may also be established by Council decision, albeit indirectly, following an initiative of the Commission, e.g. in the context of the Regulation 'on a general regime of conditionality for the protection of the Union budget, or in the framework of other conditionality mechanisms attached to EU budgetary instruments.[82] For instance, the

78 ECJ, *Conditionality ruling (I)* (n. 3), paras 157ff (emphasis added).

79 ECJ, *Conditionality ruling (I)* (n. 3), para. 161 and ECJ, *Conditionality ruling (II)* (n. 3), para. 197; ECJ, *Commission v Poland (Independence of the Supreme Court)*, judgment of 24 June 2019, case no. C-619/18, EU:C:2019:531; ECJ, *Commission v Poland (Independence of the ordinary courts)*, judgment of 11 July 2019, case no. C-192/18, EU:C:2019:924.

80 The Court's multiple formulations of the connections between Article 2 TEU and other provisions of primary law beg the question of whether these provisions play different functions in terms of operationalising the values of Article 2 TEU, and as obligations for Member States.

81 See e.g., ECJ, *Commission v Poland (Disciplinary Chamber)* (n. 45).

82 General Conditionality Regulation (n. 15); Regulation (EU) 2021/1060 of the European Parliament and of the Council of 24 June 2021 laying down common provisions [2021] OJ L231/159; Regulation (EU) 2021/241 of the European Parliament and of the Council of 12 February 2021 establishing the Recovery and Resilience Facility [2021] OJ L57/17; Council Implementing Decision on the approval of the assessment of the recovery and resilience plan for Poland [2022], Interinstitutional File: 2022/0181 (NLE), https://data.consilium.europa.eu/doc/document/ST-9728-2022-INIT/en/pdf and ANNEX https://data.consilium.europa.eu/doc/document/ST-9728-2022-ADD

Council found that Hungary had breached 'the principles of the rule of law [in a way that] affect or seriously risk affecting the sound financial management of the Union budget or the protection of the financial interests of the Union in a sufficiently direct way'. In line with Article 4(1) of the 'Conditionality Regulation', the Council imposed 'appropriate measures', by way of a suspension of some EU budgetary commitments, until Hungary's adoption of adequate remedial measures.[83] The Commission and Council also decided to withhold EU cohesion policy funds allocated to Hungary and Poland until they restored the independence of their judiciary, in line with the requirements of the Charter of Fundamental Rights.[84]

The authorities of Member States too, including their courts, may establish that a Member State is regressing on its membership commitments, notably that commitment of respecting the rule of law. Since its *LM* ruling in particular,[85] the Court of Justice has recognised that a Member State's court can be relieved from its EU obligation of mutual recognition in the specific context of the European Arrest Warrant,[86] 'where the executing judicial authority, called upon to decide whether a person in respect of whom a European arrest warrant has been issued (…) is to be surrendered, has material (…) *indicating that there is a real risk of breach of the fundamental right to a fair trial guaranteed by the second paragraph of Article 47 of the Charter, on account of systemic or generalised deficiencies so far as*

-1/en/pdf; Council Implementing Decision on the approval of the assessment of the recovery and resilience plan for Hungary [2022], Interinstitutional File: 2022/0414 (NLE), https://data.consilium.europa.eu/doc/document/ST-15447-2022-INIT/en/pdf and ANNEX, https://data.consilium.europa.eu/doc/document/ST-15447-2022-ADD-1/en/pdf. Further on EU conditionality and respect for the values, see John Morijn and Kim Scheppele, 'What Price Rule of Law' in: Södersten and Hercock (n. 67), 29–35.

83 Council implementing decision (EU) 2022/2506 of 15 December 2022 on measures for the protection of the Union budget against breaches of the principles of the rule of law in Hungary, OJ [2022] L325/94.

84 https://ec.europa.eu/commission/presscorner/detail/en/ip_22_7801 (Hungary); https://ec.europa.eu/commission/presscorner/detail/en/ip_22_4223 (Poland).

85 ECJ, *LM* (n. 71), see also ECJ, *Aranyosi et Căldăraru*, judgment of 5 April 2016, case no. C-404/15 et C-659/15 PPU, EU:C:2016:198; ECJ, *RO*, judgment of 19 November 2019, case no. C-327/18 PPU, ECLI:EU:C:2018:733.

86 Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (OJ 2002 L 190/1), as amended by Council Framework Decision 2009/299/JHA of 26 February 2009 (OJ 2009 L 81/24).

concerns the independence of the issuing Member State's judiciary' (emphasis added).[87]

As a result, a Member State's judge, in casu the 'executing authority', may itself determine the existence of 'systemic or generalised deficiencies [regarding] the independence of the issuing Member State's judiciary', and suspend that State's enjoyment of some of its membership privileges, viz. the right for the judicial authorities as the 'issuing Member State's judiciary', to be trusted, in casu the 'executing authorities', that they comply with the principles of the rule of law. Member States' judicial authorities, as part of the EU judicial system,[88] may however take that decision only where the strict conditions set out by the Court of Justice are fulfilled:[89] the '[executing] authority must determine, specifically and precisely, whether, having regard to [the prosecuted individual's] personal situation, as well as to the nature of the offence for which he is being prosecuted and the factual context that form the basis of the European arrest warrant, and in the light of the information provided by the issuing Member State (…), there are substantial grounds for believing that that person will run such a risk if he is surrendered to that State'.[90]

While in principle circumscribed to the case at hand, the executing authority's decision not to execute the decision of the issuing authority may have ripple effects across the EU judicial system.[91] Other Member States' (judicial) authorities may follow suit, thus spreading the distrust towards

87 ECJ, *LM* (n. 71), para. 79.

88 ECJ, *Unified Patent Court*, opinion of 8 March 2011, opinion no. 1/09, ECLI:EU:C:2011:123.

89 As well-established, 'a Member State may not unilaterally adopt, on its own authority, corrective or protective measures designed to obviate any breach (…) of rules of [EU] law'. See ECJ, *Commission v Greece (IMO)*, judgment of 12 February 2009; case no. C-45/07 ECLI:EU:C:2009:81; ECJ, *Commission v France*, judgment of 25 September 1979, case no. 232/78, ECLI:EU:C:1979:215.

90 ECJ, *LM* (n. 71), para. 79.

91 See e.g. the decision of 17/02/2020 of the Oberlandsgericht Karlsruhe (Higher Regional Court in Karlsruhe), DE:OLGKARL:2020:0217.AUSL301AR156.19.00. Further see Anna Wójcik, 'Muzzle Law leads German Court to refuse extradition of a Pole to Poland under the European Arrest Warrant', 6.03.2020, https://ruleoflaw.pl/muzzle-act-leads-german-to-refuse-extradition-of-a-pole-to-poland-under-the-european-arrest-warrant/; Christophe Hillion, 'A(nother) lost opportunity? The European Council and domestic assaults on the EU constitutional order', Verfassungsblog, 3.11.2021, https://verfassungsblog.de/another-lost-opportunity/.

the Member State of the issuing authorities more generally.[92] To be sure, it signals that the State in question has to re-establish the credibility of its (judicial) authorities, while implicitly calling on EU institutions' to engage with that State so as to repair mutual trust.[93]

In sum, EU institutions and Member State's authorities have the power to make a determination that a Member State is regressing from its membership commitments, and in particular from that of protecting the values of Article 2 TEU. The next section turns to mapping the potential legal tools that can be mobilised to carry out the transition that such a determination triggers, and what the EU as 'common legal order' can contribute to the process at hand.[94]

EU legal tools to reverse regression

Once established, a Member State's regression triggers a mandatory process of transition, viz. Transition 2.0. In particular, such a determination prompts various obligations stemming from EU law that bind the State in question, and which then legally structure its transition (i). A Member State's regression also prompts the duty for EU institutions, and for other Member States, to engage in that process of transition to secure that the State in question effectively reverses its regression, nullifies the negative implications thereof and regains its credibility, so that (its) membership can be repaired (ii).

3. State's obligations

A State's admitting its own regression and commitment to reverse it will undoubtedly *facilitate* the process of transition, and the re-establishment of its trustworthiness. Yet as a process embedded in EU constitutional order,

92 On the widening damage to mutual trust, see the decision of the General Court in *Sped-Pro S.A. v European Commission*, judgment of 9 February 2022, case no. T-791/19, ECLI:EU:T:2022:67.

93 The authorities of an EU partner with which the EU has mutual recognition arrangements may equally decide no longer to execute decision from a regressive Member State, adding the pressure on the EU to engage with the Member State in question to restore the rule of law. In the same vein, the suspension of external funding towards a Member State, e.g. EEA funds, following the latter's breach of the values shared between the parties, could also be an indication of that State's regression, and of the ensuing need for the EU to secure that it reverses that regression. Further Hillion (n. 31), 262.

94 ECJ, *Conditionality ruling (I)* (n. 3), para. 127.

Transition 2.0 is *activated* irrespective of that recognition and must be carried out in line with the requirements of EU law. A Member State whose actions or omissions fall foul of its EU obligations must always seek to stop and reverse its unlawful conduct, a fortiori if the latter concerns the conditions of (its) membership.

Article 260 (1) TFEU epitomises the mandatory character of the transition, once regression has been established by way of an infringement procedure. Thus, 'if the Court of Justice of the European Union finds that a Member State has failed to fulfil an obligation under the Treaties, the *State shall be required to take the necessary measures to comply with the judgment of the Court*.' The Court has recalled the general character of this remedial obligation in situations of non-compliance with EU law, by reference to Article 4(3) TEU:

> it follows from the principle of sincere cooperation (…) that the Member States are obliged to take all the measures necessary to guarantee the application and effectiveness of EU law and to eliminate the unlawful consequences of a breach of that law, and that such an obligation is owed, within the sphere of its competence, by every organ of the Member State concerned (…).[95]

A fortiori, such obligations are of particular relevance if and when it has been established that a State has regressed from its membership commitments, and in particular from that pledge to protect EU values. In view of its impact on the EU legal order, such a regression arguably bolsters the normative force of the duty 'to take all the necessary measures' referred to above. The State in question must stop and reverse its regression, and restore full compliance with the agreed conditions of membership. Re-compliance therewith is the necessary endpoint of transition 2.0,[96] at least as long as the State concerned intends to remain part of the Union. Indeed, it is that very intention that activates and justifies the State's obligation of transition based on EU law.

Formulated in *Repubblika* as a negative obligation (obligation not to), viz. to 'refrain from' taking measures that would reduce the protection of EU values, the duty of non-regression, as specific application of the obligation of sincere cooperation to the task stipulated in Article 3(1) TEU,

95 ECJ, *Asociația 'Forumul Judecătorilor din România'* (n. 36), para. 176.

96 In this regard, see the chapter of Armin von Bogdandy and Dimitri Spieker, in this volume.

arguably generates positive obligations too, particularly in the context of Transition 2.0. Borrowing the phraseology of Article 4(3) TEU recalled above, non-regression thus requires from Member States that they 'take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union', ultimately 'to facilitate the achievement of the Union's tasks', in particular that of defending its values, and more generally 'the process of integration that is the raison d'être of the EU itself'.[97] More than compliance, the duty of non-regression entails the State's overall cooperation to protect the common values of Article 2 TEU.

More specifically, what the obligation to reverse the regression entails for the State's authorities is that they disapply,[98] and if need be, remove unlawful national provisions (or inactions) generating that regression. This includes illicit judicial decisions.[99] Ultimately, they must eliminate the unlawful consequences of the regression, if need be by replacing the regressive measures with provisions that will cohere with the standards operationalising Article 2 TEU, and with the requirements of membership more generally:

> The Court has consistently held that the incompatibility of national legislation with Community provisions, even provisions which are directly applicable, can be finally remedied only by means of national provisions of a binding nature which have the same legal force as those which must be amended. Mere administrative practices, which by their nature are alterable at will by the authorities and are not given the appropriate publicity, cannot be regarded as constituting the proper fulfilment of obligations under the Treaty.[100]

97 ECJ, *EU Accession to the ECHR* (n. 5), para. 172.

98 Further Michael Dougan, 'Primacy and the remedy of disapplication', CML Rev. 56 (2019), 1459–1508.

99 ECJ, *W.Ż. (Chamber of Extraordinary Control and Public Affairs of the Supreme Court – Appointment)*, judgment of October 2021, case no. C-487/19, ECLI:EU:C:2021:798, paras 152ff. See also ECJ, *Asociația 'Forumul Judecătorilor din România'*, Opinion of AG Bobek of 23 September 2020, case no. C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19. See also ECJ, *Commission v Poland (Muzzle Law)* (n.2), para. 79. Further on this point, see the chapter of Maciej Taborowski in this volume.

100 ECJ, *Commission v. France*, judgment of 13 March 1997, case no. C-197/96, ECLI:EU:C:1997:155; see also ECJ, *Commission v. France*, judgment of 7 March 1996, case no. C-334/94, ECLI:EU:C:1996:90.

Disapplication and replacement of contentious acts might however not suffice to 'eliminate the unlawful consequences' of the State's misconduct.[101] For instance, disapplying and replacing measures that led to a reduction in the protection of the rule of law in Poland will not be appropriate to remedy the implications of these measures for individuals who did not obtain the effective judicial protection they were entitled to under EU law, and in particular Article 19(1) TEU, and Article 47 CFR. Similarly, such disapplication and replacement will not in themselves nullify the consequences of the unlawful disciplinary measures suffered by numerous Polish judges in breach of the requirements of Article 19(1) TEU.

Eliminating the consequences of regression may entail that individuals should be able to obtain reparation in case of damage, based notably on the *Francovich* jurisprudence.[102] Arguably, the latter could play a particularly important role in helping to reverse regression in the protection of EU values, which could be envisaged as 'a sufficiently serious breach' for the purpose of establishing liability of the transitioning State. Admittedly, the chances of success of this course of action, which are limited in normal circumstances,[103] will be highly dependent on whether national courts have in effect recovered, in law and in fact, their ability to adjudicate independently and impartially, on the availability of national rules on liability, and more generally on the extent to which the rule of law has been restored. The feasibility of *Francovich* liability could indeed indicate whether the State is effectively reversing its regression as regards the rule of law, and incidentally whether its judicial authorities can be trusted, in terms of providing legal protection.

101 See in this respect, e.g., ECJ, *Varhoven administrativen sad*, judgment of 24 November 2022, case no. C-289/21, ECLI:EU:C:2022:920.

102 ECJ, *Francovich*, judgment of 19 November 1991, cases no. C-6/90 and C-9/90, ECLI:EU:C:1991:428; see also, e.g. ECJ, *Deutsche Umwelthilfe*, judgment of 19 December 2019, case no. C-752/18, EU:C:2019:1114; ECJ, *JP v. Ministre de la Transition écologique*, judgment of 22 December 2022, case no. C-61/21, ECLI:EU:C:2022:1015. On the application of *Francovich* liability to judicial bodies see ECJ, *Köbler*, judgment of 30 September 2003, ECLI:EU:C:2003:513.

103 See e.g. Michael Dougan, 'Addressing Issues of Protective Scope within the Francovich Right to Reparation', European Constitutional Law Review 13 (2017), 124–165; Norbert Reich, '*Francovich* Enforcement Analysed and Illustrated by German (and English) Law' in: Jakab and Kochenov (n. 67), 112–127; Tobias Lock, 'Is Private Enforcement of EU Law Through State Liability A Myth? An Assessment 20 Years After *Francovich*', CMLRev. 49 (2012), 1675–1702.

4. Obligations of EU institutions

As recalled earlier, EU institutions are generally bound by Article 13(1) TEU to promote EU values. In this way, they have an obligation to practice sincere cooperation in line with Article 13(2) TEU, so as to help the EU perform its tasks and achieve its value-related objectives. The Court findings that the 'Union *must be able to defend* [its founding] values, within the limits of its powers as laid down by the Treaties' (*conditionality* rulings) confirm that point and add to the notion that EU institutions must actively engage with a transitioning State to reverse its regression – and to ensure that the unlawful consequences thereof are eliminated. The very 'powers' the Court alluded to in its *conditionality* rulings are particularly relevant, if not critical, in Transition 2.0, and they must be exercised accordingly.

This general EU value-mandate determines the way in which all Union's institutions, as well as other Member States, ought to engage to ensure that a transitioning State effectively reverses an established regression, and transitions back into operational membership, based on compliance with the values of Article 2 TEU. In particular, the mandate ought to frame the way EU tools, including Article 258–260 TFEU, Article 7 TEU, and the various conditionality mechanisms referred to earlier, are mobilised, ultimately to repair the transitioning State's membership and restore mutual trust in the EU.

While Transition 2.0 is mandatory from the moment regression is established, its *modalities* may however vary, not only in view of the specific characteristics of the regression at hand, but also in consideration of the attitude of the authorities of the State in question in the face of their obligation to reverse it. The transition will indeed unfold in different ways whether the State concerned accepts or contests the existence of a regression, *viz.* whether it acknowledges (or indeed self-declares) that its membership has been impaired by the authorities' past actions and/or omissions, or not.[104]

That said, Transition 2.0, as reversing a State's regression from its membership commitments, ought to be a time-limited process. Unless EU membership rules are themselves revised legally to accommodate a new type

104 See in this regard: https://www.euractiv.com/section/politics/news/eu-presses-poland-to-pay-fines-in-disciplinary-chamber-standoff/.

of differentiated membership,[105] an implausible prospect if differentiation concerns observance of the very prerequisites of membership,[106] a Member State cannot remain in a transitory mode on a permanent basis. Either the transition succeeds so that trust is restored, and membership is thus fully repaired, or transition fails and alternatives to the State's member status must be considered so as to preserve the integrity of the EU as common legal order, and membership thereof.[107]

a) In the context of Article 7 TEU

As suggested earlier, Article 7 TEU provides, in principle, a legal framework wherein EU institutions may not only establish a Member State's regression; the provision also envisages mechanisms whereby institutions determine and monitor how the State ought to reverse its regression, ultimately to be able to revalidate its membership and regain its ability to enjoy all the rights it entails. Practice so far shows that this transition framework – and thus a more constructive dimension of Article 7 TEU – has been overlooked. Much more could therefore be made of this mechanism as a

105 As attempted in the renegotiation between the Member States and the United Kingdom in 2016, see (n. 26).

106 Daniel Kelemen, 'Is differentiation possible in rule of law?', Comp Eur Polit 17 (2019), 246–260; Ivan Damjanovski, Christophe Hillion and Denis Preshova, 'Uniformity and Differentiation in the Fundamentals of EU Membership: The EU Rule of Law Acquis in the Pre- and Post-accession Contexts', IDEA Working Papers 4 (2020), https://www.iai.it/en/pubblicazioni/uniformity-and-differentiation-fundamentals-eu-membership.

107 If a disconnect appears between an intransigent Member State's government, refusing to reverse its regression, and its EU-supportive nationals, the EU and other Member States arguably ought to assist the latter, to protect their EU citizenship, and their State's membership. That might entail, e.g. direct assistance to local authorities, CSOs, without going through the captured State's structures (the connection between the EU and Union's citizens, circumventing the State's disruptive actions is evidenced in the Commission's action against Poland for the decision of its constitutional tribunal: 'The Commission's objective is to ensure that the rights of Polish citizens are protected and that they can enjoy the benefits of the EU in the same way as all EU citizens. Primacy of EU law ensures equal application of EU law across the Union', https://ec.europa.eu/commission/presscorner/detail/en/ip_23_842). Conversely, in case of alignment between a Member State and its people in carrying out anti-EU policies, EU institutions and other Member States' should respect that democratic choice while preserving the EU constitutional order, namely by facilitating Member States' withdrawal. See in this sense Dougan and Hillion (n. 16).

basis for monitoring and steering a State's transition away from an unlawful regression, precisely to avoid the latter becoming ever more damaging for the EU and other Member States, and the process of restoring the State's compliance becoming ever more difficult to carry out.

Once the procedure of Article 7(1) TEU is initiated – and this is particularly significant for Transition 2.0 – the Council may adopt 'recommendations' *before* it decides whether there is a risk of serious breach of the values of Article 2 TEU. Presumably, the very purpose of these recommendations is to set out ways to prevent the Member State from taking a further regressive course, and thus to keep its membership rights intact. Article 7(1) TEU thereby empowers the EU in general, and the Council in particular, to avert (further) regression, not only by putting the State concerned under observation, but also by possibly steering it away from its deteriorating course. These recommendations could indeed be of particular significance in helping the State's renewed compliance with its membership requirements, if considered in the light of the Court of Justice's case law on the Commission recommendations adopted in the context of the Cooperation and Verification Mechanism (CVM). In particular, and given the importance of the Council's Article 7 recommendations for the State's compliance with the values of Article 2 TEU, one may wonder whether they ought to enjoy the same constraining effect as the one the Court attributed to the CVM recommendations. Paraphrasing the Court's ruling in *Asociaţia 'Forumul Judecătorilor din România*, it is arguable that since Article 7 recommendations 'are [equally] intended to ensure that [the Member State concerned] complies with the value[s] (…) set out in Article 2 TEU', they should be equally 'binding on it, in the sense that [the Member State] is required to take the appropriate measures for the purposes of meeting those [recommendations], (…) under the principle of sincere cooperation laid down in Article 4(3) TEU'.[108]

If, and when, the Council establishes that there is a 'risk' under Article 7(1) TEU, it 'shall regularly verify that the grounds on which such a determination was made continue to apply'. This entails that the State con-

108 ECJ, *Asociaţia 'Forumul Judecătorilor din România'* (n. 36), paras 178, 249 and 250, and the Opinion of AG Bobek (n. 99). For some reflections on what these recommendations could look like, see e.g., Laurent Pech and Jakub Jaraczewski, 'Systemic Threat to the Rule of Law in Poland: Updated and New Article 7(1) TEU Recommendations', CEU DI Working Papers 2023, https://democracyinstitute.ceu.edu/articles/laurent-pech-jakub-jaraczewski-systemic-threat-rule-law-poland-updated-and-new-article-71.

cerned would be subject to increased scrutiny, until the Council considers otherwise. In making that determination, the Council ought to exercise its discretion in the light of the purpose for which the procedure exists, namely to restore the State's compliance with the values of Article 2 TEU, and ultimately to re-establish mutual trust.

Should the European Council proceed to the decision under Article 7(2) TEU, the latter would set in motion the most explicit and intrusive form of Transition 2.0. For under Article 7(3) TEU, the Member State in question may have some of its membership rights suspended by the Council, until it complies again with the values of Article 2 TEU, and thus the conditions for membership;[109] that is until the Council takes a decision 'to vary or revoke measures taken under paragraph 3 in response to changes in the situation which led to their being imposed' (Article 7(4) TEU). The transitioning State's renewed fulfilment of the prerequisites for membership, including constitutional democracy in line with the requirements of Article 2 TEU, is then a matter for the Union institutions to validate. This is a particular expression, that legally the successful outcome of Transition 2.0 as a re-compliance with the requirements of membership, needs authentication by the EU (as institutions and other Member States), rather than a mere self-proclamation of restored constitutional democracy by the Member State in question.

In the meantime, the decision to suspend a State's membership rights generally relieves the other Member States from (some of) their obligations towards the transitioning State. In particular, Member States' courts are no longer bound to recognise and execute decisions from its courts – a suspension of mutual recognition that may also apply to other national authorities. Instead, they are required to suspend some of the membership-based rights of the transitioning State, in casu the presumed confidence that its authorities comply with EU values including fundamental rights and the rule of law. This is notably the case in the context of the European Arrest Warrant (EAW) mechanism, as discussed above.[110] Thus according to the EAW Framework Decision:

109 As the Court underlined in its *Conditionality ruling (I)* (n. 3), para 170: 'the purpose of the procedure laid down in Article 7 TEU is … to allow the Council to penalise serious and persistent breaches of the values contained in Article 2 TEU, *in particular with a view to compelling the Member State concerned to put an end to those breaches*' (emphasis added).

110 See section IV.1.ii. Incidentally, such a decision could also deprive the transitioning State of some of its membership rights deriving from the external action of the

> The mechanism of the European arrest warrant is based on a high level of confidence between Member States. Its implementation may be suspended only in the event of a serious and persistent breach by one of the Member States of the principles set out in [Article 2 TEU], determined by the [European] Council pursuant to [Article 7(2) TEU,] with the consequences set out in [Article 7(3) TEU].[111]

Mutual recognition can only be resumed, and the State's presumed trustworthiness stemming from its membership in principle restored, once the European Council decision is reversed by a Council decision based on Article 7(4) TEU. Such a decision is required to terminate the transition: it formally certifies that compliance has been restored, that membership has been repaired, so that mutual trust can be re-established. The Member State in question may thus de novo, 'enjoy (…) all (…) the rights deriving from the application of the Treaties to that Member State'. In principle, that would immediately require from other Member States' courts (and other authorities) that they comply again with the principle of mutual recognition towards decisions from that State's authorities. Yet, this in turn presupposes that the assessment made by the Council of the State's renewed compliance is cogent.

A more constructive approach to Article 7 TEU could therefore be contemplated, away from the castrating and lingering discourse on Article 7 as 'nuclear option' – which it is not. This potential change of perspective could indeed come from the State concerned itself. Nothing prevents a transitioning Member State from engaging to reverse its regressive course by actively mobilising the EU, its institutions and law, including by way of a Council decision under Article 7 TEU. As paradoxical as it may sound, the transitioning State may have an interest in a Council determination that its membership is being/has been damaged by past (in)actions, which then formalises the general requirement for the State to take the necessary

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Union. Thus, EU external agreements involving mutual recognition of courts' decisions (e.g. Agreement between the European Union and the Republic of Iceland and the Kingdom of Norway on the surrender procedure between the Member States of the European Union and Iceland and Norway, [2006] OJ L 292/2; Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, [2007] OJ L 339/3) might also prompt the third states (courts) to stop executing decisions of that Member State's authorities. Further on this point, Eirik Holmøyvik, 'No Surrender to Poland', Verfassungblog, 2.11.2021, https://verfassungsblog.de/no-surrender-to-poland/; Hillion (n. 31).

111 Council Framework Decision (n. 86), Preamble.

measures to keep its membership rights intact. Such a decision would thus provide a firm EU law basis for the State's authorities, following a change of leadership, to carry out potentially far-reaching reforms deemed necessary to repair its membership and trustworthiness, with the support of EU institutions (and other Member States), as well as substantive input through, e.g., Council recommendations. Indeed, it has been compellingly argued in this volume that the process of transition might encounter internal 'obstacles and hurdles'.[112] One example would be the opposition from Poland's President and/or from the captured constitutional tribunal and/or supreme courts to the reforms the new leadership intends to introduce to repair the state's constitutional democracy, and in turn its membership.

In this scenario, an Article 7(2)-decision, establishing that the State has unlawfully and systemically regressed from its membership commitments and might lose some of its membership prerogatives if no reversing measures are taken, might provide a useful EU / and other Member States' legal authority to the government's reparation agenda, as well as additional political leverage for the latter to reverse the unlawful regression. It might incidentally unlock the tailored use of other mechanisms, including financial, for the purpose of securing the transition. It should indeed be recalled that there is no automaticity between the European Council decision of Article 7(2) and that of the Council under Article 7(3) TEU. The latter might agree on measures to be taken so that the transitioning State does not lose its rights. To be sure, Article 7 TEU does not mechanically entail a suspension of the transitioning State's right to vote. The Council appears to have a wide discretion in choosing the measures to address a serious and persistent breach of EU values, in terms of the measures to stop it. Use could be thus made of that tool to help the State repair its membership, without it losing its voting right – except in relation to the decisions relating to the very process of transitioning back, and of authenticating that the transition has been effectively accomplished, in line with the prescriptions of Article 7(5) TEU and 354 TFEU.

112 See the contribution of Adam Bodnar in this volume.

b) Outside Article 7 TEU

While all institutions (and other Member States) may activate Article 7 TEU and engage in the transition process that provision envisages, the European Commission arguably has the most prominent role to play for a Transition 2.0 unfolding outside Article 7 TEU. The EU constitutional charter foresees that it 'shall ensure the application of the Treaties, and of measures adopted by the institutions pursuant to them. It shall [also] oversee the application of Union law under the control of the Court of Justice of the European Union'.[113]

On this basis, and as indicated above, it may (and should) activate the infringement procedure of Article 258 TFEU, initiate available conditionality mechanisms whenever necessary to protect the Union as a common legal order (and/or indeed trigger the procedure of Article 7 TEU), so that a Member State's regression is formally established, and the mandatory process of transition triggered. Once such regression has been acknowledged, it must a fortiori ascertain that the then-transitioning State does comply with the obligations of conduct and result recalled above, to return to EU legality, including by way of nullifying the unlawful consequences of the regression, also for the EU.[114] In case of infringements more specifically, the Commission has to verify that the transitioning State observes the obligations stipulated in Article 260(1) TFEU and, if not, return to the Court of Justice to formalise that the regression is deepening.[115] It may indeed call on the Court to impose penalty payments and financial sanctions to put additional pressure on the transitioning State, in a further attempt to stop and reverse its regression – as it has been the case in relation to Poland.[116]

While it thus has tools to help or, as the case may be, compel regressive States to carry out their transition, the Commission may also provide substantive guidance and support to the transitioning State, by mobilising various management mechanisms, involving more dialogue and informa-

113 Article 17(1) TEU.

114 ECJ, *Commission v UK*, judgment of 31 October 2019, case no. C-391/17, ECLI:EU:C:2019:919; ECJ, *Commission v The Netherlands*, judgment of 31 October 2019, case no. C-395/17, ECLI:EU:C:2019:918.

115 Further Pål Wennerås, 'Making effective use of Article 260 TFEU' in: Jakab and Kochenov (n. 67), 79–98.

116 E.g. ECJ, *Commission v Poland (Indépendance et vie privée des juges)*, Order of the Vice-President of the Court of 27 October 2021, case no. C-204/21, ECLI:EU:C:2021:878.

tion.[117] Those may be specifically calibrated with a view to steering the Member State's effective reversal of the regression, and will be of particular relevance if the State concerned is readily engaging in its transition.[118] The Commission may thus use existing monitoring instruments such as its Annual Rule of Law reporting on each Member States, the EU Justice Scoreboard,[119] and/or the framework of the European Semester,[120] to enunciate the steps for the transitioning State to return to EU legality. In this sense, it is noticeable that, for the first time since their initial publication in 2020, the Commission's Annual Rule of Law Reports contain '*recommendations* ... to support Member States in their efforts to take forward ongoing or planned reforms, to encourage positive developments, and to help them identify where improvements or follow-up to recent changes or reforms may be needed, also with a view to address systemic challenges in certain cases' (emphasis added).[121] These 'recommendations' could have particular potency as benchmarks for Transition 2.0, specifically if used in synergy with conditionality mechanisms, for instance as basis for the decisions the Council takes in these contexts.[122]

As mentioned above, conditionality mechanisms have already been deployed to steer the transition in Poland and Hungary.[123] The question has however been raised as to whether the Commission, and other institutions, have used those mechanisms appropriately. Beyond the inconsistent use of the infringement procedure in relation to regressive states,[124] its recent

117 Sonja Priebus, 'The Commission's Approach to Rule of Law Backsliding: Managing instead of Enforcing Democratic Values', Journal of Common Market Studies 60 (2022), 1684–1700.

118 On the limits of dialogue with recalcitrant Member States, see Priebus (n. 117).

119 https://commission.europa.eu/strategy-and-policy/policies/justice-and-fundamental-rights/upholding-rule-law/eu-justice-scoreboard_en.

120 See references above (n. 82).

121 European Commission, *2022 Rule of Law Report* (n. 14), 1. The (short) recommendations are contained in an Annex of the Communication.

122 Consider the significance given by the Court to of the Commission's reports in the context of the CVM in ECJ, *Asociația 'Forumul Judecătorilor din România'* (n. 36).

123 See references above (n. 82).

124 Daniel Kelemen and Tomasso Pavone, 'Where Have the Guardians Gone? Law Enforcement and the Politics of Supranational Forbearance in the European Union', World Politics 74 (2023) (forthcoming); Gráinne de Búrca, 'Poland and Hungary's EU membership: On not confronting authoritarian governments', International Journal of Constitutional Law 20 (2022), 13–34; 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 Law 13 (2021), 1–43.

enunciation of 'Milestones' and 'Super Milestones' as conditions for Poland and Hungary to access EU funding in the context of the EU Recovery Fund has also been contested as not requiring appropriate measures to reverse well-established regressions, thus failing its obligations as Guardian of the Treaties to oversee compliance with EU law in general and deriving from the duty of non-regression in particular.[125]

To be sure, the use of monitoring mechanisms in Transition 2.0 must purport to secure that the Member States concerned *fully* reverse the established regression, e.g. by effectively resuming compliance with EU norms, including by obeying judgments of the Court of Justice. While EU institutions involved in monitoring and steering the transition enjoy a degree of discretion in the choice of tools they may deploy to that effect, that discretion always ought to be envisaged, circumscribed, and, if necessary, reviewed by reference to the obligation of result, which in casu is the transitioning State's effective return to EU legality, including compliance with EU values as condition for enjoying the benefits of membership. Institutions will otherwise end up contributing to entrenching regression, while failing to restore mutual trust, thus jeopardizing the EU functioning and credibility more generally.[126]

In sum, restoring a Member State's compliance with EU values and repairing its membership in the context of Transition 2.0 entails persuasive measures by the State authorities themselves to restore trust in their membership within the Union. But it equally requires cogent engagement by EU institutions too. Their involvement, by way of guidance and ultimate validation of the transition (e.g. by a Council decision under Article 7(4) TEU, a withdrawal of the initial reasoned opinion or decision of the Council establishing that there is no risk under Article 7(1), a termination of

125 https://medelnet.eu/rule-of-law-lawsuit-against-the-polish-recovery-and-resilience-plan/. Further Laurent Pech, 'Covering Up and Rewarding the Destruction of the Rule of Law One Milestone at a Time', Verfassungsblog, 21.06.2022, https://verfassungsblog.de/covering-up-and-rewarding-the-destruction-of-the-rule-of-law-one-milestone-at-a-time/.

126 The EU also has a responsibility vis-à-vis the wider world to restore a Member State's compliance with EU law in general and EU values in particular, and chiefly vis-à-vis partners with which the EU has elaborate agreements, e.g. including mutual recognition mechanisms. These agreements require that the domestic systems of the parties are trustworthy in terms of observing e.g. the rule of law; see Hillion (n. 31).

the penalty payments,[127] the lifting of conditionality measures), is indeed governed by EU law and determined by specific objectives, chiefly to defend EU values. It thus needs to be both lawful and credible. In this context, Member States' courts have a central role to play: both in the transitioning State to restore and preserve constitutional democracy and the rule of law, and in other Member States ultimately to validate the transition.[128] The resumed functioning of the EU legal order depends on their trust in the veracity of the renewed compliance with the common values underpinning the EU legal order.[129]

V. Conclusion

Writing about Poland's march for Democracy of 4th June 2023, the Editor of Gazeta Wyborcza underscored that '[t]his march will be a great success for a democratic Poland. It will be the beginning of a long march back to Europe, to the traditions and values we chose to embrace on June 4th, 1989!'[130]

Insofar as it involves an EU Member State, that 'long march back to Europe', which is what Transition 2.0 is all about, cannot be left to the transitioning State to walk alone. EU institutions and other Member States ought to join to help give direction to that march and bring it to the finish line. In this exercise, they ought to follow the values of Article 2 TEU, and all the agreed conditions of membership as a common constitutional compass, for they encapsulate the 'traditions and values embrace[d] on June 4th, 1989'.

127 Meeting some of the requirements of the Courts' infringement rulings may lead to a Court's decision to reduce penalties. See in this sense ECJ, *Poland v Commission*, order of the vice-President of the Court of 21 April 2023, case no. C-204/21R.RAP, ECLI:EU:C:2023:334.

128 Further on this role, see the chapter by Michal Bobek in this volume.

129 The same partly goes for third states' authorities.

130 Editorial, 'On June 4th, Poland is Marching for Democracy!', Gazeta Wyborcza, 2 June 2023, https://wyborcza.pl/7,173236,29830243,on-june-4th-poland-is-marching-for-democracy-editorial.html.