

Comment

The Justiciability of Article 2 TEU and Domestic Constitutional Autonomy

I. Taking Stock: Case Law on the Rule of Law

730

II. Can the Case Law on the Values Clause Extend Beyond Safeguarding the Rule of Law? 733

This comment focuses on the values clause in Art. 2 of the Treaty on European Union (TEU) and the pertinent case law of the Court of Justice of the European Union (CJEU).

What is the sum and substance of Art. 2 TEU? This Article sets out the fundamental values that are integral to democratic society and declares them to be the foundation of the European Union (EU). It constitutes a legally binding commitment to the idea of a system of values and has a systematic link with the EU's Charter of Fundamental Rights.¹ It is equally addressed to the EU and its Member States and provides a legal structure for homogeneity as an organising principle.² By homogeneity, I mean the equivalence or likeness, as opposed to the uniformity, of certain legal principles that are characteristic of a liberal constitutional order. Art. 2 TEU defines a consensus among the Member States on their core values which is a requirement for integration and a safeguard for the Union's legitimacy. Art. 2 TEU thus contains the substantive content for building a European identity and is intended to ensure the ability of the Union to function properly.³

I will first address the CJEU's case law on the rule of law, which is the starting point for the case law on the values clause. I will then turn to the CJEU's recent decision in the infringement case against Hungary, where the Court employed a more far-reaching approach to values than it had done

¹ See also Christian Calliess 'Art. 2 EUV' in: Christian Callies and Matthias Ruffert (eds), *EUV/AEUV – Das Verfassungsrecht der Europäischen Union mit Europäischer Grundrechtecharta* (6th edn, C. H. Beck 2022), para. 28.

² See Winfried Kluth, 'Die Mitgliedstaaten der Europäischen Union als Gestalter und Adressaten des Integrationsprozesses: Grundlagen und Problemaufriss' in: Winfried Kluth (ed.), *Europäische Integration und nationales Verfassungsrecht* (1st edn. Nomos 2007), 9-29 (22); Meinhard Hilf and Frank Schorkopf, 'Art. 2 EUV' in: Eberhard Grabitz, Meinhard Hilf and Martin Nettesheim (eds), *Das Recht der Europäischen Union* (87th supplemental delivery, C. H. Beck 2026), para. 18.

³ See Hilf and Schorkopf (n. 2), paras 8-10.

before, by incorporating other values of Art. 2 TEU as a yardstick for national legislation.

I. Taking Stock: Case Law on the Rule of Law

By activating Art. 19 in conjunction with Art. 2 TEU and Art. 47 of the Charter,⁴ the CJEU has developed an instrument which allows it to review the independence and impartiality of the courts in the Member States, and thereby also the protection of the EU legal order – that is, a review of the consistent implementation of EU law in the Member States through recourse to the national courts as EU courts. However, it must be emphasised that the CJEU restricts its review to whether the minimum standards required by the rule of law have been met;⁵ in addition, the CJEU always assesses the challenged rule in its general context.⁶ For the most part, it is only through an overall assessment of the often complex interplay of various national laws that a lasting danger to the rule of law can be identified.

Therefore, in its jurisprudence on the rule of law as it applies to the judiciary, the CJEU has found a way out of what has been described in academic writing as the Copenhagen dilemma. This dilemma refers to the perceived inability of EU institutions to guarantee the preservation of the very values – and here specifically, judicial independence – that are essential to the existence of the EU.⁷ The parallels to the well-known Böckenförde dictum (that is, ‘The liberal secular state is built on conditions that it cannot

⁴ See, e.g. ECJ, *Associação Sindical dos Juizes Portugueses v. Tribunal de Contas*, judgement of 27 February 2018, case no. 64/16, ECLI:EU:C:2018:117, paras 29-52; ECJ, *European Commission v. Republic of Poland* (Independence of the Supreme Court), judgement of 24 June 2019, case no. 619/18, ECLI:EU:C:2019:531, paras 47-59; ECJ, *Repubblika v. II-Prim Ministru*, judgement of 20 April 2021, case no. 896/19, ECLI:EU:C:2021:311, paras 62-73.

⁵ See, e.g. ECJ, *PPU Minister for Justice and Equality* (Deficiencies in the System of Justice), judgement of 25 July 2018, case no. 216/18, ECLI:EU:C:2018:586, paras 37, 68 et seq.; ECJ, *Repubblika* (n. 4), paras 56 et seq.; ECJ, *Asociația ‘Forumul Judecătorilor Din România’* (Associations of Judges), judgement of 8 May 2024, case no. 53/23, ECLI:EU:C:2024:388, para. 36.

⁶ See, e.g. ECJ, *European Commission* (n. 4), paras 78 et seq.; ECJ, *A.K. and Others* (Independence of the Disciplinary Chamber of the Supreme Court), judgement of 19 November 2019, case nos 585/18, 624/18 and 625/18, EU:C:2019:982, para. 136 et seq.; ECJ, *Repubblika* (n. 4), paras 56 et seq., 66, 72.

⁷ See, e.g. Julian Scholtes, ‘Constitutionalising the End of History? Pitfalls of a Non-Regression Principle for Article 2 TEU’, *EuConst* 19 (2023), 59-87 (60); Oliver Mader, ‘Wege aus der Rechtsstaatsmisere: der neue EU-Verfassungsgrundsatz des Rückschrittsverbots und seine Bedeutung für die Wertedurchsetzung’, *EuZW* 32 (2021), 974-978 (975).

itself guarantee')⁸ are clear. The Copenhagen dilemma is that the EU, bound by the principle of conferral, does not have any competences regarding the design of the national judiciaries.⁹ However, this does not mean that the EU must idly stand by and watch the rule of law being undermined in its Member States. The president of the German Constitutional Court, Stephan Harbarth, has therefore described the Copenhagen dilemma as a 'false dilemma' in light of the European Court of Justice's case law on the rule of law.¹⁰

The CJEU's case law on the rule of law encompasses the judiciary as a whole. The CJEU views Art. 19(1) subpara. 2 TEU as being affected not only when a Member State court interprets and applies EU law, but also when a national court's jurisdiction potentially involves the interpretation and application of EU law.¹¹ Given the level of European integration, one would struggle to find a Member State court that is not in some way potentially concerned with EU law. This broad view of Art. 19 TEU is persuasive since it is hardly imaginable and almost schizophrenic that a court could be structurally independent in interpreting and applying EU law while not being independent when it interprets laws outside of the EU context. In other words, an independent judiciary is a structural characteristic which must be guaranteed for all Member State courts.

As previously mentioned, the CJEU addresses the potential dangers of overextending this case law by taking a restrained approach, in order to minimise the interference with the national competence to organise the judiciary. It has adopted a comprehensive approach which assesses the national justice system in its entirety and implies an openness towards Member State traditions within the meaning of Art. 4(2) first sentence TEU, as long as these traditions do not endanger judicial independence.¹² Accordingly, the CJEU has not developed a uniform and formal EU-wide definition

⁸ Ernst-Wolfgang Böckenförde, 'Die Entstehung des Staates als Vorgang der Säkularisation' in: Ebracher Studien, *Säkularisation und Utopie – Ernst Forsthoff zum 65. Geburtstag* (W. Kohlhammer 1967), 75-94 (93).

⁹ See, e.g. Scholtes (n. 7), 60; Mader (n. 7), 975.

¹⁰ Stephan Harbarth and Christoph Spielmann, 'Grundlagen und Grenzen der unionsrechtlichen Kontrolle der richterlichen Unabhängigkeit in den Mitgliedstaaten', DVBl 138 (2023), 1177-1185 (1177, 1185).

¹¹ See, e.g. ECJ, *Associação Sindical* (n. 4), paras 29 and 40; ECJ, *European Commission v. Republic of Poland* (Independence of Ordinary Courts), judgement of 5 November 2019, case no. 192/18, ECLI:EU:C:2019:924, para. 104; ECJ, *Asociația 'Forumul Judecătorilor din România' and Others v. Inspecția Judiciară and Others*, judgement of 18 May 2021, case nos 83/19, 127/19, 195/19, 291/19, 355/19 and 397/19, ECLI:EU:2021:393, paras 191 et seq.

¹² See, e.g. ECJ, *A. K. and Others* (n. 6), paras 152 et seq.; ECJ, ECJ, *Repubblica* (n. 4), paras 48, 53 et seq.

of the rule of law; rather, by making reference to other sources such as the Venice Commission,¹³ it has identified certain ‘red lines’ which negatively define the limits for the rule of law, to borrow a term from Armin von Bogdandy.¹⁴

Indeed, the CJEU must ensure that the line between the legislative competence to organise the judiciary – which remains with the Member States – and the Court’s powers of judicial review, does not become blurred through increasingly stringent standards of judicial review so as to avoid a ‘competence creep’¹⁵ – in other words, the EU may not de facto assume the role of the designer of the national judicial systems through the back door.

The CJEU’s case law on the rule of law and, specifically, on judicial independence has been largely consolidated and – despite much initial criticism – can now be considered widely accepted.¹⁶ Time will tell if the broader erosion of the rule of law and the growing trend towards authoritarian and illiberal tendencies in many places, which have also gained ground in the EU,¹⁷ can be countered in the long term. What is certain is that such case law is just one instrument among many others, particularly policy measures, in the battle against the erosion of the rule of law in the Member States. Nonetheless, it can at least slow down problematic developments and bolster opposition. It would not be an overstatement to say that the EU’s measures, including financial measures to protect the EU budget, contributed to the

¹³ See, e.g. ECJ, *European Commission* (n. 4), para. 82.

¹⁴ Armin von Bogdandy, *Tyranny of the Values? Problems and Ways of European Protection of National Rechtsstaatlichkeit* (January 17, 2019), Max Planck Institute for Comparative Public Law & International Law (MPIL) Research Paper No. 2019-04, available at SSRN: <https://ssrn.com/abstract=3317539>.

¹⁵ See, Stephen Weatherill, ‘Competence Creep and Competence Control’, *YBEL* 23 (2004), Issue 1, 1-55 (5-9); Sacha Prechal, ‘Competence Creep and General Principles of Law’, *Review of European and Administrative Law* 3 (2010), 5-22 (5-6).

¹⁶ See, e.g. Daniel Sarmiento, ‘Interim Revolutions’, *Verfassungsblog*, 22 October 2018, doi: 10.17176/20181026-145427-0; Koen Lenaerts, ‘New Horizons for the Rule of Law Within the EU’, *GLJ* 21 (2020), 29-34 (34).

¹⁷ See also Laurent Pech and Kim Lane Scheppele, ‘Illiberalism Within: Rule of Law Backsliding in the EU’, *Cambridge Yearbook of European Legal Studies* 19 (2017), 3-47 (5-9); Laurent Pech and Dimitry V. Kochenov, ‘Strengthening the Rule of Law Within the European Union: Diagnoses, Recommendations, and What to Avoid’, *RECONNECT Policy Brief* No. 1, 2019, 1-2; Werner Schroeder, ‘The Rule of Law as a Value in the Sense of Article 2 TEU: What Does It Mean and Imply’ in: Armin von Bogdandy, Piotr Bogdanowicz, Iris Canor, Christoph Grabenwarter, Maciej Taborowski and Matthias Schmidt (eds), *Defending Checks and Balances in EU Member States* (Springer 2021), 105-126 (106); Rainer Hofmann and Alexander Heger, ‘Zur Zukunft der Europäischen Union als Werteunion’, *EuGRZ* 49 (2022), 361-378 (361-362).

outcome of the elections in Hungary that we witnessed just a few months ago.

II. Can the Case Law on the Values Clause Extend Beyond Safeguarding the Rule of Law?

Firstly, the rule of law is not a value like any other of the Art. 2-values. It is intrinsically linked to the functioning of the EU and its autonomy.¹⁸ In this regard, the CJEU's recourse to this value in conjunction with Art. 19 TEU and Art. 47 of the Charter is well-founded in terms of legal doctrine.

Conversely, recourse to other values in Art. 2 TEU, such as democracy and respect for human rights, and their invocation as justiciable standards is viewed more critically.¹⁹ There are, of course, those who wish to treat the value of democracy in Art. 2, read in conjunction with Art. 10 TEU (which establishes the two-fold democratic legitimacy of the European Union through the European Parliament and the national democratic institutions), in the same way as the value of the rule of law, as both constitute a structural requirement for the legitimacy of the exercise of sovereign power by the Union as a whole. In substance, the focus should be solely on fundamental and systemic breaches of the democratic principle which undermine its very core.²⁰ One example mentioned in that regard is a situation where the political process in a Member State no longer allows for a democratic transfer of power through free and fair elections.²¹

The debate on the nature of the EU as a union of values reflects the contrast between so-called pro-integration positions and more sceptical positions, which ultimately pertains to the questions of how to reconcile the goal of European integration and safeguard its foundations while still respecting national identities. While one side views judicial enforcement of EU values as having the potential to realise an 'EU of values' in the truest

¹⁸ See, e.g. Schroeder (n. 17), 112; General Court, *Yanukovych v. Council*, judgement of 15 September 2016, case no. 348/14, ECLI:EU:T:2016:508, para. 98. On the link between autonomy and values, see Charlotte Langenfeld, *Die Autonomie des Unionsrechts in der EuGH-Rechtsprechung* (Mohr Siebeck 2024), 336-340.

¹⁹ See Frank Schorkopf, 'Der Wertekonstitutionalismus der Europäischen Union', JZ 75 (2020), 477-485 (483-485); Christoph Möllers and Linda Schneider, *Demokratiesicherung in der Europäischen Union* (Mohr Siebeck 2018), 124-128.

²⁰ See Mehrdad Payandeh, 'Demokratiesicherung im europäischen Legitimationsverbund', EuZW 37 (2026), 517-522 with further references.

²¹ Payandeh (n. 20), 521.

sense,²² the other side finds judicial protection of values through the CJEU problematic because this would, in their view, replace the Member States' beliefs and convictions with those of the CJEU which could weaken national identity.²³

However, is this truly the case, given the fact that Art. 2 TEU, when correctly understood, reflects the minimum of common values which makes up the character of the European Union as a union of liberal democracies devoted to the rule of law? The relevant case law of the CJEU shows that the danger of overextending judicial review and interfering with the constitutional autonomy of the Member States can be avoided by applying a restrictive approach.²⁴ In sum, not only must Art. 2 TEU be considered legally binding but there is also much to support the justiciability of Art. 2 TEU, insofar as the scope of application of EU law is touched upon through other provisions of European Union law. Otherwise, the scope of application of EU law, which is defined by the treaties as well as Art. 51(1) of the Charter, would be exceeded.

Art. 2 TEU characterises the EU and is a prerequisite for the functioning of the EU legal order. It is essential for European integration that the Member States align their respective constitutional orders with the values in Art. 2 TEU.²⁵ In that respect, imagine a scenario in which the EU was increasingly dominated by illiberal democracies and authoritarian regimes. In such a Union, one wonders how the mutual trust that is essential for the functioning of both the single market and the area of freedom, security, and

²² See, e.g. Dimitry Kochenov 'The Acquis and Its Principles' in: András Jakab and Dimitry Kochenov (eds), *The Enforcement of EU Law and Values: Methods to Achieve Compliance* (Oxford University Press 2017), 9-27 (26-27); 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 University Press 2016), 15-35 (22, 35); Jürgen Bast and Armin von Bogdandy, 'Grundlagenteil und Verfassungskern der EU-Verträge', JZ 79 (2024), 115-125 (122, 124); Shu-Peng Hwang, 'Judikativer Werteschutz in der Europäischen Union: Eine verfassungsvergleichende Perspektive', EuR 59 (2024), 240-268 (261-265).

²³ See, e.g. Martin Nettesheim, 'European "Frankenstein Constitutionalism": TEU Article 2 as a Federal Homogeneity Clause', AJIL Unbound 118 (2024), 167-171 (170-171); Martin Nettesheim, 'Die Werte der Union: Legitimitätsstiftung, Einheitsbildung, Förderalisierung', EuR 57 (2022), 525-546 (544-546); Bernd Martenczuk, 'Art. 7 EUV und der Rechtsstaatsrahmen als Instrument der Wahrung der Grundwerte der Union' in: Stefan Kadelbach (ed.), *Verfassungskrisen in der Europäischen Union* (1st edn, Nomos 2018), 41-60 (45 et seq.); Oliver Mader, 'Enforcement of EU Values as a Political Endeavour: Constitutional Pluralism and Value Homogeneity in Times of Persistent Challenges to the Rule of Law', Hague Journal on the Rule of Law 11 (2019), 133-170 (140).

²⁴ See, e.g. ECJ, *PPU* (n. 5), paras 37, 68 et seq.; ECJ, ECJ, *Repubblika* (n. 4), paras 56 et seq.; ECJ, *Asociatia* (n. 5), para. 36.

²⁵ See, e.g. Schroeder (n. 17), 112; General Court, *Yanukovych* (n. 18), para. 98.

justice could continue to exist. Moreover, how could such an EU effectively face the challenges of the future, such as those in the fields of defence and security, which can only be addressed through joint efforts and cooperation? Whether we call it a ‘union of values’ or a ‘union based on the rule of law’, a European Union which seeks to ensure peace and prosperity now and in the future, and which seeks to assert itself on a world stage that is increasingly controlled by authoritarian actors and the unchecked exercise of power, requires common beliefs, which are laid down in Art. 2 TEU. A Europe that is divided and made up of populist states whose authoritarian governments are intent on maintaining and expanding their power will destroy the European project.

The inherent foundations of the union laid down in Art. 2 have a constitutional counterpart in Art. 23 paragraph 1 of the German Basic Law.²⁶ An EU which no longer fulfils the basic prerequisites for the exercise of public authority laid down in this provision is one in which Germany could no longer participate.

Secondly, the question to what extent Art. 2 TEU is justiciable as a self-standing provision, apart from the value of the rule of law, became relevant in the infringement proceeding against Hungary regarding the rights of members of the LGBTI+ community in the areas of media and education.²⁷ However, the question of whether Art. 2 TEU might apply autonomously, i.e. outside the scope of EU law, was not initially raised. During the proceedings, the Commission’s argument was in essence that the Hungarian legislation was discriminatory and disproportionate and violated the relevant directives, the freedom to provide services and the Charter and because of the extraordinary and severe character of those violations also violated the values in Art. 2 TEU.²⁸ In its judgment of 21 April 2026, the CJEU upheld the Commission’s actions on all counts and, for the first time, found a separate violation of Art. 2 TEU dismissing Hungary’s invocation of national identity under Art. 4 (2) TEU.²⁹

Against this background, the question arises which are the boundaries of the judicial protection of values. The Hungary judgment is not very clear in this respect, perhaps because the severity of the violation of EU law was

²⁶ See Robert Uerpmann-Witzack, ‘Art. 23 GG’ in: Ingo von Münch and Philip Kunig (eds), *Grundgesetz* (8th edn, C.H. Beck 2025), para. 20; Ferdinand Wollenschläger, ‘Art. 23 GG’ in: Horst Dreier (ed.), *Grundgesetz-Kommentar* (3rd edn, Mohr Siebeck 2015), para. 62.

²⁷ ECJ, *Commission v. Hungary* (Values of the European Union), judgement of 21 April 2026, case no. 769/22, ECLI:EU:C:2026:326.

²⁸ See, ECJ, *Commission v. Hungary* (n. 27), in particular paras 83, 93, 95, 106, 207–212, 312–320, 353–361, 377–384, 417–418, 475–481, 494–512, 565–574.

²⁹ See ECJ, *Commission v. Hungary* (n. 27), paras 544–564.

more than obvious. Hence, the Court did not need to explore the substantive content of Art. 2 TEU as a standard for judicial review more deeply. I will come back to this point at the end of my intervention.

The aforementioned link between the values of Art. 2 TEU and the existence and functioning of the EU as a common market and a common area of freedom, security, and justice means that Art. 2 TEU can only be invoked in infringement or preliminary ruling proceedings, when the matter involves a potential breach by a Member State of a specific EU obligation deriving from other provisions of the Treaty or from secondary law. Art. 2 TEU cannot be invoked on a free-standing or autonomous basis without such a clear nexus. Any other interpretation would entail the risk of granting the CJEU a general authority to supervise the Member States and their constitutions. This would put into question the constitutional autonomy as protected by Art. 4 para 2 TEU and thus endanger the further acceptance of the European integration project as a whole. Moreover, this would ultimately eliminate the limitations to the scope of application of the Charter established in Art. 51(1) of the Charter, because Art. 2 TEU also includes respect for fundamental rights as one of the values stated therein. However, the CJEU may only adjudicate questions on fundamental rights protection in the EU within the scope of application of the Charter.

Such a restriction on the CJEU's recourse to Art. 2 TEU as a standard of judicial review must be distinguished from the binding legal effect of Art. 2 TEU in the context of proceedings pursuant to Art. 7 TEU, which explicitly refers to Art. 2 TEU and which can also extend to matters beyond the agenda of European integration programme, i. e. beyond the explicit competences attributed to the European Union by the treaty. It has been the intention of the contracting Member States to create a proceeding with the purpose to review general compliance with fundamental values after the accession of a Member State.³⁰ Consequently, the legally binding effect of Art. 2 TEU and the judicial review of its contents by the Luxembourg Court are two distinct questions.

This seems to correspond to the line taken by the CJEU in the *Hungary* case, where the Court for the first time found a violation of Art. 2 TEU.³¹ Even if the Court's reasoning in this regard could appear open to interpretation, one can nonetheless discern that the CJEU did observe all of the prerequisites that should apply for invoking Art. 2 TEU in a restrictive manner. First, the CJEU found that there were violations of the freedom to

³⁰ See ECJ, *Hungary v. Parliament and Council*, judgement of 16 February 2022, case no. 156/21, ECLI:EU:C:2022:97, paras 164 ff.; ECJ, *Poland v. Parliament and Council*, judgement of 16 February 2022, case no. 157/21, ECLI:EU:C:2022:98, paras 206 ff.

³¹ See ECJ, *Commission v. Hungary* (n. 27), paras 544-564.

provide services and the Charter.³² The CJEU then – at the end of the judgment – began its review of the violation of Art. 2 TEU by stating:

‘As a preliminary point, it must be borne in mind that, in addition to the infringements of EU law found in paragraphs 163, 204, 235, 311 and 416 of the present judgment [referring to violations of the relevant secondary law], Hungary has, by adopting the amending law, also acted in breach of Articles 1, 7, 11 and 21 of the Charter [referring to the freedom to provide services]. The Court therefore must assess whether all of these infringements may give rise to an infringement of Art. 2 TEU.’³³

In the following, the CJEU also made an explicit reference to the limits of the scope of application of EU law, including in Art. 51 (1) of the Charter, which must not be rendered ineffective by an application of Art. 2 TEU.³⁴ It can be inferred from these statements that the CJEU has only invoked Art. 2 TEU as a justiciable standard of review in conjunction with other infringements of EU primary and secondary law. This interpretation of the European Court of Justice’s (ECJ’s) judgment in the *Hungary* case is confirmed by a Chamber judgment of 21 May 2026, in which the Court rejected the isolated application of Article 2 TEU with reference to Article 51(1) of the Charter whilst expressly citing the *Hungary* judgment.³⁵

Thirdly, let me conclude with some remarks on the substantive boundaries for the justiciability of Art. 2 TEU. Substantively, Art. 2 TEU establishes minimum standards derived from core values which – as expressed by the second sentence of Art. 2 TEU – are shared by the EU and its Member States as liberal democracies and pluralist societies. However, Art. 2 TEU must not be used as a general clause in order to progressively transform national societies under the ultimate control of Luxemburg and the European Commission. Not every infringement of the Charter is an infringement of the values in Art. 2 TEU. To qualify for an infringement of these values, its character must be such as to call into question the core common values; an infringement which demonstrates a fundamental disregard or, in the words of Advocate General Ćapeta, a ‘negation’ of these values.³⁶ The CJEU confirmed that such an infringement had occurred in the case of Hungary because the goal of the disputed Hungarian legislation was the marginalisation and stigmatisation of persons whose sexual identity was not that of the majority.³⁷

³² See ECJ, *Commission v. Hungary* (n. 27), paras 311–352, 416–493.

³³ ECJ, *Commission v. Hungary* (n. 27), paras 544–545.

³⁴ See ECJ, *Commission v. Hungary* (n. 27), paras 550–551.

³⁵ See ECJ, *Orbán v. 24.hu Szerkesztősége*, judgement of 21 May 2026, case no. 843/24, ECLI:EU:C:2026:426, para. 30.

³⁶ Opinion of Advocate General Ćapeta, delivered on 5 June 2025, *European Commission v. Hungary*, case no. 769/22, ECLI:EU:C2025:408, paras 237–247.

³⁷ See ECJ, *Commission v. Hungary* (n. 27), paras 551–556.

Ultimately, Art. 2 TEU should therefore only extend to a limited core of fundamental rights protected by the Charter where first, there is a more or less fixed consensus among the Member States as to their content and secondly, which form the identity of the EU as a community of democracies under the rule of law. It goes with this, that the finding of an Art. 2 TEU infringement requires a severe breach – a violation of the so-called red lines mentioned above. This restrained understanding of Art. 2 TEU as a standard of judicial review is in line with the systematic relationship between Art. 2 and Art. 7 and Art. 49 TEU, which describe the basic requirements for membership in the EU. This view seems to be shared by the CJEU in the judgment against Hungary, where it states:

‘Only manifest and particularly serious breaches of one or more values common to the Member States may give rise to a finding, in the context of an action for failure to fulfil obligations, that there has been a failure by a Member State to fulfil legally binding obligations under Article 2 TEU, such breaches being incompatible with the very identity of the Union as a common legal order of a society in which pluralism prevails.’³⁸

Here, the respect for the constitutional identities of the Member States as guaranteed by Art. 4 (2) TEU, finds its limits. In essence, this concerns the development of a positive sense of identity from the perspective of constitutional pluralism. Whether this concept will prevail is an open question. The case law on fundamental values alone is not sufficient; rather, this is precisely where politics comes into play. The effective protection of values as a foundation for the European project requires a variety of different approaches and tools: Policy-based, financial, et cetera. Ultimately, however, the existence and further development of the EU will depend on a critical mass of states not pulling in the opposite direction. Above all, the EU as we know it depends on the will of its citizens. In Hungary, this will has asserted itself with great force after decades of moving in the opposite direction. That is indeed a cause for hope.

Christine Langenfeld*

³⁸ ECJ, *Commission v. Hungary* (n. 27), para. 551.

* The author holds a chair for public law at the law faculty of the Georg-August-Universität Göttingen, Göttingen, Germany, <enomiko@gwdg.de>. Since July 2016 she serves as a Justice of the German Federal Constitutional Court.

This comment was prepared for the Constitutional Forum in Milan (3th-4th June 2026), organised by Armin von Bodgandy, Max Planck Institute for Comparative Public Law & International Law (MPIL) and Marta Cartabia, former president of the Italian Constitutional Court. The oral form has been maintained.