

REARRANGING THE PUZZLE: HOW TREATY CHANGE CAN STRENGTHEN THE PROTECTION OF EU VALUES

Inken Böttge*

Abstract: This paper strives to answer the research question of whether Treaty change is necessary to build stronger mechanisms of EU values protection. It analyses the current toolkit of available values protection mechanisms, demonstrates that those mechanisms have not proven to be very effective, and concludes that the EU is ill equipped to find convincing responses. Following on from this, it reflects on the key proposals made in the academic and institutional debate to improve the current values protection framework. Nevertheless, the paper concludes that these proposals merely represent individual puzzle pieces unlikely to change the course of backsliding if taken in isolation and not providing for a comprehensive and concerted strategy. The paper therefore opts for a broader perspective, relying on the idea of reconceptualising the framework of EU values protection pursuing the path of Treaty change. This path rests on three different dimensions: structural, institutional, and substantive reforms.

Keywords: EU values, constitutional crises, EU values protection toolkit, Treaty change, Conference on the Future of Europe.

1 Introduction

Article 2 TEU asserts that the European Union (EU) is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law, and respect for human rights, including the rights of persons belonging to minorities, and declares that ‘these values are common to the Member States’. Beyond that, numerous references to the fundamental values elsewhere in the Treaties demonstrate the constitutional significance of EU values and their position at the very apex of the EU legal order.¹ More recently, also the Court of Justice of the European Union (CJEU) has clarified the constitutional relevance of Article 2 TEU by holding that the values enshrined therein ‘define the very identity of the European Union as a common legal order’.² In other words, the constitutional relevance of the values referred to in Article 2 TEU lies in its foundational nature establishing the fundamental pillars and aspirations

* dipl iur (University of Bayreuth), LLM (Maastricht University), legal research assistant at an international law firm in Berlin. DOI: 10.3935/cyelp.19.2023.536.

¹ See Articles 3(1), 3(5), 6(1), 7, 8, 13(1), 21 and 49 TEU.

² Case C-156/21 *Hungary v European Parliament and Council* ECLI:EU:C:2022:97, para 127; Case C-157/21 *Poland v European Parliament and Council* ECLI:EU:C:2022:98, para 145.

of the EU as a common legal order.

However, democratic and rule of law backsliding within the EU,³ challenges to primacy,⁴ as well as other national threats to EU values, demonstrate that not all Member States are able and willing to uphold the high prerequisites of Article 2 TEU. For more than a decade now, the EU has faced systemic threats to its fundamental values in its own Member States, most prominently Poland and Hungary.⁵

In all these cases, EU institutions intervened by continuously using available mechanisms or creating new instruments aimed at strengthening the existing toolkit. However, the results have been rather unsuccessful, and, until today, the EU is still struggling to find adequate responses to bring recalcitrant States back in line with its core values.

While these concerns are mounting, *inter alia*, among EU institutions, this sentiment of upholding EU values has also reached the Conference on the Future of Europe. The Conference was a citizen-led series of debates set up by EU institutions that ran from April 2021 to May 2022 enabling citizens to share their ideas and help shape the future of Europe.⁶ On 9 May 2022, the Conference finally adopted its conclusions and made 49 proposals to the Presidents of the European Parliament, the Council, and the Commission.⁷ In this context, Proposal No 25 explicitly addresses the rule of law, democratic values, and European identity by aiming at systematically upholding the rule of law across all Member States. The results of the Conference eventually cumulated in the adoption of a European Parliament resolution in June 2022 calling for a revision of the EU Treaties as ‘several of the Conference proposals require amendments to the Treaties’.⁸

Against this backdrop, given the report of the Conference, the European Parliament resolution, as well as the on-going crisis on EU values, one core question in particular is to be raised: *Is Treaty change necessary to build stronger mechanisms of EU values protection?* This also emerges as the main research question to be examined in this paper.

³ See Laurent Pech and Kim Lane Scheppele, ‘Illiberalism Within: Rule of Law Backsliding in the EU’ (2017) 19 Cambridge Yearbook of European Legal Studies 5.

⁴ See Beatrice Monciunskaitė and Niels Kirst, ‘The Rule of Law Crisis and the Supremacy of EU Law’ (*Bridge Network*, 30 June 2022) <<https://bridgenetwork.eu/2022/06/30/the-rule-of-law-crisis-supremacy-eu-law/>> accessed 23 January 2023.

⁵ Thomas Conzelmann, ‘Peer Reviewing the Rule of Law? A New Mechanism to Safeguard EU Values’ (2022) 7(2) *European Papers* 678.

⁶ Council of the European Union and the European Council, ‘Conference on the Future of Europe’ <www.consilium.europa.eu/en/policies/conference-on-the-future-of-europe/> accessed 23 January 2023.

⁷ Conference on the Future of Europe, ‘Report on the Final Outcome’ (2022), <www.europarl.europa.eu/resources/library/media/20220509RES29121/20220509RES29121.pdf> accessed 4 November 2022.

⁸ European Parliament, ‘Resolution of 9 June 2022 on the call for a Convention for the revision of the Treaties’ (2022/2705(RSP)) <www.europarl.europa.eu/doceo/document/TA-9-2022-0244_EN.pdf> accessed 4 November 2022.

Hereafter, Section 2 provides an analysis of the current EU toolkit, focusing on the main mechanisms available to protect EU values. Based on concrete instances, this section addresses the Union's struggle to protect its fundamental values by reflecting on how the various instruments have been used and why they have or have not been adequate mechanisms for the protection of EU values. Following on from this, Section 3 examines potential measures to strengthen the procedure to protect EU values. As evidenced by the variety of contributions in academic and institutional debate, a great deal has already been proposed in this context. Section 3 therefore reflects on the key proposals, although without being exhaustive, and eventually shows that the proposed options do not provide for a concerted and comprehensive strategy of EU values protection either. Based on these findings, Section 4 offers a different stance by taking a broader perspective, relying on the idea of reconceptualising the framework of EU values protection pursuing Treaty change. This path rests on three different dimensions: structural, institutional, and substantive reforms. Firstly, the dimension of structural reforms is based on the idea of re-striking an adequate constitutional balance between Member States' sovereignty and supranational competences held at EU level. This aims to forcefully equip the EU with values protection competences that correspond to the constitutional relevance of Article 2 TEU. Secondly, the dimension of institutional reforms seeks to pave the way for a comprehensive and concerted response architecture that aims at clarifying the primary responsibilities of relevant actors and establishing legal obligations determining when those actors are required to act. Lastly, the dimension of substantive reforms complements the comprehensive strategy by proposing the creation of a *Charter of EU Fundamental Values* that could serve as a universal framework of EU fundamental values to clearly define and articulate their content.

Nevertheless, it should be anticipated here that there is no 'silver bullet', ie no comprehensive 'solution' to the current problem.⁹ It is multifaceted, as are the necessary responses to it, comprising, *inter alia*, legal, political, cultural, social, and economic means.

2 Overview of EU values protection mechanisms and the EU's struggle to safeguard those values

Before engaging with potential improvements, it is necessary to look at the existing toolkit of available EU values protection mechanisms. Most notably, they comprise a variety of tools all differing in their legal nature (political, judicial, financial and both hard law and soft law) and each to be applied by different institutional actors. This section, by channelling

⁹ Matteo Bonelli and others, 'Usual and Unusual Suspect in Protecting EU Values: An Introduction' (2022) 7(2) *European Papers* 641, 646; Matteo Bonelli, 'Infringement Actions 2.0: How to Protect EU Values before the Court of Justice' (2022) 18(1) *European Constitutional Law Review* 30, 45; Martina Di Gaetano and Matteo Bonelli, 'EU Democracy and the Rule of Law' (2021, June) 4th Jean Monnet NOVA EU Workshop, Policy Brief 11.

individual mechanisms into political, judicial, and financial tools, briefly describes the existing instruments, demonstrates how and why these tools have been used, and narrows down the reasons for the Union's struggle to bring recalcitrant Member States back in line with its fundamental values.

2.1 Political tools

In 1993, the Copenhagen Council established the 'political Copenhagen criteria' setting up the prerequisite for accession by demanding that any candidate state 'has achieved stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities'.¹⁰ Since then, it has become a condition for accession to the Union that is enshrined in the EU Treaties, namely Article 49 TEU. As a prerequisite for accession, candidate states must respect 'the values referred to in Article 2'. Nevertheless, referred to as the 'Copenhagen Dilemma', ie the EU's inability to uphold and enforce its fundamental values post-accession,¹¹ the pre-accession conditionality of Article 49 TEU did not manage to prevent constitutional backsliding.¹²

The most significant progress since 1993 has been the adoption of the EU Charter of Fundamental Rights (CFR) which was initially developed in 2000 and later established as a legally binding instrument of EU primary law through the Lisbon Treaty. In that regard, Member States were obliged to respect the values of Article 2 TEU when they implement EU law and they can face legal actions for non-compliance. However, there was a general recognition that adherence to Article 2 values should also be guaranteed when Member States act autonomously, ie outside the scope of EU law.¹³

Following on from this, eventually introduced in 1999 by the Amsterdam Treaty, Article 7 TEU endowed the EU with a horizontal protection mechanism applicable to *all* national measures irrespective of whether

¹⁰ European Council, Conclusions of the Presidency, Copenhagen 21-22 June 1993, SN 180/1/93 REV 1, 13.

¹¹ Mathieu Leloup, Dimitry Kochenov and Aleksejs Dimitrovs, 'Non-Regression: Opening the Door to Solving the "Copenhagen Dilemma"? All the Eyes on Case C-896/19 Repubblika v Il-Prim Ministru', RECONNECT Working Paper (Leuven) No 15, 2021, 3, 11; Viviane Reding, 'Safeguarding the Rule of Law and Solving the "Copenhagen Dilemma": Towards a New EU-Mechanism' (Speech, General Affairs Council, 22 April 2013) <http://cursdeguvernare.ro/wp-content/uploads/2013/04/SPEECH-13-348_EN1.pdf> accessed 30 January 2023; Kaarlo Tuori, 'From Copenhagen to Venice' in Carlos Closa and Dimitry Kochenov (eds), *Reinforcing Rule of Law Oversight in the European Union* (Cambridge University Press 2016) 225.

¹² Leloup, Kochenov and Dimitrovs (n 11) 17.

¹³ Bruno de Witte, 'Constitutional Challenges of the Enlargement: Is Further Enlargement Feasible without Constitutional Changes?' (2019) PE 608.872, <[https://www.europarl.europa.eu/RegData/etudes/IDAN/2019/608872/IPOL_IDA\(2019\)608872_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/IDAN/2019/608872/IPOL_IDA(2019)608872_EN.pdf)> accessed 24 January 2023, 14.

they fall inside or outside the scope of EU law.¹⁴ According to Article 7(1) TEU, on a reasoned proposal by one third of the Member States, by the European Parliament or by the European Commission, the Council, acting by a majority of four-fifths of its members after obtaining the consent of the European Parliament, may determine the existence of a *clear risk of a serious breach* of EU values by a Member State of the EU. Following the determination of such a breach, the procedure may, in a second step, result in a unanimous decision to suspend certain of the rights deriving from the application of the Treaties. This may include suspension of voting rights, limiting other political rights at EU level, or suspending payments from EU funds.¹⁵

Article 7 TEU was complemented in 2014 by a 'new EU Framework to strengthen the Rule of Law'¹⁶ (Rule of Law Framework) presented by the Commission. This instrument aimed at 'resolv[ing] future threats to the rule of law in Member States before the conditions for activating the mechanisms foreseen in Article 7 TEU would be met'.¹⁷ It provides for a three-step approach¹⁸ by mainly focusing on 'Rule of Law Opinions' and 'Rule of Law Recommendations' which may finally result in the possibility of activating the Article 7 TEU procedure.¹⁹ Being faced with constitutional backsliding, the European Commission formally activated the Rule of Law Framework for the first time against Poland in 2016.²⁰ Yet, going ahead with the undermining of the independence of the judiciary in Poland by constantly ignoring and dismissing all recommendations, this finally culminated in the Commission's activation of Article 7 TEU in 2017.²¹ Shortly afterwards, the European Parliament also formally

¹⁴ Commission, 'Communication from the Commission to the Council and the European Parliament on Article 7 on the Treaty on European Union. Respect for and promotion of the values on which the Union is based' COM (2003) 606 final, 5; Matteo Bonelli, 'From Sanctions to Prevention, and Now Back to Sanctions? Article 7 TEU and the Protection of the EU Founding Values', in Stefano Montaldo, Francesco Costamagna and Alberto Miglio (eds), *The Evolution of Sanctioning Powers* (Routledge 2021) 50; Christophe Hillion, 'Overseeing the Rule of Law in the EU: Legal Mandate and Means' in Carlos Closa and Dimitry Kochenov (eds), *Reinforcing Rule of Law Oversight in the European Union* (CUP 2016) 65 ff.

¹⁵ Tomas Dumbrovsky, 'Beyond Voting Rights Suspension: Tailored Sanctions as Democracy Catalyst under Article 7 TEU', EUI Working Papers RSCAS 2018/12, 15 ff; Bonelli (n 14) 51 ff.

¹⁶ Commission, 'A New EU Framework to strengthen the Rule of Law' COM (2014) 158 final.

¹⁷ *ibid* 6 ff.

¹⁸ *ibid* 7.

¹⁹ *ibid* 7 ff.

²⁰ Commission, 'Readout by First Vice-President Timmermans of the College Meeting of 13 January 2016' (2016), <https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_16_71> accessed 22 June 2023.

²¹ 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; Pech and Scheppele (n 3) 3.

opened the Article 7 TEU procedure, this time against Hungary.²² However, no formal decision has been adopted under Article 7(1) TEU so far, and the sanctioning mechanism under Article 7(2) and (3) TEU has also not been imposed until now.²³

Relying on the mere existence of Article 7 TEU as a sufficient deterrent²⁴ and referring to it as the ‘nuclear option’²⁵ eventually discouraged EU institutions from using the mechanism. Besides, recognising that Article 7 TEU requires unanimity which is unlikely to be achieved when two backsliding Member States back each other²⁶ already demonstrates its shortcomings. Conclusively, Article 7 TEU constitutes a ‘dead end’ in so far as the mechanism can be activated first, but its repressive consequences fail due to the high voting requirements.

In addition to the Article 7 TEU mechanisms, EU institutions have continuously come up with more and more soft-law mechanisms. This approach, however, has followed merely a ‘naming and shaming strategy’²⁷ by providing for further information and monitoring performances in specific areas, but not resulting in any real enforcement consequences.²⁸

²² 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 the European Union, the existence of a clear risk of a serious breach by Hungary of the values on which the Union is founded’ (P8_TA(2018)0340).

²³ *ibid.*

²⁴ Pech and Scheppele (n 3) 3.

²⁵ Pech and Scheppele (n 3) 2; 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 Academic 2017) 134; Dimitry Kochenov, ‘Busting the Myths Nuclear: A Commentary on Article 7 TEU’ (EUI Working Paper LAW 2017/10); Venetia Argyropoulou, ‘Enforcing Rule of Law in the EU’ (2019) *Harvard Journal of Human Rights*; Dimitry Kochenov and Laurent Pech, ‘Better Late than Never? On the Commission’s Rule of Law Framework and Its First Activation’ (2016) 54 *Journal of Common Market Studies* 1062, 1065.

²⁶ Kim Lane Scheppele, Dimitry Kochenov and Barbara Grabowska-Moroz, ‘EU Values Are Law, After All: Enforcing EU Values through Systemic Infringement Actions by the European Commission and the Member States of the European Union’ (2020) 39(1) *Yearbook of European Law* 3, 10; Steve Peers, ‘Can a Member State Be Expelled or Suspended from the EU? Updated Overview of Article 7 TEU’ (EU Law Analysis 2022), <<http://eulawanalysis.blogspot.com/2022/04/can-member-state-be-expelled-or.html>> accessed 30 January 2023; Gráinne de Búrca, ‘Poland and Hungary’s EU Membership: On Not Confronting Authoritarian Governments’ (2022) 20(1) *International Journal of Constitutional Law* 13, 23; Digidem Soyaltin-Colella, ‘The EU’s “Actions-without-sanctions”? The Politics of the Rule of Law Crisis in Many Europes’ (2022) 23(1) *European Politics and Society* 25, 34 affirming that Hungary and Poland back each other with their votes and fellow Member States show their support in opposing the activation of Article 7 TEU.

²⁷ Tore Vincents Olsen, ‘Why and How Should the European Union Defend Its Values?’ (2023) 29 *Res Publica*, 69, 81.

²⁸ Monica Claes and Matteo Bonelli, ‘The Rule of Law and the Constitutionalisation of the European Union’ in Werner Schroeder (ed), *Strengthening the Rule of Law in Europe: From a Common Concept to Mechanisms of Implementation* (Hart Publishing, Modern Studies in European Law 2016) 281.

The 'EU Justice Scoreboard' launched in 2013 by the Commission allows for rating the independence and efficiency of national justice systems on an annual basis²⁹ and is linked to the 'European Semester' introduced in 2010³⁰ which provides for the adoption of country-specific recommendations (CSRs), *inter alia* connected to rule-of-law-related issues.³¹ The 2014 Rule of Law Framework was met with criticism by the Council,³² leading to its own initiative – the 'Rule of Law Dialogue'.³³ This instrument provides for an annual dialogue between all Member States within the Council.³⁴ However, it is not explicitly related to Article 7 TEU, is not meant to address specific crises, and ultimately does not foresee any enforcement consequences.³⁵ In 2019, the Commission put forward a proposal to establish an annual Rule of Law Review Cycle,³⁶ which has already led to the publication of three annual rule-of-law reports covering

²⁹ Commission, 'The EU Justice Scoreboard A tool to promote effective justice and growth' COM (2013) 160 final; Eric Maurice, 'Protecting the Checks and Balances to Save the Rule of Law' (2021) <<https://www.robert-schuman.eu/en/european-issues/0590-protecting-the-checks-and-balances-to-save-the-rule-of-law>> accessed 24 January 2023; Justina Łacny, 'The Rule of Law Conditionality Under Regulation No 2092/2020: Is It All About the Money?' (2021) 13 *Hague Journal on the Rule of Law* 79, 82.

³⁰ Laurent Pech, 'The Rule of Law in the EU: The Evolution of the Treaty Framework and Rule of Law Toolbox' (RECONNECT Working Paper no 7, 2020) <<https://reconnect-europe.eu/wp-content/uploads/2020/03/RECONNECT-WP7-2.pdf>> accessed 24 January 2023, 20; Claes and Bonelli (n 28) 278.

³¹ See for more detailed information on the European Semester European Commission, 'The European Semester Explained, An explanation of the EU's Economic Governance' (2023) <https://commission.europa.eu/business-economy-euro/economic-and-fiscal-policy-coordination/european-semester/framework/european-semester-explained_en> accessed 18 February 2023.

³² See the Council's Legal Service concluding the incompatibility of the new instrument with the EU Treaties, Council of the European Union, 'Opinion of the Legal Service, Commission's Communication on a New EU Framework to Strengthen the Rule of Law: Compatibility with the Treaties' (2014) <<https://data.consilium.europa.eu/doc/document/ST-10296-2014-INIT/en/pdf>> accessed 22 June 2023, para 24, 28. The Opinion asserts that 'there is no legal basis in the Treaties empowering the institutions to create a new supervision mechanism of the respect of the rule of law by the Member States, additional to what is laid down in Article 7 TEU, neither to amend, modify or supplement the procedure laid down in this Article'.

³³ Council of the European Union, 'Note, Ensuring Respect for the Rule of Law' (2014) <<http://data.consilium.europa.eu/doc/document/ST-16862-2014-INIT/en/pdf>> accessed 22 June 2023.

³⁴ *ibid* 21.

³⁵ Bonelli (n 14) 61; 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* (CUP 2016) 32 ff.

³⁶ Commission, 'Strengthening the Rule of Law within the Union: A Blueprint for Action' COM (2019) 343 final, 11.

all Member States.³⁷ Regrettably, however, the reports do not refer to all core values, and their effectiveness is also limited by the lack of enforcement consequences.³⁸

As evidenced by the number of soft-law mechanisms all somehow similar, EU institutions acting in parallel ultimately did not adequately coordinate their initiatives, thus often resulting in overlapping mechanisms without a concerted strategy.³⁹ Most crucially, this also resulted in the application of diverging standards⁴⁰ by referring to very different sources of law, namely to CJEU and ECtHR case law interpreting EU's fundamental values, the CFR⁴¹ and advice of the European Union Agency for Fundamental Rights (FRA), acts developed by the Council of Europe⁴² drawing on the expertise of the European Commission for Democracy through Law (Venice Commission),⁴³ or by building their own understanding within the arsenal of rule-of-law initiatives. This clearly demonstrates the shortcomings of the various soft-law mechanisms.

2.2 Judicial tools

Judicial proceedings, such as infringement actions according to Articles 258-259 TFEU, preliminary references pursuant to Article 267 TFEU, follow-up infringement procedures based on Article 260 TFEU, as well as interim measures pursuant to Article 279 TFEU, generally equip

³⁷ Commission, '2022 Rule of Law Report – Communication and Country Chapters' (2022), <https://commission.europa.eu/publications/2022-rule-law-report-communication-and-country-chapters_en> accessed 28 January 2023; '2021 Rule of Law Report – Communication and Country Chapters' (2021), <https://commission.europa.eu/publications/2021-rule-law-report-communication-and-country-chapters_en> accessed 28 January 2023; '2020 Rule of Law Report – Communication and Country Chapters' (2020), <https://commission.europa.eu/publications/2020-rule-law-report-communication-and-country-chapters_en> accessed 28 January 2023.

³⁸ European Parliament, 'The Commission's Rule of Law Report and the EU Monitoring and Enforcement of Article 2 TEU Values' PE 727.551 (2022), <[https://www.europarl.europa.eu/RegData/etudes/STUD/2022/727551/IPOL_STU\(2022\)727551_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2022/727551/IPOL_STU(2022)727551_EN.pdf)> accessed 5 March 2023, 25.

³⁹ Claes and Bonelli (n 28) 282.

⁴⁰ De Witte (n 13) 25.

⁴¹ Deriving elements, *inter alia*, from the ECHR and the national bill of rights.

⁴² See for the relation between the Council of Europe and the European Union Council of Europe, 'Compendium of Texts governing the relations between the Council of Europe and the European Union' <<https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=090000168064c45d>> accessed 20 February 2023. Even though the Council of Europe is not part of the EU, the EU builds upon Council of Europe standards.

⁴³ Commission, 'A New EU Framework to Strengthen the Rule of Law'(n 32) para 9. The Venice Commission is composed of independent law experts appointed by its member states but acting autonomously within their capacities. It provides legal advice to the Council of Europe in the areas of democratic institutions, fundamental rights, constitutional and ordinary justice, and elections, referendums, and political parties. In 2016, the Venice Commission, *inter alia*, adopted a 'Rule of Law Checklist'. See Council of Europe, 'Rule of Law Checklist,' CDL-AD (2016) 007 <[https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2016\)007-e](https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2016)007-e)> accessed 21 February 2023.

the EU institutions, most prominently the Commission backed by the CJEU, with instruments complementing the EU's toolkit of EU values protection mechanisms.⁴⁴ This subsection, however, primarily focuses on infringement procedures as a key component of EU law enforcement.

Turning to the responses to the Polish and Hungarian crises, the Commission has brought various infringement actions before the CJEU. In 2012, for example, right after Orbán's Hungarian constitutional reforms entered into force, the Commission launched a series of infringement proceedings meant to target specific aspects of the Hungarian constitutional amendments.⁴⁵ Even though the Commission was successful in all its actions, the numerous infringement actions ultimately led to minor changes only.⁴⁶ This is mainly due to the Commission's indirect way of addressing the protection of EU values: namely, instead of taking a broader perspective on EU values more generally, the Commission merely focused on technical and narrow requirements such as age discrimination or the independence of the data protection authorities.⁴⁷ Yet, due to the narrow achievements reached after those infringement actions, both the Commission and the Court started to base infringement actions on, for example, Article 19 TEU concerning judicial independence,⁴⁸ or on the CFR,⁴⁹ which enabled them to focus on the relevant breaches of EU values in a more direct way.

The most recent and innovative approach, however, is the Commission's infringement action which has been based directly on Article 2 TEU as a standalone provision.⁵⁰ The case is an innovative approach, as

⁴⁴ In this manner, see Bonelli (n 14) 65; Bonelli, 'Infringement Actions 2.0' (n 9) 31; Matthias Schmidt and Piotr Bogdanowicz, 'The Infringement Procedure in the Rule of Law Crisis: How to Make Effective Use of Article 258 TFEU' (2018) 55(4) *Common Market Law Review*.

⁴⁵ Commission, 'European Commission launches accelerated infringement proceedings against Hungary over the independence of its central bank and data protection authorities as well as over measures affecting the judiciary' (Press release, 2012), <https://ec.europa.eu/economy_finance/articles/governance/2012-01-18-hungary_en.htm> accessed 22 June 2023; Case C-286/12 *Commission v. Hungary* ECLI:EU:C:2012:687.

⁴⁶ For example, as a reaction to the infringement action brought by the Commission addressing the lowering of the retirement age of judges and prosecutors, Hungary simply resolved the detected breach of EU law by offering monetary compensation to those judges that have been retired, or by granting reinstatement, without, however, guaranteeing to return to the same position.

⁴⁷ See in detail on this matter Bonelli (n 44) 31, 35.

⁴⁸ See for example Case C-619/18 *Commission v Poland* ECLI:EU:C:2019:531.

⁴⁹ See for example Case C-235/17 *Commission v Hungary* ECLI:EU:C:2019:432; Case C-78/18 *Commission v Hungary* ECLI:EU:C:2020:476; and Case C-66/18 *Commission v Hungary* ECLI:EU:C:2020:792.

⁵⁰ See Case C-769/22: Action brought on 19 December 2022 — *European Commission v Hungary* [2023] OJ C54/16: '(2) by adopting the legislation cited in the first paragraph, Hungary has infringed Article 2 TEU. This plea concerns a new law introduced by the Hungarian government in 2021 discriminating LGBTIQ people by which, among other things, the access of children to content and advertisements that promote or portray gender identities so-called 'diverging' from the sex assigned at birth, sex change, or homosexuality is limited. See Commission, 'Commission refers Hungary to the Court of Justice of the EU over Violation of LGBTIQ rights' (Press release, 2022) <https://ec.europa.eu/commission/presscorner/detail/en/IP_22_2689> accessed 10 March 2023.

the CJEU and the Commission have so far refrained from relying directly on Article 2 TEU and pursued a combined approach of linking it to more specific Treaty provisions that turn the values into concrete legal obligations.⁵¹ Since Article 2 TEU entails an unrestricted scope⁵² and applies generally even when Member States act outside the scope of other EU law,⁵³ by relying uniquely on Article 2 TEU as a plea for infringement actions, EU institutions may thus be enabled to tackle Member States' internal changes to those structures that may go against EU values.⁵⁴ However, this approach has already been met with great criticism as regards the institutional set-up, the CJEU's legitimacy and authority, matters of competence, as well as Member States' diversity.⁵⁵

Despite the threat of a possible initiation of infringement actions setting high incentives for Member States to commit themselves to greater compliance with EU values, the effectiveness of the tool, however, is called into question if the Commission constantly intervenes in a 'too little too late fashion'.⁵⁶ Additionally, even though approaching deterioration through the lens of Article 19 TEU and the CFR has proven to be more effective, for upholding EU values in their entirety, a broader approach covering *all* values is of fundamental importance, as not all in-

⁵¹ Luke Dimitrios Spieker, 'Op-Ed: "Berlaymont is Back: The Commission Invokes Article 2 TEU as Self-standing Plea in Infringement Proceedings over Hungarian LGBTIQ Rights Violations"' (EU Law Live 2023) <<https://eulawlive.com/op-ed-berlaymont-is-back-the-commission-invokes-article-2-teu-as-self-standing-plea-in-infringement-proceedings-over-hungarian-lgbtq-rights-violations-by-luke-dimitrios-spieker/>> accessed 27 February 2023.

⁵² See Tom Boekestein, 'Making Do With What We Have: On the Interpretation and Enforcement of the EU's Founding Values' (2022) 23 German Law Journal 431, 439; Luke Dimitrios Spieker, 'Defending Union Values in Judicial Proceedings. On How to Turn Article 2 TEU into a Judicially Applicable Provision' in Armin von Bogdandy and others (eds), *Defending Checks and Balances in EU Member States. Taking Stock of Europe's Actions* (Springer 2021) 247.

⁵³ Claes and Bonelli (n 28) 281.

⁵⁴ Spieker (n 51).

⁵⁵ *ibid*; Bonelli (n 44) 49 ff; Lena Kaiser, 'On the European Commission's Attempt to Mobilise Art 2 TEU as a Stand-alone Provision' (*Verfassungsblog*, 4 March 2023) <<https://verfassungsblog.de/a-new-chapter-in-the-european-rule-of-law-saga/>> accessed 7 March 2023.

⁵⁶ Dariusz Adamski, 'The Social Contract of Democratic Backsliding in the "New EU" Countries' (2019) 56(3) Common Market Law Review 623, 659; Laurent Pech, Patryk Wachowiec and Dariusz Mazur, 'Poland's Rule of Law Breakdown: A Five-Year Assessment of EU's (In) Action' (2021) 13 Hague Journal on the Rule of Law 1, 22, also with reference to Laurent Pech, Kim Lane Scheppele and Wojciech Sadurski, 'Before It's Too Late: Open Letter to the President of the European Commission Regarding the Rule of Law Breakdown in Poland' (*Verfassungsblog*, 28 September 2020) <<https://verfassungsblog.de/before-its-too-late/>> accessed 31 January 2023; for an extensive overview of how the instruments have been used, see Bonelli (n 44); Schmidt and Bogdanowicz (n 44); and also see, by way of example, Commission, 'European Commission Launches Accelerated Infringement Proceedings against Hungary Over the Independence of Its Central Bank and Data Protection Authorities as well as Over Measures Affecting the Judiciary' (n 45); Case C-286/12 *Commission v Hungary* ECLI:EU:C:2012:687; Case C-288/12 *Commission v Hungary* ECLI:EU:C:2014:237; Case C-619/18 *Commission v Poland* ECLI:EU:C:2019:531; Case C-192/18 *Commission v Poland* ECLI:EU:C:2019:924; Case C-66/18 *Commission v Hungary* ECLI:EU:C:2020:792; Case C-204/21 R *Commission v Poland* ECLI:EU:C:2021:593.

fringements are necessarily linked to judicial independence.⁵⁷ Moreover, time-consuming infringement actions with their average duration of 40 months also help backsliding regimes to further undermine EU values.⁵⁸ Finally, the root causes of constitutional backsliding stemming from Member States' internal legal-political developments may eventually not be resolved by a single judgment,⁵⁹ as compliance with EU law ultimately rests on the premise that Member States are also willing to abide by CJEU judgments.⁶⁰ It can thus be concluded that although infringement actions play a significant role in the EU values toolkit and may leverage Member States' compliance, a top-down approach in that regard cannot be considered 'the final step of the story'.⁶¹

Additionally, also preliminary procedures pursued by national courts of the Member States contribute to upholding the EU's fundamental values by bringing matters on those to the attention of the CJEU.⁶² Thus, the CJEU has, *inter alia*, ruled on requests for preliminary rulings brought by Maltese, Polish, Dutch and Romanian national courts which particularly concerned value relevant questions on judicial appointment procedures, the execution of European arrest warrants in the case of persistent deficiencies as regards judicial independence, the disciplinary regime for judges, the personal liability of judges, the creation of a special prosecution section dealing with judges, and the principle of the primacy of EU law.⁶³

Through the preliminary reference procedure, national courts may refer questions to the CJEU on the interpretation or validity of EU law where they need assistance to decide on an actual case. Although it has been clarified that the parties to the main proceedings do not have the

⁵⁷ See in this manner also Scheppele and others (n 26) 46.

⁵⁸ Petra Bárd and Anna Śledzińska-Simon, 'Rule of Law Infringement Procedures: A Proposal to Extend the EU's Rule of Law Toolbox' (CEPS Paper 2019) 10 <https://www.ceps.eu/wp-content/uploads/2019/05/LSE-2019-09_ENGAGE-II-Rule-of-Law-infringement-procedures.pdf> accessed 20 February 2023.

⁵⁹ Bonelli (n 14) 50 with reference to Adamski (n 56) 659; see also Linda Schneider, 'Responses by the CJEU to the European Crisis of Democracy and the Rule of Law' (Working Papers, Forum Transregionale Studien 2/2020) 5 <https://www.forum-transregionale-studien.de/fileadmin/pdf/SCHNEIDER_rec_WP_2_2020.pdf> accessed 7 March 2023.

⁶⁰ Bonelli (n 14) 50.

⁶¹ *ibid* 40.

⁶² See Commission, '2021 Rule of Law Report: Communication and Country Chapters' <https://ec.europa.eu/info/policies/justice-and-fundamental-rights/upholding-rule-law/rule-law/rule-law-mechanism/2021-rule-law-report/2021-rule-law-report-communication-and-country-chapters_en>, accessed 26 January 2023.

⁶³ Case C-66/18 *Commission v Hungary (Enseignement supérieur)* ECLI:EU:C:2020:792; Case C-510/19 *Openbaar Ministerie (Faux en écritures)* ECLI:EU:C:2020:953; Case C-354/20 PPU and C-412/20 PPU *Openbaar Ministerie (Indépendance de l'autorité judiciaire d'émission)* ECLI:EU:C:2020:1033; Case C-824/18 AB and Others ECLI:EU:C:2021:153; Case C-896/19 *Repubblica v Il-Prim Ministru* ECLI:EU:C:2021:311; Case C-83/19, C-127/19, C-195/19, C-291/19, C-397/19 *Asociația 'Forumul Judecătorilor Din România' v Inspekția Judiciară and others* ECLI:EU:C:2021:393; Case C-791/19 *Commission v Poland* ECLI:EU:C:2021:596.

right to have a preliminary question referred⁶⁴ as its activation fully depends on national judges,⁶⁵ in practice the procedure has become highly important as a bottom-up approach⁶⁶ enabling private parties to review and contest the legitimacy of national law vis-à-vis EU law.⁶⁷ Seeking to guarantee the uniform application of EU law within the EU,⁶⁸ what makes the procedure so powerful and of utmost importance is the fact that the CJEU's preliminary rulings provide for an *erga omnes* effect, ie that they are binding for *all* national courts and in all respects.⁶⁹ In this way, a preliminary ruling of the CJEU may incite public debate on an issue,⁷⁰ exert political pressure on the respective Member State, and might ultimately also require national legal reforms.⁷¹ However, the procedure also presents some risks, as access to the court might involve extreme difficulties in terms of litigation costs⁷² and the national court's discretion to refer the case, or when the national measure simply falls out of the scope of EU law. In the case of a negative outcome of the preliminary ruling, the preliminary reference procedure may eventually result in a backlash, meaning that where the CJEU did not find a violation of EU law, the decision on the legality of the measure is solely left to the national judges. This is particularly crucial when national courts have been politically captured by the Member State and do not provide for judicial independence.⁷³ However, once it is found that the national law is incompatible with EU law, the preliminary ruling might ultimately form a potential basis for an infringement action.⁷⁴ Regardless of the outcome of the preliminary reference procedure, the Commission may in any case be alerted to potential infringements in the application of EU law by upcoming ques-

⁶⁴ Virginia Passalacqua, 'Who Mobilizes the Court? Migrant Rights Defenders Before the Court of Justice of the EU' (2021) 15(2) *Law and Development Review* 381, 388.

⁶⁵ Case C-210/06 *Cartesio* ECLI:EU:C:2008:723, para 91.

⁶⁶ See for bottom-up enforcement, Passalacqua (n 64) 382, with further references: 'reactive' institutions that cannot 'acquire cases of their own motion, but only upon the initiative of one of the disputants'; the contrary part being the 'top-down approach' referring to monitoring and enforcement by EU institutions.

⁶⁷ Morten Broberg, 'Preliminary References as a Means for Enforcing EU Law' in András Jakab, Dimitry Kochenov (eds), *The Enforcement of EU Law and Values, Ensuring Member States' Compliance* (OUP 2017) 99.

⁶⁸ *ibid* 100.

⁶⁹ *ibid* 107.

⁷⁰ Thus, *inter alia*, creating awareness and mobilisation for a cause or giving a voice to minority groups.

⁷¹ Commission, 'Strategic Litigation in EU Gender Equality Law' (2020) <http://publications.europa.eu/resource/cellar/beaa7c36-90d1-11ea-aac4-01aa75ed71a1.0001.02/DOC_1> accessed 18 February 2023.

⁷² European Union Agency for Fundamental Rights, 'Access to Justice in Europe: An Overview of Challenges and Opportunities' (2010) <https://fra.europa.eu/sites/default/files/fra_uploads/1520-report-access-to-justice_EN.pdf> accessed 18 February 2023.

⁷³ See, for example, in the case of Poland, Case C-619/18 *Commission v Poland (Independence of the Supreme Court)* ECLI:EU:C:2019:531.

⁷⁴ The preliminary ruling of the CJEU becomes binding EU law and is to be implemented by the Member States thus constituting an 'obligation under the Treaties'.

tions of the procedure. This can ultimately empower the Commission to take up its role as ‘guardian of the Treaties’ and enforce the ruling vis-à-vis the respective Member State via infringement actions. In this way, the preliminary reference procedure plays a key role in upholding the EU’s fundamental values. Yet, the average duration of 15-16 months for the procedure again represents significant obstacles.⁷⁵

On some occasions, the Commission has also asked the CJEU to order interim measures to prevent irremediable harm,⁷⁶ thus complementing the EU’s toolkit to protect its fundamental values. In this way, interim measures serve as an effective mechanism that does not suffer from the same shortcoming as the infringement action in terms of duration of proceedings and immediate effect.

2.3 Financial tools

Finally, connecting money to EU values and the ‘spending conditionality’⁷⁷ resulting in the suspension of EU funds has proven to be an important tool. The European Structural Investment Funds⁷⁸ aiming at a ‘more values-based use of EU financial resources’⁷⁹ and the Justice, Rights and Values Fund⁸⁰ aimed at fostering NGOs and civil society to potentially create significant resistance against constitutional backsliding are just two of the financial tools to be mentioned.⁸¹

⁷⁵ Petra Bárd and Anna Śledzińska-Simon, ‘Rule of Law Infringement Procedures: A Proposal to Extend the EU’s Rule of Law Toolbox’ (CEPS Paper 2019) 10 <https://www.ceps.eu/wp-content/uploads/2019/05/LSE-2019-09_ENGAGE-II-Rule-of-Law-infringement-procedures.pdf> accessed 20 February 2023.

⁷⁶ Case C-619/18 R *Commission v Poland* ECLI:EU:C:2018:1021; European Commission, ‘Rule of Law: European Commission Refers Poland to the European Court of Justice to Protect Independence of Polish Judges and Asks for Interim Measures’ (Press release 2021) IP/21/1524.

⁷⁷ ‘Spending conditionality’ is generally referred to as ‘a mechanism that links the disbursement of EU funds to the fulfilment of conditions aimed at pursuing horizontal policy goals’. Marco Fiscaro, ‘Rule of Law Conditionality in EU Funds: The Value of Money in the Crisis of European Values’ (2019) 4(3) *European Papers* 695, 705; see also Antonia Baraggia and Matteo Bonelli, ‘Linking Money to Values: The New Rule of Law Conditionality Regulation and Its Constitutional Challenges’ (2022) 23 *German Law Journal* 131, 141, for a general definition of the term ‘conditionality’.

⁷⁸ Regulation (EU) 2021/1060 of the European Parliament and of the Council of 24 June 2021 laying down common provisions on the European Regional Development Fund, the European Social Fund Plus, the Cohesion Fund, the Just Transition Fund and the European Maritime, Fisheries and Aquaculture Fund and financial rules for those and for the Asylum, Migration and Integration Fund, the Internal Security Fund and the Instrument for Financial Support for Border Management and Visa Policy [2021] OJ L 231/159.

⁷⁹ Marco Fiscaro, ‘Beyond the Rule of Law Conditionality: Exploiting the EU Spending Power to Foster the Union’s Values’ (2022) 7(2) *European Papers* 697, 700.

⁸⁰ Regulation (EU) 2021/692 of the European Parliament and of the Council of 28 April 2021 establishing the Citizens, Equality, Rights and Values Programme and repealing Regulation (EU) No 1381/2013 of the European Parliament and of the Council and Council Regulation (EU) No 390/2014 [2021] OJ L 156/1.

⁸¹ For further detail on these two mechanisms, see Fiscaro (n 79).

Most importantly, in December 2020, the EU institutions also adopted the Rule of Law Conditionality Regulation linking the receipt of EU funds to respect for the rule of law.⁸² The Regulation, *inter alia*, allows the Commission and the Council to suspend EU funds in the case of Member States' breaches of the rule of law affecting or posing a serious risk of affecting the financial management of the EU budget.⁸³

Following an action for annulment brought by Hungary and Poland under Article 263 TFEU, the Court eventually declared the Regulation to be valid.⁸⁴ However, restraint on the part of the EU institutions can be demonstrated. After a long legislative process over three years,⁸⁵ first presented as an instrument aimed at the protection of the rule of law, the Regulation has been increasingly tempered following a negative Opinion of the Council's Legal Service⁸⁶ which predominantly required a direct link between rule-of-law breaches and negative budgetary consequences to be regarded as independent from the procedure of Article 7 TEU.⁸⁷ This clearly demonstrates that the current Regulation is not to be considered as a 'general rule of law oversight tool', but a 'true budgetary instrument'.⁸⁸ Regrettably, it is also associated with breaches of the rule of law only and does not take into consideration the remaining values.

From a purview of how this mechanism has been used so far, there is yet another sign of reluctance. At least, following the Commission's constant delay to apply the Regulation,⁸⁹ the European Parliament has

⁸² Regulation (EU, Euratom) 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a general regime of conditionality for the protection of the Union budget [2020] OJ L1 433/1, and European Council, 'European Council meeting (10 and 11 December 2020) Conclusions' EUCO 22/20 <<https://www.consilium.europa.eu/media/47296/1011-12-20-euco-conclusions-en.pdf>> accessed 22 June 2023.

⁸³ Article 1 and 3 of Regulation 2020/2092.

⁸⁴ Case C-156/21 *Hungary v European Parliament and Council* ECLI:EU:C:2022:97; Case C-157/21 *Poland v European Parliament and Council* ECLI:EU:C:2022:98; on this matter see also Matteo Bonelli, 'Constitutional Language and Constitutional Limits: The Court of Justice Dismisses the Challenges to the Budgetary Conditionality Regulation' (2022) 7(2) *European Papers*.

⁸⁵ See in detail, for the controversies in the course of the adoption, Baraggia and Bonelli (n 77); Sébastien Platon, 'Bringing a Knife to a Gunfight: The European Parliament, the Rule of Law Conditionality, and the Action for Failure to Act' (*Verfassungsblog*, 11 June 2021) <<https://verfassungsblog.de/bringing-a-knife-to-a-gunfight/>> accessed 19 January 2023.

⁸⁶ Council of the European Union, 'Proposal for a Regulation of the European Parliament and of the Council on the Protection of the Union's budget in case of generalised deficiencies as regards the rule of law in the Member States – Compatibility with the EU Treaties' (13593/18) <<https://data.consilium.europa.eu/doc/document/ST-13593-2018-INIT/en/pdf>> accessed 22 June 2023.

⁸⁷ *ibid.*, para 34. This has also been reaffirmed by the European Council, Conclusions EUCO 22/20 at point 2(e).

⁸⁸ Baraggia and Bonelli (n 77) 140; see also Bonelli (n 84) 507.

⁸⁹ Although the Commission identified many concerns about the breaches of the rule of law in its 2020 Rule of Law Report.

persistently called on the Commission to trigger it.⁹⁰ On 27 April 2022, shortly after the Hungarian elections, the Commission finally activated the conditionality mechanism against Hungary for the first time.⁹¹ After an intensive dialogue, the Commission eventually considered that a risk to the budget remained and proposed measures to the Council, leading to a suspension of funds.⁹² On 15 December 2022, the Council finally adopted its implementing decision suspending Hungary from receiving EU funds.⁹³ According to that decision, 55% of the budgetary commitments under the Cohesion Policy programmes were to be suspended,⁹⁴ amounting to EUR 6.3 billion.⁹⁵

In addition to the Rule of Law Conditionality Regulation, there is yet another mechanism worth mentioning: the Recovery and Resilience Facility (RRF). Under the RRF, an instrument primarily aimed at mitigating the impacts of the Covid-19 pandemic,⁹⁶ to be eligible to receive financial contributions, Member States are required to prepare national recovery and resilience plans (RRPs) setting out a reform and investment agenda and detailing a set of measures to be financed.⁹⁷ Payments of financial contributions and loans are conditional on the previous 'satisfactorily fulfilment of the relevant milestones and targets' set forth in the RRFs.⁹⁸ Most importantly, the RRF is fully embedded in the European Semester.⁹⁹

⁹⁰ European Parliament, 'Resolution of 25 March 2021 on the application of Regulation (EU, Euratom) 2020/2092, the rule-of-law conditionality mechanism (2021/2582(RSP))' (P9_TA (2021) 0103). The European Parliament even initiated the procedure under Article 265 TFEU against the Commission for a failure to act, although the case was withdrawn in the meantime.

⁹¹ Thomas Wahl, 'Commission Triggers Conditionality Mechanism against Hungary' (eucrim 2/2022) <<https://eucrim.eu/news/commission-triggers-conditionality-mechanism-against-hungary/>> accessed 20 February 2023.

⁹² See Article 6(9) of Regulation 2020/2092; Commission, 'EU budget: Commission proposes measures to the Council under the conditionality regulation' (Press release 2022), <https://ec.europa.eu/commission/presscorner/detail/en/ip_22_5623> accessed 20 February 2023.

⁹³ 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 [2022] OJ L 325/94.

⁹⁴ Article 2(1) of the Council Implementing Decision (EU) 2022/2506; the Commission initially proposed 65% though. See Commission, 'EU Budget: Commission Proposes Measures to the Council under the Conditionality Regulation' (Press release 2022) <https://ec.europa.eu/commission/presscorner/detail/en/ip_22_5623> accessed 20 February 2023.

⁹⁵ Sigrid Melchior, 'Explainer: Europe Cuts Off Funds for Hungary: What Is at Stake?' (2022) <<https://www.investigate-europe.eu/en/2022/explainer-europe-cuts-off-funds-for-hungary-what-is-at-stake/>> accessed 20 February 2023.

⁹⁶ ie the Regulation (EU) 2021/241 of the European Parliament and of the Council of 12 February 2021 establishing the Recovery and Resilience Facility [2021] OJ L 57/17; for further information on the RRF, see Commission, 'Recovery and Resilience Facility' <https://commission.europa.eu/business-economy-euro/economic-recovery/recovery-and-resilience-facility_en> accessed 18 February 2018.

⁹⁷ Articles 17-18 of Regulation (EU) 2021/241.

⁹⁸ Article 24 of Regulation (EU) 2021/241.

⁹⁹ Articles 4, 17 and 18 of Regulation (EU) 2021/241; Fiscaro (n 77) 713.

To establish the necessary link to EU values, it is to be recalled that the annual CSRs issued within the European Semester cover rule-of-law related issues whose implementation in the respective Member State will eventually be subject to the Commission's assessment under the RRF.¹⁰⁰

By way of example, in June 2022, the Council adopted its implementing decision¹⁰¹ and approved the Commission's positive assessment¹⁰² of the Polish RRP and the future disbursement of EUR 35.4 billion in grants and loans under the RRF, conditional upon the achievement of the milestones set out in its RRP.¹⁰³ The RRP particularly sets out two important 'super milestones' related to the independence of the judiciary.¹⁰⁴ As regards Hungary, the Council approved the Hungarian RRP and the future disbursement of EUR 5.8 billion in December 2022 also conditional upon the achievement of the set milestones.¹⁰⁵ The Hungarian RRP, *inter alia*, establishes 27 'super milestones' related to corruption, public procurement, judicial independence, and decision making.¹⁰⁶ However, no disbursement will be made until Poland and Hungary ultimately achieve all the milestones, and the Commission has not yet considered that they meet this condition. With respect to Poland, there are currently ongoing discussions as to whether the latest Polish legislative reforms meet the requirements set out in the milestones. Hungary, on the other hand, is far from reaching the large number of super milestones, and EU funding appears to be frozen as for now.¹⁰⁷

¹⁰⁰ Fisicaro (n 77) 714; in this context, the Commission particularly asserts that 'reforms linked to [...] the effectiveness of justice systems, and in a broader sense respect of the Rule of Law are essential elements of the Member States' overall recovery strategy'. See Commission, 'Commission Staff Working Document Guidance to Member States Recovery and Resilience Plans' SWD (2021) 12 final, Part I, 9 <<https://data.consilium.europa.eu/doc/document/ST-5538-2021-INIT/en/pdf>> accessed 18 February 2023.

¹⁰¹ Council Implementing Decision on the approval of the assessment of the recovery and resilience plan for Poland, 2022/0181 (NLE).

¹⁰² See Commission, 'NextGenerationEU: European Commission Endorses Poland's €35.4 Billion Recovery and Resilience Plan' (Press release 2022) <https://ec.europa.eu/commission/presscorner/detail/en/ip_22_3375> accessed 23 April 2023.

¹⁰³ See Council of the European Union, 'NextGenerationEU: Ministers Approve the Assessment of Poland's National Plan by the European Commission' (Press release 2022) <<https://www.consilium.europa.eu/en/press/press-releases/2022/06/17/recovery-fund-ministers-welcome-assessment-of-poland-s-national-plan/>> accessed 23 April 2023.

¹⁰⁴ European Parliament, 'Rule of Law-related "Super Milestones" in the Recovery and Resilience Plans of Hungary and Poland' (2023) (PE 741.581) 2 <[https://www.europarl.europa.eu/RegData/etudes/BRIE/2023/741581/IPOL_BRI\(2023\)741581_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/BRIE/2023/741581/IPOL_BRI(2023)741581_EN.pdf)> accessed 22 June 2023.

¹⁰⁵ See Council of the European Union, 'NextGenerationEU: Member States Approve National Plan of Hungary' (Press release 2022) <<https://www.consilium.europa.eu/en/press/press-releases/2022/12/12/nextgenerationeu-member-states-approve-national-plan-of-hungary/>> accessed 23 April 2023; Council Implementing Decision on the approval of the assessment of the recovery and resilience plan for Hungary 2022/0414 (NLE).

¹⁰⁶ European Parliament, 'Rule of Law-related "Super Milestones" in the Recovery and Resilience Plans of Hungary and Poland' (2023), (PE 741.581) 2.

¹⁰⁷ Commission, 'Commission Finds that Hungary Has Not Progressed Enough in Its Reforms and Must Meet Essential Milestones for Its Recovery and Resilience Funds' (Press release 2022), <https://ec.europa.eu/commission/presscorner/detail/en/ip_22_7273> accessed 8 April 2023.

3 Strengthening the procedure to protect EU values

The previous discussion of available EU values protection mechanisms and their shortcomings already demonstrates that the Treaties are cumbersome in tackling constitutional and democratic backsliding,¹⁰⁸ even though it is to be acknowledged that Article 2 TEU has been triggered in judicial proceedings and that there has been financial conditionality based on Treaty provisions.

Yet any path for shifting from unanimity to qualified majority voting within the Article 7 TEU procedure, or even any other Treaty change in that context, seems to be inconceivable given that the authoritarian states would potentially veto any of those proposals.¹⁰⁹ Since Treaty change eventually requires a unanimous vote by all 27 EU Member States, such a shift under current political circumstances is most certainly only a political illusion.¹¹⁰ Nevertheless, following the conclusions of the Conference on the Future of Europe and the Parliament's resolution calling for major Treaty changes, the EU is currently faced with a decision on whether to initiate reforms of the Treaties, also in matters of EU values. Even if it is said that authoritarian states, such as Poland and Hungary, would possibly veto any of those proposals, such reforms do not necessarily mean that they are inconceivable in the long run. The topic of Treaty revision is still on the agenda, and considering that so far every single act of further EU enlargement has been accompanied by Treaty changes,¹¹¹ it does not seem entirely farfetched that those reforms could become reality with the accession of further Member States.

This section therefore identifies possible ways for improvement to build stronger mechanisms of EU values protection. As evidenced by the variety of contributions in the academic and institutional debate, a lot

¹⁰⁸ See in this manner Argyropoulou (n 25).

¹⁰⁹ Scheppele and others (n 26) 10; see Stefan Lehne, 'Does the EU Need Treaty Change?' (2022) <<https://carnegieeurope.eu/2022/06/16/does-eu-need-treaty-change-pub-87330>> accessed 22 February 2023, stating that most notably, thirteen Member States have already declared themselves opposed to Treaty changes, including Bulgaria, Croatia, Czech Republic, Denmark, Estonia, Finland, Latvia, Lithuania, Malta, Poland, Romania, Slovenia and Sweden; see also Viktor Orbán, 'Speech at the 28th Bálványos Summer Open University' (2017) <<https://abouthungary.hu/speeches-and-remarks/viktor-orbans-speech-at-the-28th-balvanyos-summer-open-university-and-student-camp>> accessed 23 February 2023, declaring that 'a campaign of inquisition against Poland will never succeed, because Hungary will resort to all the legal mechanisms offered by the European Union in order to show its solidarity with the Polish people'.

¹¹⁰ For example, after the Hungarian elections in April 2022, Viktor Orbán won another four-year term as Hungarian prime minister, proving that a return from electoral autocracy to full democracy is not in sight in the near future.

¹¹¹ The Single European Act 1987, preparing for Portugal's and Spain's membership, the Maastricht Treaty 1993 followed by the accession of Austria, Finland and Sweden in 1995, the Treaty of Amsterdam 1999 to prepare for the Central and Eastern European enlargement, as well as the Treaty of Nice 2003 and the Treaty of Lisbon 2009 to provide for the functioning of the EU in a Union of 25+ Member States.

has already been proposed in this context.¹¹² Some of the proposals mentioned here can be advanced without Treaty amendment, and some require Treaty change instead. Regrettably, however, these proposals mostly offer only individual ‘pieces of the puzzle’ of possible different options, and are therefore unlikely to change the course of backsliding if taken in isolation, and without providing for a comprehensive and concerted strategy to protect EU values.¹¹³ This section briefly discusses the key proposals and demonstrates why they do not provide for a comprehensive solution either. Based on these findings, Section 4 offers a different stance by taking a broader perspective, relying on the idea of reconceptualising the framework of EU values protection by arguing for structural, institutional, and substantive reforms.

3.1 Making use of judicial proceedings

The first proposals concern the use of judicial proceedings in which legal mechanisms, particularly those related to judicial processes, are strategically and purposefully used as a means of safeguarding and upholding core values. The key aspects involve the addressing of violations through ‘systemic infringement actions’ as well as creative interpretations of existing Treaty provisions, all seeking to greatly leverage the system of EU values protection.

The proposal of ‘systemic infringement actions’ delivered by Scheppele¹¹⁴ aims at bundling several violations of EU law for joint treatment in one systemic infringement procedure before the CJEU rather than pursuing a series of single infringements on a case-by-case basis.¹¹⁵ It therefore seeks to give the Commission the chance to construe a way to present a full picture of national legal-political developments demonstrating systemic non-compliance with EU fundamental values. This could be seen as a response by the Commission to force recalcitrant Member States to abide by EU values without enabling them to make merely minor corrections but to initiate broader reforms.¹¹⁶

Another proposal concerns the creative use of Treaty provisions to further judicial proceedings, building on the idea of re-interpreting specific Treaty norms dealing with EU values protection. In the vast array of

¹¹² See, for a good overview of the core proposals, Dimitry Kochenov, ‘The Acquis and Its Principles: The Enforcement of the “Law” versus the Enforcement of “Values” in the EU’ in András Jakab and Dimitry Kochenov (eds), *The Enforcement of EU Law and Values, Ensuring Member States’ Compliance* (OUP 2017).

¹¹³ Bonelli (n 9) 647; Elise Muir, Piet van Nuffel and Geert de Baere, ‘The EU as a Guardian of the Rule of Law within Its Member States’ (2023) 29(2) *The Columbia Journal of European Law*.

¹¹⁴ Kim Lane Scheppele, ‘The Case for Systemic Infringement Actions’ in Carlos Closa and Dimitry Kochenov (eds), *Reinforcing Rule of Law Oversight in the European Union* (CUP 2016); see also Scheppele and others (n 26).

¹¹⁵ Kochenov (n 112) 18; Schneider (n 59) 17.

¹¹⁶ Schneider (n 59) 18.

such provisions, Article 51(1) CFR and Article 2 TEU stand out in particular.

Firstly, Article 51(1) CFR could be re-interpreted in such a way as to make the Charter applicable also in purely domestic cases. Article 51(1) CFR in its current state stipulates that the CFR only applies when Member States are implementing EU law, ie when they act within its scope.¹¹⁷ In order to make the provision also applicable in purely domestic cases, Jakab and Kirchmair argue that, in the case of undermining Article 2 TEU values, the application of the *clausula rebus sic stantibus* would be justified.¹¹⁸ This doctrine entails that a promise made under a treaty becomes unenforceable due to fundamentally changed circumstances.¹¹⁹ In this sense, they argue that both sides must keep their original promise under the Treaty in order to continue to ensure the balance of comprehensive fundamental rights protection.¹²⁰ Based on the *clausula rebus sic stantibus* doctrine, it is to be concluded that in the case of a fundamental rights violation, EU intervention would be justified to ‘close the *lacunae*’ and ‘ensure the fundamental rights union in Europe’.¹²¹

A creative use of Article 51(1) CFR is also foreseen under von Bogdandy’s ‘Reverse Solange doctrine’¹²² that again builds on the idea of allowing the Court to review internal constitutional structures when Article 2 TEU values are in dispute. According to this interpretation, ‘beyond the scope of Article 51(1) of the Charter, Member States remain autonomous in fundamental rights protection as long as it can be presumed that they ensure the essence of fundamental rights enshrined in Article 2 TEU’.¹²³

Secondly, Article 2 TEU could be mobilised as a standalone yardstick in judicial proceedings as already happened in the recent case of *Commis-*

¹¹⁷ See Case C-260/89 *ERT* ECLI:EU:C:1991:254, para 42.

¹¹⁸ András Jakab and Lando Kirchmair, ‘Two Ways of Completing the European Fundamental Rights Union: Amendment to vs Reinterpretation of Article 51 of the EU Charter of Fundamental Rights’ (2022) 24 *Cambridge Yearbook of European Legal Studies* 239, 243.

¹¹⁹ See Article 62 of the Vienna Convention.

¹²⁰ Jakab and Kirchmair (n 118) 243.

¹²¹ *ibid.*

¹²² Armin von Bogdandy and others, ‘Reverse Solange: Protecting the Essence of Fundamental Rights against EU Member States’ (2012) 49(2) *Common Market Law Review* 489, 489; Armin von Bogdandy, Carlino Antpöhler, Michael Ioannidis, ‘Protecting EU Values: Reverse Solange and the Rule of Law Framework’ in András Jakab and Dimitry Kochenov (eds), *The Enforcement of EU Law and Values, Ensuring Member States’ Compliance* (OUP 2017) 218-233; Armin von Bogdandy and Luke Dimitrios Spieker, ‘Countering the Judicial Silencing of Critics: Article 2 TEU Values, Reverse Solange, and the Responsibilities of National Judges’ (2019) 15(3) *European Constitutional Law Review* 391, 391; Armin von Bogdandy and Luke Dimitrios Spieker, ‘Protecting Fundamental Rights Beyond the Charter: Repositioning the Reverse Solange Doctrine in Light of the CJEU’s Article 2 TEU Case Law’ in Michal Bobek and Jeremias Adams-Prassl (eds), *The EU Charter of Fundamental Rights in the Member States* (Hart 2020) 525 ff.

¹²³ Armin von Bogdandy and others (n 122) 514; see also Dora Kostakopoulou, ‘Justice, Individual Empowerment, and the Principle of Non-regression in the European Union’ (2021) 46(1) *European Law Review* 92, 102.

sion v Hungary in which the Commission invoked Article 2 as an autonomous ground for its action. In that vein, the direct applicability of Article 2 TEU as an autonomous provision would certainly allow the CJEU to review compliance with all EU fundamental values inherent in Article 2 TEU and thus tackle Member States' regimes undermining those values in judicial proceedings. Thus, the Court would be able to rule on the incompatibility of a single national law with EU values from Article 2 TEU.

However, irrespective of the criticism voiced against the legal soundness or the desirability of the mentioned use of judicial proceedings,¹²⁴ those key proposals represent just one component among several concepts that are necessary to address effectively the multifaceted challenges of EU values backsliding. They merely concentrate on judicial proceedings which are extremely time consuming and certainly unable to eliminate the root causes of undermining EU values. While these actions can potentially target systemic violations of EU values, they may, however, not cover all aspects of protecting and promoting EU values comprehensively. Instead, safeguarding these values requires a holistic approach that goes beyond legal actions alone, including, among other things, political dialogue, monitoring mechanisms, cooperation with national authorities, support for civil society, and public awareness campaigns. The broader dimensions of these aspects related to EU values violations therefore cannot be adequately addressed solely through judicial proceedings.

3.2 Remedying the 'dead end' of Article 7 TEU: Article 354(1) TFEU by analogy

Besides using judicial proceedings, to turn Article 7 TEU into a credible provision, Article 354(1) TFEU could be applied by analogy to the extent that *any* Member State truly intentionally and systematically violating EU values will be precluded from a vote under the Article 7 TEU procedure. Article 354(1) TFEU asserts that for the purposes of Article 7 TEU on the suspension of certain rights resulting from Union membership, 'the member of the European Council or of the Council representing the Member State in question shall not take part in the vote'. Although the explicit wording refers to *one* Member State only, this provision could be interpreted as to preclude *any* Member State undermining EU fundamental values against which a procedure under Article 7 TEU could be initiated simultaneously.¹²⁵

¹²⁴ For example, concerning the potential overstretching of CJEU competences, putting its legitimacy to a great test, and questioning its judicial activism, emerging criticism as regards the institutional set-up, matters of EU competence as well as Member States' diversity and pluralism, see Schneider (n 59) 17 ff; Kaiser (n 55); Spieker (n 51); Spieker (n 52) 244; Kim Lane Scheppele, 'Enforcing the Basic Principles of EU Law through Systemic Infringement Actions' in Carlos Closa and Dimitry Kochenov (eds), *Reinforcing Rule of Law Oversight in the European Union* (CUP 2016) 114 ff.

¹²⁵ See in that manner Pech and Scheppele (n 3) 24; Iuliana-Mădălina Larion, 'Protecting EU Values. A Juridical Look at Article 7 TEU' (2018) *Challenges of Knowledge Society* 539, 543.

Nevertheless, this interpretation neglects the current ‘alliance’ of Member States: Poland and Hungary, for example, agreed to support each other in opposing the activation of Article 7 TEU.¹²⁶ Bulgaria also confirmed that it would side with the Hungarian government against Article 7 TEU.¹²⁷ Moreover, the Visegrád Cooperation, an alliance between Poland, Czech Republic, Slovakia, and Hungary that aims at cooperating in terms of national policies, diplomatic efforts, and engagement within the European Union, strongly implies that these ‘V4-States’ would possibly also assure their assistance in opposing activation of Article 7 TEU.¹²⁸ Since it will be difficult to prove a serious violation of EU values for each of these supporters, the analogous application of Article 354(1) TFEU might not lead to an effective outcome.

Eventually, irrespective of the ineffectiveness of such an analogous application, given its political nature, the current ‘dead-end status’, and the ‘alliance’ of opposing Member States, Article 7 TEU as it currently stands does not fully provide for all the dimensions necessary to address situations in which EU values are at risk. Nevertheless, if Article 7 TEU is successful, it would clearly not be just ‘one drop in the vast sea of available measures’ but would suspend the most important Member States’ rights politically and financially.

3.3 A ‘Copenhagen Commission’

Another key proposal concerns the establishment of a ‘Copenhagen Commission’ as a new EU body entrusted with the regular monitoring and enforcement of the compliance of EU Member States with Article 2 TEU.¹²⁹ This new body would be able to initiate investigations on its own motion, build on any sources and materials available, draw its information from any person or institution it considers useful, and eventually issue legally binding determinations such as recommendations but also sanctions.¹³⁰ However, such an envisaged concept of entrusting the ‘Co-

¹²⁶ Viktor Orbán, ‘Speech at the 28th Bálványos Summer Open University’ declaring that ‘a campaign of inquisition against Poland will never succeed, because Hungary will resort to all the legal mechanisms offered by the European Union in order to show its solidarity with the Polish people’; see A Rettmann, ‘Poland to Veto EU Sanctions on Hungary’ (euobserver 2018) <<https://euobserver.com/rule-of-law/142825>> accessed 24 May 2023 quoting the Polish foreign ministry statement of 12 September 2018 saying that ‘Poland will vote against any sanctions on Hungary in the forum of European institutions’.

¹²⁷ Georgi Gotev, ‘Bulgarian Government Sides with Orban Against Article 7’ (euractiv 2018) <<https://www.euractiv.com/section/eu-elections-2019/news/bulgarian-government-sides-with-orban-against-article-7/>> accessed 24 May 2023.

¹²⁸ Soyaltin-Colella (n 26) 34.

¹²⁹ Jan-Werner Müller, ‘A Democracy Commission of One’s Own, or What It Would Take for the EU to Safeguard Liberal Democracy in Its Member States’ in András Jakab and Dimitry Kochenov (eds), *The Enforcement of EU Law and Values, Ensuring Member States’ Compliance* (OUP 2017) 234 ff; Jan-Werner Müller, ‘Protecting the Rule of Law (and Democracy!) in the EU. The Idea of a Copenhagen Commission’ in Carlos Closa and Dimitry Kochenov (eds), *Reinforcing Rule of Law Oversight in the European Union* (CUP 2016) 206–224.

¹³⁰ *ibid* 213.

penhagen Commission' to adopt legally binding acts in matters of EU values will certainly conflict with the principle of institutional balance, 'according to which the EU institutions have to act within the limits of their respective powers as provided for by the Treaty'.¹³¹ As under the Treaties the enforcement of EU values is currently only conferred on the European Commission, the European Parliament, and the (European) Council,¹³² it can be drawn from that principle that the creation of additional organs with such wide discretionary competences is generally prohibited and only allowed following a Treaty revision.¹³³ As the previously mentioned proposals concern possible changes within the existing Treaty framework, the idea of a 'Copenhagen Commission' would be already disqualified solely because of there being no convincing argument that it could be established under the contemporary constitutional framework.

Anyway, the proposal of a 'Copenhagen Commission' is also to be considered as a mere 'piece of the puzzle' of the broader framework, as additional steps are still necessary to ensure effective protection of EU fundamental values. As there are already existing mechanisms and institutions in place to protect EU values, the creation of a 'Copenhagen Commission' would need to work in synergy with these existing structures, ensuring coordination and avoiding a duplication of efforts. The upholding of EU values is also a collaborative task in which action by multiple actors, including EU institutions, Member States, as well as civil society becomes necessary. The mere creation of a new body will therefore not provide for a comprehensive strategy.

3.4 'Emergency exits'

In the academic debate concerning the key proposals for EU values protection, recourse has also been made to 'emergency exits',¹³⁴ *inter alia*,

¹³¹ Ben Smulders and Katharina Eisele, 'Reflections on the Institutional Balance, the Community Method and the Interplay between Jurisdictions after Lisbon' (2012) 31(1) *Yearbook of European Law* 112, 114; see also Merijn Chamon, 'Institutional Balance and Community Method in the Implementation of EU Legislation Following the Lisbon Treaty' (2016) *Common Market Law Review* 1501, 1502–1503.

¹³² See for example Article 7 TEU.

¹³³ Michelle Everson, 'Independent Agencies: Hierarch Beaters?' (1995) 1(2) *European Law Journal* 180, 192.

¹³⁴ See in this manner Gráinne de Búrca, 'Poland and Hungary's EU Membership: On Not Confronting Authoritarian Governments' (2022) 20(1) *International Journal of Constitutional Law* 13, 21 speaking of 'last resort' measures, 'rarely to be used'.

to an expulsion procedure and the creation of an 'EU 2.0'.¹³⁵

The concept of creating an 'EU 2.0' entails the abandonment of the EU in its current form with a mass withdrawal of EU-values-compliant Member States, creating a re-founded 'EU 2.0' without the backsliding, non-compliant Member States.¹³⁶ This will be realised by all compliant Member States signing an international treaty outside the current EU legal framework, thereby committing to trigger Article 50 TEU if one Member State exercises its veto option more than a certain number of times within a certain period.¹³⁷ Next to this treaty, a second international treaty will be signed whose content reproduces the current EU legal framework, thereby creating an 'EU 2.0'.¹³⁸ This mechanism will enter into force as soon as all its signatories leave the initial EU.¹³⁹

As regards the expulsion procedure, this instrument merely entails compelling the recalcitrant Member States to leave the EU. However, the Treaties do not provide for a procedure of expulsion.¹⁴⁰ In this context, some scholars have even inferred that Article 50 TEU can be utilised effectively to expel recalcitrant Member States from the EU.¹⁴¹ Crucially, this would yet lead to the conceptualising of an implicit power of expulsion which is to be argued against for three particular reasons: first, it

¹³⁵ See for the discussion, among others, Christophe Hillion, 'Poland and Hungary Are Withdrawing from the EU' (*Verfassungsblog*, 27 April 2020) <<https://verfassungsblog.de/poland-and-hungary-are-withdrawing-from-the-eu/>> accessed 5 March 2023; Guido Bellenghi, 'EU 2.0 Revisited: Between Vetocracy and Rule of Law Concerns' (*European Law Blog*, 15 November 2022) <<https://europeanlawblog.eu/2022/11/15/eu-2-0-revisited-between-vetocracy-and-rule-of-law-concerns/#comments>> accessed 5 March 2023; de Búrca (n 134) 20 ff; John Cotter, 'Why Article 50 TEU Is Not the Solution to the EU's Rule of Law Crisis' (*European Law Blog*, 30 April 2020), <<https://europeanlawblog.eu/2020/04/30/why-article-50-teu-is-not-the-solution-to-the-eus-rule-of-law-crisis/>> accessed 5 March 2023; Tomasz Tadeusz Konciewicz, 'Polexit – Quo vadis, Polonia?' (*Verfassungsblog*, 3 August 2020) <<https://verfassungsblog.de/polexit-quo-vadis-polonia/>> accessed 5 March 2023; Oliver Mader, 'Polexit? Hungarexit? Quo vadis EU? Reflexions on the Latest Solutions Provided by EU Constitutional Law in the Face of a Persistent Rule of Law Misery' (2022) *Austrian Law Journal* 2022 47, 47 ff; Larion (n 125) 547; Tom Theuns, 'The Need for an EU Expulsion Mechanism: Democratic Backsliding and the Failure of Article 7' (2022) 28 *Res Publica* 693, 693 ff.

¹³⁶ Bellenghi (n 135), with reference to Merijn Chamon, 'Re-establishing the EU, Dissolution, Withdrawal or Succession?' (*EU Law Live* 2020) <<https://eulawlive.com/weekend-edition/weekend-edition-no32/>> accessed 5 March 2023, and Tom Theuns, 'Could We Found a New EU without Hungary and Poland?' (*euobserver* 2020) <<https://euobserver.com/opinion/149470>> accessed 5 March 2023.

¹³⁷ *ibid.*

¹³⁸ *ibid.*

¹³⁹ *ibid.*

¹⁴⁰ De Búrca (n 134) 21; Larion (n 125) 547; Matteo Bonelli, 'Symposium — Part III — Let's Take a Deep Breath: On the EU (and Academic) Reaction to the Polish Constitutional Tribunal's Ruling' (*Int'l J Const L Blog* 2021) <<http://www.iconnectblog.com/2021/10/symposium-part-iii-lets-take-a-deep-breath-on-the-eu-and-academic-reaction-to-the-polish-constitutional-tribunals-ruling/>> accessed 5 March 2023.

¹⁴¹ In this vein, Hillion has argued that both Hungary's and Poland's persistent undermining of the EU's fundamental values could be considered as a notification of an intention to withdraw within the meaning of Article 50 TEU, Hillion (n 135).

would render Article 7 TEU meaningless;¹⁴² second, from a historical purview, a similar power of expulsion under Article 50 TEU such as the one in Article 8 of the Statute of the Council of Europe¹⁴³ has been expressly rejected;¹⁴⁴ and third, the CJEU reaffirmed in its *Wightman* case that there is no such power to expel a Member State from the EU and that a Member State cannot be forced to leave the EU against its will.¹⁴⁵

Irrespective of the central objections concerning the desirability and legal soundness of such approaches, eg, criticism concerning contradictions with the concept of creating an 'ever closer union' proclaimed in Article 1 TEU, as the EU would become even more fragmented in retrospect, contradictions with Article 50 TEU and the CJEU's *Wightman* ruling, violations of the '*pacta sunt servanda*' principle, and challenges to the political concept of the EU as an endless process of European integration, as well as enormous political, economic, and legal consequences that such a mechanism would entail for the EU, its Member States, and its citizens,¹⁴⁶ expulsion or a complete start from scratch certainly does not provide for a comprehensive solution. It is debatable whether the idea of a 'piece of the puzzle' fits into the idea of an expulsion procedure or the creation of an 'EU 2.0', as they are certainly not a single piece but a 'nuclear option'. Furthermore, potential contestations of EU values also emanate from generally compliant Member States with which the EU will still be faced after making use of such 'emergency exists'. In fact, these mechanisms will ultimately not solve the crisis by just circumventing the actual reasons for the crisis. Instead, 'upholding the EU's fundamental values and ensuring the functioning of the Union while, where possible, keeping all Member States on board' appears to be the most desirable

¹⁴² De Búrca (n 134) 21; Article 7 TEU merely includes a suspension power but not an expulsion power. If such a power could be inferred from Article 50 TEU, Article 7 TEU would be *de facto* circumvented and undermined.

¹⁴³ Article 8 of the Statute of the Council of Europe explicitly stipulates that 'any member of the Council of Europe which has seriously violated Article 3 [referring to the principles of the rule of law and of the enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms] may be suspended from its rights of representation and requested by the Committee of Ministers to withdraw under Article 7. If such member does not comply with this request, the Committee may decide that it has ceased to be a member of the Council as from such date as the Committee may determine'. In that vein, Russia, for example, was expelled from the Council of Europe on 16 March 2022.

¹⁴⁴ De Búrca (n 134) 21.

¹⁴⁵ Case C-621/18 *Wightman and others* ECLI:EU:C:2018:999, paras 65, 67, 69, 72.

¹⁴⁶ See for further discussion, among others, Cotter (n 135); Maximilian Steinbeis, 'The Exit Door' (*Verfassungsblog* 8 October 2021) <<https://verfassungsblog.de/the-exit-door/>> accessed 5 March 2023; John A Hill, 'The European Economic Community: The Right of Member State Withdrawal' (1982) 12(3) *Georgia Journal of International and Comparative Law* 335, 356; De Búrca (n 134) 21.

option.¹⁴⁷ Again, a more comprehensive approach is needed that combines multiple strategies, mechanisms, collaboration between different stakeholders, including EU institutions, Member States, and civil society, to address the complex and evolving challenges related to upholding EU values more effectively.

4 Rearranging the puzzle: reconceptualising the framework of EU values protection

Given the points of criticism on the key proposals and their focus only on individual pieces of the big picture, this clearly offers sufficient reason to assume that they do not represent a comprehensive strategy in EU values protection either. Overstretching competences not provided for in the Treaties, conflicts with the principle of conferral and institutional balance, the discretion of institutional actors, politicising the enforcement of EU values, and the application of diverging standards do raise questions as to whether the framework of EU values protection needs to be reconceptualised pursuing Treaty revisions. Looking beyond the mere ‘pieces of the puzzle’, there is a need for a much broader conceptualisation of the EU’s role in the protection of the common values by equipping it with a more comprehensive and concerted response framework.¹⁴⁸ Such a strategy – as proposed hereafter – rests on three different dimensions: structural, institutional, and substantive reforms concerning the EU values protection framework.

4.1 Structural reforms

The first concept of the comprehensive strategy builds on the idea of structural reforms. As the overstretching of competences and conflicts with the principle of conferral have all challenged the idea of the constitutional balance between Member States’ sovereignty and supranational competences held at EU level that underpins the Treaties,¹⁴⁹ these reforms become necessary to re-strike the right constitutional balance. Most im-

¹⁴⁷ Guido Bellenghi, ‘EU 2.0 Revisited: Between Vetocracy and Rule of Law Concerns’ (*European Law Blog*, 15 November 2022) <<https://europeanlawblog.eu/2022/11/15/eu-2-0-revisited-between-vetocracy-and-rule-of-law-concerns/#comments>> accessed 5 March 2023 with reference also to Matteo Bonelli, ‘Symposium — Part III — Let’s Take a Deep Breath: On the EU (and Academic) Reaction to the Polish Constitutional Tribunal’s Ruling’ (*Blog of the International Journal of Constitutional Law* 2021) <<http://www.iconnect-blog.com/2021/10/symposium-part-iii-lets-take-a-deep-breath-on-the-eu-and-academic-reaction-to-the-polish-constitutional-tribunals-ruling/>> accessed 5 March 2023.

¹⁴⁸ See eg, arguing in the same manner, Monica Claes, ‘Safeguarding a Rule of Law Culture in the Member States: Engaging National Actors’ (2023) 29(2) *The Columbia Journal of European Law* 214, 223 ff.

¹⁴⁹ See eg Article 5 TEU enshrining the principle of conferral according to which the EU acts only within the limits of the competences that the Member States have conferred on it in the Treaties, and competences not conferred on the EU by the Treaties remain with the Member States.

portantly, Member States, first and foremost Poland and Hungary,¹⁵⁰ keep rejecting the authority of the CJEU or the EU in general and refuse to give full effect to EU law, *inter alia*, grounded on arguments of the EU's lack of competence, Member States' sovereignty, national (constitutional) identity under Article 4(2) TEU, essential state functions, or the supremacy of their Constitution.¹⁵¹ Such arguments are thereby contended as constituting absolute 'no-go areas' by which the respective Member States attempt to deviate at whim from EU law, including EU values, thereby favouring those areas over the primacy of EU law.¹⁵²

The constitutional balance between national sovereignty of the Member States and supranational competences held at EU level in this context needs to be rethought. On the one hand, the concept of Member States' sovereignty should not be understood as an absolute one, but in the sense that in the absence of EU law Member States are autonomous and free to determine their national (constitutional) identities as long as they do not undermine the functioning of the entire EU legal order founded on the common values of Article 2 TEU.¹⁵³ In the course of rethinking constitutional balance, it should be stressed that Article 2 TEU values are pre-eminent on national sovereignty and that the latter cannot be operationalised as a yardstick to derogate from EU law,¹⁵⁴ because Article 2 TEU values derive from and are commonly shared among Member States, and their definition is not left to a single Member State, but a 'common enterprise in the EU composite system'.¹⁵⁵ On the other hand, Article 2 TEU cannot be invoked as authorisation to allow the EU to defend its values in any case¹⁵⁶ since this would potentially undermine Member States' diversity and pluralism that need to be safeguarded.¹⁵⁷

However, as has been convincingly pointed out, there is considerable discrepancy between the constitutional relevance of EU values enshrined in Article 2 TEU and the competences assigned to the EU institutions

¹⁵⁰ See eg Case C-156/21 *Hungary v European Parliament and Council* ECLI:EU:C:2022:97, para 202; Case C-157/21 *Republic of Poland v European Parliament and Council* ECLI:EU:C:2022:98, paras 273 ff.

¹⁵¹ See Claes (n 148) 222; see also Monica Claes, 'How Common Are the Values of the European Union?' (2019) 15 *Croatian Yearbook of European Law & Policy* VII, XIV.

¹⁵² Anita Schnettger, 'Article 4(2) TEU as a Vehicle for National Constitutional Identity in the Shared European Legal System' in Christian Calliess and Gerhard van der Schyff (eds), *Constitutional Identity in a Europe of Multilevel Constitutionalism* (CUP 2019) 35.

¹⁵³ See also European Parliament, 'European Parliament resolution of 3 July 2013 on the situation of fundamental rights: standards and practices in Hungary', P7_TA (2013) 0315 <<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+TA+P7-TA-2013-0315+0+DOC+PDF+V0//EN>> accessed 15 April 2023, recitals K and M.

¹⁵⁴ See Matteo Bonelli, 'Has the Court of Justice Embraced the Language of Constitutional Identity?' (2022) *Diritti Comparati, Comparare i diritti fondamentali in Europa* 1, 5.

¹⁵⁵ *ibid* 7; see also the CJEU arguing in a similar manner in Case C-156/21 *Hungary v European Parliament and Council* ECLI:EU:C:2022:97, para 237.

¹⁵⁶ Bonelli (n 84) 520.

¹⁵⁷ This can be drawn, for example, from the Union's obligation to respect the equality of Member States and their national identities as stipulated under Article 4(2) TEU.

to protect those values.¹⁵⁸ The constitutional balance between Member States' sovereignty and supranational competences in the light of Article 2 TEU therefore needs to be reconceptualised in the sense that the EU would acquire competences that correspond to the constitutional relevance of EU values. Such a reconceptualisation certainly necessitates Treaty change extending the scope and reach of EU law, and broadening the competences for relevant actors in the EU values protection framework.

First of all, written affirmation of the principle of primacy within the Treaties could prove helpful in balancing between the need for differentiation within the framework of Member States' sovereignty and the need for unity of the common EU legal system. Recourse could be made to the already existing Declaration No 18 on primacy. In this sense, a new provision could provide for a general rule that all validly adopted EU law takes precedence over national law, including national constitutional law,¹⁵⁹ and that all national courts are obliged to set aside or disapply any conflicting measures of national law, including national constitutional law.¹⁶⁰ Such an explicit affirmation ensures the uniform interpretation and application of EU law throughout the Member States by simultaneously promoting legal certainty and consistency. It could help to solve tensions between unity and diversity as it provides for a clear reference point, further strengthens the commitment of Member States being bound to comply with EU law, and can help to deter potential challenges to the primacy of EU law, including EU values. Nevertheless, some doubts remain as to whether such a declaration of unconditional primacy will ultimately change the current course of constitutional backsliding. The German, Italian, Hungarian, and Polish constitutional courts will potentially still assert that there are limits to this at the level of the Member States' constitution. Without any possibility to find political will to implement such a change, Member States – let alone the 'illiberal' ones – will certainly not agree to such a Treaty revision.

Secondly, the envisaged reconceptualisation could be accomplished by a re-formulation of Article 4(2) TEU. This could potentially look as follows:

The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. It shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order, and safeguarding national security. This paragraph shall not constitute grounds to disrespect the values referred to in Article 2.

¹⁵⁸ Bonelli (n 84) 507, 509, 525 speaking of a current 'mismatch' and Jan Wouters, 'Revisiting Art 2 TEU: A True Union of Values?' (2020) 5(1) European Papers 255, 257, 260, speaking of 'asymmetry'.

¹⁵⁹ Case C-11/70 *Internationale Handelsgesellschaft* ECLI:EU:C:1970:114.

¹⁶⁰ Case C-6/64 *Costa v ENEL* ECLI:EU:C:1964:66; Case C-106/77 *Simmenthal* ECLI:EU:C:1978:49.

In practical terms, this amendment clarifies that ‘national specifics, safeguarded under Article 4(2) TEU, cannot permit a member’s disrespect of the values of Article 2 TEU’.¹⁶¹ It shows, as also found by the CJEU in the *RS* case, that Article 4(2) TEU in any case has ‘neither the object nor the effect’ of authorising a Member State to disregard EU values on the ground that a rule of EU law undermines the national identity of the Member State concerned.¹⁶² In the same vein, such a reformulation also clarifies that Article 4(2) TEU does not constitute an exception to the primacy of EU law.¹⁶³ Otherwise it would create the wrongful impression of allowing Member States to invoke national sovereignty as a trump card to derogate from EU values at whim, thereby also compromising the primacy, unity, and effectiveness of EU law.¹⁶⁴ Nevertheless, such a proposal – again – seems to be unviable due to potential vetoes and contestations of Member States. As there is already a prevalent interpretation of the meaning of Article 4(2) TEU, the added value of such a reformulation would probably be of only minor importance.

Finally, Article 2 TEU should be supplemented by the following clarification: ‘*The Union shall be competent as far as necessary for the enforcement of the values referred to in Article 2 TEU and with due regard for the principle of subsidiarity*’. This amendment will eventually provide for EU competences that correspond to the constitutional relevance of the EU’s fundamental values by simultaneously respecting the principle of subsidiarity and proportionality. Enforcement will be directed to EU institutions but also to Member States. The element of ‘necessity’ will be read in the light of subsidiarity and proportionality. According to the principle of subsidiarity, the EU can act only ‘if and in so far as the objectives of the proposed action cannot be sufficiently achieved by Member States’ but can rather be better achieved at Union level.¹⁶⁵ This principle is further complemented by the principle of proportionality, meaning that the content and form of Union action do not exceed what is necessary to achieve the objectives of the Treaties.¹⁶⁶ This means that EU action, thereby including the enforcement of EU values, is delimited by those principles beyond which the EU cannot go. Whether EU institutions exceed these limits is to be assessed by the CJEU. Simultaneously, Article 4(2) TEU could also serve as a legal basis for adopting secondary legislation. However, the proposed clarification could be perceived as providing ‘carte blanche’ for the EU to act whenever it feels compelled to and whenever EU values are in dispute. This likewise sounds like something not many Member States would agree to.

¹⁶¹ Hillion (n 14) 63.

¹⁶² Case C-430/21 *RS* ECLI:EU:C:2022:99, para 70.

¹⁶³ Schnettger (n 152) 34.

¹⁶⁴ Case C-399/11 *Melloni* ECLI:EU:C:2013:107, para 60; Case C-617/10 *Åkerberg Fransson* ECLI:EU:C:2013:280, para 29.

¹⁶⁵ Article 5(3) TEU.

¹⁶⁶ Article 5(4) TEU.

4.2 Institutional reforms

The second dimension of the reconceptualisation strategy rests on the idea of institutional reforms. With most of the values protection mechanisms subjected to the discretion of political actors, leaving enforcement where it currently stands will potentially not solve the political determination of values enforcement. By way of example, even though the Commission,¹⁶⁷ followed by the European Parliament,¹⁶⁸ activated Article 7 TEU, enforcement action was eventually blocked by the Council or the European Council,¹⁶⁹ thus demonstrating the struggle between the EU intergovernmental (Council¹⁷⁰ and European Council) and supranational (European Parliament and Commission) set-up failing to sanction backsliding regimes.¹⁷¹ This is further intensified by the political determination of values enforcement and the majority of mechanisms involving political actors showing constant reluctance to tackle the values crisis. With regard to national sovereignty and shown by its Legal Service Opinion of 2014, the Council as an intergovernmental institution has been the most reluctant institution.¹⁷² The solidarity among Member States stemming from fears of spillover may reasonably explain its unwillingness.¹⁷³ Likewise, the European Parliament has also shown its constraints¹⁷⁴ instigated by the strong support and party loyalty of the EPP, for which Orbán's Hungarian Fidesz party originally made strong gains in seats.¹⁷⁵ Backed

¹⁶⁷ Commission, 'Reasoned proposal in accordance with Article 7(1) of the Treaty on European Union regarding the Rule of Law in Poland' (n 21).

¹⁶⁸ European Parliament, 'Rule of Law in Hungary: Parliament Calls on the EU to Act' (Press release 2018), <<https://www.europarl.europa.eu/news/en/press-room/20180906IPR12104/rule-of-law-in-hungary-parliament-calls-on-the-eu-to-act>> accessed 31 January 2023.

¹⁶⁹ Soyaltin-Colella (n 26) 37.

¹⁷⁰ Since it has full competence in certain policy fields, one could argue that the Council is supranational. However, it also represents and follows the interests of the Member States. Therefore, the Council is predominantly an intergovernmental institution with some elements, however, of a supranational nature.

¹⁷¹ Soyaltin-Colella (n 26) 37; Joseph HH Weiler, 'Epilogue: Living in a Glass House: Europe, Democracy and the Rule of Law' in Carlos Closa and Dimitry Kochenov (eds), *Reinforcing Rule of Law Oversight in the European Union* (CUP 2016) 322; Roger Daniel Kelemen, 'Europe's Other Democratic Deficit: National Authoritarianism in Europe's Democratic Union' (2017) 52(2) *Government and Opposition* 211, 226; Dimitry Kochenov and Petra Bárd, 'Rule of Law Crisis in the New Member States of the EU: The Pitfalls of Overemphasising Enforcement' (RECONNECT Working Paper no 1, 2018) <https://reconnect-europe.eu/wp-content/uploads/2018/07/RECONNECT-KochenovBard-WP_27072018b.pdf> accessed 22 June 2023.

¹⁷² Soyaltin-Colella (n 26) 33; de Búrca (n 134) 25.

¹⁷³ Soyaltin-Colella (n 26) 34; 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* (CUP 2016) 4; Peter Oliver and Justine Stefanelli, 'Strengthening the Rule of Law in the EU: The Council's Inaction' (2016) 54(5) *Journal of Common Market Studies* 1075, 1081; de Búrca (n 134) 29.

¹⁷⁴ At least until 2018, when it activated the mechanisms under Article 7 TEU against Hungary.

¹⁷⁵ Soyaltin-Colella (n 26) 34; Kelemen (n 171) 226.

by the partisan influence of the EPP, even the Commission remained unwilling to address the illiberal developments of backsliders in the European Union during the Juncker-Commission of 2014-2019.¹⁷⁶ Besides, the current von-der-Leyen-Commission was decisively backed by Fidesz MEPs, confirming von der Leyen's candidacy in the European Parliament by the EPP.¹⁷⁷ Even if the Fidesz party has been excluded and MEPs have left the EPP in the meantime,¹⁷⁸ it clearly shows that EU institutions act in a decisively politically motivated way that is prone to arbitrariness and political preferences. With a view to further enlargement, this situation will even intensify as new States will be represented in each of the ever-growing institutions.¹⁷⁹ Due to the involvement of several actors,¹⁸⁰ criticism has also been raised as to who bears the primary responsibility for initiating and assessing the situation.¹⁸¹

In order to gain distance from political motivated actors and to clarify and substantiate obligations for safeguarding EU values, the institutional set-up of EU values protection clearly needs to be reformed. These reforms necessarily rest on two premises: first, clarifying the responsibilities of institutional actors and, second, turning the mere discretionary scope for manoeuvre into legal obligations. Simultaneously, it should be clarified that there is not one single mechanism to solve the crisis, but the solution lies in the combined application of *all* political, judicial, and financial strands distributing values protection to different actors, all needing to pursue a concerted and common strategy of EU values protection.¹⁸² In the same vein, it should also be considered that EU law and judicial protection alone cannot and will not solve the crisis. As Claes has pointed out, for the safeguarding of EU values, a 'shared commitment [...] of all actors involved – political and judicial institutions, executive and administrative bodies, civil servants, civil society organizations and the citizenry at large – who each in their own role have the responsibility to give effect to it' is needed.¹⁸³

Such a reconceptualised strategy could, for example, be designed as an '*EU values traffic light system*' which could potentially look as follows: in the first stage, under the green-light mode, the response architecture

¹⁷⁶ Soyaltin-Colella (n 26) 34; Even if the Juncker Commission was not totally inactive but triggered Article 7 TEU and launched infringement proceedings, the challenge was particularly new and nobody knew the possible responses.

¹⁷⁷ Roger Daniel Kelemen, 'The European Union's authoritarian equilibrium' (2020) 27(3) *Journal of European Public Policy* 481, 488 ff.

¹⁷⁸ Fidesz was suspended from membership of the EPP in 2019 and its MEPs resigned their membership in the EPP in 2021. See Martin Dunai and Gabriela Baczynska, 'Hungary's Fidesz Party Leaves Largest EU Parliamentary Group' (*Reuters*, 2021) <<https://www.reuters.com/article/uk-eu-hungary-idUKKBN2AV132>> accessed 9 April 2023.

¹⁷⁹ De Witte (n 13) 9.

¹⁸⁰ Particularly with respect to Article 7 TEU.

¹⁸¹ Larion (n 125) 547; Müller (n 129) 212.

¹⁸² In this manner, see also Bonelli et al (n 9) 649.

¹⁸³ Claes (n 148) 220.

could allow for an advisory group, an institutionally and politically independent body to constantly monitor all Member States' internal legal-political developments and advise on appropriate measures for anticipating, preventing, and addressing the impact of potentially emerging decays of EU values. The advisory group should particularly be composed of third-party experts, the FRA being one example. In order to strengthen the legitimacy of the EU, expertise from both within and outside the EU, including also NGOs and civil society could prove helpful in this sense.¹⁸⁴ In the second stage, under the amber-light mode, if there is a serious risk of a breach of EU values by a Member State, the strategy could provide for the obligation to activate the process for the Commission to enter into dialogue with the respective Member State focused on finding a solution to bring it back in line with EU values. This could be accompanied by opinions, advice, and recommendations. For the dialogue process, recourse could be made, for example, to the existing 2014 Rule of Law Framework which, however, must be re-designed in the sense that it will cover *all* EU values, and not just the rule of law. If this stage fails to resolve the situation or the serious risk emerges into a systemic and persistent breach of EU values, the red-light mode could lead to mandatory follow-up procedures, including the activation of sanctions, initiating judicial proceedings as well as financial response mechanisms. All EU institutions and Member States would be in charge of these procedures. The stages, however, should be able to be activated independently, depending on the degree and gravity of potential threats to, or breaches of, EU values, although monitoring should occur constantly in any case. In the same vein, notions such as 'serious risk of a breach' and 'systemic and persistent breaches' should be clarified and clearly articulated, eg by the CJEU or through legislative acts by the EU legislature. Finally, the individual colour of the traffic light should be decided by a proposal of the independent advisory group, followed by a final decision of the Commission guided by discretion but limited by the principle of subsidiarity and proportionality. Nevertheless, it should be noted that it is debatable what distinguishes an independent 'advisory body' from a 'Copenhagen Commission'. All in all, such a creation would potentially lead to even more technocratic institutions at EU level with the EU already being accused of having a democratic deficit and consisting of too many independent agencies and bodies with little democratic accountability.

Each institution in the above-mentioned values-crisis-response architecture should be assigned clear responsibilities to determine when it is required to act. However, the current EU Treaty framework is extremely limited when it comes to the protection and enforcement of the values enshrined in Article 2 TEU.¹⁸⁵ In view of the identified discrepancy between the constitutional significance of EU values and the competences assigned to the EU institutions to protect these values, it is therefore im-

¹⁸⁴ See also Claes and Bonelli (n 28) 289.

¹⁸⁵ Bonelli (n 84) 521.

perative to expand legislative, executive (eg, financial response, activation of sanctions) and judicial (eg, the initiation of judicial proceedings and the possibility to review national internal developments) competences in the area of EU values.

As a first step, the proposed amendment to Article 2 TEU above will open the door for EU institutions to acquire competences that correspond to the constitutional relevance of EU values. This could entail, for example, competences concerning the positive determination of the substantial content of EU values, further monitoring, or reactive enforcement powers, including positive actions to be undertaken by non-compliant Member States or even possible sanctions. In practical terms, the expanding of legislative competences in the area of EU values could be made more explicit, for example by adding the area of EU values as referred to in Article 2 TEU to the catalogue of the EU's shared competences under Article 4 TFEU. Such an amendment should fall into the area of shared competences, as those are also limited by the principle of proportionality and subsidiarity.

In a second step, however, the role of individual actors also needs to be clarified. The positive task of fleshing out EU fundamental values could be assigned to the legislative triangle in which the Commission proposes, and the Council and the European Parliament co-decide. The reactive enforcement competences comprising political and legal responses could then be shared among the EU legislature on the one hand, as in a co-decision procedure, and an institutionally and politically independent body, from which consent is required, on the other.¹⁸⁶ This role of an independent body could be taken by the advisory body described above. Following the proposed Treaty changes and the rethinking of the currently existing institutional balance, the role of the advisory body could be designed so as to be entrusted with valuable monitoring and enforcement powers, for example by allowing it to adopt legally binding acts which must then be enforced by EU institutions, most particularly the Commission, or allowing for the possibility to initiate judicial proceedings. Resort to the advisory body is, *inter alia*, preferable as it is institutionally separate from the EU institutions and, if it consists of members of the FRA, comprises a high level of expertise in providing assistance by simultaneously relieving the legislature.¹⁸⁷ This would not only 'depoliticise' the protection and enforcement of EU values but also make it more impartial.¹⁸⁸ However, as already mentioned, the EU is already accused of having a democratic deficit and of consisting of too many independent agencies and bodies with little democratic accountability, so that the creation of such an advisory body remains questionable and subject to Member States' contestations and doubts.

¹⁸⁶ See also Olsen (n 27) 83 ff.

¹⁸⁷ European Parliament, 'European Agencies, Common Approach and Parliamentary Scrutiny' (EPRS 2018) 5 <[https://www.europarl.europa.eu/RegData/etudes/STUD/2018/627131/EPRS_STU\(2018\)627131_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2018/627131/EPRS_STU(2018)627131_EN.pdf)> accessed 6 March 2023.

¹⁸⁸ See also Olsen (n 27) 83.

At the same time, the strategy described above with a clear focus on response measures should also be accompanied by positive instruments adopted by the EU legislature under the newly added competence as previously proposed, fostering the activities of NGOs, equality bodies, public administrations, judicial networks or universities,¹⁸⁹ promoting civil society organisations which are active at local, regional, national, or transnational levels in protecting and promoting the EU's fundamental values,¹⁹⁰ and focusing essentially on facilitating and supporting judicial cooperation, promoting judicial training, as well as safeguarding effective and non-discriminatory access to justice and effective remedy.¹⁹¹ In a more decentralised form, such a strategy potentially generates great leverage for bottom-up enforcement of EU values in order to potentially create significant resistance against 'democratic decline'.¹⁹²

With a particular view to decision-making, institutional reforms should also bear in mind that a shift from unanimity to qualified majority voting in the (European) Council is inevitable.¹⁹³ In a Union of 27 Member States (or more in the case of further enlargement),¹⁹⁴ all sharing different political interests, unanimity is inconceivable in certain policy fields,¹⁹⁵ as can be drawn from the current Article 7 TEU, thus fragmenting the EU's capacity to act.¹⁹⁶ Therefore, a shift from unanimity to qualified majority voting should be made at least in the new area in which the EU could legislate on its values, but may also be considered within the realm of broader reforms of the EU framework.

In the same vein, the EU should also reflect on how fundamental and crucially important Article 2 TEU values are for the functioning of the entire EU legal order that is based on credibility towards external parties, mutual trust between Member States, the area of freedom, security and justice, and the administration of EU funds and democratic institutions. Since the undermining of these fundamental values would fragment the functioning of the entire EU legal order, the current discretionary scope

¹⁸⁹ European Economic and Social Committee, Justice, Rights and Values Fund (2018) <www.eesc.europa.eu/en/agenda/our-events/events/justice-rights-and-values-fund/> accessed 28 January 2023.

¹⁹⁰ Article 2 of Regulation 2021/692.

¹⁹¹ Article 3 of Regulation 2021/693.

¹⁹² Fiscaro (n 79) 712.

¹⁹³ See in this manner also de Witte (n 13) 6, 9.

¹⁹⁴ In this vein, de Witte for example proposed that the European Parliament should link its consent to a candidate State's accession which is required under Article 49 TEU to the negotiation of a Treaty revision leading to a shift from unanimity to qualified majority voting, as well as for future Treaty revisions themselves. See de Witte (n 13) 9.

¹⁹⁵ This includes CFSP matters, citizenship (the granting of new rights to EU citizens), EU membership, harmonisation of national legislation on indirect taxation, EU finances (own resources, the multiannual financial framework), certain provisions in the field of justice and home affairs (the European prosecutor, family law, operational police cooperation, etc), and the harmonisation of national legislation in the field of social security and social protection.

¹⁹⁶ De Witte (n 13) 9.

of manoeuvre to act upon the protection and enforcement of EU values should therefore be turned into legal obligations for all responsible actors. Consequently, these actors will ultimately feel compelled to use the existing mechanisms more forcefully than subjecting them to mere political discretion.

4.3 Substantive reforms

The last concept builds on the idea of further constitutionalising EU values, in the sense that it would strengthen the EU's legitimacy by contractually enshrining the constitutional and non-negotiable mandate of the EU's core values in the Treaties in order to preclude policy changes necessitated by 'the circumstances or a shift of political preferences'.¹⁹⁷ Even though EU fundamental values are to be considered of paramount importance, there is still no universal standard framework to refer to. Instead, EU institutions keep applying double standards¹⁹⁸ by turning to very different sources of law such as CJEU and ECtHR case law, the CFR,¹⁹⁹ and the advice of the FRA, drawing on the expertise of the Venice Commission.²⁰⁰ Further, even soft-law or Commission interpretation guidelines would add another non-binding source for an unconcerted strategy of values protection and enforcement. This clearly demonstrates that with respect to the principle of legal certainty, according to which the laws must be clear, predictable, and prospective,²⁰¹ there is an urgent need to merge all these approaches into a single universal standard framework of EU fundamental values. Legal decisions based on EU values must be sufficiently predictable and need to allow for judicial review. This is necessary, most importantly, since far-reaching sanctions, for example under financial tools, not only hit Member States but ultimately also lead

¹⁹⁷ Dieter Grimm, 'The Democratic Costs of Constitutionalization: The European Case' in Dieter Grimm (ed), *Constitutionalism: Past, Present, and Future* (OUP 2016) 300 and 310.

¹⁹⁸ De Witte (n 13) 25.

¹⁹⁹ Deriving elements *inter alia* from the ECHR and national bill of rights.

²⁰⁰ Commission, 'A New EU Framework to Strengthen the Rule of Law' (n 32) para 9. The Venice Commission is composed of independent law experts appointed by its member States but acting autonomously within their capacities. It provides legal advice to the Council of Europe in the areas of democratic institutions, fundamental rights, constitutional and ordinary justice, and elections, referendums and political parties. In 2016, the Venice Commission, *inter alia*, adopted a 'Rule of Law Checklist'. See Council of Europe, 'Rule of Law Checklist' CDL-AD (2016) 007 <[https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2016\)007-e](https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2016)007-e)> accessed 21 February 2023.

²⁰¹ Case C-17/03 *VEMW and others* ECLI:EU:C:2005:362, para 80; Case C-325/85 *Ireland v Commission* ECLI:EU:C:1987:546, para 18; Case C-143/93 *Gebroeders van Es Douane Agenten*, ECLI:EU:C:1996:45, para 27; Case C-63/93 *Duff and Others* ECLI:EU:C:1996:51, para 20.

to private parties such as citizens being deeply affected.²⁰² Indeed, it is also not always clear or precise what is behind the values contained in Article 2 TEU.

In this context, de Witte proposed establishing a 'uniform [...] framework in which the content of the fundamental values is clearly listed'.²⁰³ Following up on this proposal, a Convention composed of representatives of the Heads of State and Government, national parliaments, the European Parliament, and the Commission could be set up to draft a *Charter of EU Fundamental Values*.²⁰⁴ The arsenal of recourse options mentioned above could serve as useful guidance in drafting such a text. As the CFR already contains elements of the fundamental values,²⁰⁵ the proposal comprising all EU values enshrined in Article 2 TEU could be realised by merging and adapting the existing CFR with the new text to be drafted. In this sense, the *Charter of EU Fundamental Values* could be designed as a catalogue in which each individual value will be given its own particular section. This new *Charter* would not be a self-standing document but an amended version of the CFR. This is mainly because if the CFR existed in parallel there could be a significant overlap between the two which would further complicate existing matters. To transform such a *Charter* into a legally binding source of EU law, Article 6(1) TEU should be amended in so far as the provision refers to the CFR which is predominantly to be replaced by the wording *Charter of EU Fundamental Values*.²⁰⁶ The *Charter*, however, without prior provision for more legislative competences in matters of EU values, can only be adopted via Treaty change as there is currently no legal basis providing for the adoption of such a legally binding source of EU law.²⁰⁷

As has been stated by the CJEU, Articles 6, 10 to 13, 15, 16, 20, 21 and 23 of the CFR already 'define' the scope of the values of human dignity, freedom, equality, respect for human rights, non-discrimination and

²⁰² Funding cuts considerably hit citizens as the bulk of the EU budget is *inter alia* spent on research and innovation, infrastructure projects, support for SMEs to thrive, and aims at securing working places and building prosperity. See for some examples on spending categories, Commission, 'Headings: Spending Categories' <https://commission.europa.eu/strategy-and-policy/eu-budget/long-term-eu-budget/2021-2027/spending/headings_en> accessed 19 January 2023.

²⁰³ De Witte (n 13) 25.

²⁰⁴ Since the draft of the Charter would be linked to Treaty change, Article 48(3) TEU requires (after the European Council has adopted a decision in favour) in any case the set-up of a Convention composed of representatives of the national Parliaments, of the Heads of State or Government of the Member States, of the European Parliament and of the Commission.

²⁰⁵ Alessandra Facchi and Nicola Riva, 'European Values in the Charter of Fundamental Rights: An Introduction' (2021) 34(1) *Ratio Juris* 3–5.

²⁰⁶ The same applies, of course, to further Articles that refer to the Charter of Fundamental Rights.

²⁰⁷ Bonelli (n 84) 521; Wouters (n 158) 260.

equality between women and men, contained in Article 2 TEU.²⁰⁸ With regard to the value of the rule of law, the CJEU referred to Articles 47 to 50 of the Charter.²⁰⁹ The value of democracy is, *inter alia*, substantiated in Article 39, 40 and 44.²¹⁰ However, the CFR in its current state not only contains six different chapters (dignity, freedoms, equality, solidarity, citizens' rights and justice), it also differs in its terminology by referring to 'values', 'principles', 'freedoms' and 'rights', leaving out any conceptualisation of these terms.²¹¹ Even though the CJEU assumes that the CFR already 'defines' the values contained in Article 2 TEU, a concrete definition of each particular value cannot be drawn from reading the provisions. Instead, recourse is to be made to value-based interpretation guides drawn from the sources mentioned above to give life to the abstract values. Additionally, the FRA concluded in one of its reports that not all Article 2 TEU values have a corresponding right in the CFR; instead, they only partially overlap but are not congruent.²¹² With a view to the double-standards criticism, this even more demonstrates the need for a revision of the CFR to turn it into a universal framework of EU fundamental values.

The *Charter of EU Fundamental Values*, however, is not intended to set detailed standards to be followed in order to achieve uniformity, as this would certainly conflict with the Member States' sovereignty, and constitutional pluralism within the EU.²¹³ Instead, it should aim to set a homogeneous framework of minimum standards by fleshing out positive determinations of the abstract values contained in Article 2 TEU.

For example, with a view to the value of the rule of law, the CJEU has already delivered numerous judgments in which the Court clarified the meaning and developed the core components of its meta-concept.²¹⁴ The most intensively examined component in this regard is the one of judicial independence. In this vein, the Court has developed standard minimum

²⁰⁸ Case C-156/21 *Hungary v European Parliament and Council of the European Union* ECLI:EU:C:2022:97, para 157.

²⁰⁹ *ibid*, para 160.

²¹⁰ Gabriel N Toggenburg and Jonas Grimheden, 'Upholding Shared Values in the EU: What Role for the EU Agency for Fundamental Rights?' (2016) 54(5) *Journal of Common Market Studies* 1093, 1099.

²¹¹ See in this manner also Sanja Ivic, 'The Four Values of the Charter of Fundamental Rights of the European Union' (2009) 4(2) *International Journal of Good Conscience* 278, 282.

²¹² European Union Agency for Fundamental Rights, 'Fundamental Rights: Challenges and Achievements in 2013' (2014) 10 <https://fra.europa.eu/sites/default/files/fra-2014-annual-report-2013-2_en.pdf> accessed 9 April 2023.

²¹³ See Spieker (n 52) 257 ff.

²¹⁴ See for example on the principles of legality, legal certainty and the protection of legitimate expectations, the prohibition of arbitrariness of executive powers, on the prohibition of retroactive application and the principle of proportionality and separation of powers *Joined Cases C-46/87 and 227/88 Hoechst AG v Commission* ECLI:EU:C:1989:337, para 19; Case C-90/95 P *Henri de Compté v European Parliament* ECLI:EU:C:1997:198, para 35; Case C-120/86 *J Mulder v Minister van Landbouw en Visserij* ECLI:EU:C:1988:213, para 24; Case C-222/86 *Unectef v Hejlsens* ECLI:EU:C:1987:442, para 15.

requirements for an independent national judiciary focusing on external and internal aspects of independence.²¹⁵ The external aspect centres on autonomy of the court and requires that the court is free from any 'external interventions or pressure liable to impair the independent judgment of its members and to influence their decisions'.²¹⁶ The internal aspect, instead, concerns the impartiality of the judges and requires objectivity and the absence of any interest in the outcome of the proceedings apart from the strict application of the rule of law.²¹⁷ These guarantees of independence and impartiality require rules, particularly as regards the composition of the body and the appointment, length of service, and grounds for abstention, and the rejection and dismissal of its members, so as to dispel any reasonable doubt in the minds of individuals as to the imperiousness of that body to external factors and its neutrality with respect to the interests before it.²¹⁸ Furthermore, freedom from external factors requires certain guarantees to be given to judges, such as those against removal from office and the receipt of a certain level of remuneration.²¹⁹

These positive determinations of minimum standards could be accomplished equally for all EU values, including all their components. In practical terms, such determinations could for example be established by conducting comparative research by looking at each particular Member State and drawing a common base for the components and minimum standards of EU fundamental values. In that way of setting a homogeneous framework of minimum standards by fleshing out positive determinations of the abstract values, each value enshrined in Article 2 TEU will thus acquire a corresponding and congruent counterpart in the *Charter*. This would then provide for a clearly defined and recognisable framework not only for Member States but also for EU institutions responsible for protecting it, and for the citizenry at large to gain a full picture of their rights. The content of these definitions, however, will not be considered exhaustive, but rather as 'living instruments' open to further development. Such a *Charter* could finally serve as a basis for all tools of the EU values protection framework, either by forming the basis for judicial proceedings, setting minimum standards for political tools, or serving

²¹⁵ Case C-192/18 *European Commission v Republic of Poland* ECLI:EU:C:2019:924, paras 109 ff; see also Stanisław Biernat and Paweł Filipek, 'The Assessment of Judicial Independence Following the CJEU Ruling in C-216/18 LM' in Armin von Bogdandy (eds), *Defending Checks and Balances in EU Member States. Taking Stock of Europe's Actions* (Springer 2021) 408.

²¹⁶ Case C-192/18 *European Commission v Republic of Poland* ECLI:EU:C:2019:924, para 109 also with reference to Case C-64/16 *Associação Sindical dos Juizes Portugueses* ECLI:EU:C:2018:117, para 44.

²¹⁷ Case C-192/18 *European Commission v Republic of Poland* ECLI:EU:C:2019:924, para 110 with reference to Case C-216/18 PPU *LM* ECLI:EU:C:2018:586, para 65; and C-619/18 *Commission v Poland (Independence of the Supreme Court)* ECLI:EU:C:2019:531, para 73.

²¹⁸ Case C-192/18 *European Commission v Republic of Poland* ECLI:EU:C:2019:924, para 111.

²¹⁹ Case C-64/16 *Associação Sindical dos Juizes Portugueses* ECLI:EU:C:2018:117, para 45; Case C-216/18 PPU *LM* ECLI:EU:C:2018:586, para 64.

as definitional conceptualisations for financial instruments. It thus represents a necessary step in the direction of a concerted strategy of EU values protection and enforcement. Nevertheless, in general, it remains debatable whether over-legislation can solve the current status of democratic and constitutional backsliding. It will again all come down to interpretation in particular cases, primarily by the CJEU but also by other relevant actors.

5 Concluding remarks

This overview of available mechanisms and procedures to protect EU values and the demonstration of their shortcomings in the EU values crisis provides clear evidence that the EU is ill equipped to bring recalcitrant Member States back in line with its fundamental values enshrined in Article 2 TEU. While a great deal has been written and proposed on how to better enforce EU values, all key proposals have merely offered individual 'pieces of the puzzle' unlikely to solve the crisis if taken in isolation, and ultimately do not provide for a comprehensive solution either. This article instead opted for a different stance by taking a broader perspective, relying on the idea of reconceptualising the framework of EU values protection pursuing Treaty change.

In this vein, it has argued for a rethinking of the constitutional balance between Member States' sovereignty and supranational competences held at EU level, most importantly to provide the EU with values protection competences corresponding to the constitutional importance of EU values. This would particularly entail a written affirmation of the principle of primacy, a re-formulation of Article 4(2) TEU, and an amendment of Article 2 TEU – all seeking to strike the right balance between the need for differentiation and the need for unity in the common EU legal system and paving the way for more EU competences in the area of EU values. It has further favoured a reform of the institutional set-up by clearly defining responsible actors and substantiating obligations in the context of EU values protection. Finally, it has demonstrated the inevitable need to constitutionalise EU values by creating a legally binding *Charter of EU Fundamental Values* as a universal framework to refer to, in order to bring the abstract values enshrined in Article 2 TEU to life and simultaneously to avoid diverging standards.

Such a reconceptualisation strategy necessarily rests on the premise of Treaty change. As has been identified, the current values protection framework in its present state is not sufficient, and the single 'pieces of the puzzle' are not adequate responses either to tackling the ongoing crisis of EU values. It is therefore inevitable to pursue the path of Treaty change. First, blurred boundaries, even if they allow room for flexibility and adaptation to challenges, must be clearly indicated to avoid arbitrariness and susceptibility to political preferences, and only Treaty re-

visions can provide the necessary degree of legal certainty and clarity.²²⁰ Second, Treaty change is already preferable since several institutions of different stakeholders, including the European Parliament, the European Commission, the Council of the EU, the European Council, as well as national parliaments, would be involved.²²¹ Since, for example, the European Parliament is directly elected by the citizens, and Member States are represented in the European Council by their Heads of State or Government, and in the Council by their governments, themselves democratically accountable either to their national parliaments, or to their citizens,²²² Treaty change will eventually provide for stronger democratic credentials, thereby strengthening the EU's overall legitimacy. Third, this would not only illustrate the extension of the reach of EU law and the broadening of competences for EU relevant actors in a visible and transparent manner, but also provide for easily accessible and clearly identifiable rights to be enforced before courts more generally.²²³ Finally, Treaty change would also elucidate the 'politically agreed shared understanding of the balance between conflicting rights and interests' relevant to protect EU values,²²⁴ thereby enshrining the constitutional and non-negotiable mandate of EU core values in the Treaties in order to preclude policy changes made on a political whim or necessitated by a shift of circumstances.²²⁵ Treaty change is therefore preferable over, for example, further developing the individual 'pieces of the puzzle' which bypass possible Treaty changes, already limited in their ability to change the course of backsliding and prone to overstressing EU competences in a questionable and controversial way. This is mainly because Treaty change will be the result of the 'agreed shared understanding' of the relevant actors involved in the process of Treaty change and will provide for the necessary degree of legal certainty and clarity, therefore potentially avoiding being subject to contestations.

Following the conclusions of the Conference on the Future of Europe and the Parliament's resolution calling for major Treaty changes, the EU is currently faced with a decision on whether to initiate reforms of the Treaties also in matters of EU values. Even if it is said that authoritarian states would possibly veto any of those proposals, such reforms do not necessarily mean that they are inconceivable in the long run. The topic of Treaty revisions is still on the agenda and considering that, so far, every single act of EU enlargement has been accompanied by Treaty changes, it does not seem entirely farfetched that these could become a reality

²²⁰ See European Central Bank, 'Continuity and Change: How the Challenges of Today Prepare the Ground for Tomorrow' (ECB Legal Conference 2021) 18 <<https://www.ecb.europa.eu/pub/pdf/other/ecb.ecblegalconferenceproceedings202204~c2e5739756.en.pdf>> accessed 22 June 2023.

²²¹ See Article 48 TEU.

²²² Article 10 TEU.

²²³ Muir et al (n 113) 22.

²²⁴ *ibid* 22.

²²⁵ Grimm (n 197) 300.

with the accession of further Member States. In this sense, the proposed reforms could then also be realised to achieve a consistent and coherent overall strategy of EU values protection. Conclusively, the EU could be put on a new level of further integration by achieving a stronger 'Union of values'²²⁶ in which several actors at different levels play a crucial role, EU values become deeply constitutionalised, and Member States' sovereignty and supranational competences are rebalanced.

The ball is now in the court of the EU institutions, and it remains to be seen whether they will consider Treaty change to strengthen the procedure to protect EU values.



This work is licensed under the *Creative Commons Attribution – Non-Commercial – No Derivatives 4.0 International License*.

Suggested citation: I Böttge, 'Rearranging the Puzzle: How Treaty Change Can Strengthen the Protection of EU Values' (2023) 19 *CYELP* 39.

²²⁶ See Koen Lenaerts, 'The European Union as a Union of Democracies, Justice and Rights' (2017) 3(2) *International Comparative Jurisprudence* 132, 136; Koen Lenaerts, 'On Checks and Balances: The Rule of Law Within the EU' (2023) 29(2) *The Columbia Journal of European Law* 25, 25.