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THE PROTECTION OF ARTICLE 2 TEU VALUES IN THE EU

The European Union 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, as laid down in Article 2 of the Treaty on European Union (TEU). In order to ensure that these values are respected, Article 7 TEU provides for an EU mechanism to determine the existence of, and possibly sanction, serious and persistent breaches of EU values by a Member State. It was recently activated for the first time in relation to Poland and Hungary. The EU is also bound by its Charter of Fundamental Rights and is committed to acceding to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Following the emergence of threats to EU values in some Member States, the EU institutions are strengthening their toolbox to counter democratic backsliding and protect democracy, the rule of law, fundamental rights, equality and minorities across the Union.

FROM JUDICIAL PROTECTION OF FUNDAMENTAL RIGHTS TO CODIFICATION IN THE TREATIES

The European Communities (EC) (now the European Union) were originally created as an international organisation with an essentially economic scope of action. There was therefore no perceived need for explicit rules concerning respect for fundamental rights, which for a long time were not mentioned in the Treaties, and were anyway considered as guaranteed by the 1950 [European Convention for the Protection of Human Rights and Fundamental Freedoms](#) (ECHR), to which the Member States were signatories.

However, once the Court of Justice of the European Union (CJEU) had affirmed the principles of direct effect and of primacy of European law, but refused to examine the compatibility of decisions with the national and constitutional law of Member States ([Stork, case 1/58](#); [Ruhrkohlen-Verkaufsgesellschaft, joined cases 36, 37, 38-59 and 40-59](#)), certain national courts began to express concerns about the effects such case law might have on the protection of constitutional values such as fundamental rights. If European law were to prevail even over domestic constitutional law, it would become possible for it to breach fundamental rights. To address this theoretical risk, in 1974 the German and Italian constitutional courts each adopted a judgment in which they asserted their power to review European law in order to ensure its consistency with constitutional rights (Solange I; Frontini). This led the CJEU to affirm through its case law the principle of respect for fundamental rights, by stating that fundamental rights are enshrined in the general principles of Community law protected by the Court ([Stauder, case 29-69](#)). These are inspired by the constitutional traditions common to the



Member States ([Internationale Handelsgesellschaft, case 11-70](#)) and by international treaties for the protection of human rights to which Member States are parties ([Nold, case 4-73](#)), one of which is the ECHR ([Rutili, case 36-75](#)).

With the progressive expansion of EU competences to policies having a direct impact on fundamental rights - such as justice and home affairs, which then developed into a fully-fledged area of freedom, security and justice - the Treaties were changed in order to firmly anchor the EU to the protection of fundamental rights. The Treaty of Maastricht included references to the ECHR and the common constitutional traditions of Member States as general principles of EU law, while the Treaty of Amsterdam affirmed the European 'principles' upon which the EU is founded (in the Treaty of Lisbon, 'values' as listed in Article 2 TEU) and created a procedure to suspend the rights provided for by the Treaties in cases of serious and persistent violations of fundamental rights by a Member State. The drafting of the Charter of Fundamental Rights and its entry into force together with the Treaty of Lisbon are the latest developments in this process of codification intended to ensure the protection of fundamental rights in the EU.

THE EU'S ACCESSION TO THE EUROPEAN CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS

As the ECHR is the leading instrument for the protection of fundamental rights in Europe, to which all Member States have acceded, EC accession to the ECHR appeared as a logical solution to the need to link the EC to fundamental rights obligations. The Commission repeatedly proposed (in 1979, 1990 and 1993) the accession of the EC to the ECHR. Requested for an opinion on the matter, the CJEU found in 1996, in its [Opinion 2/94](#), that the Treaty did not provide for any competence for the EC to enact rules on human rights or to conclude international conventions in this field, making accession legally impossible. The Treaty of Lisbon remedied this situation by introducing Article 6(2), which made the EU's accession to the ECHR obligatory. This meant that the EU (as was already the case for its Member States) would become subject, as regards respect for fundamental rights, to review by a legal body external to itself, namely the European Court of Human Rights (ECtHR). Following accession, EU citizens, but also nationals of non-EU countries present on EU territory, would be able to challenge legal acts adopted by the EU directly before the ECtHR on the basis of the provisions of the ECHR, in the same way as they may challenge legal acts adopted by the EU Member States.

In 2010, right after the entry into force of the Lisbon Treaty, the EU opened negotiations with the Council of Europe on a draft Accession Agreement, which was finalised in April 2013. In July 2013, the Commission asked the CJEU to rule on the compatibility of this agreement with the Treaties. On 18 December 2014, the CJEU issued a negative opinion stating that the draft agreement was liable to adversely affect the specific characteristics and the autonomy of EU law ([Opinion 2/13](#)). After a period of reflection and discussions on how to overcome the issues raised by the CJEU, the EU and the Council of Europe resumed negotiations in 2019, which are still under way.



THE EU CHARTER OF FUNDAMENTAL RIGHTS

In parallel to the ‘external’ scrutiny mechanism provided for by EC accession to the ECHR to ensure the conformity of legislation and policies with fundamental rights, an ‘internal’ scrutiny mechanism was needed at EC level to allow for a preliminary and autonomous judicial check by the CJEU. For this to happen, the existence of a bill of rights specific to the EU was necessary, and at the 1999 European Council in Cologne it was decided to convoke a Convention to draft a Charter of Fundamental Rights.

The Charter was solemnly proclaimed by Parliament, the Council and the Commission in Nice in 2000. After being amended, it was proclaimed again in 2007. However, only with the adoption of the Treaty of Lisbon on 1 December 2009 did the [Charter](#) come into direct effect, as provided for by Article 6(1) TEU, thereby becoming a binding source of primary law.

The Charter, although based on the ECHR and other European and international instruments, was innovative in various ways, notably since it includes, among other issues, disability, age and sexual orientation as prohibited grounds of discrimination, and enshrines access to documents, data protection and good administration among the fundamental rights it affirms.

While the scope of application of the Charter is, on the one hand, potentially very broad, as most of the rights it recognises are granted to ‘everyone’ regardless of nationality or status, Article 51 does on the other hand limit its application to the EU institutions and bodies and, when they act to implement EU law, to the Member States.

ARTICLE 7 TEU, THE COMMISSION RULE OF LAW FRAMEWORK AND MECHANISM

With the Amsterdam Treaty a new sanction mechanism was created to ensure that fundamental rights, as well as other European principles and values such as democracy, the rule of law, equality and the protection of minorities are respected by the Member States beyond the legal limits posed by EU competences. This meant giving the EU the power to intervene in areas otherwise left to Member States, in situations of ‘serious and persistent breach’ of these values. A similar mechanism had been proposed by Parliament for the first time in its [1984 draft EU treaty text](#). The Treaty of Nice added a preventive phase, in cases of ‘clear risk of a serious breach’ of EU values in a Member State. This procedure was aimed at ensuring that the protection of fundamental rights, as well as of democracy, the rule of law and of minorities’ rights, as included among the Copenhagen criteria for accession of new Member States, remains valid also after accession, and for all Member States in the same way.

Paragraph 1 of Article 7 TEU provides for a ‘preventive phase’, empowering one third of Member States, Parliament and the Commission to initiate a procedure whereby the Council can determine by a four-fifths majority the existence of a ‘clear risk of a serious breach’ in a Member State of the EU values proclaimed in Article 2 TEU, which include respect for human rights, human dignity, freedom and equality and the rights of persons belonging to minorities. Before proceeding to such a determination, a



hearing of the Member State in question must take place and recommendations may be made to it, while Parliament has to give its consent by a two-thirds majority of the votes cast and an absolute majority of its component members (Article 354(4) TFEU). This preventive procedure was activated for the first time on 20 December 2017 by the Commission in relation to Poland, and on 12 September 2018 by Parliament in relation to Hungary, but remains blocked in Council, where a number of hearings took place but no recommendations - let alone determinations - were adopted. Parliament was furthermore denied the right to present its position at the Council hearings, including on Hungary, notwithstanding its role as initiator of the procedure.

Article 7(2) and 7(3) TEU provide, in the case of the 'existence of a serious and persistent breach' of EU values, for a 'sanctioning mechanism' that can be triggered by the Commission or by one third of Member States (not Parliament), after the Member State in question has been invited to submit its observations. The European Council determines the existence of the breach by unanimity, after obtaining Parliament's consent by the same majority as for the preventive mechanism. The Council can decide to suspend certain membership rights of the Member State in question, including voting rights in the Council, this time acting by qualified majority. The Council can decide to modify or revoke the sanctions, again by qualified majority. The Member State concerned does not take part in the votes in the Council or the European Council. The determination and adoption of sanctions remain difficult to achieve, due to the unanimity requirement, as demonstrated by the fact that the Governments of Hungary and Poland announced they would veto any such decisions concerning the other Member State.

In order to fill the gap between the politically difficult activation of the Article 7 TEU procedures (used to address situations outside the remit of EU law) and infringement procedures with limited effect (used in specific situations falling within the scope of EU law), the Commission, in 2014, launched an [EU framework to strengthen the rule of law](#). This framework was aimed at trying to ensure effective and coherent protection of the rule of law, as a prerequisite for ensuring respect for fundamental rights and democracy in situations of systemic threat to them. Intended to precede and complement Article 7 TEU, it provides for three stages: Commission assessment, i.e. a structured dialogue between the Commission and the Member State, followed if need be by a rule of law opinion; a Commission rule of law recommendation; and follow-up by the Member State to the recommendation. This rule of law framework was applied to Poland in 2016 and was followed up, due to a lack of success, by the Commission [decision](#) to launch an Article 7 procedure on 20 December 2017.

In July 2019, the Commission made a further step forward in its communication entitled '[Strengthening the rule of law within the Union: A blueprint for action](#)' and launched a rule of law mechanism, comprising an annual review cycle based on a rule of law report monitoring the situation in the Member States, which forms the basis of interinstitutional dialogue. The first such [report](#) was published in September 2020, accompanied by 27 country chapters, covering the justice system (and notably its independence, quality and efficiency), the anti-corruption framework (legal and institutional setup, prevention, repressive measures), media pluralism (regulatory bodies, transparency of ownership and governmental interference, protection of journalists) and other institutional issues related to checks and balances (legislative process, independent



authorities, accessibility, judicial review, civil society organisations). The report substantially strengthens EU monitoring by encompassing, in comparison to the EU Justice Scoreboard and other monitoring and reporting instruments, not only civil but also criminal and administrative justice, addressing judicial independence, corruption, media pluralism, separation of powers and civil society space. A network of national contact points to gather information and ensure dialogue with Member States was set up, and dialogue promoted with stakeholders, including Council of Europe bodies, the Organization for Security and Co-operation in Europe, the Organisation for Economic Co-operation and Development, judicial networks and non-governmental organisations. The [third annual report](#), published in July 2022, also contained a series of recommendations addressed to each Member State, whose follow up is to be examined in subsequent annual reports on the rule of law.

OTHER INSTRUMENTS FOR THE PROTECTION OF EU VALUES

The EU has other instruments at its disposal aimed at protecting EU values.

When proposing a new legislative initiative, the Commission addresses its compatibility with fundamental rights by means of an impact assessment, an aspect which is also subsequently examined by the Council and Parliament.

The Commission furthermore publishes an [annual report on the application of the Charter of Fundamental Rights](#), which is examined and debated by the Council, which adopts conclusions on it, and by Parliament, in the framework of its annual report on the situation of fundamental rights in the EU. In December 2020, the Commission launched a new [strategy to strengthen the implementation of the Charter in the EU](#), including in relation to EU funds through the Charter-specific ‘enabling condition’ introduced in the [2021 Common Provisions Regulation](#). Cohesion funds for Poland and Hungary have not been disbursed on this basis.

Since 2014, the Council has also held an annual dialogue among all Member States within the Council to promote and safeguard the rule of law, focusing on a different subject each year. From the second semester of 2020, the Council decided to focus on the examination of the situation of the rule of law in five Member States every semester, based on the Commission rule of law report.

Furthermore, in the context of the European Semester, issues connected to EU values are monitored and can be the subject of country-specific recommendations. The areas concerned include justice systems (on the basis of the Justice Scoreboard), as well as disability, social rights and citizens’ rights (in relation to protection from organised crime and corruption).

Bulgaria and Romania are also subject to the Cooperation and Verification Mechanism, which contains aspects relating to EU values.

Infringement proceedings are an important instrument to sanction violations of EU values in the Union, and the CJEU is developing its jurisprudence on the matter. Infringements can be launched in cases of non-compliance of a national law with EU law and EU values in individual and specific cases (whereas Article 7 also applies to situations which fall outside the scope of EU law and in which fundamental rights



violations are systematic and persistent) and financial penalties can be imposed by the CJEU for failure to comply with orders or judgments.

The [EU Agency for Fundamental Rights \(FRA\)](#), established in 2007 in Vienna, plays an important role in monitoring the situation of fundamental rights in the EU. The FRA is tasked with the collection, analysis, dissemination and evaluation of information and data related to fundamental rights. It also conducts research and scientific surveys, and publishes annual and thematic reports on fundamental rights.

The Commission is also strengthening equality and the protection of minorities – two of the pillars of Article 2 TEU – through specific strategies, proposals and action to promote gender equality and to combat violence against women and domestic violence, racism, hate speech, hate crime and anti-semitism and to protect the rights of LGBTIQ people, Roma, persons with disabilities and children, under the overarching concept of ‘A Union of Equality’. The Commission, supported by Parliament and 15 Member States, recently referred Hungary to the CJEU over its [anti-LGBTIQ law](#) on grounds of violating, inter alia, Article 2 TEU. It also proposed directives to strengthen [equality bodies](#) through common standards.

After a blockage caused by the vetoes of the Governments of Hungary and Poland, an agreement was finally reached at the European Council of 10-11 December 2020 on a [regulation on a general regime of conditionality for the protection of the Union budget](#). The regulation makes it possible to protect the EU budget where it is established that breaches of the principles of the rule of law in a Member State affect, or seriously risk affecting, the sound financial management of the EU budget or the protection of the financial interests of the EU in a sufficiently direct way. An action brought by the Hungarian and Polish Governments against the regulation was [dismissed by the CJEU](#), which opened the way for the Commission and the Council to trigger the mechanism against [Hungary](#), leading to the suspension of EUR 6.3 billion.

The Commission is currently discussing the implementation of the Recovery and Resilience Facility national plans with a number of Member States’ governments and monitoring whether they are achieving agreed milestones and targets, which are a prerequisite for the disbursement of the funds. These aim at addressing the challenges identified in the [European Semester country-specific recommendations](#) adopted by the Council, and in the rule of law reports and related recommendations issued by the Commission, as well as in the Article 7 procedures against Poland and Hungary.

ROLE OF THE EUROPEAN PARLIAMENT

Parliament has always supported the strengthening of respect for and protection of fundamental rights in the EU. Already in 1977, it adopted, together with the Council and the Commission, a [Joint Declaration on Fundamental Rights](#), in which the three institutions committed to ensuring respect for fundamental rights in the exercise of their powers. In 1979, Parliament adopted a resolution advocating that the European Community accede to the ECHR.

The [1984 draft treaty establishing the European Union](#), proposed by Parliament, specified that the Union must protect the dignity of the individual and recognise for everyone falling within its jurisdiction the fundamental rights and freedoms derived from



the common principles of the national constitutions and the ECHR. It also envisaged accession of the Union to the ECHR. In its [resolution of 12 April 1989](#), Parliament proclaimed its adoption of the Declaration of Fundamental Rights and Freedoms.

Every year since 1993, Parliament has held a debate and adopted a resolution on the situation of fundamental rights in the EU, on the basis of a report produced by its Committee on Civil Liberties, Justice and Home Affairs. In addition, it has adopted a growing number of resolutions addressing specific issues concerning the protection of Article 2 TEU values in the Member States.

Parliament has always supported the EU as regards equipping itself with its own bill of rights, and has called for the Charter of Fundamental Rights to be binding. This was finally achieved in 2009 with the Lisbon Treaty.

More recently, Parliament has repeatedly expressed serious concerns about the gradual erosion of Article 2 TEU standards in some Member States. To address this problem, Parliament made a number of suggestions to strengthen the protection in the EU not only of fundamental rights, but also of democracy and the rule of law, and more widely all the EU values covered by Article 2 TEU, by proposing new mechanisms and procedures to fill the existing gaps. In various resolutions since 2012, Parliament has called for the creation of a 'Copenhagen Commission', as well as of a European fundamental rights policy cycle, an early warning mechanism, a freezing procedure and the strengthening of the FRA.

In a 2016 landmark resolution on the subject, Parliament consolidated its former proposals and requested that the Commission submit an interinstitutional agreement for the establishment of an [EU mechanism on democracy, the rule of law and fundamental rights](#), which would be based on a Union Pact with the Commission and the Council. This would include an annual policy cycle based on a report monitoring the respect of EU values in the Union drafted by the Commission and by an expert panel, followed by a parliamentary debate and accompanied by arrangements to address risks or breaches^[1]. Parliament also called for a new draft agreement for EU accession to the ECHR, and for Treaty changes such as the elimination of Article 51 of the Charter of Fundamental Rights, its conversion into a Union Bill of Rights, and the removal of the unanimity requirement for equality and non-discrimination. In a [2020 resolution](#), Parliament proposed the text for an interinstitutional agreement on reinforcing EU values, developing previous proposals and adding a possibility for urgent reports and the creation of an interinstitutional working group. In a [2021 resolution](#), Parliament also called on the Commission to broaden its annual rule of law report to cover all Article 2 TEU values and include country-specific recommendations.

In 2018, Parliament adopted a resolution welcoming the Commission decision to activate Article 7(1) TEU in relation to [Poland](#), as well as a resolution on launching the Article 7(1) TEU procedure in relation to [Hungary](#), by submitting a reasoned proposal to the Council inviting it to determine whether there could be a clear risk of a

[1]The Commission took over many of Parliament's suggestions in its 2019 communication (establishment of an interinstitutional cycle, with an annual report, monitoring Member States, on rule of law and connected issues), but not those related to covering the whole of Article 2 TEU (not only the rule of law, but also democracy, fundamental rights, equality and minorities), establishing a committee of independent experts and an interinstitutional agreement on the cycle, issuing Member State-specific recommendations and re-starting the publication of anti-corruption reports.



serious breach of the values referred to in Article 2 TEU, and to address appropriate recommendations to Hungary in this regard^[2]. In 2020 and 2022, Parliament also adopted resolutions on [Poland](#) and [Hungary](#) respectively, widening the scope of the concerns to be examined in the Article 7(1) TEU procedures. It also [called](#) on the Commission to use all available tools, including the rule of law conditionality regulation, to address breaches of Article 2 TEU values by Hungary and Poland.

Following the murders of journalists Daphne Caruana Galizia in Malta and Ján Kuciak and his fiancée in Slovakia, and in an effort to strengthen Parliament's monitoring and action as regards Article 2 TEU values, the [Committee on Civil Liberties, Justice and Home Affairs](#) created a [Monitoring Group on Democracy, Rule of Law and Fundamental Rights](#). The group is tasked with addressing threats to EU values that emerge across the Union and issuing proposals for action to the Committee on Civil Liberties, Justice and Home Affairs.

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[2]For more information on Parliament's activities on fundamental rights during the previous term, see '[The protection of fundamental rights in the EU: European Parliament achievements during the 2014-2019 legislative term and challenges for the future](#)'.

