

EDITORIAL COMMENTS

Safeguarding EU values in the Member States – Is something finally happening?

In 2013, four EU Foreign Ministers sent a letter to then Commission President Barroso, in which they held that “[a]t this critical stage in European history, it is crucially important that the fundamental values enshrined in the European treaties be vigorously protected”. They added that “the EU must be extremely watchful” whenever these values “are put at risk anywhere within its borders”, and called for a “new and more effective mechanism to safeguard [those] values in Member States”.¹

The letter triggered a debate about the “possible need for and shape of a collaborative and systematic method to tackle those issues”.² Various initiatives have been taken since, hinting that something may (at last) be happening in the defence of EU fundamentals, in the face of mounting concerns particularly in relation to Hungary.³ At the same time, these

1. Letter of the Foreign Ministers of Denmark, Finland, Germany and the Netherlands to the President of the European Commission (6 March 2013). The letter was also sent to the Presidency of the Council. It can be found here: <www.rijksoverheid.nl/bestanden/documenten-en-publicaties/brieven/2013/03/13/brief-aan-europese-commissie-over-opzetten-rechtsstatelijkheidsmechanisme/brief-aan-europese-commissie-over-opzetten-rechtsstatelijkheidsmechanisme.pdf>.

2. Council conclusions on fundamental rights and rule of law and on the Commission 2012 Report on the Application of the Charter of Fundamental Rights of the European Union; Justice and Home Affairs Council, 6 June 2013, Doc 10168/13. Such a debate had already been called for in the aftermath of the Nice Treaty, which modified Art. 7 TEU; see Communication from the Commission to the Council and the European Parliament on Article 7 of the Treaty on European Union. Respect for and promotion of the values on which the Union is based (COM(2003)606 final).

3. Such concerns were quite bluntly expressed by Norwegian Minister for European Affairs Vidar Helgesen in a letter to the *Financial Times* (28 Aug. 2014): “While not a member of the EU, Norway is closely integrated with the EU and deeply committed to the values that underpin European integration. These values are now being challenged by the Hungarian government, a Member State and a recipient of massive EU funding. Given this situation, I am puzzled and disappointed that a response from the EU institutions has been largely lacking. For decades, the EU has been the strongest impetus for democratic change and respect for human rights in Europe. As we approach the 25th anniversary of the fall of the Berlin Wall, the EU should demonstrate in no uncertain terms that it will not accept the re-establishment of an illiberal State within its borders”.

initiatives expose a significant divergence of views as to how the Union should enter this slippery terrain.

Back to basics

EU “values” are spelled out in Article 2 TEU, included in the Common Provisions of the TEU.⁴ Asserted as “common to the Member States”, they must be respected and promoted by any candidate for membership,⁵ while their observance is required for Member States to keep their membership rights intact. Thus a “clear risk of a serious breach” of such common values may be reprimanded by the Council on “a reasoned proposal” by the Commission, the Parliament or other Member States, while “a serious and persistent breach” may lead to a suspension, by the Council, of “certain” of the prevaricating State’s “rights deriving from the application of the Treaties”.⁶

The Treaties thereby conceive respect for EU values as a prerequisite for enjoying membership rights.⁷ It is indeed critical for the operation of the EU legal order, as recently emphasized by the Court of Justice:

“... essential characteristics of EU law have given rise to a structured network of principles, rules and mutually interdependent legal relations linking the EU and its Member States, and its Member States with each other, which are now engaged, as is recalled in the second paragraph of Article 1 TEU, in a ‘process of creating an ever closer union among the peoples of Europe’.

This legal structure is based on the fundamental premiss that each Member State shares with all the other Member States, and recognizes that they share with it, a set of common values on which the EU is founded, as stated in Article 2 TEU. That premiss implies and justifies the existence of mutual trust between the Member States that those

4. Art. 2 TEU reads as follows: “The 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. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.”

5. In line with Art. 49(1) TEU, according to which “Any European State which respects the values referred to in Article 2 and is committed to promoting them may apply to become a member of the Union.”

6. Art. 7 TEU. On the expression “certain rights”, see e.g. Besselink, “The Bite, the Bark and the Howl: Article 7 and the Rule of Law Initiatives” in Jakab and Kochenov (Eds.) *The Enforcement of EU Law against the Member States: Methods against Defiance* (OUP, forthcoming).

7. See Editorial Comments, “Union membership in times of crisis”, 51 CML Rev. (2014), 1.

values will be recognized and, therefore, that the law of the EU that implements them will be respected.”⁸

EU values are also referred to in Article 3(1) TEU whereby the Union is to “*promote... its values and the well-being of its peoples*” (emphasis added). Listed as the first of the EU’s goals, value promotion entails obligations of conduct for the Member States. In principle, they shall refrain from acting in a way that could jeopardize the attainment of this objective, and take necessary measures to facilitate its fulfilment, in line with their duty of sincere cooperation.⁹ This additional layer of Member States’ responsibilities in relation to the values of Article 2 TEU is all the more significant insofar as the obligation of cooperation applies irrespective of the nature of EU and Member State competence.¹⁰

The EU value promotion *mandate* is reiterated in Article 13(1) TEU whereby the EU’s institutional framework “*shall aim to promote [the Union’s] values*” (emphasis added). Here too, the promotion of values spearheads the list of EU institutions’ duties, preceding that of advancing the Union’s objectives, serving its interests, those of its citizens and those of its Member States. Indeed, in line with their obligation to “practise mutual sincere cooperation”,¹¹ the institutions must assist one another to ensure that the Union fulfils its aims,¹² including those of Article 3(1) TEU.

In sum, the values of Article 2 TEU inform the way the EU pursues its objectives, and how EU institutions exercise their powers.¹³ This is the case in the context of Article 7 TEU, and in particular its paragraph 1, included specifically to give the Union “the capacity to act preventively in the event

8. See Opinion 2/13, *ECHR II*, EU:C:2014:2454 at paras. 167–168.

9. Art. 4(3) TEU.

10. See e.g. Opinion 1/03, *Patent Court*, EU:C:2006:81 para 119; Case C-266/03, *Commission v. Luxembourg*, EU:C:2005:341, para 58; Case C-433/03, *Commission v. Germany*, EU:C:2005:462, para 64. Further, see e.g. Neframi, “The Duty of Loyalty: Rethinking its Scope through its Application in the Field of EU External Relations”, 47 CML Rev. (2010), 323.

11. Art. 13(2) TEU.

12. See Case C-409/13, *Council v. Commission*, EU:C:2015:217.

13. As does the EU Charter of Fundamental Rights: Council conclusions on the Commission 2013 report on the application of the EU Charter of Fundamental Rights and the consistency between internal and external aspects of human rights’ protection and promotion in the European Union, Justice and Home Affairs Council meeting (Luxembourg, 5 and 6 June 2014). See also the guidelines on methodological steps to be taken to check fundamental rights compatibility in the Council’s preparatory bodies, 10140/11 FREMP 54 JAI 319 COHOM 132 JURINFO 31 JUSTCIV 129; Communications from the Commission on the Strategy for the effective implementation of the Charter of Fundamental Rights by the European Union (COM(2010)573) and the Operational Guidance on taking account of Fundamental Rights in Commission Impact Assessments (SEC(2011)0567).

of clear risk of a serious breach of the common values”.¹⁴ This is equally true, for instance, for the Commission’s attributions under Article 17 TEU, specifically its power of ensuring the application of the treaties, and overseeing the application of EU law. Nothing in EU primary law excludes the provisions of Article 2 TEU from this supervisory task. Article 258 TFEU, establishing the infringement procedure, refers to the “treaties”, denoting the horizontal scope of application of the procedure; only one express limitation is foreseen, in Article 24(1) TEU with regard to the Common Foreign and Security Policy.¹⁵ In the same vein, the Treaties neither restrain nor exclude the Court of Justice’s jurisdiction in relation to Article 2 TEU. Had such limitation been wanted, the primary law-makers could have made it explicit, as they did in relation to the CFSP,¹⁶ or with respect to Article 7 TEU by circumscribing the Court’s control to the provision’s procedural stipulations.¹⁷ Article 19 TEU has certainly been understood as entrusting the Court with general jurisdiction, derogations from which must be interpreted narrowly.¹⁸

Mixed initiatives

Encouraged by several Member States,¹⁹ the Council,²⁰ and the European Parliament,²¹ EU institutions have recently taken different, though sectoral, initiatives to safeguard and promote EU values.

14. See Communication on respect for and promotion of values, cited *supra* note 2.

15. Similarly, any Member State could in principle activate the enforcement procedure envisaged in Art. 259 TFEU if another Member State is deemed to be violating the provisions of Art. 2 TEU.

16. Art. 275(2) TFEU.

17. Art. 269 TFEU.

18. See, in this respect, Case C-658/11, *European Parliament v. Council*, EU:C:2014:2025, esp. paras 69–74.

19. In addition to the Foreign Ministers’ letter quoted *supra* note 1, see the letter from then Swedish Minister for Europe Birgitta Ohlsson: “Time to deliver, President Barroso”, *EUobserver* 11 Sept. 2013. One may also mention the Final Report of the Foreign Ministers of the “Future of Europe Group” (Austria, Belgium, Denmark, France, Italy, Germany, Luxembourg, The Netherlands, Poland, Portugal and Spain), 17 Sept 2012, esp pp. 8–9, available at <www.auswaertiges-amt.de/cae/servlet/contentblob/626338/publicationFile/171844/120918-Abschlussbericht-Zukunftsgruppe.pdf>.

20. Council conclusions on fundamental rights and rule of law and on the Commission 2012 Report on the Application of the Charter of Fundamental Rights of the European Union; Justice and Home Affairs Council, 6 June 2013, Doc 10168/13, esp. paras 9–11.

21. Report on the situation of fundamental rights: standards and practices in Hungary (Rapporteur: Rui Tavares) (2012/2130(INI)), 24 June 2013; Resolution on the situation of fundamental rights: standards and practices in Hungary (2012/2130(INI)), 3 July 2013; Report on the situation of fundamental rights in the European Union (2012) (Rapporteur: Louis Michel) (2013/2078(INI)), 27 Jan. 2014.

In a Communication to the Council and the Parliament, the Commission has proposed a “new EU framework to strengthen the Rule of Law”.²² The framework consists of a three-stage structured dialogue, to be initiated in case of “clear indications of a systematic threat to the rule of law in a Member State”. The process would start by the Commission sending a “rule of law opinion” to the Member State in question. The opinion should substantiate the Commission’s concerns and give the national authorities the possibility to respond. Should the matter not be resolved satisfactorily, the Commission would then issue a “rule of law recommendation”. Here, the Commission would indicate the reasons for its concerns, possible solutions, and a deadline within which the Member State would have to remedy the identified issues, and inform it of the steps taken. If unsatisfied by the Member State’s efforts, the Commission could decide to activate the mechanisms of Article 7 TEU. Indeed, the Communication explains that the new framework is a way to address “threats to the rule of law ... which are of systemic nature ... before the conditions for activating the mechanisms foreseen in Article 7 TEU [are] met”. It is not conceived as “an alternative to [the latter], but rather [as] preced[ing] and complement[ing] [its] mechanisms”.²³

In addition, the Commission now includes a “First Vice-President” in charge of “Better Regulation, Interinstitutional Relations, the Rule of Law and the Charter of Fundamental Rights”. This new Commissioner’s title and ranking signal that it is a top priority for the new College to safeguard the values of the Union, and particularly the rule of law and fundamental rights. While the mission letter from the President to the First Vice-President was not particularly elaborate as regards the promotion of rights and principles,²⁴ the incumbent has made clear his intention to be active in that aspect of his portfolio.²⁵

On the Council’s side, it was decided to “establish ... a dialogue among all Member States within the Council to promote and safeguard the

22. Communication from the Commission to the Council and the European Parliament, A new EU framework to strengthen the Rule of Law (COM(2014)158 final). For the background to this initiative, see Commission President’s “State of the Union” speeches of 2012 and 2013, and Discussion Paper 4: Rule of Law, Assises de la Justice, conference (Brussels, 21–22 Nov. 2013), available at <ec.europa.eu/justice/events/assises-justice-2013/files/rule_of_law_en.pdf>.

23. Communication A new EU framework, cited previous note, p. 3.

24. See: <ec.europa.eu/commission/sites/cwt/files/commissioner_mission_letters/timmermans_en.pdf>.

25. See hearing at the European Parliament: <ec.europa.eu/commission/sites/cwt/files/commissioner_ep_hearings/2014-ep-hearings-reply-timmermans_en.pdf>; and debate on EU framework for democracy, rule of law and fundamental rights (11 Feb. 2015): <www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+CRE+20150211+ITEM-017+DOC+XML+V0//EN&language=EN>.

rule of law in the framework of the Treaties”.²⁶ While acknowledging the Council’s role in “promoting a culture of respect for the rule of law within the European Union”, the “Conclusions of the Council and the Member States meeting in the Council” foresee that the dialogue should take place annually in the General Affairs configuration of the Council, and that it should be prepared by the Presidency and the COREPER.

The above initiatives share a common ground. Both the Commission and the Council (and Member States) agree that, as EU institutions, they have a duty to promote EU values, and that their respective involvement should aim at preventing the activation of Article 7 TEU. Moreover, they concur on the principles which ought to underpin their respective initiatives: dialogue, equal treatment of all States, objective and evidence-based approach, as well as complementarity with other EU institutions, instruments and international organizations, to avoid duplication.

Having said this, the two initiatives differ in various ways. The institutions’ distinctive powers in general, and in the context of Article 7 TEU in particular, could be one explanation. Yet, the differences also appear to encapsulate a fundamental divergence of views as to the role the EU should play in safeguarding the values of Article 2 TEU. A couple of points may illustrate this.

To begin with, the *object* of the two undertakings is not the same. The Commission intends to establish a “framework” to “strengthen” the rule of law and to “*resolve future threats* to the rule of law in Member States before conditions for activating the mechanism [of Article 7] would be met”.²⁷ By contrast, the Council and the Member States aim at establishing a “dialogue” to “*promote a culture* of respect for the rule of law” (emphases added).

The approaches also differ in *nature*. While the Commission proposes a dialogue between itself and a potentially prevaricating Member State (an EU-driven process), the Council’s Conclusions envisage a dialogue “among” peers (a more restricted EU involvement). And while the Communication suggests that the EU (notably the Commission), has the appropriate *power* to set out a new framework to strengthen the protection of the rule of law, the hybrid Council/Member States’ Conclusions clearly indicate that the Council, and indirectly the EU, was not deemed able legally to establish alone an annual rule of law dialogue.²⁸

26. Conclusions of the Council of the European Union and the Member States meeting within the Council on Ensuring Respect for the Rule of Law, General Affairs Council meeting, Brussels, 16 Dec. 2014.

27. Communication, A new EU framework, cited *supra* note 22, p. 3.

28. Though interestingly, the Presidency note referred to in the Conclusions did not evoke the possible need for formal support of the Member States to establish an annual rule of law dialogue. See Note from the Presidency to the Council, “Ensuring respect for the Rule of Law in the European Union”, doc. 15206/14, Brussels, 14 Nov. 2014.

It is indeed symptomatic that the Council's Conclusions make express references to the principle of conferred powers, and respect for national identities, while not mentioning any provision of the EU Treaties. The Commission's Communication is not mentioned either. Instead, the Conclusions refer to a note from the *Presidency* on "Ensuring respect for the Rule of Law",²⁹ suggesting that they are not based on, and not meant to be a follow-up to the Commission's proposal – in turn hinting that, for the Council and the Member States, the Commission does not have the power to take this initiative.

This position reflects, albeit only partly, the views of the Council's Legal Service according to which: "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". Instead, the Council Legal Service recommended that the Member States set up a mechanism based on an inter-governmental agreement, potentially involving the institutions for some tasks.³⁰

Questions still outstanding

This brief account suggests that the safeguarding of EU values might require some elucidation on the perennial, if distracting, issue of competence. But this is not the only unsettled question.

First, the content of Article 2 TEU remains substantively vague.³¹ It is therefore difficult to establish a breach for the purpose of activating either Article 7 TEU, the new framework, or the classic infringement procedure. Any EU oversight of Member States' observance of Article 2 TEU would therefore require further articulation of its substance.

Operational standards could be one such articulation. In this exercise, the criteria enunciated in the context of the enlargement procedure could also be relevant. In effect, EU institutions and Member States have spelled out the values of Article 2 TEU, by reference to various sources, in order to ascertain

29. Note from the Presidency cited previous note.

30. Doc 10296/14. It remains to be seen whether this type of intergovernmental arrangement, endorsed by the ECJ in *Pringle* (Case C-370/12, EU:C:2012:756), would be acceptable also in this particular context.

31. See COREPER doc 10168 on Council Conclusions on fundamental rights and rule of law and on the Commission 2012 Report on the Application of the Charter of Fundamental rights of the European Union, 6–7 June 2013, point 9. See also Address by Ireland's Minister of State for Disability, Older People, Equality and Mental Health, Kathleen Lynch TD at the 4th Annual FRA Symposium: *Promoting the Rule of Law in the EU*, 7 June 2013, Vienna, p. 6 – Ireland then held the Presidency of the EU Council.

the candidates' respect of the condition of Article 49(1) TEU.³² Since observance of the values of Article 2 TEU remains an essential element of membership, equivalent standards should be applied in relation to existing Member States too.

The EU judiciary may also contribute to the clarification of Article 2 TEU. The ECJ would thereby refine the *procedural* framework of Article 7 TEU, whose observance it guarantees,³³ and that of Article 49 TEU. After all, the Court did spell out the whole body of general principles of EU law, without elaborate substantive foundations in EU primary law, finding instead inspiration in international and national constitutional sources.

To be sure, this process of articulation will raise thorny questions concerning notably the interaction between Article 2 TEU on the one hand, and the EU Charter of Fundamental Rights (EUCFR), and the General Principles referred to in Article 6 TEU, on the other, given their differentiated scope of application. In particular, can the Charter inspire the articulation of the human rights referred to in Article 2 TEU which Member States have to respect in all circumstances, in view of the prescriptions of Article 51 EUCFR?³⁴ The question has become particularly pertinent following the Hungarian Prime Minister's suggestion to re-establish the death penalty, prohibited by Article 2(2) EUCFR, within his country.

The second issue that needs clarification concerns the interface between the specific arrangements of Article 7 TEU, and the general infringement mechanism of Articles 258–260 TFEU. As rightly mentioned by one commentator, “there is nothing in the treaty which informs us about the relationship between the two procedures”.³⁵ Should Article 7 TEU operate as *lex specialis* for monitoring and sanctioning (non-) observance of EU values, thereby having priority over, or indeed excluding the application of the

32. The specific “pre-accession strategy”, whereby the Commission reports to the Council and European Council on the candidates' progress in fulfilling the accession conditions, has also been instrumental in this substantive articulation. Thus Commission's “Progress reports” and “Screening reports” have given some indications as to what the provisions of Art. 2 TEU may amount to, and how their observance and promotion may be scrutinized.

33. Art. 269 TFEU. The Court has been invited to do so in the past, for instance, in Case C-505/13 *Levent Redzheb Yumer*, EU:C:2014:2129. The ECJ declined jurisdiction to interpret Art. 2 TEU in that case, not because it considered itself inapt in principle to provide such an interpretation, but because the referring court had failed to explain why that interpretation was relevant to the pending case.

34. In this regard, see speech by then Vice-President of the European Commission, EU Justice Commissioner Viviane Reding “The EU and the Rule of Law – What next?” (CEPS/Brussels, 4 Sept. 2013, Speech/13/677).

35. Hoffmeister, “Enforcing the EU Charter of Fundamental Rights in Member States: How Far are Rome, Budapest and Bucharest from Brussels?” in von Bogdandy and Sonnenberg (Eds.) *Constitutional Crisis in the European Constitutional Area: Theory, Law and Politics in Hungary and Romania* (Hart publishing, 2015), p. 195.

procedure of Article 258 TFEU? That Article 7 TEU sets out a specific arrangement in relation to Article 2 TEU is supported, for instance, by the fact that the Court of Justice has only limited jurisdiction over its provisions. Were the Commission allowed to trigger the enforcement procedure to tackle alleged violations of Article 2 TEU without activating Article 7 TEU first, one could question the very relevance of the latter. In addition, it could circumvent the specific limits to judicial control. Another view could be that Article 7 TEU ought to be triggered only where the classic enforcement procedure becomes insufficient to address a systematic threat to the values of Article 2 TEU. This is, it seems, the approach adopted by the Commission in its proposal for a rule of law framework. In this context, it is noteworthy that in their Conclusions, the Council and the Member States suggested that the rule of law could be safeguarded both through the infringement procedure *and* the mechanisms of Article 7 TEU.³⁶

The third issue that needs to be addressed is the relation between the Member States' obligation to respect the values of Article 2 TEU and the possible EU sanction in case of serious and persistent breach, on the one hand, and the principle of Article 4(2) TEU, on the other. The Council and Member States' Conclusions raised this question when including a paragraph whereby their proposed approach

“will be without prejudice to the principle of conferred competences, as well as the respect of national identities of Member States inherent in their fundamental political and constitutional structures, inclusive of regional and local self-government, and their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security, and should be brought forward in light of the principle of sincere cooperation.”

It is evident that a balance has to be found between the fundamental obligations States subscribe to when deciding to be(come) Members of the Union, including sincere cooperation, and respect for their national identities. At a recent debate within the European Parliament, the First-Vice President of the Commission provided clues on this balancing act:

“When I express my reservations or my rejection of something that was once described as ‘illiberal democracy’, I just want to say that you cannot

36. “The dialogue established by the conclusions *complements* the existing means which the EU might use in the field of rule of law, namely the infringement procedure in the case of a breach of EU law and the so-called article 7 procedure of the Lisbon Treaty which allows for the suspension of voting rights in the case of a serious and persistent breach of EU values.” Conclusions, General Affairs Council, 16 Dec. 2014, doc. 16936/14, p. 21.

use the argument of a democratic majority – even if it is a two-thirds majority – to weaken the rules based on the rule of law or human rights. You cannot use a two-thirds or even more of a political majority through democratic votes to weaken human rights in a Member State. This is one of the fundamental principles upon which this Union is built, and this applies to every single Member State.”³⁷

Thus, the Union should respect national identities under Article 4(2) TEU but only insofar as their expression is compatible with the common values of Article 2 TEU. This is how any viable safeguard mechanism would need to be framed.

37. Frans Timmermans, First Vice-President of the Commission, “EU Framework for democracy, rule of law and fundamental rights”, European Parliament, 11 Feb. 2015, discussion following Timmermans’ speech, available at <www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+CRE+20150211+ITEM-017+DOC+XML+V0//EN&language=EN>.