

## DEFENDING EU VALUES: MISSION IMPOSSIBLE?

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### Abstract

*While Article 2 TEU lists six concepts as ‘values’ on which the European Union is founded, a look at other EU normative instruments and policy-oriented documents reveals inconsistency as to which abstractions should be conceived as ‘values’, as distinct from ‘principles’ and ‘objectives’. This inconsistency does not prevent the Union from defending the three core values of liberal democracy. Yet, the fluctuation in terminology does not bode particularly well for a concerted approach to the defence of Union values. Looking at the various remedies and mechanisms that the Union may be able to marshal with a view to defending its core values, some involve actions before the CJEU, while others are of a more political nature, and none of which are free from their own challenges. These challenges become all the more pressing in the current climate, which implies an increasing hostility towards liberal democracy and a move towards extremist ideologies. These developments would require a firm resolve to meet the challenges both internally and externally. Yet, the EU is not particularly potent in taking forceful and swift action in a political environment where the Union’s traditional ‘soft power’ is simply not good enough. Solving the present conundrum would require a significant overhaul of the constitutional system by creating a much more federal structure. That, again, seems like a pipe dream. Therefore, this contribution argues that it is national political developments in Member States, rather than legal norms, that will determine the future of European integration.*

### 1. What values?

Fashion commands to portray the EU as a ‘Union of Values’. Legal authority for such a characterization can, of course, be found in Article 2 of the Treaty on European Union (TEU). According to this provision, the Union ‘is founded’ on a set of values; namely, the values of ‘respect for human

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dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities'. It is added that 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'. Article 7 TEU, which allows the suspension of Member States' rights under the Treaties, refers to serious breaches of 'the values referred to in Article 2', while according to Article 49 TEU, a European State may apply to become a member of the Union providing that it 'respects the values referred to in Article 2 and is committed to promoting them'.<sup>1</sup> The Treaties also refer to the Union's 'values' in other contexts, including in the context of external relations.<sup>2</sup>

From a legal point of view, it appears safe to consider as values the six concepts listed explicitly as values in Article 2 TEU. The elements defining the required nature of society, which are listed after the six values, would then be understood not as values *stricto sensu*, but rather as principles informing us of a proper reading of the six values. The European Court of Justice (ECJ) has referred to one of these elements – namely, solidarity – as a 'principle' mentioned in Article 2 and as 'one of the fundamental principles of EU law'.<sup>3</sup> As to the six values, the Court has recognized their unique character and importance by stating that they 'define the very identity of the European Union as a common legal order' and that the Union 'must be able to defend those values, within the limits of its powers as laid down by the Treaties'.<sup>4</sup> That said, the crucial question is: to what extent is the Union capable of defending those values effectively?

Before trying to provide an answer to that question, it is pertinent to ponder the question as to how well ingrained the six concepts listed as values in Article 2 TEU are in the Union's own legal and declaratory discourse. In this regard, the quest for conceptual clarity and consistency leaves much to be desired. First, there is some conceptual overlapping, as

1. The European Court of Justice (ECJ) has ruled that compliance with the values contained in Art 2 TEU 'cannot be reduced to an obligation which a candidate State must meet in order to accede to the European Union and which it may disregard after its accession'. Case C-156/21, *Hungary v European Parliament and Council of the European Union*, EU:C:2022:97, para 126.

2. See eg Arts 3(1), 3(5), 8(1), 13(1), 21(2)(a), 32 and 42(5) TEU and the Opinion of AG Ćapeta in Case C-769/22, *European Commission v Hungary*, EU:C:2025:408, para 171.

3. Case C-156/21, *Hungary v Parliament and Council*, para 129 and the case law cited. See also Lucia Serena Rossi, "'Concretised", "Flanked" or "Standalone"? Some Reflections on the Application of Article 2 TEU' (2025) 10 *European Papers* 1, 11–13.

4. Case C-156/21, *Hungary v Parliament and Council*, para 127. For other similar judicial statements, see eg Case C-284/16, *Slowakische Republik v Achmea BV*, EU:C:2018:158, para 34 and Case C-896/19, *Repubblica v Il-Prim Ministru*, EU:C:2021:311, paras 63–64. See also Rossi (n 3) 3–6.

respect for ‘human dignity’, ‘freedom’ and ‘equality’ also follows from the EU Charter of Fundamental Rights<sup>5</sup> and other human rights and fundamental rights instruments and thus can be seen as part of the value of ‘respect for human rights’. While there is also some overlap between ‘democracy’, the ‘rule of law’ and ‘human rights’,<sup>6</sup> these three values are often singled out in political and legal discourse.<sup>7</sup> As to the evolving case law of the ECJ citing Article 2 TEU, it has so far focused primarily on the rule of law.<sup>8</sup>

One should not be too punctilious about such conceptual niceties. The story does not end here, however. While the second recital of the Preamble to the TEU does refer to ‘universal values’ and lists as such values the same values as in Article 2 (except that ‘human dignity’ is not mentioned separately), the fourth recital of the Preamble refers to liberty, democracy and respect for human rights and fundamental freedoms and of the rule of law as ‘principles’. The second recital of the Preamble of the EU Charter of Fundamental Rights proclaims that the Union ‘is founded on the indivisible, universal values of human dignity, freedom, equality and solidarity’. Thus, only four of the six values listed in Article 2 TEU are referred to as values, while the two remaining values – democracy and the rule of law – are here referred to as ‘principles’.

This inconsistency is compounded by the fact that, apart from the reference in recitals of the Preambles of the TEU and of the Charter of Fundamental Rights to democracy and the rule of law as ‘principles’, the concept of a ‘principle’ has different meanings in EU legal discourse. One can thus distinguish at least between the elements of a good society listed in Article 2 TEU, the more established fundamental principles of EU law such as the principles of conferral, national identity, sincere cooperation, subsidiarity and proportionality<sup>9</sup> and finally the provisions of the Charter that

5. See Art 1 of the Charter (‘human dignity’), Title II (‘Freedoms’) and Title III (‘Equality’).

6. See eg Allan Rosas, ‘Democracy and the Rule of Law: Siamese Twins or Strange Bedfellows’ in Allan Rosas, Juha Raitio and Pekka Pohjankoski (eds), *The Rule of Law’s Anatomy in the EU: Foundations and Protections* (Hart Publishing 2023) 11.

7. To cite but one example, see the President of the European Commission, ‘Speech by President von der Leyen at the European Parliament Plenary on the new College of Commissioners and its programme’ (27 November 2024) <enlargement.ec.europa.eu/news/speech-president-von-der-leyen-european-parliament-plenary-new-college-commissioners-and-its-2024-11-27\_en> (all websites last visited 26 November 2025). In it, Ursula von der Leyen declared that ‘[...] the vision of a continent united by democracy, the rule of law and respect for fundamental freedoms will always drive our work’.

8. But, in the Opinion of AG Ćapeta in Case C-769/22, *Commission v Hungary*, para 266, the Commission argues that Hungary has breached the values of equality, human dignity and respect for human rights.

9. See Arts 4 and 5 TEU. To add to the uncertainty, one wonders whether these well-established principles are equivalent to the ‘general principles of the Union’s law’ referred to in Art 6(3) TEU.

contain ‘principles’ as distinct from ‘rights’ and ‘freedoms’.<sup>10</sup> Not only does the concept of a ‘principle’ have different meanings depending on the context but, more generally, the basic Treaties, the TEU and the Treaty on the Functioning of the European Union (TFEU), seen as a whole, are not very good at distinguishing between values, principles, objectives and more detailed rules. Hence, the normative structure is hazy.<sup>11</sup>

The above short survey of terminology conveys the impression that the Union has not quite made up its mind as to which concepts to use when denoting its values and distinguishing between values and principles. A look at non-legal sources bolsters that impression. To cite but one example, the 2024 Draghi Report on the future of European competitiveness states that ‘Europe’s fundamental values’ are ‘prosperity, equity, freedom, peace and democracy in a sustainable environment’. The Report goes on to say that the Union exists ‘to ensure that Europeans can always benefit from these fundamental rights’ (sic) and that failure to provide them entails loss of its *raison d’être*.<sup>12</sup> Of the six values listed in Article 2 TEU, the Draghi Report thus lists only freedom and democracy as values, while referring also to prosperity, equity, peace and a sustainable environment (but not the rule of law!) as Europe’s values.

This terminological diversity is not the end of the world. It does not prevent the Union from defending its values. The values listed in Article 2 TEU can arguably be pinned down to the basic requirement of ‘liberal democracy’, meaning a democracy entailing respect for the rule of law and fundamental rights as well.<sup>13</sup> Respect for human dignity, freedom and equality, which are also listed as values in Article 2 TEU, do not seem to add much to the ‘trinity’ of democracy, human rights and the rule of law<sup>14</sup> but do not, on the other hand, detract from the idea of liberal democracy. The fact that some of the values in Article 2 are sometimes referred to as ‘principles’ can be explained by the fact that an earlier version of the TEU

10. See Art 52(5) of the Charter and the last recital of the Charter.

11. Allan Rosas, ‘(Non-)Compliance with the Rulings of the CJEU’ in Elise Muir, Sacha Garben and Inge Govaere (eds), *Activating Human and Fundamental Rights before the European Courts* (forthcoming, Hart Publishing 2026).

12. Mario Draghi, *The Future of European Competitiveness* (Publication Office of the European Union 2025) 5.

13. According to the ECJ, ‘[...] there can be no democracy and respect for fundamental rights without respect for the rule of law and vice versa’, as seen in Case C-156/21, *Hungary v Parliament and Council*, para 6. Liberal democracy and constitutional democracy are often used more or less as synonyms; see eg Sacha Garben, Inge Govaere and Paul Nemitz (eds), *Critical Reflections on Constitutional Democracy in the European Union* (Hart Publishing 2019).

14. Rosas (n 6) 13 and 16–19.

referred in its Article 6(1) to the ‘principles’ of liberty, democracy, respect for human rights and fundamental freedoms and the rule of law.<sup>15</sup>

The fluctuations in terminology and concepts would not merit to be highlighted here were it not for the fact that they can be seen as symptomatic of a more general weakness appertaining to the profile of the EU: the Union is not very good at branding itself, despite finding itself in a world of communication and information warfare.<sup>16</sup> In view of the great importance attached to the idea of a Union of Values and to values that, to quote the ECJ, ‘define the very identity of the European Union as a common legal order’,<sup>17</sup> one would expect more consistency and forcefulness from the relevant normative instruments and arrangements. For the time being, it would be a small step forward if EU discourse, whether of a legal, political or economic nature, could rally around the values listed as values in Article 2 TEU and as clarified in an evolving case law, rather than inventing new values or adding to the conceptual ambiguities relating to the distinction between values and principles.<sup>18</sup>

Arguably, the problems of branding identified above are not accidental, nor are they due simply to the whims of the drafters of the Treaties or other legal or political instruments. The main underlying reason may be associated with the very nature of the EU and its normative edifice, which is highly complex and consists of a sometimes confusing mix of values, principles, objectives and detailed rules.<sup>19</sup> Effective branding of a political and constitutional entity such as the EU seems to presuppose a clear perception of the thing to be branded and a central and politically legitimate authority with a missionary zeal able and willing to ‘sell’ the product. Are these qualities lacking to such an extent in the EU that one cannot expect the Union to be able to defend its values effectively?

15. See also the Opinion of AG Čapeta in pending Case C-769/22, *Commission v Hungary*, para 169.

16. Another example is the confusion surrounding the names of two political institutions and an international organization; namely, the European Council, the Council of the EU and indeed, the Council of Europe, an intergovernmental organization outside of the EU. Yet another example is the notion of the ‘Court of Justice of the European Union’, which in Art 19(1) TEU does not refer to one but to two courts. The names of these two courts – again, the ‘Court of Justice’ and the ‘General Court’ – are not very informative, to say the least, as to their status and tasks.

17. Case C-156/21, *Hungary v Parliament and Council*, para 127.

18. In the Opinion of AG Čapeta in Case C-769/22, *Commission v Hungary* (n 2) para 170, the AG observes that ‘the Treaties themselves use the terms ‘values’ and ‘principles’ interchangeably, as does the Court’. See also Rossi (n 3) 8–14. While this may be true to some extent, such conceptual ambiguity should be avoided.

19. On the nature of this constitutional structure in general, see eg Allan Rosas and Lorna Armati, *EU Constitutional Law: An Introduction* (3rd edn, Hart Publishing 2018) 7–19.

## 2. Infringement action and Article 2 TEU

According to the ECJ, Article 2 ‘is not merely a statement of policy guidelines or intentions’, but ‘compliance by a Member State with the values contained in Article 2 TEU is a condition for the enjoyment of all the rights deriving from the application of the Treaties to that Member State’. Such compliance cannot be reduced to an obligation that a candidate State must meet in order to accede to the Union and that it may disregard after its accession.<sup>20</sup> Recent ECJ case law makes frequent references to Article 2 TEU, especially in the context of alleged violations of the principle of effective judicial cooperation as recognized in Article 19(1)(2) TEU.<sup>21</sup>

The Court has also referred to the value of democracy as one of the values listed in Article 2, which is given concrete form in Article 10(1) TEU on representative democracy.<sup>22</sup> Article 10(1) TEU provides that the functioning of the Union ‘shall be founded on representative democracy’, while according to Article 10(2), citizens ‘are directly represented at Union level in the European Parliament’ and Member States are represented in the European Council by their Heads of State and government and in the Council by their governments, ‘themselves democratically accountable either to their national parliaments or to their citizens’. Arguably, at least a manifest violation of the basic tenets of liberal democracy would constitute a violation of Article 2 or Article 10 TEU.<sup>23</sup>

That said, there is still disagreement as to whether Article 2 can be enforced through infringement procedures brought under Article 258 TFEU independently of an alleged infringement of other EU law provisions or even independently of whether the situation at issue falls within the scope of

20. Case C-156/21, *Hungary v Parliament and Council*, para 126 and the case law cited.

21. The seminal case is, of course, Case C-64/16, *Associação Sindical dos Juizes Portugueses v Tribunal de Contas*, EU:C:2018:117, paras 29–37. For references to ensuing case law, see eg Joined Cases C-313, C-316 & C-332/23, *Inspektorat kam Visshia sadeben savet*, EU:C:2025:303, paras 84–85 and the case law cited. See also the Opinion of AG Ćapeta in Case C-769/22, *Commission v Hungary*, para 208 and the case law cited, as well as Laurent Pech and Dimitry Kochenov, *Respect for the Rule of Law in the Case Law of the European Court of Justice: A Casebook Overview of Key Judgments since the Portuguese Judges Case* (Swedish Institute for European Policy Studies 2021).

22. Case C-418/18 P, *Patrick Grégor Puppinck, Filippo Vari, Josephine Quintavalle, Edith Frivaldszky, Jakub Baltroszewicz, Alicia Latorre Canizares and Manfred Liebner v European Commission*, EU:C:2019:1113, para 64; Case C-502/19, *Oriol Junqueras Vies*, EU:C:2019:1115, para 63; Case C-808/21, *European Commission v Czech Republic*, EU:C:2024:962, para 114; Case C-814/21, *European Commission v Republic of Poland*, EU:C:2024:963, para 112. See also Rossi (n 3) 11.

23. See eg John Cotter, ‘Democracy Manifest? Ensuring the EU Legislature’s Democratic Legitimacy in the Face of National-Level Autocratisation’ (2025) 20 *European Papers* 489 and the literature and case law cited.

Union law.<sup>24</sup> In the pending case of *Commission v Hungary* referred to above, Advocate General Ćapeta, in her Opinion of 5 June 2025, distinguishes between Article 2 as a ‘self-standing ground’ of infringement and its use as an ‘autonomous ground’. While the first ground can only be invoked if the case falls within the scope of EU law, the second ground would exist even when the situation otherwise goes beyond the scope of application of EU law.<sup>25</sup> She argues that, as this case undoubtedly falls within the scope of Union law, it would not be necessary for the Court to rule on the issue of autonomous infringement.

To limit the scope of Article 2 TEU to situations entailing the application *in concreto* of provisions of EU law other than Article 2 itself seems out of the question. In the context of the principle of effective judicial protection, Article 19(1)(2) TEU refers more generally to ‘the fields covered by Union law’. In the Portuguese judges’ salary case, the ECJ ruled that Member States have an obligation to ensure that a national court that ‘*may rule* [...] on questions concerning the application or interpretation of Union law’ meets the requirements essential to effective judicial protection.<sup>26</sup> It is, in other words, not necessary that the case before the national court concerns the application of Union law *in concreto*.

Could applying this approach to other values listed in Article 2 TEU concern not only national courts, but also political and administrative authorities that may generally be called on to apply or interpret Union law? And are there any such authorities that are not so required? To take the value of respect for human rights, would ensuring respect for that value in Article 2 presuppose the applicability of, say, Article 6(3) TEU as well, and if so, would the applicability of the latter provision require a situation of ‘implementing’ Union law in the meaning of Article 51(1) of the Charter?<sup>27</sup> While it is true that the ECJ has seen continuity in the interpretation of Article 51(1)

24. See eg Jouni Heliskoski, ‘Infringement Procedures as a Tool for Enforcing the Rule of Law in EU Member States: A Critical Review’ in Rosas and others (n 6) 139; Benedikt Riedl, ‘The case against enforcing the Article 2 TEU values independently’ (*European Law Blog*, 31 March 2025) <[www.europeanlawblog.eu/pub/wil1tmaqB/release/1](http://www.europeanlawblog.eu/pub/wil1tmaqB/release/1)>.

25. Opinion of AG Ćapeta in Case C-769/22, *Commission v Hungary*, para 32. See also Rossi (n 3), who distinguishes between a ‘concretized’, ‘flanked’ and ‘standalone’ application of Art 2 TEU.

26. Case C-64/16, *Associação Sindical dos Juizes Portugueses*, para 40 (emphasis added).

27. On Art 51(1), see eg Allan Rosas, ‘The Applicability of the EU Charter of Fundamental Rights at National Level’ (2013) 13 *European Yearbook on Human Rights* 97; Rosas and others (n 19) 162–165; Allan Rosas, ‘Application of the European Union Charter of Fundamental Rights at National Level: One More Step Towards a Federal Structure?’ in Alexander Korezov and others (eds), *Justice in Transition: Towards a United and Sustainable European Union* (Bruylant 2025) 167.

and the applicability of fundamental rights as general principles of Union law (the latter concept being expressed in Article 6(3) TEU),<sup>28</sup> other references to values in the Treaties, including Articles 7 and 49 TEU in particular, contain no such restriction to situations involving the application of Union law.

Article 2 TEU is a systemic provision listing the values on which the Union ‘is founded’ and that are ‘common to the Member States’. Arguably, Article 2 should not be interpreted as having different scopes of application depending on the scope of application of this or that provision giving more concrete form to a value. And, even limiting the focus to one given value, Article 2 seems to require a constitutional system that applies across the board, without distinguishing between situations covered by Union law or those not so covered. Does it make sense to require a Member State to be a democracy only to the extent that it acts, to cite Article 19(1)(2), ‘in the fields covered by Union law’?

Moreover, Article 258 TFEU applies to situations where the Commission considers that a Member State ‘has failed to fulfil an obligation under the Treaties’. Article 2, as noted above, establishes obligations. There is nothing in the wording of Article 7 TEU or Article 258 TFEU that would suggest that the applicability of Article 7 TEU would exclude the applicability of Article 258 TFEU, or vice versa. In the conditionality judgments, the ECJ rejected the applicant States’ assertion that the rule of law can be protected by the European Union only under the procedure laid down in Article 7 TEU.

At Member States level, political, administrative and judicial institutions and bodies apply Union law, a combination of Union and national law, and national law, but also in the latter case, national law that must be in conformity with Union law.<sup>29</sup> To be able to do that, they must constitute democracies and respect the rule of law and basic human rights. This basic obligation follows from Article 2 TEU and is always relevant and applicable ‘autonomously’. That said, finding a violation of Article 2 TEU alone should not be taken lightly but would require a systemic violation of a particularly serious nature, characterized by Advocate General Ćapeta as a situation involving the very ‘negation’ of a value.<sup>30</sup> A military coup or an overthrow of the democratic system by organizing a manifestly fraudulent election would, in any case, qualify as a ‘negation’ of the value of democracy.

28. Case C-617/10, *Åklagaren v Hans Åkerberg Fransson*, EU:C:2013:105, paras 18–19.

29. Allan Rosas, ‘EU Law and National Law: A Common Legal System’ (2024) European University Institute, AEL Working Paper 2024/01, 27–29 <cadmus.eui.eu/server/api/core/bitstreams/8a6a823b-28f0-593d-806e-133a14f7b567/content>.

30. Opinion of Ćapeta in Case C-769/22, *Commission v Hungary*, paras 235–247.

### 3. Defending Union values: Using the available mechanisms<sup>31</sup>

It was argued in the preceding section that Article 2 TEU is applicable on an autonomous basis. In any case, it seems obvious that it is applicable when Member States are acting in a field covered by the Union, independently of whether the situation involves the application or interpretation of a provision of Union law *in concreto*. Moreover, numerous provisions of Union law other than Article 2 TEU provide a more concrete form to the values enumerated in Article 2 and can, in any case, be invoked in infringement, preliminary ruling or annulment (judicial review) procedures before the CJEU. Failure to respect the Union values may also be addressed through conditionality based on a conditionality regulation and other financial instruments. In the following, some observations are made on the actual use of these mechanisms. As to the possibility to resort to a suspension of Member States' Treaty rights under the Article 7 TEU procedure, the Commission has initiated the procedure against Poland and the European Parliament against Hungary and the activation of this procedure has played a certain role in Council practice and ECJ and national case law.<sup>32</sup> The unanimity requirement makes the actual suspension of membership rights unlikely, however. It is also unlikely that all Member States would, in the foreseeable future, agree to move from unanimity to qualified majority.

Failure to respect some of the values enumerated in Article 2 TEU, and the value of the rule of law in particular, has led the European Commission to initiate infringement actions under Article 258 TFEU; notably, against Hungary and Poland. Most of the infringement actions have been based primarily on Article 19(1)(2) TEU, in combination with Article 2 TEU and taking into account Article 47 of the Charter of Fundamental Rights.<sup>33</sup> In the pending case of *Commission v Hungary*, the Commission argues a violation of the values of equality, human dignity and respect for human rights as a separate point, supplementing the alleged violations of other provisions of Union law.<sup>34</sup>

31. According to Art 7(2), a decision to determine the existence of a serious and persistent breach by a Member State of the values referred to in Art 2 (such a decision is a precondition for the actual suspension of membership rights under Art 7(3)) can only be taken by the European Council, acting by unanimity.

32. Rosas (n 11).

33. See eg Allan Rosas, 'The Rule of Law and Judicial Independence: Recent EU Developments and Case Law of the European Court of Justice' in Philipp B Donath and others (eds), *Der Schutz des Individuums durch das Recht: Festschrift für Rainer Hofmann zum 70. Geburtstag* (vol 3, Springer 2023) 919; in view of Art 51(1) of the Charter, these cases are normally not based directly on Art 47.

34. Opinion of AG Ćapeta in Case C-769/22, *Commission v Hungary*.

What is the practical impact of infringement judgments, and in particular, if the first judgment is not complied with, of judgments based on Article 260 TFEU and entailing financial sanctions in the form of lump sums or penalty payments? While, in general, the amounts of such sanctions have usually been quite modest,<sup>35</sup> the rule of law infringements in Hungary and Poland have triggered somewhat more tangible sanctions.<sup>36</sup> As Poland did not comply with a Court order, the Commission started to offset the unpaid amounts against EU financial assistance due to the Member State. An action brought by Poland seeking the annulment of a series of offset decisions (amounting to a total of EUR 320 million) was dismissed by the General Court.<sup>37</sup> In another case brought by the Commission against Hungary, the ECJ ordered the defendant to pay a lump sum of EUR 200 million and a penalty payment of EUR 1 million per day until an earlier ECJ ruling was complied with.<sup>38</sup> As Hungary has refused to comply with the earlier judgment and pay the lump sum and the penalty payment, the Commission has begun to recover the unpaid amounts through offsetting.<sup>39</sup> While these financial sanctions are no longer merely symbolic, the amounts used so far are arguably not substantial enough to guarantee compliance. Article 260 TFEU does not contain any upper limit for the amounts of such sanctions.

Apart from infringement actions, value questions and alleged failure to respect the rule of law in particular have been raised in Article 267 TFEU preliminary rulings. Polish courts have been particularly active in this respect. There is a handicap affecting this procedure, as national courts may find themselves in curious situations where they are requesting rulings

35. Rosas (n 11).

36. In Case C-204/21 R, *European Commission v Republic of Poland*, EU:C:2021:878, an order of the Vice President of the Court of 27 October 2021 ordered Poland to pay a periodic penalty payment of EUR 1 million per day for failure to respect an interim order.

37. Joined Cases T-830/22 & T-156/23, *Republic of Poland v European Commission*, EU:T:2025:125. This case covered the period from 15 July 2022 to 4 June 2023. See also Niels Kirst, 'Whose Jurisdiction? Penalty Payments for Failing to Execute Interim Measures under Article 279 in Poland v Commission' (*Review of European Litigation*, 3 March 2025) <[europeanlitigation.eu/wp-content/uploads/pdf/Kirst-N.-Penalty-payments-for-failing-to-execute-interim-measures-1.pdf](https://europeanlitigation.eu/wp-content/uploads/pdf/Kirst-N.-Penalty-payments-for-failing-to-execute-interim-measures-1.pdf)>.

38. Case C-123/22, *European Commission v Hungary*, EU:C:2024:493. See also Pekka Pohjankoski, 'Bolstering Federal Execution of EU Law: Case C-123/22 Commission v Hungary (reception of applicants for international protection)' (2025) 32 MJECL 89, doi: 10.1177/1023263X251329803.

39. For the first three months, amounting to EUR 293 million, see 'Regarding the Execution of the Judgment of the Court of Justice of the European Union (CJEU): Case C-123/22 (European Commission v. Hungary)', access to document request [5]RE: 2025/0490 (*asktheeu.org*, 29 January 2025) <[www.asktheeu.org/request/regarding\\_the\\_execution\\_of\\_the\\_j#outgoing-30062](https://www.asktheeu.org/request/regarding_the_execution_of_the_j#outgoing-30062)>.

on their own independence – or lack of it – and this in the context of a procedure that does not allow the ECJ to establish the facts of the case.<sup>40</sup>

In principle, Article 2 TEU could perhaps also be invoked in the context of actions for annulment under Article 263 TFEU. Such a situation could arise, for instance, if a Member State that is bereft of a democratic regime designates persons as members of the European Parliament, the European Council or the Council, and these persons are considered at EU level as illegitimate to such an extent that they are not allowed to take up their seats (such decisions to decline membership rights being challenged in an Article 263 action).<sup>41</sup>

While the preliminary ruling procedure is not a very efficient mechanism and the annulment procedure would imply entering uncharted waters, the preliminary ruling procedure may, at the very least, play a role as a way of clarifying the legal status of these values and their interpretation. Much more efficient, it is suggested, may be the use of conditionality for EU financial assistance to Member States. Money talks. The Conditionality Regulation linking respect for the rule of law with the proper implementation of the Union budget provides an obvious example.<sup>42</sup> In an action of annulment brought by Hungary and Poland, the ECJ upheld the legality of this regulation, including the legal basis used for its adoption.<sup>43</sup> With respect to Hungary and Poland, the Commission has suspended the payment of funds under three conditionality instruments; apart from the Conditionality Regulation, the Recovery and Resilience Facility (RRF) and the so-called ‘Common Provisions Regulation’ (CPR).<sup>44</sup> The total amount concerning

40. See Art 94 of Rules of Procedure of the Court of Justice of the European Union [2012] OJ L265/1, with later amendments, according to which a request for a preliminary ruling must contain, *inter alia*, ‘a summary of the subject-matter of the dispute and the relevant findings of fact as determined by the referring court or tribunal, or, at least, an account of the facts on which the questions are based’.

41. See, in particular, Cotter (n 23) 495–511, who discusses the pros and cons of the legality of refusals to accept the legitimacy of persons designated in their home States as members of the European Parliament, the European Council and the Council and the possible legal remedies available in such cases. As he acknowledges (497–498), however, the existing case law appears to prevent the European Parliament from questioning the credentials of nationally declared electoral winners. See Case C-600/22 P, *Carles Puigdemont i Casamajó and Antoni Comín i Oliveres v European Parliament*, EU:C:2024:803, paras 61–69 and the case law cited.

42. 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 L4331/1. See also Pekka Pohjankoski, ‘Of Carrots and Sticks: Constitutional Limits to Rule-of-Law Conditionality’ in Rosas and others (n 6) 157.

43. Case C-156/21, *Hungary v Parliament and Council*; Case C-157/21, *Republic of Poland v European Parliament and Council of the European Union*, EU:C:2022:98.

44. Regulation (EU) 2021/241 of the European Parliament and of the Council of 12 February 2021 establishing the Recovery and Resilience Facility [2021] OJ L57/17;

Hungary is more than EUR 30 billion and is thus significantly higher than the highest amounts ordered by the ECJ in the form of lump sums and penalty payments.<sup>45</sup>

It is suggested that the combined effect of infringement actions, preliminary rulings, the use of conditionality and political persuasion including initialling the Article 7 TEU procedure constitutes a vehicle that is not devoid of relevance. It is arguable that the situation in Hungary with respect to the values of democracy, the rule of law and respect for fundamental rights would be even worse were it not for these legal remedies and means. Nor can it be excluded that the result of the Polish elections held on 15 October 2023, which brought to power a government attempting to restore the independence of Polish courts, was to some extent influenced by the reduction in Union payments to Poland due to failure to respect the principle of effective judicial protection, and the independence and impartiality of the judiciary in particular.

That said, despite the measures referred to above, the Hungarian government in particular continues to defy the efforts of Union institutions and the majority of Member States to improve the rule of law and fundamental rights situation in Hungary.<sup>46</sup> Using the above-mentioned legal mechanisms to remedy the situation more generally in Europe can bring results, but only if used with determination and with respect to financial sanctions and conditionality, by measures that are not merely symbolic but have real economic consequences. There are no silver bullets or quick fixes. Law alone cannot bring a satisfactory and sustainable solution. What are the ideological and political realities at stake?

#### 4. The future of liberal democracy

It goes without saying that Europe is fraught with an ideological and political struggle between liberal and ‘illiberal’ democracy.<sup>47</sup> From a

Regulation (EU) 2021/1060 of the European Parliament and of the Council of 24 June 2021 laying down common provisions on [several EU funds] [2021] OJ L231/159.

45. With respect to Poland, the total amount was much higher but the situation has changed after the Polish election of 2023 brought a new government attempting to restore the independence of the Polish judiciary. See eg Zselyke Csaky, ‘Freezing EU Funds: An Effective Tool to Enforce the Rule of Law’ (Centre for European Reform, 27 February 2025) <[www.cer.eu/insights/freezing-eu-funds-effective-tool-enforce-rule-law](http://www.cer.eu/insights/freezing-eu-funds-effective-tool-enforce-rule-law)>.

46. See eg Katalyn Miklóssy, ‘Tackling EU Conditionality with the Hungarian Legal Manoeuvres’ in Rosas and others (n 6) 171.

47. Lucan Way and Steven Levitsky, *Competitive Authoritarianism: Hybrid Regimes after the Cold War* (CUP 2010). They use the notion of ‘competitive authoritarianism’ to characterize what is by and large referred to here as ‘illiberal’ democracy.

broader, worldwide perspective, the struggle is also between democracy and autocracy or dictatorship.<sup>48</sup> As noted above, liberal democracy is founded on the trinity of democracy, rule of law and fundamental or human rights. Illiberal democracy advocates a ‘vulgar’ version of democracy, meaning that the perceived ‘will of the people’ trumps the requirements of the rule of law and respect for fundamental or human rights.<sup>49</sup> And the perceived will of the people is not always expressed by the majority, but is associated with the ‘real’ people, sometimes obtained through manipulation of the electoral system.<sup>50</sup> Such manipulation may at least, to some extent, be curtailed by the courts but is obviously facilitated by the lack of an independent and impartial judiciary.<sup>51</sup> Illiberal regimes also regularly resort to kleptocracy and corruption, to further their political aims and own economic benefit.<sup>52</sup>

Even a cursory look at the EU normative edifice reveals that liberal democracy is not merely a pious hope, but is firmly entrenched in that edifice, including the TEU, TFEU, the Charter of Fundamental Rights, secondary legislation and CJEU case law. Yet, the concept of liberal democracy is being challenged by some political forces within Europe – including, at the time of writing, the Hungarian government.<sup>53</sup> These political forces receive ideological and material support from some autocratic and dictatorial regimes; notably Russia, which fights liberal democracy by military

48. See eg Steven Levitsky and Daniel Ziblatt, *How Democracies Die: What History Reveals About Our Future* (Penguin Books 2019).

49. See eg Sanja Bogojević and Xavier Groussot, ‘Illiberal Democracy and Rule of Law from an EU Perspective’ in Rosas and others (n 6) 45.

50. In the US, one form of voter suppression is called ‘gerrymandering’, which is achieved through changes to electoral districts so as to favour a particular political party. In *Rucho v Common Cause*, No 18-422, 588 US 684 (2019), the US Supreme Court (by its Republican majority) ruled that partisan gerrymandering is a political rather than justiciable question, which is thus beyond the reach of federal judicial review. In *Alexander v South Carolina State Conference of the NAACP*, No 22-807, 602 US 1 (2024), the Court rejected a claim of the existence of racial gerrymandering and confirmed that partisan gerrymandering is a non-justiciable question.

51. Rosas (n 6) 19–26.

52. Anne Applebaum, *Autocracy, INC: The Dictators who Want to Run the World* (Penguin Books 2025) 43–64.

53. See eg ‘Full text of Viktor Orbán’s speech at Băile Tuşnad (Tusnádfürdő) of 26 July 2014’ (Prime Minister Viktor Orbán’s speech at the XXV Bálványos Free Summer University and Youth Camp, Băile Tuşnad) <[www.almendron.com/tribuna/wp-content/uploads/2016/01/discurso-viktor-orban.pdf](http://www.almendron.com/tribuna/wp-content/uploads/2016/01/discurso-viktor-orban.pdf)>. Reference was made here to a ‘reorganization’ of the Hungarian State, ‘in contrast to the liberal state organization logic’. The illiberal State, according to Orbán, ‘does not reject the fundamental principles of liberalism such as freedom [...] but it does not make this ideology the central element of state organization, but instead includes a different, special, national approach’.

(Ukraine), hybrid and financial means.<sup>54</sup> That such forces may also be crowned with sympathy from the current US so-called ‘MAGA movement’ is demonstrated by Vice President Vance’s speech in Munich in February 2025, in which he declared that the ‘threat from within’ was a more serious security threat for Europe than the threat from Russia, China or other external actors.<sup>55</sup> While the ‘threat from within’ was couched in terms of an alleged retreat of Europe from its own values, it is obvious, judging from the context and contents of the speech, that the target was European liberal democracy.

The EU, and liberal democracies more generally, are thus faced with formidable challenges while being attacked from various quarters, both internal and external.<sup>56</sup> Internally, the legal mechanisms discussed above may help to contain the onslaught. They will not suffice, however, if elections bring to power proponents of illiberal democracy into many EU Member States. As to the aptness of the EU to defend its values and interests against external threats, the signs are not very promising. To quote a recent observer commenting on the trade ‘deal’ with the US that the European Commission agreed to in August 2025:<sup>57</sup>

‘European countries together lack the economic strength, the military power and the shared worldview to collectively stand up for common values and interests. Europe cannot conduct a trade war with the US because it is divided. It cannot afford one because it is weak. It cannot play the art of the Trump deal, mixing geopolitics, hard power and ego into the technocratic process for which the EU is designed. America knew this. The rest of the world knows it now. Europe’s relief is born in impotence and made of humiliation.’

While this quite pessimistic assessment relates primarily to EU external relations, and trade policy in particular, there is a clear link between external and internal challenges. The EU consists of Member States considered to be independent and sovereign entities, with their own foreign and, to a large

54. Applebaum (n 52). See also Anne Applebaum, *Twilight of Democracy: The Failure of Politics and the Parting of Friends* (Allen Lane 2020).

55. Benedikt Franke (ed), ‘Speech by JD Vance and Selected Reactions’ (Volume II of the Series ‘Selected Speeches held at the Munich Security Conference, Munich, 24 February 2025) <[securityconference.org/assets/02\\_Dokumente/01\\_Publikationen/2025/Selected\\_Key\\_Speeches\\_Vol\\_II/MS\\_C\\_Speeches\\_2025\\_Vol2\\_Ansicht\\_gek%C3%BCrzt.pdf](https://securityconference.org/assets/02_Dokumente/01_Publikationen/2025/Selected_Key_Speeches_Vol_II/MS_C_Speeches_2025_Vol2_Ansicht_gek%C3%BCrzt.pdf)>.

56. Allan Rosas, ‘Foreword’ in Garben and others (n 13).

57. Marc De Vos, ‘Europe’s summer of humiliation’ *Financial Times* (London, 31 July 2025) <[www.ft.com/content/698517e6-9955-4ae9-9a9f-b91202157571](https://www.ft.com/content/698517e6-9955-4ae9-9a9f-b91202157571)>. See also Allan Rosas, ‘EU External Relations: Time for a Reality Check’ (2020) 27 MJECL 277, doi: 10.1177/1023263X20922387.

extent, internal national policy. Their governments, to quote Article 10(2) TEU, are ‘democratically accountable either to their national Parliaments, or to their citizens’ rather than to a European parliament or a ‘European people’.

With 27 independent governments, whose legitimacy depends on national political systems and that often articulate varying interests – and in some cases, even differing values! – the Union’s efforts to ‘speak with one voice’ will sometimes end up sounding like a ‘gaggle of geese’.<sup>58</sup> It is difficult to avoid the impression that the only really effective remedy would be to create a truly federal structure. That, again, seems like a pipe dream. The current approach of muddling through, with incremental improvements and setbacks, and declarations rather than real action, is thus likely to stay with us for the foreseeable future, both internally and externally. There may be a future for the EU as the guardian angel of liberal democracy, but much will depend on the outcome of national and European elections. The current constitutional structure is fragile, while significant steps towards a more federal system seem unlikely. Yet, the memories of the 1930s should haunt us all.

58. I owe this expression to a Finnish journalist; see Rosas and others (n 19) 244.

