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dell'Università di Milano-Bicocca

The EPPO and the Rule of Law

Edited by

Benedetta Ubertazzi

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THE EU'S RULE OF LAW TOOLBOX BETWEEN EVOLUTION AND REVOLUTION

Serena Crespi

SUMMARY: 1. The foundational and constitutional nature of common values under Article 2 of the TEU. – 2. The notion of "Rule of Law" in light of EU case law. – 3. Tools for preventing violations of common values by Member States: the annual Reports of the European Commission on the Rule of Law. – 4. Following: The peer review system of the General Affairs Council. – 5. Reactive tools to the risk of violation or breach of common values: the mechanism provided for in Article 7 of the TEU. – 6. Following: the infringement procedure referred to in Articles 258-260 of the TFEU between theory… – 7. …And Practice. – 8. Preliminary ruling under Article 267 of the TFEU. – 9. The principle of mutual trust among Member States in EU infringement and preliminary case law: a new weapon to protect the Rule of Law? – 10. The conditionality mechanism: Regulation 2020/2092. – 11. Conclusions… also in light of the recent directive on the protection of persons reporting violations of EU law.

1. *The foundational and constitutional nature of common values under Article 2 of the TEU*

The Rule of Law is one of the common values shared by the Member States – and therefore inherent to the European Union as a whole – listed in Article 2 of the TEU along with 'human dignity, freedom, democracy, equality, the rule of law and respect for human rights' including those of 'persons belonging to minorities'.[1] The European Union is, in other words, a union of values, with re-

[1] On Article 2 TUE, among others, A. VON BOGDANDY, M. IOANNIDIS, *Systemic deficiency in the rule of law: what it is, what has been done, what can be done*, in *Common Mark. Law Rev.*, 2014, p. 59 ff.; D. KOCHENOV, *EU Law without the Rule of Law: Veneration of Autonomy Worth it?*, in *Yearbook Eur. Law*, 2015, p. 74 ff.; J.P. JACQUÉ, *Crise des valeurs dans l'Union européenne*, in *Rev. trim. dr. eur.*, 2016, p. 213 ff.; W. SCHROEDER, *Strengthening the Rule of Law in Europe From a Common Concept to Mechanisms of Implementation*, Oxford/Portland, 2016; R. MASTROIANNI, *Stato di diritto o ragion di Stato? La difficile rotta verso un controllo europeo del rispetto dei*

spect for democracy, the Rule of Law, and fundamental rights being the basis on which Italian and European society, and our common identity as EU Member States, are founded.

The foundational nature of these values is evident not only from the text of Article 2 of the TEU – the Union is 'founded' on them – but also from the fact that they are an essential condition for becoming a member of the European Union. Article 49 of the TEU provides that '[a]ny 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'.[2] Indeed, the Court of Justice, interpreting Articles 2 and 49 of the TEU in the Wightman Judgment of 2018, emphasised that 'the European Union is composed of States which have freely and voluntarily committed themselves to those values'.[3] The protection of these values as a condition for even initiating negotiations with third countries aspiring to become members of the Union was already applied in the EU system before the codification of Articles 2 and 49 of the TEU following the latest revision of the Treaties, namely the Lisbon Treaty of December 2009. The Copenhagen criteria, adopted by the European Council in 1993, already made the initiation of the accession procedure conditional on the establishment in the third country of stable institutions guaranteeing 'democracy, the rule of law, human rights and respect for and protection of minorities'.[4] However, even before that, accession negotiations, for example, with Greece, Spain and Portugal to the Eu-

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valori dell'Unione negli Stati membri, in E. TRIGGIANI, F. CHERUBINI, I. INGRAVALLO, E. NALIN, R. VIRZO (eds.), *Dialoghi con Ugo Villani*, Bari, 2017, p. 605 ff.; B. NASCIMBENE, *Valori comuni dell'Unione europea*, *ibid*, p. 631 ff.; E. LEVITIS, *L'Union européenne en tant que communauté de valeurs partagées. Les conséquences juridiques des articles 2 et 7 du traité sur l'Union européenne pour les États membres*, in AA.VV., Liber Amicorum *Antonio Tizzano: De la Cour CECA à la Cour de l'Union: le long parcours de la justice européenne*, Torino, 2018, p. 509 ff.; L.S. ROSSI, *Il valore giuridico dei valori. L'articolo 2 TUE: relazioni con altre disposizioni del diritto primario dell'UE e rimedi giurisdizionali*, in *federalismi.it*, 2020, p. 4 ff.; G. PITRUZZELLA, *L'Unione europea come "comunità di valori" e la forza costituzionale del valore dello "stato di diritto"*, in *federalismi.it*, 2021, p. iv ff. On the genesis of Article 2 TUE, see the extensive reconstruction by A. CIRCOLO, *Il valore dello Stato di diritto nell'Unione europea. Violazioni sistematiche e soluzioni di tutela*, Napoli, 2023, especially pp. 83-97.

[2] On the specific aspect of common values within the framework of the enlargements of the European Union, B. NASCIMBENE, *La procedura di adesione all'Unione europea*, in M. GANINO, G. VENTURINI (eds.), *L'Europa di domani: verso l'allargamento dell'Unione*, Milano, 2002, p. 3 ff.; M. CARTA, *Lo Stato di diritto alla prova dell'allargamento dell'UE (o l'allargamento della UE alla prova dello Stato di diritto)*, in *Eurojus*, 2022, p. 177 ff.; A. ŁAZOWSKI, *Strengthening the rule of law and the EU pre-accession policy:* Repubblika v. Il-Prim Ministru: case C-896/19, in *Common Mark. Law Rev.,* 2022, p. 1803 ff.

[3] Court of Justice, 10 Dicember 2018, C-621/18, points 62-63. Similarly, the conclusions of Advocate General Kokott of 12 April, 2018, C-561/*16, Saras Energía,* point 75.

[4] The text of the conclusions of the European Council in Copenhagen on June 21-22 1993, is available at the following address: *https://www.consilium.europa.eu/media/21225/72921.pdf*.

ropean Communities were initiated, leading to their respective entry in 1981 and 1986, only after the conclusion of their respective dictatorships, thus demonstrating the implicit foundational nature of the values referred to in Article 2 of the TEU even before their codification in common law. This is understandable given that freedom, democracy and the Rule of Law, even before being EU values, are part of the constitutional traditions of the individual Member States since the post-war period. [5]

The values referred to in Article 2 of the TEU must also be possessed by each State not only at the time of accession to the Union under Article 49 of the TEU but also throughout their membership to the EU system (so-called stand-still condition). This result, already logical in itself, is evident first of all from the letter of paragraph 2 of Article 2 of the TEU. This latter qualifies the values listed in paragraph 1 (human dignity, freedom, democracy, equality, rule of law, human rights) as 'common', thus implying that the States are bound to respect them even when members of the Union. Indeed, the Court of Justice, albeit with regard to respect for one of the values referred to in Article 2 of the TEU, namely the Rule of Law, has clarified that a State cannot, once it has entered the Union, modify its domestic legislation in a way that entails a regression in the protection of the value under consideration (so-called non-regression principle). [6] Generalising, as seems appropriate, the application of this latter principle to every common value, the level of protection of the values referred to in Article 2 of the TEU required of candidate countries and/or potential candidates at the time of their entry into the Union under Article 49 of the TEU must then be maintained even after becoming members of the EU system, compliance with common values being an obligation that derives directly from the commitments made by the Member States to each other and to the Union. [7] This is under-

[5] In this regard, the European Commission's Communication to the Parliament and the Council, *A New Framework for the EU to Strengthen the Rule of Law*, 11 March 2014, COM(2014)158, especially p. 2.

[6] Such principle was first illustrated in Court of Justice, 20 April 2021, C-896/19, *Repubblika*, point 63 regarding the respect for the Rule of Law in Malta. It was then confirmed in further rulings such as, for example, Court of Justice, 18 May 2021, C83/19, C127/19, C195/19, C291/19, C355/19 and C397/19, *Asociaţia Forumul Judecătorilor din România*, point 162, regarding the respect for the Rule of Law in Romania. For an analysis of the principle of non-regression in doctrine, see N. CANZIAN, *Indipendenza dei giudici e divieto di regressione della tutela nella sentenza* Repubblika, in *Quaderni cost.*, 2021, p. 715 ff.; A. FESTA, *Indipendenza della magistratura e non regressione nella garanzia dei valori comuni europei. Dal caso* Repubblika *alla sentenza K 3/21 del Tribunale costituzionale polacco*, in *Freedom, Security & Justice. European Legal Studies. Rivista quadrimestrale on line sullo Spazio europeo di libertà, sicurezza e giustizia*, 2021, p. 72 ff.; M. LELOUP, D. KOCHENOV, A. DIMITROVS, *Opening the door to solving the "Copenhagen dilemma"? All eyes on* Repubblika v II-Prim Ministru, in *Eur. Law Rev.*, 2021, p. 692 ff.; A. ŁAZOWSKI, *Strengthening the rule of law cit.*

[7] Court of Justice, 16 February 2022, C-156/21 (*Hungary v. European Parliament and Council*),

standable because Article 2 of the TEU contains common values that are part of the European identity,[8] so that each Member State shares with all other Member States, and recognises that these share with it, a series of common values on which the European Union is founded.[9]

The respect for Article 2 of the TEU and the values mentioned therein is also imposed not only on candidate or potential candidate countries for accession to the Union and those already members thereof but also on EU institutions in the exercise of their internal and external activities, with Article 13 of the TEU providing that '[t]he Union shall have an institutional framework which shall aim to promote its values'. In particular, as regards relations with third countries, Article 3(1) of the TEU lists among the objectives of the European Union the promotion of peace, its values, and the well-being of its peoples, also in relations with the rest of the world, and Article 21(1) and (2) of the TEU reiterates that '[t]he Union's action on the international scene shall be guided by the principles which have inspired its own creation, development and enlargement, and which it seeks to advance in the wider world: democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, and respect for the principles of the United Nations Charter and international law'.[10] Furthermore, in the framework of the Common Foreign and Security Policy (CFSP), Article 42(5) of the TEU establishes that the Council may, through the deploy-

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points 124, 127, 231, 233, and C-157/21, (*Poland v. European Parliament and Council*), points 145, 169, 265. For an analysis in doctrine of these twin judgments, rendered moreover by the plenary assembly of the Court of Justice with regard to the validity of the so-called Conditionality Regulation, as will be discussed further, see J. ALBERTI, *Adelante, presto, con juicio. Prime considerazioni sulla sentenza della Corte di giustizia che sancisce la legittimità del Regolamento condizionalità*, in *Eurojus,* 2022, p. 25 ff.; V. BORGER, *Constitutional identity, the rule of law, and the power of the purse: the ECJ approves the conditionality mechanism to protect the Union budget*: Hungary and Poland v. Parliament and Council: case C-156/21, Hungary v. Parliament and Council and case C-157/21, Poland v. Parliament and Council, in *Comm. Mark. Law Rev.*, 2022, p. 1771 ff.; S. PLATON, *La valeur des valeurs. La confirmation de la validité du mécanisme de conditionnalité «État de droit» par la Cour de justice de l'Union européenne*, in *Cahiers dr. eur*, 2022, p. 197 ff.; H. GAUDIN, *Ce que l'Union européenne signifie: l'identité de l'Union et de ses États membres. À propos des arrêts de la Cour de justice rendus en assemblée plénière, le 16 février 2022*, Hongrie c. Parlement européen et Conseil, C-156/21, et Pologne c. Parlement européen et Conseil, C-157/21, in *Rev. trim. dr. homme*, 2023, p. 17 ff.

[8] Court of Justice, *ibid*.

[9] Court of Justice, Opinion 2/13, 18 December 2014, on the accession of the European Union to the ECHR, points 167-168. In doctrine, L. FUMAGALLI, *Articolo 2*, in A. TIZZANO (ed.), *Trattati dell'Unione Europea*, Milano, 2014, as well as more recently, L.S. ROSSI, *Il valore giuridico dei valori cit*., p. vi.

[10] Regarding the binding nature of the Rule of Law for EU institutions in the exercise of external dimension, Court of Justice, 27 February 2007, C-355/04 P, *Segi e.a.*, point 51; as well as more recently, 19 July 2016, C-455/14 P, *H v Consiglio*, point 41; 28 March 2017, C-72/15, *Rosneft*, point 72.

ment of civilian and military capabilities of individual Member States, entrust the performance of a Union mission to a group of Member States for the purpose, once again, of preserving common values.

The fact that the values referred to in Article 2 of the TEU, as part of the European identity, pervade every aspect – internal and external – of the construction of the Union and are imposed on all interested parties – candidate countries, members, or third States, as well as EU institutions – has correctly led EU case law to recognise the rule in question as having a "constitutional" nature.[11] In Opinion 1/17, the judges in Luxembourg affirmed that 'Union possesses a constitutional framework that is unique to it' and that 'the founding values set out in Article 2 TEU'[12] are part of this framework, in addition to the values enshrined in the Charter of Fundamental Rights of the EU, the rules on the allocation and distribution of powers between the Union and the Member States, as well as the rules for the functioning of European institutions and the judicial system. This is further confirmed by the placement of the provision in question among the first provisions of the TEU, that is, of the Treaty which, unlike the TFEU, contains the constitutive and constitutional principles of the Union system.

2. *The notion of "Rule of Law" in light of EU case law*

The "Rule of Law", theorised primarily at the national constitutional level[13] and also employed at the ECHR level,[14] is one of the values mentioned in Arti-

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[11] In this regard, L.S. ROSSI, *Il valore giuridico dei valori cit*., p. v) asserts that as an expression of the founding principles and supreme values of the Union, Article 2 TEU is situated at a higher level than all other treaty provisions.

[12] Court of Justice, Opinion 1/17, 30 April 2019, on the conclusion of the international agreement CETA between Canada and the European Union, point 110; as well as the aforementioned Opinion 2/13 on the accession of the Union to the ECHR, point 158.

[13] A. FESTA, *L'Unione europea e l'erosione dello Stato di diritto in Polonia*, in *Freedom, Security Justice*, 2020, p. 145 ff., especially p. 146 reports how the notion of the "Rule of Law" was primarily theorised by German doctrine between the late 18th and early 19th centuries and manifested in England in the form of the so-called Rule of Law, in the United States with the concept of constitutional state, and in France with that of *règne de la loi*. On the differences between the notions of the Rule of Law in continental Europe, R. BIN, *Rule of Law e ideologie*, in G. PINO, V. VILLA (eds.), Rule of Law. *L'ideale della legalità*, Bologna, 2016, p. 42 ff.

[14] See also Article 18 ECHR, Article 3 of the Statute of the Council of Europe, as well as Opinion 512/2009 of the Venice Commission of 4 April 2011 (CDL-AD(2011)003rev). On the Rule of Law in the case law of the ECHR, 28 May 2002, *Stafford v. The United Kingdom*, No. 46295/99, point 63; 23 May 2016, *Mozer v. The Republic of Moldova and Russia*, No. 11138/10, point 134. In doctrine, F. TAN, *The Dawn of Article 18 ECHR: A Safeguard Against European Rule of Law Backsliding?*, in *Goettingen Jour. Int. Law*, 2018 p. 109 ff., especially pp. 111-112; S. GIANELLO, *Sul (possibile) utilizzo della CEDU come argine alle sistemiche violazioni dello Stato di diritto*, in *DPCE online*, 2019, p. 2373 ff.

cle 2 of the TEU. However, this provision does not provide a definition of this notion and/or the underlying principles, so their content must be reconstructed in light of the EU case law, which, especially since 2018, has been repeatedly called upon to interpret the aforementioned treaty provision mainly through the judicial instruments of infringement proceedings (Articles 258-260 of the TFEU) and preliminary rulings (Article 267 of the TFEU). Indeed, since Article 2 of the TEU is a primary law provision, modifiable as such only through the procedure provided for in Article 48 of the TEU, the notion of the "Rule of Law" contained therein could not have been specified through means other than judicial ones, such as acts of secondary law. Even those that offer a definition of the "Rule of Law" – such as, for example, the European Commission's communications on the Rule of Law,[15] or the so-called Conditionality Regulation,[16] which links the disbursement of European funds to the respect for common values – refer, in fact, to the EU case law, which is thus the only one able to give content to the notion of primary law in question as written by the drafters of the treaties.[17]

In light of EU rulings, it emerges that the "Rule of Law" is an autonomous notion of EU law,[18] which encompasses a series of different principles,[19] albeit

[15] For example, the Communication from the Commission of 2014, *A New Framework for the EU cit*., particularly p. 2; the Communication from the European Commission to the European Parliament, the European Council, and the Council, *Strengthening the Rule of Law in the Union. The current context and possible new initiatives*, 3 April 2019, COM(2019)163; the Communication from the European Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions, *Strengthening the Rule of Law in the Union. Action plan*, 7 August 2019, COM(2019) 343.

[16] See in particular recital 3, Article 2, point (a), and Article 3 of Regulation 2020/2092 of the European Parliament and of the Council of December 16, 2020, on a general regime of conditionality for the protection of the Union's budget. In doctrine, M. CARTA, *Strumenti finanziari e tutela della Rule of Law: i recenti sviluppi nell'Unione europea*, in AA.VV., *Temi e questioni di diritto dell'Unione europea. Scritti offerti a Claudia Morviducci*, Bari, 2019, p. 153 ff.; M. FISICARO, *Beyond the Rule of Law Conditionality: Exploiting the EU Spending Power to Foster the Union's Values*, in *Eur. Papers*, 2022, p. 697 ff.; I. STAUDINGER, *Usual and Unusual Suspect: New Actors, Roles and Mechanisms to protect EU Values*, *ibid*, 2022, p. 721 ff.; E. MAURICE, *Etat de droit: le pari incertain de la conditionnalité*, in *Question d'Europe. Policy Paper de la Foundation Robert Schuman*, 13 March 2023, p. 1 ff.

[17] Expressly on the definition of the Rule of Law contained in the Conditionality Regulation *cit*., Court of Justice, *Hungary v. European Parliament and Council cit*., point 227; *Poland v. European Parliament and Council cit*., point 323. Similarly, the Communication from the European Commission, *Guidelines on the application of Regulation (EU, Euratom) 2020/2092 on a general regime of conditionality for the protection of the Union's budget*, OJEU, 18 March 2022, particularly points 10-11 and Annex I.

[18] On the qualification of the Rule of Law as an autonomous concept of EU law, Court of Justice, *Poland v. European Parliament and Council cit*., point 143.

[19] A list of the principles included in the notion of the Rule of Law elaborated by EU case law

complementary to each other. In particular, it requires that all public authorities (legislative, executive and judicial) act within the limits set by law, in line with the values of democracy and in respect of the fundamental rights enshrined in the EU Charter, under the control of independent and impartial judicial bodies.[20] The "Rule of Law" ensures, in other words, that in a context of separation of powers (principle of the separation of powers),[21] the legislative process is transparent, accountable, democratic and pluralistic (principle of legality),[22] that executive power is not exercised arbitrarily (prohibition of arbitrariness),[23] and that the exercise of such powers is always subject to the control of an impartial and independent judiciary,[24] easily accessible to citizens and guaranteeing effective judicial protection,[25] legal certainty,[26] equality before the law/non-discrimination,[27] and the protection of fundamental rights,

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is provided by T. KOSTANTINIDIES, *The rule of Law in the European Union. The Internal Dimension*, Oxford, 2017, especially p. 83 ff.

[20] Thus, the Communication from the European Commission of 2014, *A New Framework cit*., especially p. 4, as well as Article 2, point (a) of the Conditionality Regulation *cit*.

[21] Court of Justice, 22 December 2010, C-279/09, *DEB*, point 58; 10 November 2016, C-477/16, *Kovalkovas*, point 36; 10 November 2016, C-452/16, *Poltorak*, point 35.

[22] Court of Justice, 29 April 2004, C-496/99 P, *CAS Succhi di Frutta*, point 63; 21 June 2022, C-817/19, *Ligue des droits humains v. Council*, point 146. In doctrine, A. ADINOLFI, *Il principio di legalità nel diritto comunitario. Atti del Convegno di studi di scienza dell'amministrazione, Varenna 20-22 settembre 2007*, Milano, 2008, p. 87 ff.

[23] Court of Justice, 21 September 1989, 46/87 e 227/88, *Hoechst*, point 19.

[24] Court of Justice, 27 February 2018, C-64/16, *Associação Sindical dos Juízes Portugueses*, points 31 and 40-41; 25 July 2018, C-216/18 PPU, *LM*, points 63-67. Regarding the former judgment, see among others, M. CLAES, *Judicial serendipity: how Portuguese judges came to the rescue of the Polish judiciary*, in *Eur. Const. Law Rev.*, 2018, p. 622 ff.; A. MIGLIO, *Indipendenza del giudice, crisi dello stato di diritto e tutela giurisdizionale effettiva negli Stati membri dell'Unione europea*, in *Diritti umani e diritto int.*, 2018, p. 421 ff.; M. PARODI, *Il controllo della Corte di giustizia sul rispetto del principio dello Stato di diritto da parte degli Stati membri; alcune riflessioni in margine alla sentenza* Associacao Sindacal dos Juizes Portugueses, in *Eur. Papers*, 2018, p. 985 ff. Regarding the *LM* judgment, see T. KONSTADINIDES, *Judicial independence and the Rule of Law in the context of non-execution of a European Arrest Warrant: LM*, in *Comm. Market Law Rev*., 2019, p. 743 ff.; M. WENDEL, *Indépendance judiciaire et confiance mutuelle: à propos de l'arrêt LM*, in *Cah. dr. eur*., 2019. p. 189 ff.

[25] Court of Justice, *Rosneft cit.*, point 73 and the case law cited therein.

[26] Court of Justice. 12 November 1981, 212/80 a 217/80, *Amministrazione delle finanze dello Stato/Srl Meridionale Industria Salumi e.a.*, point 10; *Rosneft cit*., points 161-162; *Hungary v. European Parliament and Council cit.*, points 136 and 223; 24 July 2023, C-107/23 PPU, *C.I. e.a.*, point 114. According to the Court of Justice, the principle of legal certainty requires, on the one hand, that legal rules be clear and precise and, on the other hand, that their application be predictable. In doctrine, M.L. TUFANO, *La certezza del diritto nella giurisprudenza della Corte di giustizia dell'Unione europea*, in *Dir. UE*, 2019, p. 767 ff.

[27] Court of Justice, 19 January 2010, C-555/07, *Kucukdeveci* (age); 22 January 2019, C-193/17, *Cresco* (religion). In doctrine, L.S. ROSSI, F. CASOLARI (eds.), *The principle of equality in EU Law*, Berlin, 2017.

as indeed happens in every legal system aspiring to be democratic. [28]

As noted by the European Commission, [29] this list is not exhaustive, so it is always possible that further principles may be added to the aforementioned notion of the "Rule of Law", either by the drafters of the treaties through the procedure provided for in Article 48 of the TEU, or by the Court of Justice through interpretation. [30] According to some doctrine, for example, legitimate expectations or *ne bis in idem* could fall within the scope of this examination as they are connected to the principle of legal certainty and effective judicial protection, or the execution of judicial decisions because it is linked to the principle of legality, or even the classic principles of the primacy of EU law, direct effect, or loyal cooperation. [31] Understanding these basic principles of the EU system within this notion is desirable, considering the tendency, as will be discussed further, of constitutional courts of some Member States, among others affected by the violation of the Rule of Law (i.e., Poland and Romania), to deny their applicability at the national level, even though they have been implemented throughout the Union for over sixty years.

More specifically, from the analysis of EU case law in the last five years, it emerges that the most investigated principle has been that of the impartiality and independence of national judiciaries. The particular attention of the Court of Justice to these aspects was probably due to a dual practical and legal reason. From a practical perspective, it should first be noted how the setback, starting from 2011, of the Rule of Law, especially in two Member States, namely Poland and Hungary, has affected precisely these aspects. In 2011, for example, the Hungarian Assembly adopted, through a procedure considered

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[28] On the fact that fundamental rights are an essential component of respect for the Rule of Law, only a society based on the latter allowing individuals to fully enjoy fundamental rights, see K. LENAERTS, *The Autonomy of European Union Law*, in *Dir. UE*, 2018, p. 617 ff., especially p. 621. Similarly, *Council conclusions (Justice and Home affairs) 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 July 2013, especially p. 4.

[29] See, COMMISSIONE EUROPEA, *70 years of EU Law. A Union for its citizens*, in *Unione europea*, 2022, especially p. 39.

[30] On the fact that the realisation of the Rule of Law notion can only be done primarily by the Member States or interpretatively by the Court of Justice, see E. CANNIZZARO, *Il ruolo della Corte di giustizia nella tutela dei valori dell'Unione europea*, in AA.VV., Liber Amicorum *Antonio Tizzano cit*., p. 158 ff., especially p. 161.

[31] The examples are from A. CIRCOLO, *Il valore dello Stato di diritto cit*., especially p. 102. On the understanding of classic EU principles in the context of the examined notion (primacy, direct effect, obligation of conforming interpretation, loyal cooperation), see E. PERILLO, *Il rispetto dello "Stato di diritto" alla luce delle sentenze Ungheria e Polonia sulla clausola di condizionalità finanziaria. Quali prospettive?*, in *BlogDUE*, 16 March 2022, especially pp. 4-5. In this regard, the Luxembourg Court also seems to move in the same direction in the order of 20 November 2017, C-441/17, *European Commission v. Poland*, point 102.

non-transparent,[32] new constitutional rules on the retirement of judges, which resulted in the simultaneous removal of three hundred judges, even when newly appointed.[33] More recently, legislation has provided for the possibility, by the Constitutional Court, to declare the decision of Hungarian judges to refer preliminary questions to the Luxembourg judges as illegitimate, thus limiting a faculty instead directly attributed to them by Article 267 of the TFEU.[34] Similarly, since 2015 the Polish Parliament has introduced the possibility of cancelling the appointment of constitutional judges made in the previous legislature, as well as attributing the appointment of the latter, the Presidents of the Courts and the Courts of Appeal directly to the Ministry of Justice. The appointment of additional judges has also been entrusted not to the National Council of the Judiciary, i.e., the body traditionally responsible for this task to safeguard the independence of judges, but to Parliament. Poland has also established new disciplinary procedures concerning the conduct of members of the judiciary, as well as generic reasons for disciplinary misconduct.[35] In this context, the high number of EU pronouncements on the independence and impartiality of national judiciaries was then determined by the corresponding significant number of cases filed with the Court of Justice by the European Commission (infringement proceedings under Articles 258-260 of the TFEU) or by national judges themselves (preliminary ruling of interpretation under Article 267 of the TFEU) in order to ascertain to the first the incompatibility with Article 2 of the TEU (then mostly effectively ascertained) of Polish and Hungarian legislation on the reorganisation of the judiciary.

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[32] In this regard, A. JAKAB, P. SONNEVEND, *Continuity with Deficiencies: the New Basic Law of Hungary*, in *Eur. Cost. Law Rev*., 2013, p. 102 ff.

[33] In case C-286/12, *European Commission v. Hungary*, although Advocate General Kokot (conclusions of 2 October 2012, points 54-56) had raised doubts about the independence of the judiciary due to this reform, the Court of Justice (judgment of 6 November 2012) declared it incompatible "only" with the principle of non-discrimination on the basis of age under Directive 2000/78 on equal treatment in employment matters, and not with the Rule of Law under Article 2 TEU. For an analysis of violations in Hungary, see A. DI GREGORIO, *Lo stato di salute della rule of law in Europa: c'è un regresso generalizzato nei nuovi Stati membri dell'Unione?*, in *DPCE online*, 2016, p. 175 ff.; A.L. PAP, A. ŚLEDZIŃSKA-SIMON, *The Rise of Illiberal Democracy and the Remedies of Multi-Level Constitutionalism*, in *Hungarian Journal of Legal Studies*, 2019, p. 65 ff.

[34] Court of Justice, 23 November 2021, C-564/19, *IS*. In doctrine, A. CORRERA, *Il giudice nazionale deve disattendere qualsiasi prassi giurisdizionale interna che pregiudichi la sua facoltà di interrogare la Corte di giustizia*, in *BlogDUE*, 12 January 2022.

[35] For a reconstruction of the Polish violations, see A. ANGELI, A. DI GREGORIO, J. SAWICKI, *La controversa approvazione del "pacchetto giustizia" nella Polonia di "Diritto e Giustizia": ulteriori riflessioni sulla crisi del costituzionalismo polacco alla luce del contesto europeo*, in *DPCE online*, 2017, p. 787 ff.; F. GUELLA, *Indipendenza della magistratura polacca e stato di diritto in Europa: malgrado l'irricevibilità di questioni ipotetiche, la garanzia di una tutela giurisdizionale effettiva prescinde dalle attribuzioni dell'Unione*, in *DPCE online*, 2022, p. 2917 ff.; A. CIRCOLO, *Il valore dello Stato di diritto cit*., especially p. 159.

Considering then that, as emerges from the European Commission's Rule of Law Reports to be discussed below, the reforms of national judicial systems initiated in recent years also in Member States other than Hungary and Poland (e.g., Spain, Slovakia, Bulgaria, Romania, Malta) equally raise concerns about the independence and impartiality of the judiciary, it is probable that Luxembourg judges will also be called upon to deal with these aspects in the future. [36]

However, in fact, the particular interest of the Court of Justice in the aforementioned aspects may also have been due to the fact that the independence and impartiality of internal judges are protected in the EU legal system by rules additional to Article 2 of the TEU – namely Article 19(1), paragraph 2 of the TEU ('Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law'), Article 267 of the TFEU (preliminary references may only be made by national judicial bodies that possess, among other things, these characteristics), [37] and Article 47 of the Charter (right to an effective judicial remedy before an impartial tribunal) [38] – which multiplies the opportunities to invoke their respect before national and/or EU jurisdictions. The importance of these principles in EU law is not surprising given that, according to longstanding and consolidated EU case law, [39] national judges are the natural judges of the EU system, so the failure to respect their independence in domestic legal systems also affects the European system. These aspects are not, in other words, purely national issues, as they can undermine the correct and uniform application by internal judges of EU law in the Member States. Moreover, as will be seen later, the rulings of the Court of Justice, assuming that Articles 19 of the TEU and 47 of the Charter concretise the content of Article 2 of the TEU, tend, at least for the moment, to assess the compatibility of national regulations with the principles of independence and impartiality of the judiciary underlying the Rule of Law precisely in light of the combined provisions of Articles 2 of the TEU, 19 of the TEU, and/or 47 of the Charter. [40]

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[36] Regarding this, see paragraph 3 of this contribution.

[37] Regarding the fact that the preliminary ruling mechanism under Article 267 TFEU can only be activated by a body responsible for applying Union law that meets, in particular, the criterion of independence, see Court of Justice *Associação Sindical dos Juízes Portugueses cit.*, point 43; as well as 21 January 2020, C-274/14, *Banco de Santander*, point 56.

[38] Court of Justice, 26 March 2020, C-542/18 *RX-II* and C-543/18 *RX-II*, *Simpson v. Council* and *HG v. Commission*, points 69-71, where it is stated that 'under this provision [i.e., Article 47 of the Charter], everyone is entitled to have their case heard fairly, publicly and within a reasonable time by an independent and impartial tribunal established by law.'

[39] In this regard, the landmark judgment of the Court of Justice on 9 March 1978, *Simmenthal*, 106/77, point 16.

[40] The first EU judgment to establish a connection between Articles 2 and 19 TEU was the aforementioned judgment of *Associação Sindical dos Juízes Portugueses cit.*, points 30 and 34. On Article 47 of the Charter, see Court of Justice order of the President of the Court of Justice of 15

The independence and impartiality of the judiciary have not, however, been the only principles related to the Rule of Law addressed by Union judges. In a recent infringement proceeding,[41] for example, the European Commission requested the Court of Justice to ascertain the incompatibility with Article 2 of the TEU and, more specifically, the principle of non-discrimination, which is fully encompassed in the definition of the Rule of Law,[42] of the so-called Hungarian "anti-LGBTQIA+" laws, which, in the name of protecting minors against paedophiles, prohibit minors from accessing content, including advertising materials, promoting or depicting a presumed deviation from the gender identity assigned at birth, sex change, or homosexuality; require media to classify all programs whose defining element is the presentation of deviation from the gender identity corresponding to that assigned at birth, sex change, or homosexuality; and, prohibit certain professions from promoting deviation from the gender identity corresponding to that assigned at birth, sex change, or homosexuality. As will be seen later, in Hungary,[43] unlike in Poland, violations of EU law have not mainly concerned the independence and impartiality of the judiciary, but also many aspects of society (secondary education, taxation, media freedom, non-discrimination, protection of minorities, etc.).

3. *Tools for preventing violations of common values by Member States: the annual Reports of the European Commission on the Rule of Law*

In order to protect common values and the Rule of Law, the European Union system has established a variety of different tools aimed at preventing the deterioration of these common values in national legal systems and at restoring respect for them in case of violation. In particular, depending on the function performed by these tools, they can be distinguished between means of (i) preventing violations of

November 2018, C-619/18 *Commission v. Poland*, points 20-21, where it is stated that 'the requirement of judicial independence concerns the essential content of the fundamental right to a fair trial, which is of cardinal importance as a guarantee of the protection of all the rights derived from Union law to which individuals are entitled and the safeguarding of the values common to the Member States set out in Article 2 TEU, in particular, the value of the rule of law.' In doctrine, K. LENAERTS, *The Court of Justice as the guarantor of the rule of law within the European Union*, in G. DE BAERE, J. WOUTERS (eds.), *The Contribution of International and Supranational Courts to the Rule of Law*, Leuven, 2015, p. 242 ff. On the fact that Article 19 TEU is also strengthened in the light of Article 2 TEU, see L.D. SPIEKER, *Berlaymont is back: the Commission invokes Article 2 TEU as self-standing plea in infringement proceedings over Hungarian LGBTIQ rights violations*, in *EU Law Live*, 22 February 2023.

[41] In this regard, the landmark judgment of the Court of Justice, *Simmenthal cit.*, point 16.

[42] Court of Justice, *Hungary v. European Parliament and Council cit.*, point 229; *Poland v. European Parliament and Council cit.*, point 324.

[43] Regarding this, see paragraph 5 of this contribution.

Article 2 of the TEU, (ii) reacting to these violations, or (iii) supporting those who report failures to comply with common law and therefore also with common values. While bearing in mind the functional diversity among these remedies, the EU system regarding violations of Article 2 of the TEU must nevertheless be evaluated in its unity, each of the instruments composing the aforementioned categories contributing, to varying degrees, to achieving the same objective, namely the protection of common values and the Rule of Law in the European system.

Among the remedies that respond to the adage "prevention is better than cure" first and foremost are the European Commission's annual Reports on the Rule of Law, which since 2020 measure the degree of compliance (and violation!) of this (only) common value in individual national legal systems.[44] To this end, every year (between February and April), the European Commission (DG Justice and Consumers, in collaboration with other services) initiates a dialogue, defined by itself as "open and frank", with the Member States to assess the level of protection of the Rule of Law ensured in each State. These dialogues involve not only government authorities but also representatives of the judiciary, regulatory authorities, non-governmental organisations (NGOs), as well as professional organisations (journalists' or lawyers' associations) and civil society, in order to objectively ascertain, based on EU legal rules, the level of protection and non-compliance with the Rule of Law in a certain national system regarding four areas, namely (i) the independence, quality, and effectiveness of the judiciary system; (ii) the fight against corruption; (iii) freedom and pluralism of the media; and, (iv) the so-called checks and balances, i.e., the existence of internal checks and balances to ensure respect for the principles underlying the Rule of Law. Since 2022, the European Commission's annual Report on the Rule of Law also contains recommendations addressed to the Member States.

Although this tool does not have binding effectiveness, the dialogue established between the Member States and the European Commission during the drafting of the annual Report, and the recommendations contained therein, have indeed already produced positive results. In 2023, for example, Ireland, France, Spain and Finland increased the number of judges in order to reduce judicial backlog and shorten lengthy legal proceedings.[45] Moreover, considering that, to

[44] COM(2020)580; COM(2021)700; COM(2022)500; COM(2023)800. The 2023 report of the European Commission on the Rule of Law was published on 5 July 2023, and presented to the General Affairs Council on 10 July 2023. On 24 July 2024 the European Commission published its fifth annual Rule of Law Report (COM(2024)800 final). https://commission.europa.eu/document/download/27db4143-58b4-4b61-a021-a215940e19d0_en?filename=1_1_58120_communication_rol_en.pdf. For the first time, the Rule of Law Report contains an evaluation of the protection of the Rule of Law in some accession (Serbia, Albania, North Macedonia and Montenegro see p. 190 and 191).

[45] See the 2023 report of the European Commission on the Rule of Law, section 'Initiatives to improve the quality and efficiency of justice'.

ensure the independence of the judiciary, the methods and criteria for selecting domestic judges must dispel any doubts about their immunity from external influences and their neutrality in judgment,[46] Luxembourg modified the appointment process of its Judicial Council to make it more transparent.[47] The European Commission's annual Report on the Rule of Law does not only objectively evaluate the level of protection of the latter but also fulfils the additional function of encouraging change and constructive reforms at the national level. The fact that many of the recommendations contained therein are, even if only in part, implemented by the Member States[48] demonstrates the ability of the Report in question to promote the correction of national initiatives or practices (perhaps not the most serious and systemic ones) that may endanger the respect for the Rule of Law.

Also considering these positive results, the views of those who consider this annual Report,[49] because it is based on mere dialogue between Member States and the European Commission, ineffective – and therefore somewhat useless – in solving the longstanding issue of respect for EU values by Member States, do not seem justified. The effectiveness of this protection would be subject to the activation of additional mechanisms (i.e., those reacting to violations of the Rule of Law), which are the only ones truly capable of offering effective and direct protection. Moreover, given the complementarity between the various remedies provided by the European Union system to combat violations of Article 2 of the TEU, the tools specifically designed to react to violations of Article 2 of the TEU intervene where dialogue between Member States and the European Commission and/or the latter's recommendations have not led to fruitful outcomes.

Moreover, the fact that the European Commission's annual Report is just one of the remedies for situations of non-compliance with EU law based on dialogue between Member States and European institutions – as is also the case

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[46] In this regard, see the following judgments: Court of Justice, 19 November 2019, *AK*, C-585/18, C-624/18, and C-625/18, points 137 and 138; 2 March 2021, *AB* (Appointment of judges to the Supreme Court), C-824/18, points 66, 124, and 125; 20 April 2021, *Repubblika*, C-896/19, point 66; 15 July 2021, *European Commission v. Poland*, C-791/19, points 98-108. For a doctrinal analysis, see P. MORI, *La questione del rispetto dello Stato di diritto in Polonia e in Ungheria: recenti sviluppi*, in *federalismi.it*, 2020, p. 166 ff.

[47] See the 2023 Report of the European Commission on the Rule of Law, section 'Perception of Independence'.

[48] From reading the 2023 Report of the European Commission on the Rule of Law, it appears that a significant number of recommendations formulated in the 2022 report have indeed been implemented by the Member States. According to the representation of Italy to the European Union (*https://italy.representation.ec.europa.eu/notizie-ed-eventi/notizie/relazione-sullo-stato-di-diritto-2023-progressi-sul-65-delle-raccomandazioni-ma-occorrono-ulteriori-2023-07-05_it*), 65% of the recommendations from the 2022 report have been fully or partially addressed in 2023.

[49] In this regard, see E. CANNIZZARO, *Il ruolo della Corte di giustizia cit*., especially p. 166.

within the Council to promote respect for the Rule of Law,[50] or the evaluations of the *s.c.* "European Semester" regarding the effectiveness of the judicial systems and public administration of the Member States,[51] or even the EU Justice Scoreboard by the European Commission, which presents an annual overview of indicators regarding the efficiency, quality and independence of judicial systems[52] – does not make the latter superfluous or, even more, a source of uncertainty.[53] On one hand, the violations of the Rule of Law identified in the European Commission's Report take into account the information collected within the framework of the justice assessment.[54] On the other hand, they form the basis of the political dialogues of the Council to promote respect for the Rule of Law, the evaluations of the European Semester, as well as the use of the so-called reactive tools to failures to comply with EU values (e.g., infringement proceedings and the Conditionality Regulation).[55] This is understandable given that the European Commission's annual Reports, also given that it is drafted by an institution independent of the Member States, contain, unlike the political assessments of the Council and the European Council, an objective and detailed assessment of the actual respect for the Rule of Law, which is presented as technical, not political.

Finally, it is worth noting how, according to some scholars, the Reports in question should, on one hand, focus on the analysis not only of the protection of the Rule of Law but also on the resilience of democracies and the respect for

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[50] Regarding this, see paragraph 4 of this contribution, and in doctrine, T. CONZELMANN, *Peer Reviewing the rule of law? A new Mechanism to safeguard EU Values*, in *Eur. Papers*, 2022, p. 671 ff.

[51] In the first six months of the year, the Council, upon recommendation from the European Commission and with the favourable opinion of the European Council, can issue specific recommendations to each Member State if, from the analysis of State conduct in the areas of structural reforms and public finances, there are critical issues regarding the fight against corruption, the effectiveness of judicial systems, and public administration. In the subsequent six months, Member States make the necessary corrections, taking into account the aforementioned recommendations. For more information, see *https://www.consilium.europa.eu/it/policies/european-semester/*.

[52] This tool monitors the health of the judicial systems of the Member States, comparing them in terms of independence, quality, and efficiency, based on shared indices such as the number of pending cases, duration of proceedings, *ratio* of cases concluded to new ones in a year, training of judges, etc. The information gathered may lead to the adoption of recommendations by the Council at the request of the European Commission. For more information, see *https://commission.europa.eu/strategy-and-policy/policies/justice-and-fundamental-rights/upholding-rule-law/eu-justice-scoreboard_it*.

[53] In this sense, see A. CIRCOLO, *Il valore dello Stato di diritto cit.*, especially p. 152.

[54] *https://commission.europa.eu/strategy-and-policy/policies/justice-and-fundamental-rights/upholding-rule-law/eu-justice-scoreboard_it#scoreboards*.

[55] In this regard, the European Commission explicitly stated in the *2022 Rule of Law – Questions and Answers*.

EU fundamental rights,[56] and on the other hand, involve the collaboration of additional actors such as, for example, the European Parliament or the Fundamental Rights Agency (FRA).[57] However, it seems appropriate to question whether these objective and subjective novelties would not burden and slow down the drafting of the Report, whose success has so far been precisely the timeliness and clarity of the charges raised. Furthermore, even if the categories of values (Article 2 of the TEU) and fundamental rights (Article 6 of the TEU) are distinct from each other, certain principles included in the former are referenced in the latter, thus attesting to an objective connection between the two areas, already highlighted by the mention in Article 2 of the TEU of EU fundamental rights. The principles of independence and impartiality of the judiciary underlying the Rule of Law are, for example, also protected in Article 47 of the Charter, and the principle of non-discrimination in Article 21 of the Charter is fully part of the definition of the Rule of Law. Therefore, verifying non-compliance with the latter effectively amounts to verifying, at least to a large extent, non-compliance with the latter as well. Moreover, as it clearly results from the methodology followed for the drafting of the Rule of Law Reports, such a methodology is in fact also based on information collected by the FRA with respect to fundamental rights. It is also worth recalling that since 2010, the European Commission has published an annual Report on the application of the Charter. In addition, the European Commission's assessment on the Rule of Law takes into account information collected by several international organisations (e.g., case law of the ECHR; Council of Europe and its Commission for the Efficiency of Justice as well as the Venice Commission; World Bank; OECD; OSCE; UN; Word Economic Forum); as well, as far as the chapter on anti-corruption is concerned, data from the European Anti-Fraud Office, the European Public Prosecutor Office, the Group of States against Corruption, and the Committee of Experts on the Evaluation of Anti-Money Laundering measures of the Council of Europe.

Nor would an expansion of the content of the European Commission's annual Report be necessary to ensure its alignment with the procedure under Article 7 of the TEU, which allows the Member States, gathered in the Council and the European Council, to ascertain violations of every common value under Article 2 of the TEU. As will be seen later, the procedure under Article 7 of the TEU is, in fact, the specifically provided instrument in the treaties to identify

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[56] Similarly, J. JARACZEWSKI, *The European Commission's Rule of Law Report in 2022 – progress or more of the same?*, in *EU Law Live*, 26 September 2022.

[57] Similarly, A. CIRCOLO, *Il valore dello Stato di diritto cit.*, especially p. 151. On the possibility of expanding the mandate of the FRA to enhance the protection of common values and the Rule of Law, see also G.N. TOGGENBURG, G. GRIMHEDEN, *The Rule of Law and the Role of Fundamental Rights. Seven Practical Pointers*, in C. CLOSA, D. KOCHENOV (eds.), *Reinforcing Rule of Law Oversight in the European Union*, Oxford, 2016, p. 147 ff., especially p. 169.

and possibly sanction violations of common values, so it understandably has a broader objective scope than purely preventive instruments, which focus only on the core of common values. The traditional adoption of resolutions by the European Parliament commenting on the annual Report on the Rule of Law allows the latter to highlight additional issues to those raised by the European Commission, which are then often taken into consideration by the latter in the subsequent annual Report. [58]

The President of the European Commission, Ursula Von der Layen, seems convinced of the importance and effectiveness of the European Commission's annual Report on the Rule of Law. On 13 September 2023, in her State of the Union address, she indeed qualified these Reports as 'a key priority' of the European Commission, extending their use from 2024 also '… to those accession countries who get up to speed even faster' in this sector, [59] i.e., currently Albania, North Macedonia, Montenegro and Serbia. This represents a rather rare example of the use of a Union instrument in situations that are not yet part of the Union.

The positive considerations just made about the effectiveness of the preventive tool under review do not exclude, however, that the Rule of Law is deteriorating also in Member States other than Hungary and Poland. As indicated in the European Commission's 2023 Report, serious concerns have been raised, for example, regarding the appointment and dismissal procedures of judges carried out by the High Council of the Judiciary in Spain, Slovakia and Bulgaria. In Slovakia, there is concern about the offence introduced for judges of abuse of right in judicial decisions, which can indeed limit their independence. In fact, the same offence has in the past led to investigations and disciplinary proceedings in Hungary and Poland regarding the content of judicial decisions, often only to limit the independence of the judiciary. In Bulgaria and Romania, the Judicial Inspectorate, which is responsible for overseeing the work of judges and proposing the opening of disciplinary proceedings against them, continues to be exposed to executive influence. The shortage of judges and the low level of their remuneration, as well as that of officials of regulatory authorities, i.e., elements that can cause their bias or corruption, are then highlighted in Lithuania, Slovakia, Greece, Croatia and Romania. In Hungary, Slovenia and Poland, concerns persist regarding the independence of regulatory authorities from undue political influences on the appointment process or their operation. In Mal-

[58] See, for example, the resolution of the European Parliament of 19 May 2022, on the European Commission's 2021 Rule of Law Report (P9_TA(2022)0212). The European Parliament highlighted aspects of concern regarding the Rule of Law that were only briefly mentioned by the European Commission, particularly regarding the situation in Malta concerning freedom of information and corruption investigations, as noted by T. CONZELMANN, *Peer Reviewing cit*., especially p. 683.

[59] *https://ec.europa.eu/commission/presscorner/detail/it/speech_23_4426*.

ta, Romania and Slovakia, freedom of information is in a state of considerable difficulty (limited independence of public media, lack of protection for journalists, and rules on access to documents), and investigations into cases of high-level corruption rarely end in convictions. The 2024 Rule of Law Report of the European Commission has essentially confirmed these concerns.

4. *Following: The peer review system of the General Affairs Council*

The European Commission's annual Reports on the Rule of Law are the basis for a further tool for preventing violations of the values referred to in Article 2 of the TEU, namely dialogues within the General Affairs Council.

In particular, thanks to an initiative by the Belgian, German and Dutch foreign ministers in 2019,[60] starting from 17 November 2020, this Council now dedicates a portion of its meetings to a dialogue on the Rule of Law. During each meeting, which usually begins with a brief introduction by the European Commission to illustrate the results contained in the annual Report on the Rule of Law, the ministers for European affairs from the twenty-seven Member States discuss, based on the chapters for each Member State contained in the aforementioned Report,[61] the specific situation regarding the respect for the Rule of Law of at least groups of five countries: Belgium, Bulgaria, the Czech Republic, Denmark and Estonia (17 November 2020); Germany, Ireland, Greece, Spain and France (20 April 2021); Croatia, Italy, Cyprus, Latvia and Lithuania (23 November 2021); Luxembourg, Hungary, Malta, the Netherlands and Austria (12 April 2022); Portugal, Romania, Slovenia and Sweden (18 October 2022); Belgium, Slovakia, Bulgaria, Finland and the Czech Republic (21 March 2023); Denmark, Ireland, Estonia, Germany and Greece (24 October 2023). As evidenced by the conclusions of the General Affairs Council on 23 November 2021 and 12 December 2023, the Member State undergoing the hearing, which lasts half an hour per country and is conducted in accordance with the principles of objectivity, non-discrimination and equal treatment, has the opportunity to present national developments regarding the Rule of Law. Ministers from other Member States subsequently have the opportunity to present their observations in turn, also sharing their experiences and best practices.

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[60] Similarly, D. REYNDERS, M. ROTH, S. BLOK, *Fundamental Values Check-Up: Let's Intensify Our Dialogue*! (28 November 2020) Federal Foreign Office *www.auswaertiges-amt.de*. On the origins of the mechanism under consideration, O. PORCHIA, *Le Conclusioni del Consiglio del 16 dicembre 2014 "Rafforzare lo Stato di diritto": un significativo risultato dalla Presidenza italiana*, in *Eurojus*, 2015; L.S. ROSSI, *Un nuovo* soft instrument *per garantire il rispetto della* rule of law *nell'Unione europea*, in *SIDIBlog*, 2015.

[61] In this regard, see the conclusions of the General Affairs Council of 19 November 2019, points 8, 10 and 15.

The considerations expressed on this occasion by the ministers for EU policies are not binding on the Member State under scrutiny. The dialogue established there is, in fact, a soft law tool based on political peer review.[62] The General Affairs Council does not even adopt formal recommendations to the countries audited, as instead happens in the European Commission's annual Report. Despite lacking strictly prescriptive effects, this mechanism is not devoid of efficacy, creating indeed so-called peer pressure, i.e., continuous and reciprocal surveillance among Member States regarding respect for the Rule of Law,[63] as well as an exchange of best practices to improve the protection of the Rule of Law on certain issues. In other words, these States are induced to respect this common value or to resolve any violations thereof because they know that cyclically (every two and a half years) they will be called upon to account for the conformity of their national legislation before a peer group.

The undeniable positive results that a real and constant comparison between Member States has in protecting, even only preventively, the Rule of Law – especially if we consider the weak role played, at least until now, by the General Affairs Council in the main tool for reacting to violations of the Rule of Law, namely that provided for in Article 7 of the TEU – lead to proposing certain improvements to the procedure in question in order to enhance its deterrent and corrective effects. In fact, the General Affairs Council itself seems to be convinced of this, in its conclusions of 12 December 2023, having stated that 'while considering the current content and structure of the dialogue satisfactory, it should be further improved to better reflect the Council's commitment to strengthening the rule of law and contributing to the prevention of emerging and existing challenges regarding the rule of law, in an inclusive and constructive manner, through discussion and exchange of best practices and lessons learned'. Moreover, already in the conclusions of 23 September 2019, the General Affairs Council had foreseen a reassessment of the functioning of the procedure by the end of 2023 based on the experience gained in the period 2019-2023.

In particular, and although the pace of hearings of Member States (every 2 and a half years) is in line with that of similar mechanisms used, for example, in the Organisation for Economic Cooperation and Development (OECD), intensifying them could increase pressure on Member States to respect the Rule of

[62] Indeed, this characteristic of the dialogue under consideration is reiterated five times in just the two and a half pages that make up the evaluations of the annual dialogue on the Rule of Law annexed to the conclusions of the General Affairs Council of 12 December 2023.

[63] On the essential role of peer pressure in peer review mechanisms at the international level, see F. PAGANI, *Peer Review is a Tool for Co-operation and Change: an Analysis an OECD Working Method*, in *African Secutirty Rev.*, 2002, p. 15 ff., especially pp. 16-17; G. DIMITROPOULOS, *Compliance through collegiality: peer review in international law*, in *Loy. LA Int'l & Comp. L. Rev*, 2015, p. 275 ff.

Law.[64] For the same reason, the duration of Member State hearings within the General Affairs Council, currently only half an hour, could be aligned with that conducted, albeit in other matters, by the United Nations Human Rights Council (three and a half hours) or the World Trade Organisation (half a day).[65] It would also be appropriate to dedicate separate meetings of the General Affairs Council to the examination of the respect for the Rule of Law, as discussing such a sensitive issue in a normal working session, together with other agenda items, would make it difficult to have an in-depth discussion between governments on respecting the Rule of Law.

Now, as indicated by the Assessment of the annual dialogue on the Rule of Law (point 8) attached to the conclusions of 12 December 2023,[66] the General Affairs Council seems oriented to at least intensify specific discussions for each Member State, which will go from twice a year for five States per meeting to three times a year, i.e., two in the first half and one in the second half, each focusing on the situation in four Member States. This will lead to the analysis of twelve Member States per year, instead of the previous ten. As for the possibility of dedicating separate meetings to the examination of respect for the Rule of Law, the General Affairs Council has only specified that 'discussions on one or more particular horizontal rule of law themes could be organised in the General Affairs Council, when deemed appropriate and necessary' (point 15 of the assessment of the annual dialogue on the Rule of Law). In this regard, however, it seems appropriate to clarify that, in the second half of each year, the General Affairs Council now usually holds a meeting dedicated to a dialogue on the overall situation of the Rule of Law in the Union, always using the European Commission's annual Report.[67] The Justice and Home Affairs Council has also developed in recent years a series of specific thematic debates on issues related to the Rule of Law.[68] However, while these initiatives are commendable, they do not compensate for the lack of separate meetings of the General Affairs Council concerning the situation of the Rule of Law in individual Member States.

In order to increase the deterrent effect of peer review, the General Affairs

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[64] The example is from T. CONZELMANN, *Peer Reviewing cit*., especially p. 689. Regarding the OECD, see F. PAGANI, *Peer Review cit*., p. 15.

[65] Similarly, T. CONZELMANN, *Peer Reviewing cit*., especially p. 690; also see V. CARRARO, T. CONZELMANN, H. JONGEN, *Fears of Peers? Explaining Peer and Public Shaming in Global Governance*, in *Cooperation and Conflict*, 2019, *https://journals.sagepub.com/doi/full/10.1177/0010836718816729*.

[66] Point 8. Discussions within the General Affairs Council between November and December 2023 did not lead to unanimous agreement on the adoption of this text. As indicated by the conclusions of the General Affairs Council of 12 December 2023, it received support from only 25 delegations.

[67] Similarly, the conclusions of the General Affairs Council of 12 December 2023 *cit*.

[68] *Ibid.*

Council could consider introducing specific recommendations on respect for the Rule of Law for the individual Member States audited, compliance with which could then be subject to assessment in subsequent meetings. However, the need to avoid duplications with the recommendations of the European Commission, which could lead to misunderstandings and uncertainties, could simply lead the General Affairs Council to consider more explicitly the observations of the European Commission, thus reinforcing the useful synergy between the interventions of the two EU institutions in the field of the Rule of Law. In this regard, the assessment of the annual dialogue on the Rule of Law only specifies that the General Affairs Council commits to 'devote this dialogue to analysing' the data contained in the European Commission's annual report (point 9) and takes 'note that, in practice, this dialogue will continue to be based on the Commission's annual rule of law report, creating synergies between the institutions, and we note the inclusion of recommendations in the report as a way of highlighting specific issues requiring further attention from Member States' (point 10). Member States could then be induced to respect the observations formulated within the General Affairs Council if the results of the government-to-government comparison were made public,[69] the report of the meetings currently being published on the website of the European Council and/or in its conclusions being indeed particularly concise.

Finally, as for the criteria on which the General Affairs Council chose to conduct the hearings of Member States, it might be perplexing that it still specifies that the dialogue respects the 'national identities of the Member States inherent in their fundamental political and constitutional structures, including the system of local and regional autonomy, and their essential functions, in particular the functions of safeguarding the territorial integrity of the state, maintaining public order, and protecting national security'.[70] In this regard, the Court of Justice, in the judgments Hungary v. European Parliament and Council and Poland v. European Parliament and Council, has indeed stated that 'even though, as is apparent from Article 4(2) TEU, the European Union respects the national identities of the Member States, inherent in their fundamental structures, political and constitutional, such that those States enjoy a certain degree of discretion in implementing the principles of the rule of law, it in no way follows that that obligation as to the result to be achieved may vary from one Member State to another'.[71] In other words, the protection of common values cannot vary within

[69] In this regard, see also L. RAVO, *EU governments' upcoming rule of law peer review: better get off on the right foot*, in *Euractiv*, 2020, *https://www.euractiv.com/section/justice-home-affairs/opinion/eu-governments-upcoming-rule-of-law-peer-review-better-get-off-on-the-right-foot/*.

[70] Similarly, the conclusions of the General Affairs Council of 12 December 2023 *cit.*

[71] On these aspects, see G. DI FEDERICO, *The Potential of Article 4/2)TUE in the Solution of Constitutional Clashes Based on Alleged Violation of National Identity and the Quest of Adequate*

the Union by invoking the (alleged) need to protect one's national identity. This EU case law also applies to Article 2 of the TEU, a general principle of EU law concerning Article 4 of the TEU according to which decisions taken by national systems even in areas of exclusive competence do not render Union law inapplicable when they compromise the compelling, uniform and effective nature of Union law that comes into contact and conflict with measures adopted by Member States in areas of national exclusive competence. [72]

However, the possible improvements to the dialogue within the General Affairs Council do not exclude the positive aspects inherent in the constant and robust application of this instrument. The regularity since 2020 of a structured dialogue on the Rule of Law within the Council has finally made respect for the Rule of Law a "normal" topic of discussion among governments, [73] which could well contribute to strengthening the responsibility of Member States in the matter under examination. This is particularly important considering the weak role played by the latter until now in the use of the main means of countering violations of the values referred to in Article 2 of the TEU, namely the procedure provided for in Article 7 of the TEU.

5. *Reactive tools to the risk of violation or breach of common values: the mechanism provided for in Article 7 of the TEU*

Article 7 of the TEU, introduced into the EU system by the Amsterdam Treaty of 1999 (Article 7 of the TEU and Article 309 of the TEC), as a response, for the first time in Europe since the end of World War II, to the participation of an extreme right-wing party in the Austrian government, [74] provides for a specific procedure that can be activated when there is a risk of violation or an

(Judicial) Standards, in *Eur. Public Law*, 2019, p. 370 ff.; K. LENAERTS, *National identity, the equality of Member States before the Trieties and the primacy of EU Law*, in AA.VV., *Identità nazionale degli Satti membri*, *primato del diritto dell'Unione europea, Stato di diritto e indipendenza dei giudici nazionali. Giornata di Studio Corte Costituzionale e Corte di giustizia*, Roma, 2022, p. 9 ff., especially. p. 11 ff.

[72] This principle has also been used in the Court of Justice in the following cases: 20 March 2018, C-187/16, *Commission v. Austria* (State Printing House), points 75-76; 2 April 2020, C-715, 718 and 719/17, *Commission v. Poland*, *Hungary and the Czech Republic* (Temporary relocation mechanism for asylum seekers), points 143 and 170; 6 October 2020, C-511/18, C-512/18, C-520/18, *La Quadrature du Net, French Data Network and Ordre des barreaux francophones et germanophone*, point 99, Case C-623/17, *Privacy International*, point 44.

[73] In this regard, see L.S. ROSSI, *Un nuovo* soft instrument *cit*.

[74] Similarly, R. CAFARI PANICO, *Le sanzioni europee nel caso Hider*, in *Dir. pub. comp. eur*., 2000, p. 202 ff.

on-going violation of the values set out in Article 2 of the TEU in a particular Member State.[75]

In particular, in the current version of the provision in question, subsequent to the latest Lisbon Treaty revision of 2009, Article 7 of the TEU stipulates that the European Commission, the European Parliament, and one-third of the Member States can request the (General Affairs) Council to determine and establish, by a four-fifths majority, an obvious risk of serious violation of the values set out in Article 2 of the TEU by a Member State. The Council, after hearing the Member State in question in accordance with the principle of adversarial procedure, may address recommendations to it, deliberating according to the same procedure (Article 7, paragraph 1). If, on the other hand, the situation is more serious and there is already a violation underway, one-third of the Member States or the European Commission (but not the European Parliament, which, on this occasion, only needs to give approval) can request the European Council to determine and establish, unanimously, the existence of a serious and persistent violation by a Member State of the aforementioned common values, after inviting that Member State to present its observations (Article 7, paragraph 2). If the European Council finds a violation under paragraph 2 of Article 7 of the TEU, the General Affairs Council, deliberating by qualified majority, can then decide to suspend some of the rights deriving to the Member State from the application of the treaties, such as those of the government representative of that Member State in the Council (essentially legislative and budgetary functions). In this regard, Article 354, paragraph 1 of the TFEU specifies that the representative of the Member State subject to a procedure under Article 7 of the TEU is excluded both from participation in the vote and from the calculation of the constitutive and deliberative quorum. However, the Member State in question continues to be bound by the obligations deriving from the treaties (Article 7, paragraph 3), for example, participation in the budget of the European Union.

Article 7 of the TEU establishes a procedure specifically aimed at determining and, if necessary, sanctioning violations, actual or potential, of each common value. It has a broader objective scope of application compared to prevention tools, such as the European Commission's Reports on the Rule of Law and dialogues within the General Affairs Council, which instead focus on violations of the Rule of Law alone. In this regard, it has already been observed how this misalignment is justified by the difference between preventive remedies and reactive ones to violations of Article 2 of the TEU. This seems even more true considering that not every violation of common values can

[75] On the origins of Article 7 TEU, see, among others, B. DE WITTE, *The impact of Enlargement on the Constitution of European Union*, in M. CREMONA (ed.), *The Enlargement of the European Union*, Oxford, 2003, p. 209 ff.; L.F.M. BESSELINK, *The Bite, the Bark and the Howl Article 7 TEU and the Rule of Law Initiatives*, in *https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2715943*, 2016, p. 3 ff.

lead to the opening of a procedure under Article 7 of the TEU, paragraph 2 providing that it must be 'serious and persistent'. In the absence of further indications in the treaties, this double cumulative condition has been understood by doctrine,[76] the European Commission,[77] and the Court of Justice[78] as synonymous with a "systemic" or "structural" or "generalised" violation of EU values, to be assessed on the basis of qualitative (object and result of the violation) and quantitative (duration and size of the violation) criteria.[79] Furthermore, 'the fact that a Member State has repeatedly been condemned for the same type of breach over a period of time by an international court such as the European Court of Human Rights …, and has not demonstrated any intention of taking practical remedial action is a factor that could be taken into account'.[80] Likewise, repeated findings, for example, in EU infringement or interpretative judgments, or in the European Commission's annual Reports on the Rule of Law, also seem to at least support the initiation of the procedure under consideration.

In this regard, it is irrelevant to verify the intentionality of the violation by a Member State (intent or negligence), the latter being assessed only according to objective parameters, as is also the case within the context of "non-compliance" at the basis of the infringement procedures under Articles 258-260 of the TFEU.[81] Although one-off violations, lacking the requirement of persistence and therefore of being systematic in nature, should in principle be excluded from the scope of Article 7 of the TEU, even particularly serious individual violations (adoption of "anti-LGBTQIA+" legislation) or minor but repeated non-compliances over time (abusive disciplinary measures against individual judges) seem to create prejudice to common values liable to the procedure under consideration.

The procedure provided for in Article 7 of the TEU was conceived as a particularly burdensome mechanism for the Member States – 'a nuclear weapon'

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[76] Similarly, A. VON BOGDANDY, M. IOANNIDIS, *Systemic deficiency in the rule of law: What it is, what has been done, what can be done*, in *Comm. Mark. Raw Rev.*, 2014, p. 59 ff.; A. VON BOGDANDY, *Principles of a systemic deficiencies doctrine: How to protect checks and balances in the Member States*, *ibid*, 2020, p. 705 ff.; L.S. ROSSI, *Il valore giuridico cit.*, p. xiv.

[77] European Commission Communication of 2014, *A New Framework for the EU cit.*

[78] Both the Court of Justice (25 July 2018, *LM cit.*, point 69) and Advocates General (Tanchev in his conclusions of 24 September 2019, C-558/18 and C-563/18, *Miasto Łowicz* (Disciplinary Procedure for Magistrates), point 125 concerning Article 19 TEU and the independence of the judiciary in Poland) use this term, albeit without providing a definition.

[79] In this regard, Commission Communication to the Council and the European Parliament regarding Article 7 TEU, *To Respect and Promote the Values on which the Union is Founded*, COM(2003)0606, points 1.4.3 and 1.4.4.

[80] *Ibid* point 1.4.4.

[81] See also, Court of Justice, 1 October 1998, C-71/97, *European Commission v. Spain*, 4 March 2010, C-287/08, *European Commission v. Italy*.

according to then-President of the European Commission Barroso [82] – the mere threat of activating it should have induced them to spontaneously respect the values set out in Article 2 of the TEU. [83] The suspension of voting rights in the Council would, in fact, have relegated the Member State subject to the procedure under examination to a situation of 'regulation without representation', [84] as still being subject in any case to acts adopted during the suspension period. The fact that this sanction is only referred to as an example – 'the Council, acting by a qualified majority, may decide to suspend certain of the rights deriving from the application of the Treaties to the Member State in question, including the voting rights of the representative of the government of that Member State in the Council' – does not exclude the possibility of applying additional sanctions, such as the suspension of the right to receive structural funds or funds from the European Investment Bank (EIB), [85] as well as those attributed by Articles 20 *et seq.* of the TFEU to the citizens of the Member State subject to the procedure under Article 7 of the TEU. [86] But the latter cannot lead to the expulsion of the Member State from the Union, paragraphs 3 and 4 of Article 7 of the TEU providing for the application of measures of a non-definitive nature – 'the Council may subsequently decide to amend or revoke the measures adopted pursuant to paragraph 3, to respond to changes in the situation that led to their imposition' – and this even when the violation of common values persists for a considerable time and/or after the ineffective application of suspension sanctions. However, the fact that compliance with common values is a necessary condition for the accession of a new Member State to the Union (Article 49 of the TEU) could induce the Member States to introduce, through the revision procedure under Article 48 of the TEU, the possibility, alongside the voluntary withdrawal of a Member State from the Union (Article 50 of the TEU), to expel a Member State that systematically violates the Rule of Law. [87] Naturally, such extreme conflict situations could not be managed by EU institutions alone, but should also involve national parlia-

[82] Speech by the President of the European Commission, José Manuel Barroso, on the State of the European Union in 2012, Strasbourg, 12 September 2012, *https://ec.europa.eu/commission/presscorner/detail/fr/SPEECH_12_596*.

[83] On the sanctioning system of Article 7 TEU, see E. HELLQUIST, *Ostracism and the EU's contradictory approach to sanctions at home and abroad*, in *Contemporary Politics*, 2019, p. 393 ff.

[84] The phrase is mentioned by A. CIRCOLO, *Il valore dello Stato di diritto cit*., especially. p. 131. This possibility seems to have been threatened at the European Council meeting on 2 February 2024 in order to allow the unanimous adoption of new aid to Ukraine.

[85] Regarding this, see the European Commission's Reflection Paper on the *Future of EU Finances* dated 28 June 2017, COM(2017)358.

[86] Similarly, A. CIRCOLO, *Il valore dello Stato di diritto cit*., p. 131.

[87] On expulsion from international organisations, see K.D. MAGLIVERAS, *Exclusion from Participation in International Organisations: The Law and Practice Behind Member States' Expulsion and Suspension of Membership*, The Hague-London-Boston, 1999.

ments.[88] In this case, Article 2 of the TEU would finally acquire the same legal value for candidate/potential candidate countries and Member States.

The determination of violations of common values by Member States under Article 7 of the TEU is left to a political and intergovernmental procedure. This is deduced from a dual element. On the one hand, decision-making powers are attributed to the European institutions representing the Member States within the Union, namely the Council and the European Council. On the other hand, European institutions that are independent of the Member States and represent the common interest have only a marginal role. Article 7 of TEU, paragraph 1, assigns, in fact, to the European Commission and the European Parliament the mere function of procedural initiative, albeit in competition with the Member States, and paragraph 2 of the same provision allows, in the decision-making phase, the European Parliament only to approve the decision of the Council. Furthermore, and precisely because of the political nature of the decisions adopted there by the Council and the European Council, Article 269 of the TFEU excludes the ability to challenge these decisions before the Luxembourg judges for a substantive examination. This provision stipulates, in fact, that the 'Court of Justice shall have jurisdiction to decide on the legality of an act adopted by the European Council or by the Council pursuant to Article 7 of the Treaty on European Union solely at the request of the Member State concerned by a determination of the European Council or of the Council and in respect solely of the procedural stipulations contained in that Article'.[89] As already noted by authoritative doctrine,[90] the absence of independent judicial control over political decisions in areas where the interests of the States dominate risks favouring the adoption of arbitrary decisions, not necessarily coinciding with justice.

As is known, the procedure provided for in Article 7 of the TEU was activated (only two times in the history of the European Union) in 2017 and 2018 respectively by the European Commission[91] and the European Parlia-

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[88] In this regard, B. DE WITTE, G. TOGGENBURG, *Human Rights and Membership of the European Union*, in S. PEERS, A. WARD (eds.), *The EU Charter of Fundamental Rights*, Oxford, 2004, p. 59 ff., especially p. 72; L.S. ROSSI, *Un nuovo* soft instrument *cit*.

[89] According to EU case law (*Hungary v. European Parliament and Council cit*., point 32), acts of EU institutions requesting the opening of the procedure provided for in Article 7 TEU are challengeable, such as the resolution of the European Parliament of 12 September 2018. In fact, these acts are final and produce legal effects vis-à-vis third parties, thus possessing the objective characteristics to be subject to an action for annulment under Article 263 TFEU.

[90] In this regard, see A. TIZZANO, *L'azione dell'Unione europea per la promozione dei diritti umani*, in *Dir. UE*, 1999, especailly p. 264. It is noted that the treaty project elaborated by Altiero Spinelli in 1984 provided, in Article 44, for the competence of the Court of Justice to address serious and persistent violations of treaty provisions.

[91] European Commission Proposal for a Council Decision on the establishment of an evident risk of a serious breach of the Rule of Law by the Republic of Poland, COM(2017)835 of 20 December 2017.

ment [92] against Poland and Hungary in the face of the deterioration of the Rule of Law in these Member States. However, although, in the last five years, these two Member States have been repeatedly heard by the General Affairs Council, as provided for in Article 7 of the TEU, paragraph 1 – the last time still in November 2023 [93] – the Council and the European Council have never adopted decisions in this regard. [94] This is despite, on the one hand, the European Parliament having repeatedly urged the Council to advance the procedures under Article 7 of the TEU, most recently with a resolution of 15 September 2022, [95] and on the other hand, the European Commission having, also in November 2023, illustrated to the Ministers for European Affairs the continuing serious concerns regarding the Rule of Law in both Poland (operation of the Constitutional Court and Judicial Council; failure to implement the reform of the disciplinary regime applicable to judges undertaken to align with European standards) and Hungary (independence and pluralism of the media; rights of migrants and people belonging to minorities such as Roma, Jews and LGBTQIA+; pressure on civil society; extensive use of emergency powers by the government). Despite repeated urging, the General Affairs Council has only noted 'the importance of addressing all the issues regarding judicial independence and rule of law in Poland and voiced their support to the Commission as regards the concerns raised, expressing the hope that Poland will soon address them'. Similarly, as for Hungary, it has 'urged Hungary to continue to address all the issues raised'. In May 2024, the European Commission decided to close the Article 7(1) of the TEU procedure for Poland. In 2024, the Prime Minister Donald Tusk launched a series of legislative and non-legislative measures to address the concerns of independence of the justice system, the primacy of EU law and the implementation of all EU judgments on Rule of Law. The European Commission considers thus that there is no longer a clear risk of a serious breach of the Rule of Law in Poland.

The thresholds provided for in Articles 7, paragraphs 1 and 2 of the TEU to adopt decisions of the General Affairs Council (four-fifths of the members) and

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[92] European Parliament Resolution of 12 September 2018 on a proposal inviting the Council to determine, in accordance with Article 7(1) of the Treaty on European Union, the existence of a clear risk of a serious breach by Hungary of the values on which the Union is founded (2017/2131 (INL)) P8_TA-PROV(2018)0340.

[93] Council Conclusions on General Affairs of 30 May 2023 (fifth hearing) and then 15 November 2023 (sixth hearing).

[94] On this ineffectiveness, in doctrine, see R. MASTROIANNI, *Stato di diritto o ragion di Stato? La difficile rotta verso un controllo europeo del rispetto dei valori dell'Unione cit.*, p. 605 ff.; B. NASCIMBENE, *La violation grave des obligations découlant du traité UE. Les limites de l'application de l'art. 7*, in AA.VV., Liber Amicorum *Antonio Tizzano cit.*, p. 678 ff.

[95] European Parliament Resolution of 15 September 2022 on the proposal for a Council decision on the determination, in accordance with Article 7(1) TEU, of the existence of a clear risk of a serious breach by Hungary of the values on which the Union is founded, 2018/0902R(NLE), P9_TA(2022)0324.

of the European Council (unanimity) have certainly an impact on the (in)effectiveness of this procedure.[96] In the latter case, it was in fact sufficient for Hungary to use its veto power in the procedure concerning Poland, and vice versa, to effectively make the adoption of the decision and/or the application of sanctions impossible.[97] Moreover, considering that unanimity is used in several sensitive areas of EU law (multiannual EU budget or CFSP), the adoption of a decision under Article 7 of the TEU by four-fifths of the members of the Council could lead to decision-making paralysis in these sectors as a result of "retaliatory" measures. The activation thresholds required by paragraphs 1 and 2 of the provision under consideration have, in other words, made Article 7 of the TEU a tool of difficult utilisation,[98] which would justify its revision under Article 48 of the TEU in order to introduce the use of qualified majority, already provided for in Article 354 of the TFEU as regards the decisions under paragraphs 3 and 4 of Article 7 of the TEU. This seems all the more important considering that the political nature of the decisions of the Council and the European Council makes it impossible to initiate an action for failure to act (Article 265 of the TFEU) against them when, as observed in the cases of Poland and Hungary, they do not adopt the aforementioned decisions under Article 7 of the TEU.[99]

However, the inability of the Council and the European Council to reach a decision is also due to a difficulty of the Member States to point the finger at each other especially when it comes to violations of common values and the Rule of Law. In this context, the dialogue initiated within the General Affairs Council on the Rule of Law, especially if based on an objective and real assessment of the shortcomings highlighted by the European Commission in its annual Report, could then lead in the future Member States to greater responsibility in this regard and moreover in the use of the procedure provided for in Article 7 of the TEU.

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[96] In this regard, see A. VON BOGDANDY, L. LANCY, *Suspension of EU Funds for Member States Breaching the Rule of Law – A Close of Tough Love Needed?*, in *Max Planck Institute for Comparative Public Law & International Law* (MPIL) *Research Paper No. 2020-24*, 2020, p. 9 ff.

[97] In order to overcome the risk of this type of alliances between Member States, K.L. SCHEPPELE (*Can Poland be Sanctioned by the EU? Not Unless Hungary is Sanctioned Too*, in *Verfassungsblog*, 24 October 2016) suggested the activation of Article 7 TEU against multiple Member States simultaneously. This is despite the wording of Article 7(1) TEU stating that 'the Council may determine that there is a clear risk of a serious breach by *a* Member State of the values referred to in Article 2 TEU' (emphasis added).

[98] In this regard, see P. MORI, *Strumenti giuridici e strumenti politici di controllo del rispetto dei diritti fondamentali da parte degli Stati membri dell'Unione europea*, in A. TIZZANO (ed.), *Verso i 60 anni dai trattati di Roma, stato e prospettive dell'Unione europea*, Torino, 2016, p. 199 ff., especially p. 207. Similarly, C. BLUMANN, *Le mécanisme des sanctions de l'article 7 du traité sur l'Union européenne: pourquoi tant d'inefficacité*, in AA.VV., *Les droits de l'homme à la croisée des droits. Mélanges en l'honneur du Professeur Sudre*, Paris, 2018, p. 70 ff.

[99] See P. MORI, *La questione del rispetto dello Stato di diritto cit*., p. 166 ff.

6. *Following: the infringement procedure referred to in Articles 258-260 of the TFEU between theory…*

The ineffectiveness of the main reaction tool to violations of Article 2 of the TEU, namely the procedure provided for in Article 7 of the TEU, [100] has thus induced doctrine and the European Commission, [101] as the guardian of the treaties and therefore also of the respect for the Rule of Law, to reconsider the framework of safeguards provided by the EU system to protect its founding values, in order to try to identify alternative remedies in the treaties that allow to ensure effective protection of the rights that individuals derive directly from common law.

Among the instruments traditionally used by the Union system, it was decided first of all to enhance the use of the infringement procedure governed by Articles 258-260 of the TFEU. [102] As is known, in order to ensure the correct and uniform application of EU law in national legal systems, the latter, which consists of a pre-litigation phase carried out by the European Commission and a contentious phase before the Court of Justice, aims to ascertain in a judgment, the violations by Member States of the obligations that derive from the non-compliance, incomplete or incorrect implementation at the national level of EU law, in particular secondary legislation adopted in specific areas (competition, industry, agriculture, fisheries, etc.). The use of the infringement procedure also to verify the non-compliance by Member States with rules of primary law and constitutional rank, as is precisely Article 2 of the TEU, [103] was admitted by the Luxembourg judges in

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[100] For instance, see K.L. SCHEPPELE, *What Can the European Commission Do When Member States Violate Basic Principles of the European Union? The Case of Systematic Infringement Action*, in *Verfassungsblog*, 2013; M. SCHMIDT, P. BOGDANOWICZ, *The infringement procedure in the rule of law crisis: how to make effective use of article 258 TFUE*, in *Common. Mark. Law Rev*., 2018, p. 1061 ff.; K.L. SCHEPPELE, D.V. KOCHENOV, *EU Values Are Law, after All: Enforcing EU Values through Systemic Infringement Actions by the European Commission and the Member States of the European Union*, in *Yearbook Eur. Law*, 2020, p. 3 ff.

[101] In this regard, see the European Commission's Communication of 2014, *A New Framework for the EU cit*.

[102] Regarding this judicial instrument in general, refer to C. AMALFITANO, *La procedura di «condanna» degli Stati membri dell'Unione europea*, Milano, 2012; L. PRETE, *Infringement Proceedings in EU Law*, Alphen aan den Rijn, 2017; M. CONDINANZI, C. AMALFITANO, *La procedura di infrazione dieci anni dopo Lisbona*, in *federalismi.it*, 2020, p. 217 ff.

[103] On the use of the infringement procedure under Article 2 TEU, see M. SCHMIDT, P. BOGDANOWICZ, *The Infringement Procedure in the Rule of Law Crisis: How to Make Effective use of Article 258 TFEU*, in *Common Mark. Law Rev.*, 2018, p. 1061 ff.; M. ARANCI, *La procedura d'infrazione come strumento di tutela dei valori fondamentali dell'Unione europea*, in *Eurojus*, n. 3, 2019, p. 49 ff.; A. ŚLEDZIŃSKA-SIMON, P. BÁRD, *The Teleos and the Anatomy of the Rule of Law in EU Infringement Procedures*, in *Hague Journal on the Rule of Law*, 2019, p. 445 ff.; S. MONTALDO, F. COSTAMAGNA, A. MIGLIO (eds.), *EU Law Enforcement: The Evolution of Sanctioning Powers*, Ox-

the aforementioned judgment of Associação Sindical dos Juízes Portugueses of 2018.[104] In a dispute that required verifying the (subsequently excluded) incompatibility of the salary reduction measures for judges deliberated by the Portuguese government for budgetary reasons with the independence of judges enshrined in Articles 2 and 19 of the TEU, the Court of Justice affirmed for the first time that such provisions create an obligation on the part of the Member States to ensure effective judicial control in their legal systems before an independent and impartial judge, thus paving the way for the use of the infringement action against violations also of treaty provisions of constitutional rank.[105] The infringement procedure requires that the violated norm be mandatory for the Member States, so the formalisation of the attribution to Article 2 of the TEU of this legal characteristic has in fact authorised the European Commission to use this tool also in the context of protecting common values. And indeed, precisely on the basis of this premise, in 2019, only three months after the ruling Associação Sindical dos Juízes Portugueses, the judges of Luxembourg declared admissible the infringement actions brought by the European Commission against Poland regarding the reform of the Polish judicial system, which undermined the independence and immovable nature of the judiciary.[106]

But in fact, the use of the procedure under Article 258 of the TFEU in the matter at hand required the Court of Justice to overcome a further obstacle related to the already highlighted general, abstract, and non-exhaustive nature of both the common values listed in Article 2 of the TEU and the principles underlying the notion of the Rule of Law. Since non-compliance with common rules can be detected in the exercise of judicial instances only if they impose on Member States a legal obligation in a clear and precise manner, the judges of the Union have thus subordinated the use of Article 2 of the TEU as a criterion of legitimacy of national law to the reading of the latter in combination with Article 19 of the TEU or with Article 47 of the Charter.[107] As already mentioned, in fact, these provisions – but indeed any other rule of the treaties, of the Charter or of the derived law that recalls the principles underlying the Rule of Law[108] –

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on, 2021; M. BONELLI, *Infringement Action 2.0: How to Protect EU Values before the Court of Justice*, in *Europe. Const. Law Review*, 2022, p. 1 ff.

[104] Court of Justice, *Associação Sindical dos Juízes Portugueses cit*.

[105] *Ibid* especially points *29-38.*

[106] Court of Justice, 24 June 2019, C-619/18, *Commission v. Poland* (Independence of the Supreme Court); 5 November 2019, C-192/18, *Commission v. Poland* (Independence of Ordinary Courts).

[107] On the use of the Charter of Fundamental Rights in the context of infringement proceedings, see P. MORI, *L'uso della procedura di infrazione a fronte di violazioni dei diritti fondamentali*, in *Dir. UE*, 2018, p. 363 ff.; L. PRETE, B. SMULDERS, *The age of Maturity of Infringement Proceedings*, in *Comm. Mark. Law Rev.*, 2021, p. 285 ff., especially p. 289.

[108] For the list of norms referring to the values of Article 2 TEU, see European Commission, *70 years of EU Law cit.*, especially pp. 51-53.

concretise the content of the instead abstract Article 2 of the TEU and the generic notion of the Rule of Law, thus transforming them into legal obligations *stricto sensu*. And in fact, the EU case law, both on infringement and on preliminary rulings, concerning the Rule of Law has in fact ascertained the compatibility of legislation mostly Hungarian and Polish in the light not so much of Article 2 of the TEU alone, but of the latter in combination with Article 19 of the TEU and/or Article 47 of the Charter. [109]

The fact, moreover, that, precisely in light of the numerous EU rulings that in recent years have dealt with the Rule of Law, the Court of Justice has progressively defined the scope of Article 2 of the TEU and the notion of the Rule of Law, leads one to wonder whether these latter have not in fact lost, through judicial interpretation, their general and abstract nature, which would allow their invocation autonomously in the future. [110] The qualification of Article 2 of the TEU, in the judgments Hungary v. European Parliament and Council and Poland v. European Parliament and Council, as 'not… a mere statement of political orientations or intentions, but…, also because it contains common values that are part of the same European identity, an obligation of result that derives directly from the commitments undertaken by the Member States towards each other and towards the Union' seems to go precisely in this direction. [111] It is then

[109] For example, see Court of Justice, *Associação Sindical dos Juízes Portugueses cit*., point 30; 24 June 2019, C-619/18, *Commission v. Republic of Poland*, point 47.

[110] They appear optimistic, S. PLATON, *Le Respect de L'Etat de Droit Dans l'Union Européenne: La Cour de Justice A la Rescousse?*, in *Rev. dr. liberté fond*., 2019, *http://www.revuedlf.com/droit-ue/le-respect-de-letat-de-droit-dans-lunion-europeenne-la-cour-de-justice-a-larescousse*; L.S. ROSSI, *Il valore giuridico dei valori cit*.; L.D. SPIEKER, *Defending Union Values in Judicial Proceedings. On How to Turn Article 2 TEU into a Judicially Applicable Provision*, in A. VON BOGDANDY, P. BOGDANOWICZ, I. CANOR, C. GRABENWARTER, C. TABOROWSKI, M. SCHMIDT (eds.) *Defending Checks and Balances in EU Member States. Beiträge zum ausländischen öffentlichen Recht und Völkerrecht*, Berlin, Heidelberg, 2021, p. 237 ff. On the contrary, B. BUGARIČ, *Protecting Democracy and the Rule of Law in the European Union: The Hungarian Challenge*, in *Question' Discussion Paper Series*, 2014; D. KOCHENOV, *On Policing Article 2 TEU Compliance – Reverse Solange and Systemic Infringements Analyzed*, in *Polish Yearbook of International Law*, 2014, p. 145 ff.; D. KOCHENOV, L. PECH, *Renforcer le respect de l'état de droit dans l'UE: Regards critiques sur les nouveaux mécanismes proposés par la Commission et le Conseil*, in *Question d'Europe*, 2015; M. BONELLI, M. CLAES, *Judicial Serendipity: How Portuguese Judges Came to the Rescue of the Polish Judiciary: ECJ 27 February 2018, Case C-64/16, Associação Sindical Dos Juízes Portugueses*, in *Eur. Const. Law Rev*., 2018, p. 622 ff. Similarly, for example, Advocate General P. Pikamäe (conclusion of 11 December 2019, C-457/18, *Slovenia v. Croatia*), where it is stated (point 132): 'I wonder whether… a criticism based on the value of the Rule of Law enshrined in Article 2 TEU is admissible under the infringement action pursuant to Article 259 TFEU. In this regard, the Court has recently referred to this value in numerous cases. However, I note that in the case law, this value has not been invoked autonomously, but always together with a rule that 'concretizes' it or constitutes "a specific manifestation" of it, namely Article 19 TEU'.

[111] Court of Justice, *Hungary v. European Parliament and Council cit.*, point 264; *Poland v. European Parliament and Council cit.*, point 232.

perhaps not a coincidence that, following these judgments, the European Commission, in the aforementioned infringement action against the Hungarian "anti-LGBTQIA+" laws, asked the Court of Justice to ascertain their incompatibility with Article 2 of the TEU.[112] Although this action also raises other profiles of incompatibility of the aforementioned internal regulations with EU law (Directives 2000/31 on electronic commerce, 2006/123 on services in the internal market and 2010/13 on audio-visual media services; Regulation 2016/679 on the protection of personal data, Articles 1, 7-8, 11 and 21 of the Charter concerning the inviolability of human dignity, freedom of expression and information, the right to private life and data protection, and the principle of non-discrimination) it is clear that the European Commission's intention is to at least prompt the Union judges to reflect on this matter. If the latter accept this interpretation, Article 2 of the TEU would thus acquire the same weight when applied to candidate/potential candidate states for accession to the Union or to already acceded Member States. In light of the current approach, in fact, while the former cannot join the Union if they do not respect the common values of (only) Article 2 of the TEU, the full respect of the latter for the latter is instead subject to the consideration of additional EU rules of primary or secondary law.

Thanks also to these legal inventions, since 2018 the task of ensuring respect for common values and the Rule of Law in the Union has also been entrusted to the European Commission and the Court of Justice, i.e., to the EU institutions that are independent of national governments and act in the common interest. In this way, the judicial and objective control of the European Commission and the Court of Justice under Article 258 of the TFEU has been added to the political and often arbitrary control of the Council and the European Council referred to in Article 7 of the TEU.

One could not object to the coexistence of the procedures under examination, despite the fact that the treaties reserve the determination of violations of the Rule of Law to the procedure provided for in Article 7 of the TEU and therefore to the competence of the Member States gathered in the General Affairs Council. This is not only implicitly deducible from the decision of the judges of Luxembourg to declare admissible the infringement actions filed already in 2018 by the European Commission against Poland, but is also deducible from the absence of indications in this regard in the treaties. In fact, the latter, on the one hand, did not provide for a prohibition on the concurrence of the procedures under examination, and on the other hand, did not even exclude the use of the infringement action with respect to Article 2 of the TEU. In the silence of the treaties, it therefore seems more reasonable to authorise the use of the procedure under Article 258 of the TFEU in the context at issue, a different

[112] Regarding the case from 2022, *European Commission v. Hungary*, as previously mentioned.

solution would have made common values less protected than other mandatory provisions of the treaties or seconded law, which can instead always be the subject of an infringement procedure. [113] Moreover, given the ineffectiveness of the mechanism under Article 7 of the TEU to ensure compliance with Article 2 of the TEU, the exclusion of the infringement procedure in this latter area would have left common values devoid of any protective mechanism.

The cumulative use of the two procedures under examination is also justified by their different nature – Article 7 of the TEU is political and intergovernmental; Article 258 of the TFEU is judicial and at the Union level – which also excludes the possible configuration of a "double judgment". Even in the case where the two mechanisms lead to the joint application of sanctions – Article 258 of the TFEU is pecuniary; Article 7 of the TEU uses the suspension of voting rights within the Council – the violation of this principle could well be avoided by balancing the sanctions imposed for the infringement of the same rule. [114]

Moreover, although with regard to the concurrence between Article 7 of the TEU and the financial regime established by the Conditionality Regulation which will be discussed below, the Court of Justice, in the judgment Poland v. European Parliament and Council, specified that contrary to what Poland, supported by Hungary, asserted, in addition to the procedure provided for in Article 7 TEU, numerous provisions of the treaties (such as, for example, Article 19 TEU, Articles 8 and 10, 19, paragraph 1, 153, paragraph 1, letter i), Article 157, paragraph 1 of the TFEU, Articles 6, 10-13, 15, 16, 20, 21 and 23 of the Charter) confer on the Union institutions the competence to examine and ascertain violations of the values enshrined in Article 2 TEU committed in a Member State. [115]

7. … *And Practice*

Once the Luxembourg judge admitted the possibility of using the infringement procedure also in the context of common values, the European Commission began to use it to scrutinise national conduct contrary to these values. In the period 2019-2022, for example, the European Commission initiated five infringement procedures – more than one per year – against Poland in order to counter the judicial reforms adopted there that put at least at risk the independence and immovability of Polish judges. [116] Although Article 259 of the TFEU

[113] See L.S. ROSSI, *Il valore giuridico dei valori cit*., especially p. xxxiii.

[114] In this regard, A. CIRCOLO, *Il valore dello Stato di diritto cit*., especially p. 198.

[115] Regarding this, Court of Justice, *Poland v. European Parliament and Council cit.*, point 195.

[116] C-192/18 (Independence of Ordinary Courts); C-619/18 (Independence of the Supreme Court); C-791/19 (Disciplinary Regime of Judges); C-204/21 (Private Life of Judges); C-715/17 (Temporary Mechanism for the Relocation of International Protection Applicants).

also authorises Member States to initiate the contentious phase of the procedure in question against other Member States for violation of EU law, at the moment all actions have been filed before the Luxembourg judges by the European Commission under Article 258 of the TFEU. The decision of the Dutch parliament in 2020 requesting the government to initiate proceedings under Article 259 of the TFEU against Poland for the latter's failure to comply with the infringement judgments of the Court of Justice that found a violation of the Rule of Law did not result in an actual action under Article 259 of the TFEU. [117]

Furthermore, in February 2023, the European Commission lodged another infringement procedure against Poland, [118] this time for the Constitutional Court, now controlled by the Polish government, [119] having adopted in 2021 a series of rulings challenging the primacy of EU law over national rights, [120] namely a principle that has governed the balance between EU and internal systems for over sixty years. [121] Moreover, in the judgment K 7/21 of March

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[117] The example is from A. CIRCOLO, *Il valore dello Stato di diritto cit*., especially p. 209. In general, on the use of Article 259 TFEU in the context of common values, G. DI FEDERICO, *Il Tribunale costituzionale polacco si pronuncia sul primato (della Costituzione polacca):* et nunc quo vadis?, in *BlogDUE*, 13 October 2021, especially p. 8.

[118] The European Commission's infringement procedure has been registered with the Court of Justice under number C-448/23. In November 2023, the European Commission filed another infringement case against Poland (INFR(2022)0332) for the incomplete transposition of Directive 2013/48 of 22 October 2013, regarding the right to access a lawyer in criminal proceedings and the execution of the European arrest warrant, the right to inform a third party upon deprivation of personal liberty, and the right of persons deprived of liberty to communicate with third parties and consular authorities.

[119] In this regard, A. PLOSZKA, *It Never Rains But it Pours. The Polish Constitutional Tribunal Declares the European Convention on Human Rights Unconstitutional*, in *Hague Jour. Rule of Law*, 2022, especially pp. 4-5; previously A. MLYNARSKA-SOBACZEWSKA, *Polish Constitutional Tribunal Crisis: Political Dispute or Falling Kelsenian Dogma of Constitutional Review*, in *Eur. Public Law*, 2017, p. 489 ff.; J. SAWICKI, *Prove tecniche di dissoluzione della democrazia liberale: Polonia 2016*, in *Nomos*, No. 1/2016, *www.nomosleattualitaneldiritto.it*.

[120] The Polish Constitutional Tribunal judgments that denied the principle of primacy are from 14 July 2021 (P7/20, especially paragraphs. 27 and 33) and 7 October 2021 (K 3/21, paragraph 2). On these rulings, see F. CASOLARI, *The judgment of the Polish Constitutional Tribunal in case K 3/21: What can the Member States do to shield the EU values?*, in *EU Law live*, 9 November 2021; A. CIRCOLO, *Ultra* vires e *rule of law: a proposito delle recenti sentenze del Tribunale costituzionale polacco sul regime disciplinare dei giudici*, in AA.VV., *Quaderni AISDUE*, Napoli, 2021, p. 117 ff.; G. DI FEDERICO, *Il Tribunale costituzionale polacco cit*.; A. FESTA, *Indipendenza della magistratura e non regressione cit*. On the relationship between the Court of Justice and Constitutional Courts, including the Italian one, see R. MASTROIANNI, *Da Taricco a Bolognesi, passando per la Ceramica Sant'Agostino: il difficile cammino verso una nuova sistemazione del rapporto tra Carte e Corti*, in *Osservatorio sulle fonti*, 2018, p. 1 ff.

[121] Regarding this matter, refer to the landmark judgment of the Court of Justice of 15 July 1964, 6/64, *Costa v. ENEL*. In doctrine, A. ARENA, *From an unpaid electricity bill to the primacy of EU law: Gian Galeazzo Stendardi and the making of* Costa v. ENEL: C-6/64, in *Eur. Jour. Int. Law*, 2019 p. 1017 ff.

2022, the Polish supreme judge similarly stated that judgments of the Strasbourg Court based on Article 6 of the ECHR regarding the right to a fair trial ('everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law…') are not binding on Polish authorities. [122]

The infringement procedures initiated by the European Commission in 2018 all ended with the Court of Justice finding violations, in certain cases with the payment of penalty payments, including of considerable amount. [123] Poland's non-compliance with the orders of the President of the Court in July 2021 to suspend, on a precautionary basis, the application in Poland of certain national provisions on the organisation of the judicial system contested in the main proceedings led to the condemnation of the latter to pay a late payment penalty of one million euros per day, later reduced to 500,000 euros per day. [124] The possibility of applying, even in infringement procedures concerning, among other things, the violation of common values and the Rule of Law, interim measures and/or financial penalties in the event of non-compliance with previous interim orders has made the protection of Article 2 of the TEU even more effective. [125] This was not obvious given that Article 260 of the TFEU admits the possibility of imposing fines only in judgments on the merits concluding procedures under Article 258 of the TFEU, and Article 279 of the TFEU allows the adoption of interim measures exclusively for actions under Articles 263 (annulment), 265 (failure to act) and 268 (liability) of the TFEU and therefore not within the framework of infringement proceedings. Furthermore, through the interim order, the Luxembourg judges can instruct a Member State to suspend national rules that are highly

[122] See A. PLOSZKA, *It Never Rains But it Pours cit*. concerning the judgment of the Polish Constitutional Tribunal of 14 November 2021, K 6/21.

[123] On *interim* protection in general, M. CONDINANZI, *La protezione giurisdizionale cautelare avanti al Giudice dell'Unione europea: l'efficacia e l'equilibrio*, in AA.VV., Liber Amicorum *Antonio Tizzano cit*., p. 190 ff. On *interim* measures in the context of protecting values, see D. SARMIENTO, *Provisional (And Extraordinary) Measures in the Name of the Rule of Law*, 24 November 2017, *https://despiteourdifferencesblog.wordpress.com/2017/11/24/provisional-and-extraordinary-measures-in-the-name-of-the-rule-of-law/*.

[124] Court of Justice order of 27 October 2021, C-204/21 R, *European Commission v. Poland*, states that Poland is ordered to pay 'a periodic penalty payment of EUR 1 000 000 per day, from the date on which the present order is notified to the Republic of Poland and until such time as that Member State complies with the obligations arising from the order of the Vice-President of the Court of 14 July 2021, *Commission v Poland* (C-204/21 R, EU:C:2021:593), or, if it fails to do so, until the date of delivery of the judgment closing the proceedings in Case C-204/21'. This order, challenged by Poland under Article 163 of the Court of Justice's Rules of Procedure, led to the penalty being reduced to EUR 500,000 per day (Vice-President Court of Justice order of 21 April 2023, C-204/21 R-RAP). The controversy concluded with the Court of Justice judgment of 5 June 2023, C-204/21, *European Commission v. Poland*, confirming Poland's infringement.

[125] See D. SARMIENTO, *Provisional (And Extraordinary) Measures cit*.

likely to be incompatible with common values, thus further increasing the deterrent effect against Member States violating Article 2 of the TEU.

Moreover, in accordance with Regulation 2018/1046, if a Member State fails to pay the pecuniary penalties imposed following interim or final proceedings in the context of infringement actions, the European Commission may deduct them from the funds distributed by the European Union to the Member States. [126] This happened in the case of Poland, which saw 360 million euros suspended for non-payment of the late payment penalty at the end of the precautionary proceedings in 2021.

The same approach was taken by the European Commission towards Hungary. From 2018 to 2022, the Commission initiated eight infringement procedures against Hungary, [127] which ended with Hungary's failure to comply with various aspects: for prematurely ending the mandate of the data protection supervisory authority, [128] for abolishing the usufruct rights held by non-Hungarian citizens on Hungarian agricultural land, [129] for restrictions imposed on funding of civil organisations by entities established outside Hungary, [130] for the amendment of higher education law, which led to the closure of the Central European University in Budapest, [131] for the unjustified limitation of access to international protection procedure, irregular treatment of applicants in transit zones and exe-

[126] In particular, Articles 101 and 102 of Regulation 2018/1046 of the European Parliament and of the Council of 18 July 2018, which establishes the financial rules applicable to the general budget of the Union, amends Regulations 1296/2013, 1301/2013, 1303/2013, 1304/2013, 1309/2013, 1316/2013, 223/2014, 283/2014, and Decision 541/2014/EU, and repeals Regulation 966/2012, OJEU L 193 of 30 July 2018. Before the adoption of the Regulation in question, this possibility was doubted due to the silence of Article 260 TFEU on the matter. For example, see the conclusions of Advocate General Colomer of 28 September 1999, C-387/97, *Commission v. Greece*, point 1. Pecuniary sanctions paid by Member States under Articles 258-260 TFEU flow into the EU budget under 'other revenue' (Article 311 TFEU).

[127] In fact, the European Commission initiated twelve infringement procedures during the period considered. However, Cases C-587/22 (Court of Justice 7 December 2023, *Commission v. Hungary*) on urban wastewater treatment; C-856/19 (Court of Justice 25 March 2021, *Commission v. Hungary*) on cigarette excise rates; C-400/19 (Court of Justice 11 March 2021, *Commission v. Hungary*) on food product sale prices; C-771/18 (Court of Justice 16 July 2020, *Commission v. Hungary*) on access conditions to electricity and gas transmission networks, while always concluding with the finding of infringement, did not raise issues strictly related to the protection of common values and/or fundamental rights. In 2023, the European Commission initiated a new infringement procedure against Hungary ([INFR(2020)2364]) for voting against the Union's position on the World Health Organisation (WHO) recommendations concerning the scheduling of cannabis in two United Nations conventions, as prescribed by Council Decision 2021/3.

[128] Court of Justice 8 April 2014, C-288/12, *Commission v. Hungary* (personal data).

[129] Court of Justice 21 May 2019, C-235/17, *Commission v. Hungary* (usufruct rights).

[130] Court of Justice 18 June 2020, C-78/18, *Commission v. Hungary* (associative transparency).

[131] Court of Justice 6 October 2020, C-66/18, *Commission v. Hungary* (higher education).

cution of return procedures without recognition of due guarantees,[132] as well as for violating common rules on recognition and revocation of diplomatic protection status.[133] Unlike in Poland, the violations of EU law by Hungary have affected not only the independence and impartiality of the judiciary, but more generally many aspects of social life, which has mostly led the European Commission to initiate such infringement procedures against Hungary to challenge not only the violation of Articles 2 and 19 of the TEU, but the non-compliance with EU rules of secondary law, different from Article 2 of the TEU and related to specific areas such as education, taxation, international protection, or usufruct rights. As rightly pointed out by scholars,[134] this does not exclude, however, that these violations can still be attributed to Article 2 of the TEU, as they are indeed evidence of Hungary's systematic tendency to threaten common values and the Rule of Law.

On 27 January 2023, the European Commission also filed another appeal under Article 258 of the TFEU[135] against Hungary for adopting the already mentioned "anti-LGBTQIA+" laws in 2021. In this regard, it has already been observed that on this occasion the European Commission expressly requested the Union judges to ascertain the incompatibility of these laws directly with Article 2 of the TEU alone for the first time. The outcome of this judgment will then allow us to establish whether this provision can be used as an independent validity parameter for national and EU conduct. Moreover, with regard to this case, it is worth noting that the European Commission has obtained the support of fifteen

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[132] Court of Justice, 17 December 2020, C-808/18, *Commission v. Hungary* (international protection), and 16 November 2021, C-821/19, *Commission v. Hungary* (international protection). In this case, Hungary had allowed, in violation of Directive 2013/32 on common procedures for granting and withdrawing international protection status, the rejection of an application for international protection on the grounds that the applicant had entered its territory through a State where they were not exposed to persecution or a risk of serious harm. Additionally, it criminalised the actions of any person who, as part of an organisational activity, provided assistance in submitting or forwarding an asylum application within its territory. In the judgment of 2 April 2020, C-715/17, C-718/17, and C-719/17, *Commission v. Hungary, Poland, and the Czech Republic*, the Court of Justice found that 'by failing to indicate at regular intervals, and at least every three months, an appropriate number of applicants for international protection who could be relocated swiftly to its territory' Hungary (as well as Poland and the Czech Republic) had failed to fulfil its EU obligations.

[133] Court of Justice, 22 June 2023, C-823/21, *Commission v. Hungary* (international protection status). Hungary, by requiring certain third-country nationals or stateless persons who are on Hungarian territory or at its borders to submit a declaration of intent at a Hungarian embassy in a third country and obtain a travel document allowing them to enter Hungarian territory before they can apply for international protection, has failed to fulfil its obligations under Directive 2013/32 on common procedures for granting and withdrawing international protection status.

[134] In this regard A. CIRCOLO, *Il valore dello Stato di diritto cit*., p. 181 and the doctrine cited therein.

[135] 2022 lawsuit, *European Commission v. Hungary*, C-769/22 *cit*.

Member States (not including Italy), which will intervene in the infringement procedure alongside it to protect the founding values of the Union. [136] Although the threshold of 4/5 set out in Article 7(1) of the TEU (i.e., 22) is still far away, the participation for the first time of such a high number of Member States in favour of the Rule of Law is certainly a sign of the greater willingness of the Member States to counter threats to common values and the Rule of Law.

8. *Preliminary ruling under Article 267 of the TFEU*

Similarly to what has been observed regarding the infringement action, the inefficacy of Article 7 of the TEU to ascertain, remedy and possibly sanction violations of the Rule of Law by Member States has also led national judiciaries – and foremost the Polish one, which was among the first to suffer the consequences of State non-compliance with common values – to seek protective measures that, in addition to the mechanism under Article 258 of the TFEU, allowed for the verification by the Luxembourg judges (and the declaration of incompatibility!) of controversial internal legislation aimed at limiting the independence and impartiality of national judges with Article 2 of the TEU (at least for now) jointly with Articles 19 of the TEU and/or 47 of the Charter. [137]

In this context, the judicial instrument that has proven most suitable is the preliminary ruling provided for in Article 267 of the TFEU. Based on the cooperation between the Union judge and national judges, it allows the former to assist the latter in the delicate task of verifying the compatibility of domestic legislation with EU law, which results, in case of incompatibility, in the inapplicability of the latter in the national judgment by virtue of the primacy principle. [138]

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[136] *https://www.ansa.it/europa/notizie/rubriche/altrenews/2023/04/07/pe-e-15-stati-ue-contro-la-legge-ungherese-anti-lgbt_deea374d-eac5-4e42-832a-7016fd3c8734.html*.

[137] In this regard, it has already been observed that, at least under current EU case law, Article 2 TEU is not in principle an independent validity parameter for national and EU law. However, the situation could change, as the European Commission has just filed an infringement action with the Court of Justice, requesting for the first time that it assesses the compatibility of the so-called Hungarian "anti-LGBTQIA+" legislation solely with Article 2 TEU (*European Commission v. Hungary*, C-769/22 *cit*.).

[138] On preliminary rulings in general, see, among many others, E. CIMIOTTA, *L'ambito soggettivo di efficacia delle sentenze pregiudiziali della Corte di giustizia*, Torino, 2023; A. CORRERA, *Natura ed effetti delle sentenze pregiudiziali della Corte di giustizia*, Napoli, 2023; F. FERRARO, C. IANNONE (eds.), *Le renvoi préjudiciel*, Bruxelles, 2023; B. NASCIMBENE, *Il rinvio pregiudiziale innanzi alla Corte di giustizia dell'Unione europea: disciplina e indicazioni pratiche*, in *federalismi.it*, Paper 12 July 2023. For a reconstruction of the preliminary ruling mechanism in the context of the protection of EU values and fundamental rights, see R. BARATTA, *Droit fondamentaux et valeur dans le processus d'integration européenne*, in *Revue juridiche étudiants Sorbonne*, 2019, p. 11 ff.

Moreover, given that the preliminary ruling can only be made by independent judicial authorities of the Member States,[139] the references made to the Court of Justice by national judiciaries to ascertain the incompatibility of internal judicial reforms with Articles 2 and 19 of the TEU have simultaneously protected the functioning of the preliminary mechanism, that is an essential instrument to ensure the uniform and correct application of EU law in internal systems.[140] It has thus become not only a means of safeguarding the independence and impartiality of national judiciaries but also the object of protection offered in such occasions by the Luxembourg judges.[141]

Now, the fact that the preliminary ruling, unlike the infringement action which is left to the initiative of the European Commission, allows national judges to directly request Union judges to ascertain the compatibility of controversial internal legislation with common values has led national judiciaries, feeling threatened by judicial reforms in the Member States, to frequently use this mechanism even with respect to infringement procedures initiated in the same context and timeframe. In the last five years (2018-2023), the Polish judiciary, for example, has made thirty-two references to the Court of Justice concerning the protection of the Rule of Law[142] – more than six per year – that is, six times the number of actions initiated in the same period under Article 258 of the TFEU. The first preliminary ruling of the Polish judiciary regarding Articles 2 and 19 of the TEU and 47 of the Charter (August 2018) was almost simultaneous with the first infringement action filed by the European Commission (May 2018). This is understandable since even to activate the reference in question it was necessary to preliminarily ascertain that Article 2 of the TEU, although in conjunction with other EU rules, could serve as a legitimacy parameter for domestic law.

As for the outcome achieved in the preliminary rulings made by the Polish judiciary, although some of them were withdrawn,[143] or declared inadmissi-

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[139] Similarly, the landmark judgment Court of Justice, 30 June 1966, 61/65, *Vaasen-Goebbles*.

[140] In this sense, see also, A. ADINOLFI, *I fondamenti del diritto dell'UE nella giurisprudenza della Corte di giustizia: il rinvio pregiudiziale*, 2019, especially p. 213, *https://www.aisdue.eu/wp-content/uploads/2019/11/Adelina_Adinolfi.pdf*.

[141] See A. CIRCOLO, *Il valore dello Stato di diritto cit*., especially p. 231.

[142] C-522/18, 558/18, 563/18, C-585/18, C-624/18, C-625/18, C-668/18, C-824/18, 508/19, C-748/19 to C-754/19, C-132/20, C-387/20, C-491/20 to 496/20, 506/20, C-509/20, C-511/20, C-615/20, C-671/20, C-181/21, C-269/21, C-718/21. In general, on these judgments, see G. CAGGIANO, *La Corte di giustizia sulla tutela dell'indipendenza della magistratura nei confronti di sanzioni disciplinari lesive dello Stato di diritto*, in *Studi integraz. eur*., 2020, p. 249 ff.; P. MORI, *La questione del rispetto dello Stato di diritto cit*., p. 166 ff.; A. ANGELI, *Il principio di indipendenza e imparzialità degli organi del potere giudiziario nelle recenti evoluzioni della giurisprudenza europea e polacca*, in *federalismi.it*, 2021, p. 4 ff.

[143] Similarly, in cases C-522/18 (Court of Justice order of 29 January 2020) and C-668/18 (Court of Justice order of 3 December 2019).

ble,[144] or ended with a declaration of compatibility,[145] on twelve occasions the Luxembourg judges verified the incompatibility of the principles of independence and impartiality of judges underlying the notion of the Rule of Law with Polish legislation,[146] which were sometimes the same as those subject to infringement proceedings initiated by the European Commission.[147]

The same activism is to be noted also in Romania. In the last four years (2019-2023), Romanian judges have made twelve preliminary references to the Court of Justice[148] – that is, three per year – asking it to verify the incompatibility – then effectively ascertained – of the laws reforming the Romanian judicial system concerning disciplinary and appointment proceedings of judges with the principles of independence and impartiality of the judiciary under Articles 2 and 19 of the TEU. In fact, as already observed, the progressive degradation of the Rule of Law in this country emerges clearly from the annual reports of the European Commission. Considering also that the Romanian Constitutional Court, aligning with the Polish one, has recently held that domestic judges are obliged not to disapply internal rules contested by the Court of Justice when the Constitutional Court confirms their compatibility with the Romanian Constitution,[149] the Luxembourg judges, on nine occasions, had to remind that 'the

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[144] In this sense, in cases C-181/21, C-269/21 (Court of Justice judgment of 9 January 2024); C-491/20 to 496/20, C-506/20, C-509/20 and C-511/20 (Court of Justice order of 22 December 2022); C-387/20 (Court of Justice order of 1 September 2021); C-508/19 (Court of Justice judgment of 22 March 2022); C-558/18 and C-563/18 (Court of Justice judgment of 26 March 2020), C-718/21 (Court of Justice judgment of 21 December 2023).

[145] Similarly, Court of Justice judgment of 29 March 2022, C-132/20.

[146] In this regard, see Court of Justice, 19 November 2019, C-585/18, C-624/18, and C-625/18, *AK* (on the dependency of the National Council of the Judiciary and its Disciplinary Chamber of the Supreme Court); 2 March 2021, C-824/18, *AB* (on the appointment of judges to the Supreme Court made directly by the President of the Republic and not subject to appeal); 19 November 2021, from C-748/19 to C-754/19, *WB* (on the secondment or revocation of secondment by the Minister of Justice at any time, according to non-public criteria and without a reasoned decision); 13 July 2023, C-615/20 and C-671/20, *YP and others* (on the suspension and initiation of criminal proceedings against domestic judges for alleged violations of domestic law).

[147] For example, the legislation on the Disciplinary Chamber has been the subject of both the infringement dispute *Commission v. Poland* (disciplinary regime for judges) *cit*. and the preliminary ruling *AK* (independence of the Disciplinary Chamber of the Supreme Court). In this sense, see also A. CIRCOLO, *Il valore dello Stato di diritto cit*., p. 236.

[148] Cases C-357/19, C-379/19, C-547/19, C-811/19, and C-840/19 concluded with Court of Justice judgment of 21 December 2021, *PM*; C-859/19, C-926/19, and C-929/19 resolved with Court of Justice order of 7 November 2021, *FX*; C-216/21 concluded with Court of Justice judgment of 7 September 2023, *Asociația "Forumul Judecătorilor din România"*; C-430/21 resolved with Court of Justice judgment of 22 February 2022, *RS*; C-817/21, resolved with Court of Justice judgment of 11 May 2023, *RI*; C-107/23 PPU, resolved with Court of Justice judgment of 24 July 2023, *CI*.

[149] Similarly, the judgments of the Romanian Constitutional Court No. 33 of 23 January 2018;

principle of the primacy of EU law … prevents national legislation or practice according to which national judges are bound by the decisions of the national constitutional court and cannot disapply, on their own initiative, the case-law resulting from such decisions, where they consider, in light of a judgment of the Court of Justice, that such case-law is contrary to [EU law]'. [150] Consequently, the fact that the domestic judge in question applied EU law, as interpreted by the Court of Justice, deviating from the case law of the Constitutional Court, cannot be considered a disciplinary offence. [151]

Despite the concerns raised by the respect for the Rule of Law also in Bulgaria and Malta, judges from these two Member States have so far made only one preliminary reference each, both of which have ended with the finding of compatibility with Articles 2 and 19 of the TEU of the national legislation under EU scrutiny. In particular, as regards Bulgaria, the Court of Justice noted that 'the adoption of general provisions of civil or commercial law relating to the compensation regime within the framework of a bank failure, even if retroactive, is not capable, per se, of violating…' the principles of independence of the national judiciary under Article 19 of the TEU. [152] Similarly with regard to Malta, the judges of Luxembourg found that Articles 2 and 19 of the TEU do not preclude national provisions which, as in the case of Malta, give the Prime Minister a decisive role in the process of appointing judges, since, in this procedure, an independent body responsible for evaluating candidates also intervenes and provides an opinion to the Prime Minister. [153]

No preliminary ruling has ever been made by Hungarian judges. Considering that the number and quality of references also serve, among other things, to measure the level of awareness and reaction of society and the judiciary to violations of the Rule of Law in their own country, this data, also in light of Hungary's clear non-compliance with EU values for more than ten years, raises many concerns. This seems all the more true considering that the apparent inertia of

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No. 104 of 6 March 2018; No. 390 of 8 June 2021. In literature, see C. SANNA, *Dalla violazione dello Stato di diritto alla negoazione del primato del diritto dell'Unione nel diritto interno: le derive della questione polacca*, in *Eurojus*, 31 Dicember 2021; B. SELEJAN-GUTAN, *A Take of Primacy. The ECJ Ruling on Judicial Indipendnece in Romania*, in *VBolg*, 2 June 2021; D. GALLO, *Primato, identità nazionale e stato di diritto in Romania*, in *Quaderni cost*., 2022, p. 374 ff.; P. FILIPEK, M. TABOROWSKI, *From Romania with Love. The CJEU confirms criteria of independence for constitutional courts*, in *Verfassungsblog*, 14 February 2022; S. SCIARRA, *First and Last Word: Can Constitutional Courts and the Court of justice of the EU Speak Common Word?*, in G. CONTALDI, R. CISOTTA (eds.), *Courts, Values and European Identity*, in *Numero speciale Eurojus,* 2022, p. 69 ff.

[150] Similarly, the aforementioned cases C-357/19, C-379/19, C-547/19, C-811/19, and C-840/19, *PM*; C-859/19, C-926/19, and C-929/19, *FX*; C-107/23 PPU, *CI*.

[151] In this sense, the aforementioned case C-430/21, *RS*.

[152] Court of Justice (order) 15 November 2022, C-260/21, *Corporate Commercial Bank*.

[153] Court of Justice, *Repubblika cit*.

Hungarian society and the judiciary with regard to the so-called bottom-up protection of the Rule of Law is only partially compensated by the top-down one provided through the infringement procedures of the European Commission against Hungary. On the one hand, the number of procedures (and therefore also of findings of incompatibility!) that the latter can initiate alone to monitor compliance with the Rule of Law in the twenty-seven Member States is by nature lower than that of preliminary referrals, which are instead made by judicial bodies of every level (justice of the peace, courts, courts of appeal, supreme courts, etc.) and matter (civil, criminal, administrative, labour, tax, etc.) of a Member State. On the other hand, unlike the procedure under Article 258 of the TFEU which allows to ascertain non-compliance with EU values after a long and complex process (about 5 years), the preliminary ruling procedure, despite lacking the possibility of imposing pecuniary sanctions, allows, in shorter times (on average one and a half years), national judges to (at least in principle) immediately disapply the national legislation considered to be in conflict with Articles 2 and 19 of the TEU. The protection of EU values, even more in the absence of interventions in this regard by the Council and the European Council on the basis of Article 7 of the TEU, therefore requires both the joint action of national and EU actors, and the contribution of all judicial instruments useful for this purpose.

9. *The principle of mutual trust among Member States in EU infringement and preliminary case law: a new weapon to protect the Rule of Law?*

In the aforementioned judgment of Associação Sindical dos Juízes Portugueses of February 2018, the Court of Justice, reiterating principles already expressed in Opinion 2/2013 concerning the draft international accession agreement of the Union to the ECHR, affirmed that the European legal construction is based on the 'fundamental premise according to which each Member State shares with all other Member States, and recognises that these share with it, a series of common values on which the Union is founded, as specified in Article 2 TEU'.[154] Based on this premise, the judges in Luxembourg, in the Achmea judgment of March 2018, deduced that 'it is the duty of the Member States to ensure, within their respective territories, the application and respect of Union law [and therefore also of EU values], and to adopt, for this purpose, any measures capable of ensuring compliance with the obligations arising from the treaties or acts of the EU institutions'.[155] From the combined reading of these

[154] Court of Justice, *Associação Sindical dos Juízes Portugueses cit.*, point 30, as well as opinion 2/13, also *cit.*, points 167-168.

[155] Court of Justice, 6 March 2018, C-284/16, point 34. For a commentary on the judgment

judgments, it emerges that each Member State has confidence that other Member States also recognise the common values and ensure their respect in their own legal systems. The Luxembourg judge applies, in other words, to Article 2 of the TEU, the principle of mutual trust among the Member States in the simultaneous and complete application at the national level of the EU *acquis*, which is at the basis of the European integration process, as well as the functioning of the single market and the area of freedom, security and justice. [156]

In this context, even a transient asymmetry in compliance with EU law and the values referred to in Article 2 of the TEU – a Member State systematically violates the Rule of Law, reducing the independence and impartiality of its judiciary – breaks the trust pact at the basis of the European integration process, thus justifying reactions by other Member States and the European Union system. Hence, with regard to the arrest warrant issued by a Polish judge, the Court of Justice, echoing principles already underlying the LM Judgment, [157] specified that if there are serious and proven reasons to believe that, in the event of the surrender of a suspect, the recognition of the right to an effective remedy before an independent judge could be denied, the executing judicial authority, in an entirely exceptional manner, may refrain from executing the aforementioned warrant. [158] Similarly, in the NS judgment, the Union judges admitted that the Member State where an asylum seeker is located (the United Kingdom) may refuse to transfer the latter to the competent State to consider the asylum application whenever there is a risk that, due to proven systemic deficiencies in

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with specific regard to the principle of mutual trust, see N. PIGEON, *Autonomie de l'ordre juridique de l'Union européenne: confiance mutuelle entre États membres et arbitrage d'investissement: commentaire de l'arrêt de la Cour de justice du 6 mars 2018*, Achmea, *aff. C-284/16*, in *Ann. français dr. int.* LXIV/2018, 2019, p. 471 ff.

[156] In this sense see L. FUMAGALLI, *Articolo 2 cit.*, and L.S. ROSSI, *Il valore giuridico dei valori cit.*, especially p. vi. On the principle of mutual trust in general, see K. LEANERTS, *La vie après l'avis: exploring the principle of mutual (yet not blind) trust*, in *Comm. Market Law Rev.*, 2017, p. 805 ff.; P. MORI, *Quelques réflexions sur la confiance réciproque entre les États membres: un principe essentiel de l'Union européenne*, in Liber Amicorum *A. Tizzano cit.*, p. 651 ff.; J.P. JACQUE, *État de droit et confiance mutuelle*, in *Rev. trim. dr. eur.*, 2018, p. 239 ff.

[157] Thus, see Court of Justice, *LM cit.*, points 60-79, regarding the extradition of a suspect to Poland by the Irish authorities. The *LM* judgment draws, by analogy, on the previous Court of Justice ruling of 5 April 2016, C-404/15 and C-659/15 PPU, *Aranyosi and Căldăraru*. On the Rule of Law in criminal matters generally, see M. CARTA, *Unione europea e tutela dello Stato di diritto negli Stati membri*, Bari, 2020.

[158] In this sense, see Court of Justice, 22 February 2022, C-562/21 PPU and C-563/21 PPU, *Openbaar Ministerie* (Court established by the law of the issuing Member State). In literature, F. GAZIN, *Mandat d'arrêt européen. Indépendance des juges et droit à un procès équitable*, in *Europe*, 2022, number 4, comm. 108. Similarly, with regard to Poland, see Court of Justice, 17 December 2020, C-354/20 and C-412/20 PPU, *Openbaar Ministerie* (Independence of the issuing judicial authority); 26 October 2021, C-428/21 *PPU* and C-429/21 PPU, *Openbaar Ministerie* (Right to be heard by the issuing judicial authority).

the protection of fundamental rights (Greece), the asylum seeker may be exposed to inhuman and degrading treatment.[159] More recently, in the Sped-Pro Judgment, the Tribunal annulled a decision of the European Commission, which had rejected the request of a whistle-blower under Article 102 of the TFEU because it considered that the competence to hear the case lay with the Polish Office of Competition and Consumer Protection under Regulation 1/2003, as it had failed to ascertain whether the said national authority was able to ensure satisfactory protection of the rights of the whistle-blower.[160] According to the latter, in Poland, also, the competition authority is dependent on the executive, so that the handling of the complaint by the whistle-blower of an abuse of dominant position by a company controlled by the Polish State would not have taken place in accordance with Articles 2 and 19 of the TEU and Article 47 of the Charter.

The joint reading of these judgments seems to suggest that the violation of common values and EU fundamental rights may, at least in principle, entail the further "sanction" consisting in the suspension of forms of cooperation (asylum and international protection; cooperation in criminal matters; competition) based on mutual trust between Member States.

However, precisely because this calls into question the effectiveness of the principles of mutual trust and mutual recognition underlying the single market and the area of freedom, security and justice, the Court of Justice subject their application to strict conditions to be interpreted restrictively. And so, a Member State can derogate from these latter 'only in exceptional circumstances where that authority finds, after carrying out a specific and precise assessment of the particular case', moreover to be carried out on the basis of 'objective, reliable, specific and properly updated evidence', that there are 'there are substantial grounds for believing' that there is 'real risk that that person's fundamental rights will be breached'.[161] However, proving the existence of these cumulative

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[159] See Court of Justice, 21 December 2011, C-411/10 and C-493/10, *NS*. In literature, see G. MORGESE, *Regolamento Dublino II e applicazione del principio di mutua fiducia tra Stati membri: la pronunzia della Corte di giustizia nel caso* N.S. e altri, in *Studi integraz. eur.*, 2012, p. 147 ff.; P. GARCÍA ANDRADE, *La responsabilidad de examinar una solicitud de asilo en la UE y el respeto de los derechos fundamentales: comentario a la Sentencia del TJUE de 21 de diciembre de 2011 en los asuntos* N.S. y M.E y otros, in *Rev. general der. eu.*, 2012, p. 1 ff. See also Court of Justice, judgment of 19 March 2019, C-163/17, *Jawo*.

[160] See General Court, 9 February 2022, T-791/19, *Sped-Pro v. European Commission*, point 71. In literature, see L. TERMINIELLO, *La sentenza* Sped-pro c. Commissione: *sull'importanza del rispetto dello Stato di diritto per la tenuta del sistema d'applicazione delle regola antitrust dell'Unione*, in *BlogDUE*, 20 March 2022; M. BERNATT, *Economic frontiers of the rule of law:* Sped-Pro v. Commission*: case T-791/19*, in *Comm. Market Law Rev*., 2023, p. 199 ff.

[161] On the test developed in *LM* (Court of Justice, *LM cit*., points 60-68), see S. BIERNAT, P. FILIPEK, *The Assessmen to Judicial Independence Following the CJEU Ruling in C-216/18*, *LM*, in A. VON BOGDANDY, P. BOGDANOWICZ, I. CANOR, C. GRABENWARTER, M. TABOROWSKI, M.

elements is not a simple operation. In fact, while in Sped-Pro (competition), the Tribunal left this complex assessment to the European Commission, in the Cases LM and Openbaar Ministrie (arrest warrant) and NS (asylum), the Court of Justice excluded that the gravity of the situation justified *a priori* the suspension of cooperation between Member States, that is, in the absence of an evaluation of the specific case. And this even though the LM, Openbaar Ministrie and Sped-Pro Cases concerned Poland, i.e., a Member State that has been violating the Rule of Law for years.

Moreover, the fact that Recital 10 of Framework Decision 2002/584 establishing the European arrest warrant [162] provided that 'may be suspended only in the event of a serious and persistent breach by one of the Member States of the principles set out in Article 6(1) of the Treaty on European Union, determined by the Council pursuant to Article 7(1) of the said Treaty with the consequences set out in Article 7(2) thereof', led the Court of Justice to clarify, in the LM Judgment concerning the execution of a Polish arrest warrant, that the initiation of a procedure under Article 7(1) of the TEU does not justify the refusal to execute the latter, this possibility being subject to a concrete assessment of the specific case demonstrating the existence of systemic deficiencies in common values. [163] If, on the other hand, the Member State has been the subject of a decision by the European Council pursuant to Article 7(2) of the TEU which has established a serious and persistent violation of Article 2 of the TEU, the judicial authority of another Member State is obliged to automatically refuse its execution, without the need in this case to carry out a concrete assessment of the real risk that the person concerned will see the essential content of his fundamental right/common value to a fair trial compromised. [164] The persistence of violations of the Rule of Law in Hungary and Poland and the degradation of this common value even in Member States other than these should, however, lead the Court of Justice to lighten the evidentiary regime currently provided for in order to allow its use when infringements of the values referred to in Article 2

SCHMIDT (eds.), *Defending Checks and Balances in EU Member States cit*., p. 403 ff., especially p. 413; C. DUPRÉ, *The Rule of Law, Fair Trial and Human Dignity: The Protection of EU Values After* LM, *ibid*, p. 431 ff.; A. FRĄCKOWIAK-ADAMSKA, *Drawing Red Lines with No (Significant) Bites: Why an Individual Test Is Not Appropriate in the* LM *Case*, *ibid*, p. 443 ff.; M. BONELLI, *Intermezzo in the Rule of Law Play: The Court of Justice's* LM *Case*, *ibid*, p. 455 ff. By analogy, also see Court of Justice, *NS*, points 80 ff., and more recently, Court of Justice, 31 January 2023, C-158/21, *Puig Gordi and others*.

[162] Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, as last amended by Council Framework Decision 2009/299/JHA of 26 February 2009.

[163] In this sense, see Court of Justice, *LM cit*., points 69-72. In this sense, also see Advocate General Rantos (opinion of 16 December 2021) in the cited case *Openbaar Ministerie* (Court established by the law of the issuing Member State), point 71.

[164] *Ibid*.

of the TEU by a certain Member State have already been found in the context of preliminary references. [165]

The above cannot be put into question by the argument that, in the LM Judgment, the Luxembourg judges conditioned the non-execution of the European arrest warrant on the finding of a violation of the Rule of Law through the mechanism provided for in Article 7 of the TEU. On the one hand, in subsequent judgments, the Court has admitted the coexistence of the latter with other means of ascertaining failures to comply with Article 2 of the TEU, such as the infringement procedure and the so-called Conditionality Regulation. On the other hand, the link between Articles 2 and 7 of the TEU established in the LM Judgment is based on the interpretation of a specific provision of a framework decision, which cannot limit the scope of Article 2 of the TEU. This EU case law does not seem, therefore, to give rise to any general rule capable of imposing that the violation of common values can be invoked only if the EU institutions have initiated or concluded one of the procedures provided for in Article 7 of the TEU. In this context, and as already noted by the Court itself in the LM Judgment, the reasoned proposal addressed by the European Commission, the European Parliament, or a third of the Member States to the Council pursuant to Article 7(1) of the TEU – and even more so the decision of the Council and the European Council pursuant to paragraphs 1 and 2 of this same provision – constitute elements of particular relevance for the assessment of the violation of Article 2 of the TEU, [166] in competition therefore with the judgments of the Court of Justice pursuant to Articles 258 and 267 of the TFEU.

10. *The conditionality mechanism: Regulation 2020/2092*

On the proposal of the European Commission in 2018, on 16 December 2020, the Union legislator adopted Regulation 2020/2092 (the so-called "Conditionality Regulation") during negotiations for the adoption of the 2021-2027 multiannual budget and the financing of so-called NextGenerationEU. This Regulation, which entered into force on 1 January 2021, [167] aims to protect the

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[165] Critically on the *LM* test, see A. FRĄCKOWIAK-ADAMSKA, *Drawing Red Lines cit*., as well as the literature cited on p. 141 of A. CIRCOLO, *Il valore dello Stato di diritto cit*.

[166] Thus, see Court of Justice, *LM cit*., point 61.

[167] Regulation 2020/2092 *cit*. For an analysis, see B. NASCIMBENE, *Il rispetto della* rule of law *e lo strumento finanziario. La "condizionalità"*, in *Eurojus*, 2021, p. 172 ff. On the use of conditionality in the Union, even before the regulation in question, mostly in the external dimension, see A. TIZZANO, *L'azione dell'Unione europea per la promozione dei diritti umani*, in *Dir. UE*, 1999, p. 149 ff.; L. BARTELS, *Human Rights Conditionality in the EU's International Agreement*, Oxford, 2005, p. 60 ff.; M.E. BARTOLONI, *Politica estera e azione esterna dell'Unione europea*, Napoli, 2021, especially. p. 79 ff. As noted by A. CIRCOLO, *Il valore dello Stato di diritto cit*., p. 303, conditionali-

Union's budget by making access to every European fund by Member States contingent upon respect for the Rule of Law. This is based on the premise that violations of the values set out in Article 2 of the TEU undermine the proper management of European funds, such as when there is a lack of independent and impartial judicial oversight of procurement procedures for projects funded by the European Union.[168] Indeed, the fight against corruption was already an element used by the European Commission in its annual reports to assess compliance with the Rule of Law in national legal systems. For example, in the 2022 report on Italy, eight out of the total twenty-eight pages are dedicated to these aspects, with explicit references to the need for that country to more effectively combat corruption resulting from the infiltration of organised crime into the Italian legal economy.[169] Furthermore, Italy's decision to join the European Public Prosecutor's Office (EPPO), unlike Hungary, which is specifically tasked with prosecuting offences against the EU budget, was positively evaluated by the European Commission in the aforementioned report as a signal of Italy's willingness to combat corruption in the use of European funds and thus protect the Rule of Law.[170]

Specifically, the Conditionality Regulation applies when the European Commission identifies a violation of the principles underlying the Rule of Law – not every common value – such as 'legality implying a transparent, accountable, democratic and pluralistic law-making process; legal certainty; prohibition of arbitrariness of the executive powers; effective judicial protection, including access to justice, by independent and impartial courts, also as regards fundamental rights; separation of powers; and non-discrimination and equality before the law' (Article 2, letter a of the Conditionality Regulation). Article 3 of the Regulation further specifies that relevant behaviours include 'endangering the independence of the judiciary; failing to prevent, correct or sanction arbitrary or unlawful decisions by public authorities, including by law-enforcement authorities, withholding financial and human resources affecting their proper functioning or

ty had indeed already been employed internally, for example, in the good agricultural and environmental conditions introduced in the CAP by Regulation 1307/2023, and in the set of rules of the financial stability mechanism. For the use of conditionality in the accession of new States to the Union, see D. KOCHENOV, *EU Enlargement and the Failure of Conditionality: Pre-accession Conditionality in the Field of Democracy and the Rule of Law*, the Hague, 2008.

[168] Thus, the rationale of the European Commission's proposal for the Conditionality Regulation of 2 May 2018, COM(2018)324 final.

[169] *https://commission.europa.eu/system/files/2022-07/29_1_194038_coun_chap_italy_en.pdf*, especially pp. 21 and 25.

[170] *Ibid* p. 4. Poland notified the European Commission of its intention to participate in EPPO on 5 January 2024. The European Commission Decision 2024/807 of 19 February 2024 confirmed the participation of Poland in the enhanced cooperation on the establishment of the EPPO. In July 2024, the European Commission adopted a decision (2024/1952 of 16 July 2024) on Sweden's membership of the European Public Prosecutor's Office (EPPO).

failing to ensure the absence of conflicts of interest; limiting the availability and effectiveness of legal remedies, including through restrictive procedural rules and lack of implementation of judgments, or limiting the effective investigation, prosecution or sanctioning of breaches of law'. [171] However, it has already been observed that, for the Court of Justice, this enumeration does not exhaustively define the Rule of Law, but merely specifies, for the purposes of its application, various principles that it encompasses and that are the most relevant to ensuring the protection of the EU budget. As also evidenced by Recital 15 of the Regulation in question, the relevant violations are not only those that are general and systemic, as with Article 7 of the TEU, but also individual ones. [172]

In addition to these conditions, Article 4 of the Regulation states that the European Commission must prove the existence of a direct causal link between the violation of the Rule of Law and the harm to the EU budget, which includes all European resources ('resources allocated through the European Union Recovery Instrument established pursuant to Council Regulation (EU) 2020/2094, and through loans and other instruments guaranteed by the Union budget' regardless of the method of implementation used by the Member States) as stated in Recital 7. The Regulation in question is therefore not applicable to every violation of the Rule of Law, but only to those, whether systemic or individual, that have a direct causal relationship with the harm caused to the Union's budget.

Once these conditions are established, the European Commission, after giving the Member State the opportunity to present its defences (Article 6) and informing the European Parliament (Article 8), proposes to the ECOFIN Council the adoption of an implementing decision containing measures to protect the EU budget (Article 6), which may consist of the total or partial suspension of payments or the repayment of loans, or the prohibition of concluding new agreements on loans and other instruments guaranteed by the EU budget, or even the suspension of the approval of financing programs (Article 5). The Council then adopts the decision by qualified majority (Article 6). Upon proposal by the European Commission, it can also adopt a decision revoking the measures taken (Article 7).

The creation, for the first time in the history of the European Union, of a legal mechanism that subordinates the disbursement of European funds to respect for the Rule of Law has immediately led reaction from those Member States that have been violating this common value for years. Only three months

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[171] In this regard, see Court of Justice, *Hungary v. European Parliament and Council cit*., point 227; *Poland v. European Parliament and Council cit*., point 323, as well as the European Commission Communication, *Guidelines on the Application of the Regulation cit*., points 10-11 and Annex I.

[172] In this sense, explicitly point 13 of the aforementioned European Commission Communication, *Guidelines on the Application of the Regulation cit*.

after the adoption of the Regulation in question, the latter was, in fact, challenged by Hungary and Poland before the Court of Justice to request its annulment pursuant to Article 263 of the TFEU, which was rejected with a ruling on 16 February 2022.[173] This ruling was decided by the Union judges sitting as a full court – i.e., by all twenty-seven judges that make up the Court of Justice, therefore including the Hungarian and Polish judges – thus attesting to the latter's desire to send a signal to Hungary and Poland of the compactness of the EU system in the protection of the common values referred to in Article 2 of the TUE.[174]

In confirming the validity of the Conditionality Regulation, the Court first rejected the argument of the applicants that this EU act would deal with issues related to national identity and the exercise of essential and constitutional functions of the Member States, which, under Article 4 of the TEU, fall within the scope of national law. In this regard, the Court, citing established EU case law, simply clarified that even the exercise of an exclusive competence of the Member States must be carried out in accordance with the obligations they have under Union law. In other words, even if the application of the Regulation in question could indeed affect the exercise of essential functions of the Member States, the Union retains the right to adopt every means to protect the values set out in Article 2 of the TEU, which constitute the identity of the common system.

As for the alleged impossibility of adopting additional Rule of Law protection instruments to Article 7 of the TEU, the Luxembourg judges, adopting a reasoning similar to that followed with regard to Article 258 of the TFEU, instead admitted their coexistence due to the different subject matter of the procedures in question. While the former allows any violation to be determined, provided it is serious and persistent, of any value set out in Article 2 of the TEU, the latter focuses exclusively on one of these, namely the Rule of Law, regardless of its systemic or individual nature.[175] Unlike the procedure

[173] The actions *Hungary v. European Parliament and Council* and *Poland v. European Parliament and Council* cited above were introduced on 11 March 2021. Pending the EU ruling, the European Commission decided not to apply the regulation, also because the European Council (conclusions of 11 December 2020) stated that '[s]hould hould an action for annulment be introduced with regard to the Regulation, the guidelines will be finalised after the judgment of the Court of Justice…'. *Contra*, the European Parliament, which in June 2021 threatened to use an action for failure to act (Article 265 TFEU) against the inaction of the European Commission. Thus, the minutes of the JURI committee meeting of 14 October 2021 (JURI_PV(2021)1014_1). On the illegitimacy of the European Council's conclusions, see, *inter alia*, K.L. SCHEPPELE, L. PECH, S. PLATON, *Compromising the Rule of Law while Compromising on the Rule of Law*, in *Verfassungsblog*, 13 Dicember 2020.

[174] Court of Justice, *Poland v. European Parliament and Council cit*., points 268 ff.

[175] *Ibid* points 212 and 213; *Hungary v. European Parliament and Council cit.*, points 173 ff.

provided for in Article 7 of the TEU, which aims to protect common values, the Regulation in question primarily aims to ensure the protection of the budget in case of violation of the principles underlying the Rule of Law, rather than sanctioning, even through the Union budget, failures to comply with the Rule of Law. [176]

Although the Court did not refer to it, the decision adopted by the Council under Article 6 of the Conditionality Regulation, unlike that of the Council or the European Council under Article 7 of the TEU, can be challenged before the Court of Justice. Unlike the latter, the one devised under the Conditionality Regulation operates within the framework of judicial protection. [177]

Once the validity of the Conditionality Regulation was established, the European Commission then applied the mechanism provided for therein towards Hungary. On 15 December 2022, the latter saw a reduction of 55% of the budgetary commitments of three operational programs for the period 2021-2017 for an amount of approximately 6 billion euros. [178] On the other hand, considering that Hungary has adopted a series of institutional reforms to restore the independence of the judiciary in Hungary in 2023, the European Commission authorised the partial disbursement of EU funds in December 2023. On 25 March 2024, this decision was challenged by the European Parliament before the Court of Justice to request its annulment. As has indeed emerged from the Resolution of the European Parliament on 19 April 2024, the violations in Hungary of the values of Article 2 of the TEU, among other things through the adoption in December 2023 of a law on the protection of national sovereignty and the establishment of the Sovereignty Protection Office (SPO), are considered as being of a too serious nature, including in different areas from that of the independence of the judiciary, to justify easing the pressure on that Member State. As has al-

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[176] In this regard, see A. CIRCOLO, *Il valore dello Stato di diritto cit.*, pp. 328-330 and the literature cited therein.

[177] Thus see A. VON BOGDANDY, J. ŁACNY, *Suspension of EU Funds for Member States Breaching the Rule of Law – A Dose of Tough Love Needed?*, in *Max Planck Institute for Comparative Public Law & International Law (MPIL)*, Research Paper No. 2020-24, 21 July 2020, *https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3638175*.

[178] The European Commission had indeed proposed to the Council (proposal for a Council implementing decision of 18 September 2022, COM(2022)485 final) the suspension of 65% of commitments for a total of 7.5 billion euros. However, COREPER proposed to the Council to reduce the suspension of funds. On 15 December 2022, the Council confirmed, in Decision 2022/2506, the suggestion of the Member States' ambassadors, also due to the adoption by Hungary of two so-called omnibus laws that responded to some EU requests (an integrity authority; a working group to fight corruption operating within the framework of a general anti-corruption strategy for the period 2021-2027; an audit mechanism for the use of EU funds). In this sense, see E. MAURICE, *Etat de droit cit.*, especially p. 3. Part of these funds were "unfrozen" in December 2023 in light of Hungary's (alleged) justice reform, which supposedly aligned with the EU's. In this regard, *https://www.euronews.com/my-europe/2023/12/13/brussels-releases-10-billion-in-frozen-eu-funds-for-hungary-amid-orbans-threats*.

ready been observed, in fact, the European Parliament, in this latest resolution, hopes that the European Commission will initiate the procedure provided for in paragraph 2 of Article 7 of the TUE.

Due to the difficulty of proving the causal link between the violation of the Rule of Law and the prejudice to the EU budget, [179] the European Commission instead gave a favourable opinion on the disbursement of European funds to Poland and Romania, [180] albeit subjecting it to the adoption in these Member States of institutional reforms in line with the common values referred to in Article 2 of the TUE. Furthermore, given that Poland has never paid the penalty payment of one million euros (later reduced to 500,000 euros) per day imposed in the infringement proceeding ruling, European Commission v. Poland 2021, the European Commission has deducted these sums from the European funds to be paid to that Member State. [181] The actual disbursement of funds to Poland will in any case only take place in the course of 2024 precisely as a result of the adoption of a series of reforms in line with Article 2 of the TEU decided by the newly elected Prime Minister Donald Tusk (13 December 2023). In January-February 2024, in fact, the latter presented a national plan to the main EU institutions to restore respect for the Rule of Law in Poland. This plan includes joining the European Public Prosecutor's Office (EPPO), as well as applying the EU Charter of Fundamental Rights and the principle of the primacy of EU law over national law. In this regard, it has already been observed how the implementation of the latter had been denied by the Polish Constitutional Court in a series of rulings in 2021.

As for Romania, the situation could change if it decides to enhance the principle developed by the Court of Justice in the aforementioned PM ruling of 2021. According to this principle, the jurisprudence of the Romanian Constitutional Court, which denies the principle of the primacy of EU law, may pose a systemic risk of impunity in relation to acts constituting serious crimes of fraud against the financial interests of the EU or corruption. [182]

The conditionality procedure has not yet been applied to the recovery and resilience funds, despite Recital 7 of the Regulation in question mentioning that 'resources allocated through the European Union Recovery Instrument' are considered applicable to such funds, as also noted by both the European Commission and the European Parliament. [183] The national recovery and resilience

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[179] In thise sense, E. CANNIZZARO, *Editorial – Neither Representation nor Values? Pr, "Europe's Moment" – Part II*, in *Eur. Papers*, 2022, p. 1102 ff.

[180] *https://ec.europa.eu/commission/presscorner/detail/fr/ip_22_4223*.

[181] Court of Justice, order C-204/21 *cit*.

[182] Court of Justice, C-357/19 *cit*., points 200 and 203.

[183] In this sense, see the Press Release of 6 October 2021, *Hungary and Poland plans should be approved only if concerns are addressed*. Similarly, in the literature, see I. STAUDINGER, *The Rise and Fall of Rule of Law Conditionality*, in *Eur. Papers*, 2022, p. 721 ff., especially. p. 736 ff.

plans of Poland and Hungary were authorised, in fact, in June and December 2022 respectively by the ECOFIN Council,[184] following a somewhat turbulent process: the European Commission repeatedly postponed the adoption of a positive opinion on these national plans, which in the case of Poland also occurred without the consent of the two Executive Vice Presidents of the European Commission, Timmermans and Vestager; on one hand, the European Parliament asked the Council not to approve the Polish NRRP until compliance with EU law and values was guaranteed, and on the other hand, it threatened a motion of censure against the European Commission, which had ultimately given a positive opinion on the Polish plan; the Council's decision to authorise the Polish plan was made with the abstention of the Netherlands,[185] whose parliament had urged the government to initiate infringement proceedings against Poland precisely for violation of the Rule of Law.

Moreover, in August 2022, the main judicial associations representing judges in Europe initiated annulment proceedings before the General Court against the Council's June 2022 implementing decision to approve the Polish NRRP for manifest violation of the Rule of Law.[186] If this action were to overcome the admissibility hurdles under paragraph 4 of Article 263 of the TFEU,[187] the judgment to be rendered in this case could provide useful insights into the value of the protection of the Rule of Law also within the framework of Regulation 2021/214 establishing the Recovery and Resilience Facility. Although the plans of Hungary, Poland and Romania were approved by the Council on condition that reforms to protect the Rule of Law were implemented – strengthening the independence of the judiciary in Poland and Romania; protecting the LGBTQIA+ community in Hungary[188] – that Council decision, somewhat surprisingly, does

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[184] Articles 18-20 of Regulation 2021/214 establishing the Recovery and Resilience Facility, OJEU L 57 of 18 February 2021.

[185] For a reconstruction on this topic, see A. ALEMANNO, *Cesuring von der Leyen's Capitulation on the Rule of Law*, in *Verfassungsblog*, 8 June 2022; M. LANOTTE, *L'azione di annullamento proposta dalle associazioni giudiziarie contro la decisone del Consiglio di approvare il PNRR di Varsavia*, in *BoGDUE*, 26 October 2022. See also the European Parliament resolution of 9 June 2022 on the Rule of Law and the Potential Approval of the Polish National Recovery Plan (NRP) (2022/2703(RSP)).

[186] Cases T-531/22, *International Association of Judges (Rome, Italy) v. Council*; T-532/22, *Association of European Administrative Judges (Trier, Germany) v. Council*; T-533/22, *Stichting Rechters voor Rechters (The Hague, Netherlands) v. Council*. See T. SHIPLEY, *European Judges v. Council: The European Judiciary Stands Up for the Rule of Law*, in *eulawlive.com*, 30 August 2022.

[187] On the possibility for legal persons to challenge an EU Council implementing act, see M. CONDINANZI, R. MASTROIANNI, *Il contenzioso dell'Unione europea*, Torino, 2009; C. AMALFITANO, *Standing (Locus standi): Court of Justice of European Union (CJEU)*, in *Max Planck Encyclopedia of International Procedural Law*, 2021.

[188] Regarding Hungary, 2022/0414 (NLE) of 5 December 2022, point 2. For Poland, 2022/0181 (NLE) of 14 June 2022, point 2. These modifications would indeed be merely cosmetic according to J. SAWICKI, *Le milestones della Commissione europea sull'indipendenza dei giudici: presupposto per migliorare le condizioni della rule of law o misure puramente cosmetiche*, in *Nomos*, 2022.

not mention the Rule of Law, limiting itself to requiring compliance with environmental, climate and digital transition objectives (Articles 3 and 4).

11. *Conclusions… also in light of the recent directive on the protection of persons reporting violations of EU law*

Since 2018, the Union's system has progressively strengthened both preventive and reactive tools to safeguard common values and the Rule of Law, aiming to protect its identity and meet the expectations of EU citizens who, at least according to data from the Eurobarometer,[189] consider it necessary for these values to be equally respected in all Member States. In particular, the analysis of the mechanisms provided for this purpose highlights how the most active watchdogs in identifying violations of Article 2 of the TEU have been not only the Union institutions representing the common interest – the European Commission and the Court of Justice – but also members of civil society and the legal community, as evidenced by the numerous preliminary rulings referred to the Union judges to provoke an assessment of compatibility with Article 2 of the TEU of controversial national legislation, as well as the action for annulment likewise introduced by associations representing European magistrates to verify the illegitimacy of the Council's implementing decision to authorise, despite the established non-compliance with the Rule of Law in Poland, the recovery and resilience plan of that Member State.

The need to strengthen "bottom-up" enforcement of every violation of EU law has also motivated the European Commission to propose, and the EU co-legislator to adopt, Directive 2019/1937, which, starting from the premise that individuals are often the first to become aware of common law infringements, introduced minimum safeguards in all national systems (prohibition of retaliation; actions of financial, psychological, and judicial support; sanctions for those who intimidate) to protect whistle-blowers, i.e., those who report violations of even fundamental common rights, which also damage European financial interests (Article 2). Although the directive in question does not expressly mention common values, the implementation of the latter in Article 2 of the TEU seems justified by the already highlighted connection between fundamental rights and common values. The reference to harm to European financial interests also recalls the Conditionality Regulation, which is applicable precisely in case of violations of Article 2 of the TEU. The importance of this instrument among the remedies aimed at combating infringements of this provision is further evidenced by the fact that the European Commission, in February 2023, lodged an

[189] *https://commission.europa.eu/strategy-and-policy/policies/justice-and-fundamental-rights/upholding-rule-law/rule-law/initiative-strengthen-rule-law-eu_it*.

infringement action against eight Member States (namely the Czech Republic, Germany, Italy, Estonia, Spain, Luxembourg, Hungary and Poland) that have not yet correctly transposed, more than two years after the deadline, Directive 2019/1937 into their national legal systems. [190]

The undeniable progress made, especially in the last five years, in combating violations of common values should not, however, make us forget the weak role played therein by the Member States, both unilaterally considered and when gathered in the Council and the European Council. Since it is unrealistic for the latter to amend, at least in the short term, Article 7 of the TEU in the context of treaty revision – by lightening, for example, the deliberative quorums provided therein – the further strengthening of the protection of Article 2 of the TEU then depends on a more incisive and effective use of the tools already available to them: not only Article 7 of the TEU, but also dialogues within the Council and the application of the Conditionality Regulation, among other things within the framework of national recovery and resilience plans.

Even the role of the European Parliament could be more decisive. Although the latter has repeatedly criticised violations of the Rule of Law by Member States, it effectively initiated the procedure under Article 7 of the TEU against Hungary only after the European Commission had lodged a similar request against Poland. In light of the Council's decision to authorise the Polish recovery and resilience plan, instead of challenging as a privileged applicant this act before the Court for annulment, the European Parliament chose to threaten the use of a motion of censure against the European Commission, which had given a favourable opinion on the adoption of the said Council decision.

A "more frontline" position of the European Parliament would thus support the European Commission and the Court of Justice in the delicate task of assessing and sanctioning violations of common values, which burden, at least until now, primarily rests on their shoulders. This seems even more important considering that, in the face of the deterioration of the Rule of Law in many Member States other than Hungary and Poland, the latter will likely be called upon to open new avenues of protection for Article 2 of the TEU, transforming, for example, Article 2 of the TEU into an autonomous legitimacy parameter of domestic and EU law, or applying the "sanction" consisting in the suspension of forms of cooperation based on mutual trust between Member States.

[190] See regarding [INFR(2022)0043], [INFR(2022)0052], [INFR(2022)0055], [INFR(2022)0073], [INFR(2022)0106], [INFR(2022)0119], [INFR(2022)0093], and [INFR(2022)0150].

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