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A New Approach to Constitutional Crisis Prevention?: Article 2 TEU as an Obligation to Take Preventive Action

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Abstract

To date, Article 2 TEU has mainly been construed as a negative obligation to refrain from violating the values enshrined therein. In light of the *Repubblika* case law, which established a duty to prevent any regression in the protection of Article 2 TEU values, this paper considers whether Article 2 TEU can be construed in such a way as to bring about a positive obligation on the part of the Member States to take preventive action to safeguard the EU's foundational values and thus prevent (or at least mitigate the risk of) violations of those values. We first consider the doctrinal and normative bases for such an obligation. We then argue that such an obligation arises whenever Article 2 TEU values are presently under threat (or when a threat is imminent), and when such a threat is sufficiently grave or systemic. We believe that an interpretation of Article 2 TEU that requires Member States to act, at source, to prevent national actors from committing violations of EU values, contributes to enhancing constitutional resilience in the EU. Consequently, we propose a novel legal approach that could, under certain circumstances, better equip the EU to address future threats to Article 2 TEU.

Keywords: Article 2 TEU; preventive obligations; *Repubblika*

1. Introduction

In recent years, several Member States have been affected by democratic decline, causing a “value crisis” in the European Union.¹ Article 2 TEU has had a central role to play in addressing this crisis. Often in conjunction with other Treaty provisions, Article 2 TEU has

¹ See, for example, A Gora and P de Wilde, “The Essence of Democratic Backsliding in the European Union: Deliberation and Rule of Law” (2022) 29 *Journal of European Public Policy* 321, 344; A von Bogdandy, “Towards a Tyranny of Values? Principles on Defending Checks and Balances in EU Member States” in A von Bogdandy and Others (eds), *Defending Checks and Balances in EU Member States* (Springer 2021) p 74; B Bakó, “Hungary’s Latest Experiences with Article 2 TEU: The Need for “Informed” EU Sanctions” in A von Bogdandy and Others (eds), *Defending Checks and Balances in EU Member States* (Springer 2021) p 43; R Bellamy and S Kröger, “Countering Democratic Backsliding by EU Member States: Constitutional Pluralism and ‘Value’ Differentiated Integration” (2021) 27 *Swiss Political Science Review* 619; M Avbelj, “Pluralism and Systemic Defiance in the EU” in A Jakab and D Kochenov (eds), *The Enforcement of EU Law and Values: Ensuring Member States’ Compliance* (Oxford University Press 2017) p 44; KL Scheppele, “Enforcing the Basic Principles of EU Law through Systemic Infringement Actions” in C Closa and D Kochenov (eds), *Reinforcing Rule of Law Oversight in the European Union* (Cambridge University Press 2016) p 105; P Bárd and VZ Kazai, “Enforcement of a Formal Conception of the Rule of Law as a Potential Way Forward to Address Backsliding: Hungary as a Case Study” (2022) 14 *Hague Journal on the Rule of Law* 165.

provided a legal basis for enforcing European values such as the rule of law and democracy in court. However, such court proceedings are often unable to end instances of value backsliding in Member States. Part of the reason for this, it is submitted, is that Article 2 TEU (and other provisions which give concrete effect to that provision) only become judicially enforceable once a violation has actually occurred.

But might one imagine situations in which violations of Article 2 TEU values are (with a reasonable degree of certainty) foreseeable and could, therefore, be prevented by Member State action? Consider a situation in which the national government of an EU Member State is aware of plans to overthrow the government of a region/province within that state and does not take any action to counteract these plans. Would the lack of action represent a threat to Article 2 TEU values? Imagine a situation in which a Member State becomes aware of undue foreign influence in its elections. The result of such interference is that the elections are not conducted on an even playing field. If that Member State refuses to take any action in such circumstances, would this constitute an infringement of Article 2 TEU? How about a scenario in which individuals plan to attack judges and to block access to Courts. The authorities in the Member State concerned are aware of these plans. However, they wait until the attacks have taken place, and until individuals have had their to access justice hindered, before taking any action to deal with the matter. Does the Article 2 TEU value of the rule of law have anything to say in such circumstances? Consider a situation in which the authorities in a Member State of the European Union organise national elections. In so doing, they send out postal votes to citizens living abroad who are eligible to vote. However, the postal ballot papers are sent out just a few days before the deadline to vote, meaning that virtually no citizen living abroad will be able to return a viable ballot in time. If the authorities take these steps in the full knowledge that large numbers of citizens will be effectively disenfranchised, would such actions pose a threat to the foundational value of democracy? Finally, at a time where populist parties are on the rise and gaining more (governing) power across Europe, what if a Member State becomes aware that its constitution and existing legislation provides inadequate protection against populist attacks on courts and their independence, but decides to do nothing to further safeguard the judiciary? Can this failure to take action be condemned (or at least scrutinised) against Article 2 TEU standards?

We anticipate that many readers of the questions posited in the above paragraph will be inclined to respond with a resounding no – none of the scenarios depicted engage Article 2 TEU in any way. But humour us for a moment. Let us try to tamper with your beliefs a little. In all the scenarios posited above, one can foresee with a reasonable degree of certainty that the purported actions, if and when they are carried out, would be profoundly troubling from a democracy and/or rule of law perspective – both of which are foundational values of the Union per Article 2 TEU. One must ask oneself, then, whether it is plausible to conclude (from the perspective of EU law at least) that Member State authorities, when faced with such scenarios, must wait until any violation of the Article 2 TEU values occurs before taking action? Our intuition has always been to say no. In this regard, some scholars have recently suggested that Article 2 TEU may be capable of requiring those in power to pro-actively take steps to prevent violations of the Union's foundational values from occurring.² However, to date, this suggestion has not been fully fleshed out by those who advocate for such an understanding, nor has it received

² LD Spieker, "Trust the Treaties! Protecting EU Values Does Not Require Treaty Change" (2024) 84 ZaöRV 745, 759; M Klamt, *Die Europäische Union Als Streitbare Demokratie [The European Union as Militant Democracy]* (Herbert Utz Verlag 2012) p 328 et sqq; A Hatje, "Parteiverbote Und Europarecht" (2005) 120 DVBl 261, 266 et sqq; K Hölzen and NA Marandi, "Die Pflicht Zum Demokratieschutz: Zivilgesellschaftliche Räume Als Voraussetzung Der Wehrhaften Demokratie" (*Verfassungsblog*, 7 April 2024) available at <https://verfassungsblog.de/die-pflicht-zum-demokratie-schutz/> (last accessed 14 April 2024).

widespread discussion in the literature dealing with Article 2 TEU values and their possible enforcement.

The purpose of this paper is to try to fill this gap. In so doing, we start by analysing the plausible doctrinal bases that may exist in EU law and which may be capable of supporting the following proposition: Can Article 2 TEU (either itself, or in combination with other Treaty provisions) bring about a positive obligation on the part of the Member States and/or EU institutions to take preventive action to safeguard the EU's foundational values and thus prevent (or at least mitigate the risk of) violations of those values? From there, the paper then moves to consider the possible scenarios in which such an obligation might arise, before assessing who could be obliged to take preventive action to safeguard the Union's foundational values. Having explored these ideas, the paper then turns to examining the circumstances in which an obligation to take preventive action to protect EU values could and should be judicially enforced, considering at this juncture the issues of justiciability and direct effect. In this endeavour, we limit our analysis to the values of democracy and the rule of law as anchored in Article 2 TEU. This is because the scope of the other values contained in Article 2 TEU are defined by the Charter of Fundamental Rights and are thus regulated by the principles enshrined therein.³ In contrast, the principles of the rule of law and democracy apply beyond the scope of application of the Charter,⁴ and thus warrant a discussion of the extent to which Article 2 TEU may require those in power to take preventive action to protect the values enshrined within that provision.

II. Positive obligations in EU law and beyond

I. Overview

Many areas of the law recognise a distinction between negative and positive obligations.⁵ Simply put, negative obligations “essentially require states not to interfere in the exercise of rights”⁶ whereas positive obligations require member states to “take action” to protect those rights.⁷ Admittedly, the distinction between negative and positive obligations is nuanced and open to contestation. Nonetheless, the distinction continues to be utilised in the practice of national and international courts and tribunals and remains useful for analytical purposes. At their core, positive obligations are concerned with unlawful omissions and the attribution of responsibility for said omissions.⁸ As Stoyanova points out, for an omission to be legally relevant, “there must be an obligation upon the State to do something in the first place, and in this sense, the State's omission needs to be shown to have been wrongful.”⁹ The existence of an obligation on the part of a state (or EU institution) to do something, which, if not done, would be wrongful, needs to be proven and justified. This necessarily leads one to questioning the standards that are to be applied to the creation of any obligation to take action? It also gives rise to questions about the

³ Case C-156/21, *Hungary v. Parliament and Council* [2022] ECLI:EU:C:2022:97, para. 157; Case C-157/21 *Poland v European Parliament and Council* [2022] ECLI:EU:C:2022:98, para. 193.

⁴ *Ibid.*

⁵ D Shelton and A Gould, “Positive and Negative Obligations” in D Shelton (ed), *The Oxford Handbook of International Human Rights Law* (OUP 2013) p 563.

⁶ J-F Akandji-Kombe, *Positive Obligations under the European Convention on Human Rights: A Guide to the Implementation of the European Convention on Human Rights* (Council of Europe Human Rights Handbook No. 7, 2007) p 5.

⁷ A Mowbray, *Human Rights Law in Perspective: The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights* (Hart 2004) p 2. For a discussion within the context of state responsibility see Shelton and Gould, *supra* note 5, 563.

⁸ V Stoyanova, *Positive Obligations under the European Convention on Human Rights: Within and beyond Boundaries* (Oxford University Press 2023) pp 12–16.

⁹ *Ibid.*, 15.

standards one should apply in the assessment of whether any omission is unlawful and thus incurs responsibility?¹⁰ These questions are returned to in detail below.

In terms of the ways in which such obligations may be discharged, one can distinguish between two types of measures that a state (or EU institution) may be required to take. The first are *post factum* measures which are aimed at investigating harm. The second are preventive measures which seek to avert any actual harm from materializing.¹¹ As noted above, the following confines its analysis to the latter of these two categories. It is the preventive element of Article 2 TEU that is beginning to attract attention in the literature. Moreover, and more importantly, in light of this special issue's theme of constitutional resilience, we submit that the existence of any positive obligation to take preventive action (if shown to exist and to be capable of meaningful operationalisation) would make a novel and meaningful contribution to the protection of the Union's foundational constitutional values.

2. Positive obligations in EU law

Within the European Union context, there are evidently many areas of EU law where Member State authorities are placed under obligations to refrain from infringing provisions of Union law. These negative obligations permeate the EU Treaties in virtually all policy fields.¹² At the same time, there are some areas of EU law where Member State authorities are also obliged to take all appropriate measures to guarantee the full scope and effect of provisions of Union law. This idea of EU law imposing positive obligations upon the Member States is to be found, most prominently, in the principle of sincere cooperation enshrined in Article 4(3) TEU.

The provision thus entails two positive obligations for the Member States – “first, in respecting, facilitating and assisting the European Union in carrying out tasks which flow from the Treaties, (...) and second, in taking all the necessary measures for the fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions.”¹³ To this end, the CJEU has noted that the Member States “are obliged, by reason *inter alia* of the principle of sincere cooperation set out in the first subparagraph of Article 4(3) TEU, to ensure in their respective territories the application of and respect for EU law, and to take for those purposes any appropriate measure, whether general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the EU”.¹⁴

Another area where one typically finds judicial doctrine and academic analysis of positive obligations is in relation to fundamental rights protection. This is certainly true of the European Convention on Human Rights System.¹⁵ However, the extent to which the EU Charter of Fundamental Rights may impose upon the EU institutions and/or the Member States positive obligations to protect Charter rights has received far less attention.¹⁶ Outwith the context of Charter-based rights, there has been even less discussion to date on the ways in which EU law may impose obligations upon the EU institutions and Member

¹⁰ *Ibid.*, 15.

¹¹ *Ibid.*, Chapters 6 and 7.

¹² A classic example here would be the fundamental freedoms of the EU internal market, which are all addressed to the Member States in the form of prohibitions on certain forms of state action which are liable to restrict trade.

¹³ Case C-15/22, *RF v Finanzamt G* [2023] ECLI:EU:C:2023:636, para. 57.

¹⁴ Case C-284/16, *Slovak Republic v Achmea BV* [2018] EU:C:2018:158, para. 34.

¹⁵ Stoyanova, *supra* n 8.

¹⁶ See B De Witte, “The Strange Absence of a Doctrine of Positive Obligations under the EU Charter of Rights” (2020) 4 *Quaderni costituzionali* 854–7.

States to take action to prevent violations of EU law rights and interests from being infringed.

Hillion has explored positive obligations in the context of re-transition – that is, in helping previously backsliding Member States to re-transform into constitutional democracies.¹⁷ He is concerned with the obligations which attach to both the EU institutions and the Member States to take action to redress violations of Article 2 TEU values which have already occurred, and thereby restore the offending Member State to a position of Article 2 TEU compliance.¹⁸ In this sense, any notion of positive obligations under Article 2 TEU are said to be (only) triggered once a violation of Article 2 TEU has been found and extend (only) to the obligation to nullify the consequences of that violation and re-store respect for Article 2 TEU.¹⁹

The question that is yet to be addressed by Hillion or anyone else (at the time of writing), however, is whether Article 2 TEU may require the EU institutions and/or the Member States to take measures to prevent violations of Article 2 TEU values from occurring in the first place? If such a preventive obligation to protect Article 2 TEU values exists, what does it look like? Who would it apply to? And how might it be enforced?

3. An EU obligation to protect Article 2 TEU

If we take the EU institutions first, within the specific context of the protection of Article 2 TEU values, the Union is obliged to ensure “that the values laid down in Article 2 TEU (...) are guaranteed for all Union citizens and residents, throughout the territory of the Union.”²⁰ Recently, the European Court of Justice has seemingly stretched this obligation to protect Article 2 TEU a little further, holding that “the European Union must be able to defend those values, within the limits of its powers as laid down by the Treaties.”²¹

Doctrinally, the Union’s obligation to protect Article 2 TEU values can be rooted in Article 3(1) and (6) TEU, which obliges the Union to “promote” the values of Article 2 TEU and to “pursue” them “by appropriate means.” As such, and “[l]ike other Treaty objectives, the obligation of the Union to promote its values in Art 3(1) TEU is a legally binding policy directive” meaning that the Union must “take positive action to fully realise the values in the process of making and enforcing Union law.”²² Article 13 TEU further provides that the Union shall have an institutional framework which shall aim to promote its values, suggesting that “upholding and promoting the values of Article 2 TEU is an obligation for the EU institutions when they legislate internally or act externally.”²³

From a normative perspective, Theuns roots the duty of the EU institutions to act within their authority to protect values such as democracy and the rule of law within the theory of complicity.²⁴ He argues in this regard not only that the European Council “has a treaty responsibility vis-à-vis its own institutional legitimacy to maintain a derivative

¹⁷ C Hillion, “Reversing a Member State’s Regression and Restoring (Its) Union Membership” in M Bobek and Others (eds), *Transition 2.0 – Re-establishing Constitutional Democracy in EU Member States* (Nomos 2023) p 506 et sqq.

¹⁸ *Ibid.*, 518.

¹⁹ *Ibid.*

²⁰ European Parliament, “European Parliament resolution of 25 October 2016 with recommendations to the Commission on the establishment of an EU mechanism on democracy, the rule of law and fundamental rights (2015/2254[INL])” (2016) P8_TA(2016)0409, Annex, Recital 6.

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

²² For the rule of law, see W Schroeder, “The Rule of Law as a Constitutional Mandate for the EU” (2023) 15 Hague Journal on the Rule of Law 1, 9; for democracy, see W Schroeder, “Das Herausgeforderte Parlament: Parlamentsrecht in Der Europäischen Union in Zeiten Wachsenden Populismus” (2025) 60 EuR 124.

²³ Opinion of AG Ćapeta, Case C-769/22, *Commission v Hungary* [2025] ECLI:EU:C:2025:408, para. 172.

²⁴ T Theuns, *Protecting Democracy in Europe* (C Hurst & Co 2024) p 101 et sqq.

democratic character,”²⁵ but also that the European Commission must use all their legal and political authority, for example by initiating infringement procedures, to check autocratic politics in the EU.²⁶

That being said, the Union institutions have little influence over how Article 2 TEU values might be guaranteed “on the ground” in the respective Member States. This is because the concrete implementation and realisation of these values is a competence of the Member States.²⁷ Consequently, one must shift the focus and ask to what extent are Member States bound to assist the Union in effectively fulfilling its primary task of promoting its values?²⁸

III. Framing Article 2 TEU as a preventive obligation

In what follows, we contend that the protection of Article 2 TEU values is a task that is shared between the EU and the Member States. As we shall see, the shared nature of this obligation means that the Union will only be able to comply with its obligation to promote and protect Article 2 TEU values to the extent that the Member States do the same (and vice versa). As such, we will show that the Member State’s obligation to comply with Article 2 TEU requires them to take positive action. Having demonstrated this point, we then argue that this shared obligation to protect Article 2 TEU values comprises a preventive element.²⁹

1. A shared obligation to protect the rule of law and democracy

The obligation to protect the values of the rule of law and democracy is an obligation that is shared by the European Union and the Member States alike. This is demonstrated firstly by Article 49 TEU which demands that Member States are “committed to promoting” the values of Article 2 TEU as long as they are members of the Union. This is reiterated secondly by the *Portuguese Judges* case which has demonstrated that the values of Article 2 TEU are where the Member State’s and the Union’s constitutional orders interlock and where the Member States are required to take positive action to implement and guarantee the values of Article 2 TEU.

a. The shared obligation to protect Article 2 TEU values: the context of EU accession

Article 49 TEU and the Copenhagen criteria specify that, in order to accede to the Union, candidate countries must have achieved a “stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities.”³⁰ The law governing EU accession thus creates a positive obligation on the part of the candidate countries to ensure that they have stable institutions that can guarantee and protect Article 2 TEU values. This is not to say that the demands imposed upon candidate states with respect to institutional capacity and substantive legal commitments are certain to be fulfilled. We recognise that the aspirations of Article 49 TEU and the Copenhagen

²⁵ *Ibid.*, 116.

²⁶ *Ibid.*, 122.

²⁷ See, for example, Case C-808/21, *Commission v Czech Republic* [2024] ECLI:EU:C:2024:962, para. 104 and 154; Case C-814/21, *Commission v Poland* [2024] ECLI:EU:C:2024:963, paras. 103 and 153, stating that the organisation of national political life is a competence of the Member States and is part of a Member State’s national identity; Case C-896/19, *Repubblica* [2021] ECLI:EU:C:2021:311, para. 48, stating that the organisation of justice is a competence of the Member States.

²⁸ Hillion, *supra* n 17, 507.

²⁹ See Spieker, *supra* n 2, 759 calling on scholars to develop the preventive side of Art 2 TEU.

³⁰ European Council, Copenhagen 21–22.06.1993, Conclusions of the Presidency, DOC/93/3.

criteria with regards to the compliance of acceding states with EU values are not always perfectly matched by the empirical reality on the ground.³¹ Nevertheless, once the decision has been taken by the Member States to admit a new state to the Union, the position in Union law is that the acceding state complies with the requirements of Articles 2 and 49 TEU at the time of accession.

Crucially, the Court has recently emphasised that the positive obligation to ensure compliance with Article 2 TEU values at the moment of accession does not cease upon a given Member State's accession to the Union.³² Rather it constitutes a “continuous process for as long as such a Member State remains within the EU.”³³ This is exemplified by Article 49 TEU itself, which demands that Member States are “committed to promoting” the EU's founding values, indicating that the obligation on the part of the Member States to guarantee Article 2 TEU values extends to their protection, advancement and development after accession.³⁴ The obligation to align all national policies and institutions with Article 2 TEU values, as required by the Article 49 TEU process, is thus transformed into an obligation to keep protecting Article 2 TEU at all times.

This finding is supported by AG Ćapeta who recently reiterated that “the word ‘promote’ in Article 49 TEU also requires a positive effort to achieve Article 2 values within the societies of each of the Member States.”³⁵ This implies that Member States must “take the necessary measures to remove any existing obstacles impeding the full respect of those values in their societies.”³⁶ As such, Member States are not merely bound by negative obligations but, “[t]o the contrary, Member States have the obligation to maintain and to promote actively the values enumerated in Article 2 TEU, on the basis of that provision, read in conjunction with Article 49 TEU.”³⁷

In the words of the Court, the obligation to guarantee Article 2 TEU after accession becomes transformed into an “obligation de résultat”³⁸ which manifests itself, inter alia, as an obligation to take action to protect Article 2 TEU. This is further exemplified by the Court's judgement in *Portuguese Judges*.³⁹

b. Portuguese judges and the positive obligation to protect Article 2 TEU: Article 2 TEU as an area of shared governance

Whilst the *Portuguese Judges* judgment is widely known for making the CJEU the “watchdog”⁴⁰ of the independence of national judges, it is rarely discussed in the context of positive obligations. However, a closer look at the judgment reveals that the Court has laid the foundations for framing Article 2 TEU as including an obligation to act to prevent

³¹ For critical discussion see E Bashenska “EU Enlargement in Disregard of the Rule of Law: A Way Forward Following the Unsuccessful Dispute Settlement Between Croatia and Slovenia and the Name Change of Macedonia” (2022) 14 Hague Journal on the Rule of Law 221–56; D Kochenov, *EU Enlargement and the Failure of Conditionality: Pre-accession Conditionality in the Fields of Democracy and the Rule of Law* (Kluwer 2008).

³² Case C-156/21, *Hungary v. Parliament and Council* [2022] ECLI:EU:C:2022:97, para. 126; Case C-157/21 *Poland v European Parliament and Council* [2022] ECLI:EU:C:2022:98, para. 144.

³³ K Lenaerts, “On Checks and Balances: The Rule of Law Within the EU” (2023) 29 *Columbia Journal of European Law* 25, 63.

³⁴ Hillion, *supra* n 17, 507.

³⁵ Opinion of AG Ćapeta, Case C-769/22, *Commission v Hungary* [2025] ECLI:EU:C:2025:408, para. 185.

³⁶ *Ibid*, para. 184.

³⁷ *Ibid*, para. 186.

³⁸ Case C-156/21, *Hungary v. Parliament and Council* [2022] ECLI:EU:C:2022:97, para. 233; Case C-157/21 *Poland v European Parliament and Council* [2022] ECLI:EU:C:2022:98, para. 169; Case C-204/21, *Commission v. Poland* [2023] ECLI:EU:C:2023:442, para. 73.

³⁹ Case C-64/16, *Associação Sindical dos Juizes Portugueses* [2018] ECLI:EU:C:2018:117.

⁴⁰ AT Pérez, “From Portugal to Poland: The Court of Justice of the European Union as Watchdog of Judicial Independence” (2020) 27 *Maastricht Journal of European and Comparative Law* 105.

violations of the rule of law from occurring.⁴¹ More specifically, the Court has held that Member States are “obliged, by reason, *inter alia*, of the principle of sincere cooperation, set out in the first subparagraph of Article 4(3) TEU, to (...) establish a system of legal remedies and procedures ensuring effective judicial review in those fields.”⁴² *Portuguese Judges* thus demonstrates that Article 2 TEU, when read in light of other provisions of EU law, e.g., Article 19 TEU, renders both the EU and the Member States as being responsible for ensuring that Article 2 TEU values are protected.

According to the CJEU, “Article 19 TEU, which gives concrete expression to the value of the rule of law stated in Article 2 TEU, entrusts the responsibility for ensuring judicial review in the EU legal order not only to the Court of Justice but also to national courts and tribunals.”⁴³ Article 19 TEU thus gives expression to a distribution of responsibilities between the Union and the Member States that is initially rooted in Article 2 TEU. By its very structure, Article 2 TEU makes clear that the values of the Union and the values of the Member States are inherently intertwined and inter-active – they are the founding values of the Union⁴⁴ and at the same time “common to the Member States.”⁴⁵ As explained by the Court in *Opinion 2/13*, the EU’s essential “legal structure is based on the fundamental premiss that each Member State shares with all the other Member States, and recognises that they share with it, a set of common values on which the EU is founded, as stated in Article 2 TEU.”⁴⁶ Compliance with Article 2 TEU values is thus no longer merely “an internal constitutional responsibility [of each Member State], but also a responsibility with regard to the Union and to other Member States.”⁴⁷ Only when the Member States protect Article 2 TEU values can the Union itself guarantee that those values are upheld, and vice versa.⁴⁸ It follows from this that the Union complies with its own obligation to protect the rule of law under Article 2 TEU by imposing an obligation on the part of the Member States to take action to protect the rule of law. In line with Article 4(3) TEU, the Union and the Member States assist each other in carrying out the tasks which flow from the Treaties. Protecting the rule of law is such a task. It is a task that the Union and the Member State can only achieve together. This can be achieved by the Union providing “proportionate assistance to Member States in ensuring the respect of the rule of law”⁴⁹ and the Member States taking all measures necessary to protect the rule of law on the ground. The Court has emphasised this point in the *Portuguese Judges* case with regards to the Member State’s positive obligation “to establish a system of legal remedies and procedures ensuring effective judicial review.”⁵⁰ Despite this being a matter falling within the Member State’s area of competence, the Member States are bound by an obligation emanating from EU law, because the overarching responsibility for ensuring judicial review and, ultimately, respect for the rule of law, is shared jointly by both the EU and the Member States.

Whereas *Portuguese Judges* is of course limited to the rule of law, in general, and judicial independence, in particular, we maintain that the Court’s reasoning can be applied, by analogy, to the value of democracy in Article 2 TEU. Indeed, many scholars have argued

⁴¹ Case C-64/16, *Associação Sindical dos Juízes Portugueses* [2018] ECLI:EU:C:2018:117, para. 34.

⁴² *Ibid.*

⁴³ *Ibid.*, para. 32.

⁴⁴ Art 2 sentence 1 TEU.

⁴⁵ Art 2 sentence 2 TEU.

⁴⁶ *Opinion 2/13* ECLI:EU:C:2014:2454, para. 168.

⁴⁷ See for the rule of law European Commission, “Strengthening the Rule of Law within the Union A Blueprint for Action” COM(2019)343 final, 3.

⁴⁸ See NN Shuibhne, “Article 2 TEU: Determining ‘the Parameters of the EU Legal Order and the Duties Incumbent Upon Member States’” in C Barnard and Others (eds), *Pursuit of Legal Harmony in a Turbulent Europe* (Bloomsbury Publishing 2024), p 60.

⁴⁹ See for the rule of law European Commission, *supra* n 47, 3.

⁵⁰ Case C-64/16, *Associação Sindical dos Juízes Portugueses* [2018] ECLI:EU:C:2018:117, para. 34.

that “[t]he methodology established by the CJEU in [*Portuguese Judges*] to protect the value of the rule of law in the Member States could serve as a blueprint to protect the value of democracy.”⁵¹ Specifically, the intertwining of EU and Member State democracy is inherent in Article 10(3) TEU which, giving concrete expression to Article 2 TEU, enshrines European citizens’ right to be effectively represented and to effectively participate in the democratic life of the Union.⁵² This however “presupposes a democratic life in the Member States”⁵³ as the active and passive right to vote would be rendered meaningless without a (European) public and political space.⁵⁴ It has thus been argued that within this “shared democratic space,” Articles 2 and 10 TEU, read in light of the principle of sincere cooperation in Article 4(3) TEU, render both the EU institutions and Member State authorities responsible for ensuring democratic representation and accountability in the EU legal order.⁵⁵ Such a reading is “necessary to enable citizen’s participation in the democratic life of the Union, allowing the forming of European political awareness and the expression of the will of citizens as requested by Article 10 TEU.”⁵⁶ As a result, Member States are obliged, by virtue of the principle of sincere cooperation, to ensure that the organs which structure democratic participation respect the EU value of democracy.⁵⁷

Consequently, the EU and the Member States are under a shared responsibility to protect the values of democracy and the rule of law enshrined in Article 2 TEU. As the next section will show, this responsibility extends to taking preventive action to safeguard EU values.

2. An obligation with a preventive element

The positive obligation to protect Article 2 TEU entails a preventive obligation on the part of the Member States. As the *Schmidberger* Case Law demonstrates, preventive obligations are not foreign to Union Law. If Member States are under an obligation to prevent violations of their obligations under free movement law, there is no reason why this logic cannot be transposed to the Member State’s obligations under Article 2 TEU. That the obligations of Article 2 TEU indeed entail a preventive element is further emphasised by the Article 7 procedure, the *Repubblica* case law and the role Article 2 TEU plays in protecting individuals.

⁵¹ D Krappitz and N Kirst, “An Infringement of Democracy in the EU Legal Order” (*EU Law Live*, 29 May 2020) available at <https://eulawlive-com.libproxy.kcl.ac.uk/op-ed-an-infringement-of-democracy-in-the-eu-legal-order-by-david-krappitz-and-niels-kirst/> (last accessed 1 August 2023); see also LD Spieker, “Breathing Life into the Union’s Common Values: On the Judicial Application of Article 2 TEU in the EU Value Crisis” (2019) 20 *German Law Journal* 1182, 1206; T Verellen, “Hungary’s Lesson for Europe: Democracy is Part of Europe’s Constitutional Identity. It Should be Justiciable” (*Verfassungsblog*, 8 April 2022) available at <https://verfassungsblog.de/hungarys-lesson-for-europe/> (last accessed 1 August 2023); M Schuler, “Paving the Way for an Enforcement of Democracy under Article 10 TEU? The Court’s Judgments in Cases C-808/21 *Commission v Czechia* and C-814/21 *Commission v Poland*” (*European Law Blog*, 20 November 2024) available at <https://www.europeanlawblog.eu/pub/fsc541k/release/2> (last accessed 22 November 2024); TL Boeckstein, “Making Do With What We Have: On the Interpretation and Enforcement of the EU’s Founding Values” (2022) 23 *German Law Journal* 431, 441.

⁵² Case C-808/21, *Commission v Czech Republic* [2024] ECLI:EU:C:2024:962, paras. 114–22; Case C-814/21, *Commission v Poland* [2024] ECLI:EU:C:2024:963, paras. 112–20.

⁵³ A von Bogdandy and LD Spieker, “Transformative Constitutionalism in Luxembourg: How the Court Can Support Democratic Transitions” (2022) MPIL Research Paper No. 2022-14, 19.

⁵⁴ J Morijn, “Separate Charter Invocation as a New Enforcement Method: The *Lex NGO* Case” (2022) 59 *CMLR* 1137, 1157.

⁵⁵ E Muir, P Van Nuffel and G De Baere, “The EU as a Guardian of the Rule of Law within Its Member States” (2023) 29 *CJEL* 1, 19; Schuler, *supra* n 51.

⁵⁶ Muir, Nuffel and Baere, *supra* n 55, 19.

⁵⁷ *Ibid.*

a. Article 4(3) and the *Schmidberger* Case Law

As we have seen above, the Court has read the Member States' obligation to protect the rule of law under Article 2 TEU in light of Article 4(3) TEU and concluded that Member States are "obliged, by reason, inter alia, of the principle of sincere cooperation, set out in the first subparagraph of Article 4(3) TEU, to (...) establish a system of legal remedies and procedures ensuring effective judicial review in those fields".⁵⁸ Turning then to the more specific obligation to take action to prevent violations of Article 2 TEU values from occurring, we submit that longstanding principles of EU law derived from the EU internal market context can be of assistance here. In particular, the economic freedoms of the internal market, in combination with Article 4(3) TEU, can bring about an obligation on the part of the Member States to take preventive measures to safeguard EU rights and interests.

Consider in this regard the Court's longstanding principle that the fact that a Member State abstains from taking action, or fails to adopt adequate measures to prevent obstacles to free movement from arising, is just as liable to constitute a restriction to free movement as a positive action taken by a Member State.⁵⁹ Indeed, it has long been settled case law that Member States may, through their failure to act, be liable for obstacles to free movement which are caused by the actions of private parties.⁶⁰ The attribution of responsibility to a Member State for restrictions on free movement can be brought about when the authorities of that state abstain from adopting the measures required to deal with violations of EU law (e.g., restrictions on freedom of movement) which are not caused by the state.⁶¹

This line of case law further suggests that Member States may also be obliged to take preventive measures to stop such violations from arising in the first place. That much is clear from the leading case of *Schmidberger*, where an environmental group held a protest which resulted in heavy goods vehicles being unable to use the Brenner motorway, which connects Austria and Italy, and thus being unable to transport goods between different EU Member States. The Court found not only that the protests resulted in a restriction of the free movement of goods and thus infringed Article 34 TFEU, but that that infringement could be attributed to the Member State on account of its failure to take all necessary and appropriate measures to ensure that fundamental freedoms were respected on its territory by, inter alia, preventing restrictions caused by the actions of individuals.⁶² Crucially, it was the national authorities' failure to ban the protest, despite having been notified of it in advance, which constituted a restriction of Article 34 TFEU, when read in light of Article 4(3) TEU. In other words, the failure by a Member State to take specific actions to prevent the violation of EU law from occurring was itself incompatible with EU law and thus required justification.⁶³ The *Schmidberger* case law thus demonstrates that preventive obligations are not foreign to EU law. Rather, Article 4(3) TEU, combined with another Treaty provision, can impose upon Member States the obligation to take action to prevent a violation of EU law if they knew or ought to have known that such a violation would occur. There is no reason why this principle should be limited to the context of market freedoms. By the same token, we thus submit that a combination of Article 2 TEU

⁵⁸ *Ibid.*

⁵⁹ Case C-112/00, *Eugen Schmidberger, Internationale Transporte und Planzüge v Republik Österreich* [2003], ECLI:EU:C:2003:333, para. 58.

⁶⁰ *Ibid.*

⁶¹ Opinion of AG Jacobs, Case C-112/00, *Eugen Schmidberger, Internationale Transporte und Planzüge v Republik Österreich* [2002] ECLI:EU:C:2002:437, para. 82.

⁶² Case C-112/00, *Eugen Schmidberger, Internationale Transporte und Planzüge v Republik Österreich* [2003], ECLI:EU:C:2003:333, paras. 59–60.

⁶³ *Ibid.*, para. 64.

and Article 4(3) TEU can justify to require Member States to take action to prevent violations of Article 2 TEU from occurring (at least within certain circumstances).⁶⁴

b. The Article 7 procedure

In addition to the above, one may also factor in the (in)famous Article 7 TEU procedure, which provides a tool for the Union to protect Article 2 TEU values. That provision distinguishes between two scenarios: First, the identification by the Council of a clear risk of a serious breach of Article 2 TEU by a Member State, governed by Article 7(1) TEU. Second, the determination by the European Council of the existence of a serious and persistent breach of Article 2 TEU values by a Member State, governed by Article 7(2) and (3).

The first scenario in Article 7(1) TEU provides that even before the Council determines that such a clear risk exists, it can address recommendations to the Member State affected. Whereas Article 7(1) TEU does not further specify the purpose of these recommendations, the structure of Article 7 TEU suggests that these recommendations can have two purposes. Firstly, because those recommendations are given before a determination of a clear risk has been made, they might instruct the Member State on how to avoid said risk from materialising. Secondly, because the clear determination of a risk to values comes before any determination of a breach of those values, the recommendations might advise a Member State on how to prevent an identified risk from transforming into a breach.⁶⁵

In either scenario, the way Article 7 TEU is structured to take account of clear risks to Article 2 TEU values is instructive. The EU institution's oversight of Member State actions, their evaluation of how Member States address identified risks to the EU's foundational values, and their regular verification of the persistence of identified risks, all confirm that the EU legal order does not tolerate threats to Article 2 TEU values in the Member States.⁶⁶ This makes clear that Member States are not only under an obligation to prevent violations of Article 2 TEU from occurring. Rather, in light of Article 7(1) TEU, a Member State's obligation extends to providing effective deterrence against threats to Article 2 TEU, and to remedy such threats when they arise. From a doctrinal perspective, the very purpose of the Article 7 TEU procedure would be significantly undermined if Member States were free to refrain from taking any action, either to mitigate risks that have been identified, or to prevent breaches of Article 2 TEU from occurring – particularly when the risks of such a breach have been previously identified by the Council. Much like the discussion of EU accession, however, we recognise that this argument speaks to how the law should, in our view, be interpreted and applied. There is unquestionably a tension here between the wording of Article 7 TEU and the way it has been applied in practice. In both instances where the Article 7 TEU practice has been activated to date, the situation on the ground had already moved beyond the prospect of a clear risk to Union values. Violations of those values had already occurred.⁶⁷ This reality should not detract from our view that Article 7 TEU can be interpreted as including a positive obligation to take action to safeguard EU values when serious risks to those values have been identified. Whether those involved in the Article 7 TEU process choose to follow this interpretation and to utilise their powers accordingly remains to be seen. For our part, we simply contend that

⁶⁴ Those circumstances are discussed below, see Section IV.

⁶⁵ Hillion, *supra* n 17, 527.

⁶⁶ Klamt, *supra* n 2, 327, 342.

⁶⁷ See M Krogel, "The Closure of the Article 7(1) TEU Procedure Against Poland: The Weight of Intentions and the Risk to Common Values in the Twilight of Illiberalism" (2025) *Maastricht Journal of European and Comparative Law* 1, 6; Commentary on Article 7 in J Tomkin, M Klamert, M Kellerbauer (eds), *The EU Treaties and Charter of Fundamental Rights – A Commentary* (2nd ed., Oxford University Press 2024).

understanding Article 7 TEU in the manner espoused above is plausible and, indeed, preferable in terms of protecting EU values.

c. *The non-regression principle*

So far, the core idea that Article 2 TEU may entail a positive obligation to take preventive action to protect the Union's foundational values may plausibly be located on the basis of Article 4(3) TEU, the *Schmidberger* line of jurisprudence, Article 7 TEU, or a combination thereof. In addition, we further submit that this core idea finds support in the CJEU's landmark *Repubblika* judgment. That judgment was grounded in the rule of law as enshrined in Articles 2 and Article 19 TEU, but the non-regression principle that it established applies to all the of the Article 2 TEU values.⁶⁸ As is well-known, the Court in that case held that:

A Member State cannot (...) amend its legislation in such a way as to bring about a reduction in the protection of the value of the rule of law, a value that is given concrete expression, inter alia, by Article 19 TEU (...). The Member States are thus required to ensure that, in the light of that value, any regression of their laws on the organisation of justice is **prevented**, by refraining from adopting rules which would undermine the independence of the judiciary (...).⁶⁹

Admittedly, scholars have to date overwhelmingly framed *Repubblika* as a case about the negative duty to abstain from measures which jeopardise the attainment of Article 2 TEU values.⁷⁰ However, integral to the non-regression principle established in *Repubblika* is also the Member States' obligation to actively "prevent"⁷¹ any regression in the protection of Article 2 TEU. Based on this, it is submitted that *Repubblika* has concretised two separate obligations⁷² on the part of the Member States:

- The duty to refrain from any action that would bring about a reduction in the protection of Article 2 TEU values (principle of non-regression), and
- the obligation to prevent any regression of Article 2 TEU values from occurring.

This is because, based on the reasoning of the Court, the obligation to prevent any regression in the protection of Article 2 TEU values is a stand-alone obligation that may be infringed (or indeed complied with) in a variety of ways. In *Repubblika*, that obligation to prevent regression took the specific form of refraining from enacting rules which undermine the independence of the judiciary. Crucially, the overarching obligation to prevent regression could have taken different forms depending on the facts and context of

⁶⁸ Opinion of AG Ćapeta, Case C-769/22, *Commission v Hungary* [2025] ECLI:EU:C:2025:408, para. 183; Mathieu Leloup et al "Non Regression: Opening the Door to Solving 'the Copenhagen Dilemma'? All Eyes on Case C-896/19 *Repubblika v Il-Prim Ministru*" (2021) RECONNECT Working Paper No. 15, 16; LS Rossi, "Concretised", "Flanked", or "Standalone"? Some Reflections on the Application of Article 2 TEU" (2025) 10 European Papers 1, 6; J Scholtes, "Constitutionalising the End of History? Pitfalls of a Non-Regression Principle for Article 2 TEU" (2023) 19 European Constitutional Law Review 1, 59.

⁶⁹ Case C-896/19, *Repubblika* [2021] ECLI:EU:C:2021:311, paras. 63–4; emphasis added by the authors.

⁷⁰ O Mader, "Wege Aus Der Rechtsstaatsmisere: Der Neue EU-Verfassungsgrundsatz Des Rückschrittsverbots Und Seine Bedeutung Für Die Wertedurchsetzung (Teil 2)" 32 EuZW 974, 974; Scholtes, *supra* n 68; LD Spieker, "The Conflict over the Polish Disciplinary Regime for Judges – an Acid Test for Judicial Independence, Union Values and the Primacy of EU Law: Commission v. Poland" (2022) 59 CMLR 777, 789 et sqq.

⁷¹ Case C-896/19, *Repubblika* [2021] ECLI:EU:C:2021:311, para. 64.

⁷² L Pech and D Kochenov, *Respect for the Rule of Law in the Case Law of the European Court of Justice: A Casebook Overview of Key Judgments since the Portuguese Judges Case* (Swedish Institute for European Policy Studies 2021) 96.

the case, including an obligation to take preventive action to safeguard the protection of Article 2 TEU values.

This reading of *Repubblica*, if correct, would mark a significant development in the Court's value jurisprudence: By stating that Member States must prevent value regression, the Court clarifies that a Member State's accession to the Union "is not the finish line but rather the starting point" of value protection.⁷³ In other words, the level of value protection in Member States "may always be improved, [but] it may not suffer value regression."⁷⁴ This interpretation is further supported by the Court's reasoning in the judgment, which noted that the EU is composed of states that, according to Article 49 TEU, have freely and voluntarily committed themselves to respect the common values referred to in Article 2 TEU and to "undertake to promote them."⁷⁵ This undertaking mirrors the parallel obligation imposed on the Union by Article 3(1) TEU to promote its values.⁷⁶

In a constantly changing world, regression cannot be prevented by simply refraining from taking certain actions. Nor does *Repubblica* suggest that refraining from taking action is all that is required to comply with the non-regression obligation. Rather, non-regression also requires the Member States to take positive action to continue to guarantee and protect Article 2 TEU at all times.⁷⁷ This is because the status quo – that is, the current level of value protection – can logically only be maintained and promoted if threats to the values are prevented when they arise.

Although it remains unclear whether a regression constitutes a violation separate and independent from Article 2 TEU or whether the non-regression principle can merely be used to find a breach of Article 2 TEU,⁷⁸ both interpretations of the *Repubblica* case law support our conclusion that Member States are under an obligation to take preventive action. On the one hand, the non-regression principle could indeed include value regressions that do not in themselves amount to a breach of Article 2 TEU values. Such an interpretation is put forward by Lübke-Wolf who argues that "[i]f it were otherwise, the prohibition of regression would be superfluous because in every case of its applicability a violation of [Article 2 TEU] could be established regardless of the direction of change."⁷⁹ If that is the case, however, then a mere regression of value protection – in other words a threat to Article 2 TEU but not yet a violation of Article 2 TEU – is already a violation of EU law. Member States could then only avoid non-compliance by preventing threats (regressions) to Article 2 TEU. In other words, Member States may be required to prevent risks to Article 2 TEU values from arising far earlier than they would otherwise be required to nullify the unlawful consequences which occur from a violation of EU law that has already been committed. But even if the non-regression principle only catches regressions that in themselves amount to a breach of the minimum standards contained in Article 2 TEU, it has added an important element to the Member State's obligations: Given the wording of *Repubblica*, Member States must prevent violations from happening. Such prevention requires preventive action by the Member States.

According to our interpretation, therefore, the *Repubblica* case law is capable of imposing upon Member States an obligation to prevent any regression in the protection of Article 2 TEU values. On this view, Member States must, at a minimum, positively protect

⁷³ Lenaerts, *supra* n 33, 63.

⁷⁴ *Ibid.*

⁷⁵ Case C-896/19, *Repubblica* [2021] ECLI:EU:C:2021:311, paras. 61–2.

⁷⁶ Rossi, *supra* n 68, 7; cf. also Opinion of AG Sharpston, Case C-573/14, *Lounani* [2016] ECLI:EU:C:2016:380, para. 77.

⁷⁷ Opinion of AG Ćapeta, Case C-769/22, *Commission v Hungary* [2025] ECLI:EU:C:2025:408, para. 184.

⁷⁸ Scholtes, *supra* n 68, 25.

⁷⁹ Rossi, *supra* n 68, 11; cf. M Schuler, "Why the EU Should Care about National Elections" (*European Law Blog*, 2023) available at <https://www.europeanlawblog.eu/pub/why-the-eu-should-care-about-national-elections/release/1> (last accessed 9 October 2024).

the status quo level of protection and, moreover, prevent any violations of Article 2 TEU from occurring. The *Republika* judgment hence expressly provides that a Member State cannot be allowed to wait until a violation of Article 2 TEU is realised. Rather, Member States have a positive obligation to intervene preventively before that happens.

d. Article 2 TEU as a duty towards the individual

The final place where one might find normative support for the claim that there is a positive obligation to take action to prevent violations to Article 2 TEU values from occurring is the role of Article 2 TEU in ensuring the effective enjoyment of rights for individuals. Article 2 TEU “is not only a duty of each Member State towards the Union and the other EU countries, it is also a duty towards the EU citizens and all other individuals falling in the scope of EU law.”⁸⁰ As such, Article 2 TEU defines and protects the sphere of freedom individuals live in⁸¹ and guarantees them the effective enjoyment of their Article 2 TEU derived rights. As the Commission has stated, Article 2 TEU “constitutes a hard core of defining features in which [everyone] can recognise himself irrespective of the political or cultural differences linked to national identity”.⁸² Article 2 TEU puts “the person at the very centre of the European integration project,”⁸³ and hence does not only require abstract state structures to comply with EU values but also demands that those values must be concretely implemented in society.⁸⁴

It results, however, from this that a Member State must not only refrain from adopting any measures violating Article 2 TEU. Rather, Member States must equally guarantee that these values are implemented in society and must take preventive measures when the individual’s enjoyment of these values is under threat. With specific regards to Article 2 TEU, the Commission has emphasised that threats to Article 2 TEU values can arrive not only “where the authorities of a Member State are taking measures” but also where they are “tolerating situations”⁸⁵ – arguably indicating that the failure to adopt preventive measures can equally constitute a violation of Article 2 TEU.

This point is perhaps best illustrated by examples. Consider a group of individuals who support the party in power and who plan violent protests on election day. They specifically target polling stations in constituencies known to support the opposition, with the aim of intimidating voters or preventing them from voting. Consider violent attacks by individuals on politicians or members of political parties. Consider individuals blocking access to a courthouse to prevent plaintiffs from attending their public hearing.

In all these examples, the state is still running elections, the Courts are still independent and providing judicial protection, and the state still guarantees all eligible individuals the negative and positive right to vote. However, their enjoyment of, and access to, the guarantees of Article 2 TEU values is either fully blocked or at least severely hindered. This is a situation that Member States are not allowed to tolerate under Article 2 TEU and where, in order to protect the effective enjoyment of individual rights under

⁸⁰ Rossi, *supra* n 68, 11; cf. M Schuler, “Why the EU Should Care about National Elections” (*European Law Blog*, 2023) available at <https://www.europeanlawblog.eu/pub/why-the-eu-should-care-about-national-elections/release/1> (last accessed 9 October 2024).

⁸¹ Schroeder, *supra* n 22, 8.

⁸² European Commission, “Communication from the Commission to the Council and the European Parliament on Article 7 of the Treaty on European Union – Respect for and Promotion of the Values on Which the Union Is Based” (2003) COM/2003/0606 final, 3.

⁸³ *Ibid.*

⁸⁴ Rossi, *supra* n 68, 13.

⁸⁵ European Commission, “Communication from the Commission to the European Parliament and the Council: A New EU Framework to Strengthen the Rule of Law” (2014) COM/2014/0158 final, 6.

Article 2 TEU, a Member State must take preventive measures to ensure that these rights are not put under threat.

e. Conclusion: Article 2 TEU as entailing an obligation to take preventive action to safeguard values

Taken together, we submit that all of the above reasons are capable, either alone or in combination with one another, of supporting the proposition that both the EU institutions and the Member States are bound to take action to promote and protect the foundational values of the Union.⁸⁶ Whereas Hillion sees the relevance of such obligation in the context of facilitating a Member State's retransition to constitutional democracy after the CJEU has confirmed a violation of EU law,⁸⁷ we argue that this obligation extends to taking action to prevent violations of Article 2 TEU from occurring in the first place.

Framing Article 2 TEU in this way is an important development because it provides a theoretical basis for finding that the EU institutions and/or the Member States may bring about violations of Article 2 TEU through their omissions – understood in the sense of failing to take action to prevent threats to Article 2 TEU values from materialising. This is especially relevant because some risks to Article 2 TEU are limited to the territory of a specific Member State, where other EU competences cannot reach, and where the EU cannot remedy those threats to Article 2 TEU with Union-wide legislation. For example, in light of populist attacks on courts, and given the rise of the populist and far-right political party AfD, Germany is currently debating whether its legal framework provides sufficient protection to its Federal Constitutional Court.⁸⁸ While this is not explicitly acknowledged, such discussion can be interpreted as involving Germany in considering whether preventive action is needed to safeguard the Article 2 TEU value of judicial independence from future threats. This brings us back to a question that was posited above. In circumstances where populist threats to judicial independence are on the rise in a particular Member State, does it make sense to say that Article 2 TEU, in combination with other Treaty provisions such as Article 4(3) TEU, only requires Member State authorities to take action to remedy violations of judicial independence after they occur? Based on our analysis above, we contend that it is preferable to conclude that EU law engages a positive obligation on the part of the Member State to adequately engage with the threat at an earlier stage (pre-violation) and thus attempt to safeguard against attacks on judicial independence or on democracy.

This brings us to the next stage in our analysis. It might well be plausible to claim, based on the analysis above, that EU law imposes upon the EU institutions and the Member States an obligation to take action to prevent violations of Article 2 TEU values from occurring. It is another question yet again as to whether such an obligation can be meaningfully enforced.

IV. Enforcing the positive obligation to protect Article 2 TEU values

In the following sections, we contend that an obligation on the part of a Member State to take action to prevent violations of Article 2 TEU values from occurring arises when there is a systemic risk to those values. Having explored this idea, we further contend that the

⁸⁶ Cf. European Parliament, *supra* n 20, Recital F; Klamt, *supra* n 2, 342; Hatje, *supra* n 2, 266; Hölzen and Marandi, *supra* n 2.

⁸⁷ Hillion, *supra* n 17, 523.

⁸⁸ See, for example, K Duden, "Schützt Das Bundesverfassungsgericht!: Rechtsvergleichende Überlegungen" (Verfassungsblog, 2024) available at <https://verfassungsblog.de/schutzt-das-bundesverfassungsgericht/> (last accessed 23 April 2024); LTO, "BVerfG-Schutz: BMJ schlägt Grundgesetzänderung vor" (Legal Tribune Online, 2024) available at <https://www.lto.de/recht/nachrichten/n/resilienz-schutz-bverfg-gesetzesentwurf-bmj-grundgesetz-nderung-verfassung> (last accessed 12 September 2024).

Member States enjoy a wide margin of discretion as to the means chosen to address an identified systemic risk to EU values. We then consider who can enforce positive obligations against Member States.

1. Systemic risks to Article 2 TEU values

How should one determine whether a sufficiently serious threat to Article 2 TEU values has arisen to trigger the obligation on the part of the Member States to take preventive action to safeguard those values? Should we evaluate this based on individual, identifiable risks, or confine our analysis to situations of systemic risks to the Union's foundational values? We submit that an obligation may be triggered on the part of a Member State only once a systemic and generalised risk to Article 2 TEU has arisen. This is because Article 2 TEU's nature is that it is a norm that imposes upon Member States (structural) minimum standards.⁸⁹ Support for this can be found in Article 7(1) TEU, which only condemns risks of a "serious breach" of Article 2 TEU and where "[t]he risk or breach identified must (...) go beyond specific situations and concern a more systematic problem."⁹⁰ This is further confirmed by a closer look at the Court's judgment in *Repubblika*, which addresses the risk of value regression. Value regression, however, implies that the situation in question is of sufficient gravity, or of a systemic nature, to lead to a regression in the protection of Article 2 TEU values.⁹¹ This is also the approach supported by AG Bobek with regards to the rule of law. He notes that the enforcement of EU values is "an extraordinary remedy for extraordinary situations," the purpose of which "is not to catch all possible issues (...) but only those of a certain gravity and/or of a systemic nature."⁹² Hence, the obligation flowing from Article 2 TEU to take action to safeguard EU values will arise only when the threat to those values reaches a certain gravity or is of a systemic nature.

2. A wide margin of discretion

Turning then to enforcement, we submit that the Member States are always under an obligation to protect Article 2 TEU values. Member States enjoy full discretion to assess, evaluate and design the best strategies to guarantee Article 2 TEU. This changes only when there is: (i) a threat to Article 2 TEU values which reaches a certain gravity; and/or (ii) a Member State becomes aware (or should have become aware) that a systemic threat to Article 2 TEU is likely to arise. The existence of such a grave and/or systemic risk to the protection of EU values leads to the concretisation of the obligation under Article 2 TEU to take preventive action to safeguard those values from threat.

Whereas the existence of a serious risk to Article 2 TEU means that EU institutions will now start to monitor⁹³ how Member States remedy the threat to Article 2 TEU, this does

⁸⁹ See, for example, LD Spieker, "Defending Union Values in Judicial Proceedings. On How to Turn Article 2 TEU into a Judicially Applicable Provision" in A von Bogdandy and Others (eds), *Defending Checks and Balances in EU Member States: Taking Stock of Europe's Actions* (Springer 2021) p 257 et sqq; M Taborowski and Others, "Guest Editorial: A Potential Constitutional Moment for the European Rule of Law – The Importance of Red Lines" (2018) 55 Common Market Law Review 983, 990; A Von Bogdandy, "Principles of a Systemic Deficiencies Doctrine: How to Protect Checks and Balances in the Member States" (2020) 57 Common Market Law Review 705, 717 et sqq.

⁹⁰ European Commission, "Communication from the Commission to the Council and the European Parliament on Article 7 of the Treaty on European Union – Respect for and promotion of the values on which the Union is based", COM/2003/0606 final, [1.4.1.].

⁹¹ Rossi, *supra* n 68, 6.

⁹² Opinion of AG Bobek, Cases C-748/19 to C-754/19, *Prokuratura Rejonowa w Mińsku Mazowieckim* [2021] ECLI:EU:C:2021:403, para. 147.

⁹³ This monitoring can be done either under Article 7(1) TEU, under Article 258 TFEU or under various mechanisms of the EU's rule of law protection toolbox.

not mean that EU law requires Member States to adopt specific measures. In this context, the Court has clarified the relationship between Article 2 TEU and the guarantee of national identity under Article 4(2) TEU. According to the Court, Member States must comply with Article 2 TEU even “in choosing their respective constitutional model.”⁹⁴ This means that even in areas that fall under a Member State’s national identity, the Member States share one conception of the values in Article 2 TEU and must respect them at all times.⁹⁵ Rather than being the ultimate limit to Article 2 TEU, Article 4(2) TEU thus must be read taking into account Article 2 TEU.⁹⁶ As such, “only a conception of national identity which is consistent with the fundamental values of the European Union as enshrined inter alia in Article 2 TEU may be protected under Article 4(2) TEU.”⁹⁷ Consequently, Member States are, on the one hand, under a duty to choose appropriate measures that guarantee the respect of Article 2 TEU but, on the other hand, they are free to choose the appropriate measures in light of their constitutional history and traditions.

This is especially so as positive preventive obligations will only rarely, if ever, dictate to the Member State what specific measures it must take to remedy a particular threat to Article 2 TEU values. Rather, Member States enjoy discretion when ensuring compliance with their obligations under Article 2 TEU, taking into account their national identity and their specific constitutional traditions when doing so. Indeed, the duty to protect Article 2 TEU is predominantly a matter of achieving a certain level of protection that can be realised in several different ways.

Considering that Member States are under an EU law obligation to counter the risks posed to Article 2 TEU, the Council, Commission or perhaps even Parliament (depending upon the procedures involved) might recommend specific steps to the Member State, and the Member State can then enter into a dialogue with the relevant EU institutions. While the Commission has often been described as hesitant or even reluctant to enforce the values of Article 2 TEU in infringement proceedings,⁹⁸ it has put considerable effort into developing prevention mechanisms, such as for example the Rule of Law Reports which since 2023 contain specific recommendations to the Member States. A violation of a Member State’s obligation to protect the values of Article 2 TEU will, however, only be found where a Member State fails to take *any* measures to remedy a threat to Article 2 TEU, or where the measures taken were completely inadequate or unsuitable to address said risk. While, from this perspective, it might seem unlikely that the European Commission will launch an infringement action against Member States on the basis of preventive obligations, we maintain that the added value in recognising an obligation on the part of the Member States to take preventive action to protect Article 2 TEU lies in creating a meaningful and fruitful dialogue with Member States on how to best protect Article 2 TEU values, enabling the European institutions to enter into the conversation and address threats to European values earlier. In doing so, it also significantly changes the division of responsibilities between the Member States and the Union institutions, making the management of “value crises” a shared responsibility at all times. Whereas this does not lead to any competences being shifted from the Member States to the EU, this may

⁹⁴ Case C-430/21, *RS* [2022] ECLI:EU:C:2022:99, para. 43.

⁹⁵ Case C-156/21, *Hungary v. Parliament and Council* [2022] ECLI:EU:C:2022:97, para. 234; Case C-157/21 *Poland v European Parliament and Council* [2022] ECLI:EU:C:2022:98, para. 266; Case C-204/21, *Commission v. Poland* [2023] ECLI:EU:C:2023:442, para. 73.

⁹⁶ Case C-204/21, *Commission v. Poland* [2023] ECLI:EU:C:2023:442, para. 72.

⁹⁷ Opinion of AG Kokott, Case C-490/20, *Pancharevo* [2021] ECLI:EU:C:2021:296, para. 73.

⁹⁸ See, for example, RD Kelemen, “The European Union’s Failure to Address the Autocracy Crisis: MacGyver, Rube Goldberg, and Europe’s Unused Tools” (2023) 45 *Journal of European Integration* 223; KL Scheppele, DV Kochenov and B Grabowska-Moroz, “EU Values Are Law, after All: Enforcing EU Values through Systemic Infringement Actions by the European Commission and the Member States of the European Union” (2020) 39 *Yearbook of European Law* 3, 9; KL Scheppele, “The Treaties Without a Guardian” (2023) 29 *CJEL* 93.

potentially reduce the risk of constitutional conflicts between the Union and Member States moving forward.

3. Public vs private enforcement

Finally, then, who is capable of enforcing the obligation on the part of the Member States to take preventive action to safeguard EU values in circumstances where the threat level reaches a sufficient degree of gravity and/or systematicity? Evidently, the European Commission is entrusted by the EU Treaties to ensure that Member States comply with their EU law obligations,⁹⁹ and this includes obligations flowing from Article 2 TEU.¹⁰⁰ But what about private individuals? Can they invoke the obligation in a national court that Article 2 TEU places upon Member States to take preventive action to safeguard EU values when they are under threat?

Notably, many scholars argue that Article 2 TEU is too vague to be the separate subject of infringement actions under Article 258 TFEU.¹⁰¹ On this basis, one could also question whether Article 2 TEU, as a standalone provision, is able to give rise to positive obligations. After all, the CJEU's case law suggests that a positive obligation "exists only in conjunction with a specific obligation on the part of the Member States pursuant to the Treaties."¹⁰²

It is important at this juncture to consider the issues of justiciability and direct effect.¹⁰³ Although an authoritative response by the Court is still outstanding, AG Ćapeta has recently held that Article 2 TEU imposes in and of itself legally binding obligations and that these obligations are justiciable in the sense that they can be used as a yardstick to review Member State legislation.¹⁰⁴ AG Ćapeta's finding of justiciability is however limited to the negative obligations contained in Article 2 TEU. At the time of writing, the question of whether Article 2 TEU is capable in and of itself of imposing legally binding positive obligations upon the Member States thus remains open. Relatedly, the question of whether Article 2 TEU is itself capable of direct effect has not yet been addressed by the CJEU.

However, we submit that, irrespective of the answer that ultimately comes from the Court in relation to Article 2 TEU, Member States nevertheless are obliged to take positive action to protect Article 2 TEU values on the basis of the non-regression principle, read in light of Article 4(3) TEU. This combination of provisions creates sufficiently concrete legal obligations which bind the Member States, and which may be invoked by the Union, e.g., via Article 258 TFEU proceedings. However, that same combination of provisions lacks the specificity required to be capable of direct effect. This is because there is a difference between saying: (i) that the combination of Article 2 TEU, the specific non-regression principle and Article 4(3) TEU can create legal obligations upon the Member States; and saying (ii) that those same obligations are sufficiently clear and precise to be invoked by individuals. Whereas all provisions of EU law that are capable of direct effect are

⁹⁹ Cf. Article 17(1) TEU, Article 258 TFEU.

¹⁰⁰ Cf. Opinion of AG Ćapeta, Case C-769/22, *Commission v Hungary* [2025] ECLI:EU:C:2025:408, para. 188, concluding that Article 2 TEU imposes legal obligations upon the Member States.

¹⁰¹ See, for example, M Bonelli, "Infringement Actions 2.0: How to Protect EU Values before the Court of Justice" (2022) 18 *European Constitutional Law Review* 30, 47; P Pohjankoski, "Rule of Law with Leverage: Policing Structural Obligations in EU Law with the Infringement Procedure, Fines, and Set-Off" (2021) 58 *CMLR* 1341, 1346; Boeckstein, *supra* n 51, 437, 447; B Riedl, "The Case against Enforcing the Article 2 TEU Values Independently" (*European Law Blog*, 31 March 2025) available at <https://www.europeanlawblog.eu/pub/wi1tmaqB/release/1> (last accessed 10 June 2025); F de Cecco, "Added Value(s)?" (*Verfassungsblog*, 5 December 2024) available at <https://verfassungsblog.de/commission-v-hungary/> (last accessed 6 December 2024).

¹⁰² Case C-15/22, *RF v Finanzamt G* [2023], ECLI:EU:C:2023:636, para. 59.

¹⁰³ LD Spieker, *EU Values Before the Court of Justice: Foundations, Potential, Risks* (Oxford University Press 2023), Chapter 2.

¹⁰⁴ Opinion of AG Ćapeta, Case C-769/22, *Commission v Hungary* [2025] ECLI:EU:C:2025:408, para. 188, 218.

justiciable, the inverse is not necessarily true. For example, the principle of sincere cooperation itself, as enshrined in Article 4(3) TEU, is not capable of direct effect.¹⁰⁵ And yet, the Commission has launched infringement proceedings against Member States for infringing elements of that provision, and the CJEU has found in the Commission's favour.¹⁰⁶ As Klamert puts it, despite not being capable of direct effect, the principle of sincere cooperation in Article 4(3) TEU is "an independent source of obligations in a variety of constellations."¹⁰⁷ Accordingly, the question of whether the non-regression principle for Article 2 TEU values, read in light of Article 4(3) TEU, is capable of placing binding positive obligations upon the Member States to take preventive action (justiciability) is a different question to whether those obligations may be invoked by individuals (direct effect). This much is clear from the Court's recent judgment in *RF v Finanzamt G*, where it was held that Article 4(3) TEU, in combination with general statements on the policy objectives and general functioning of EU development cooperation policy (Articles 208(1) and 210(1) TFEU), could not have the effect of creating individual rights that could be invoked in national courts. This was because those latter provisions were "too general" to be capable of creating such rights.¹⁰⁸ Crucially, for present purposes, the Court concluded that, "while the Member States and the European Union are able to rely on those obligations, those provisions, by contrast – in the absence of a more concrete expression of the obligations they provide for – cannot be raised by individuals as against a Member State or the European Union."¹⁰⁹ This leads to the conclusion that a Member State's obligation under Article 2 TEU to take preventive action to safeguard EU values in circumstances where they are under threat can be invoked by the Commission via Article 258 TFEU. However, CJEU jurisprudence equally suggests that such an obligation can, under specific circumstances, be relied upon by individuals. This is the case if the obligation under Article 2 TEU to take preventive action to protect EU values is granted expression to in another, more concrete Treaty provision.¹¹⁰ For the rule of law, that would be Article 19 (1) TEU. For the value of democracy, that would be Article 10(1)-(3) TEU.

V. Conclusion

The sections above have argued that Article 2 TEU can form the legal basis from which Member States are placed under positive obligations to take action to prevent violations of the EU's founding values from occurring. Such an obligation arises whenever those values are presently under threat (or when a threat is imminent), and when such a threat is sufficiently grave or systemic. We believe that an interpretation of Article 2 TEU that requires Member States to act, at source, to prevent national actors from committing violations of EU values, contributes to enhancing constitutional resilience in the EU. Construed as an obligation to protect European values, and enforced mainly by the European Commission, the preventive approach taken to Article 2 TEU above would address threats to those foundational values at an earlier stage; thereby potentially

¹⁰⁵ Case C-511/03, *Ten Kate Holding Musselkanaal ua* [2005] EU:C:2005:625, para. 28.

¹⁰⁶ Case C-192/84, *Commission v Greece* [1985] EU:C:1985:497, paras. 19–20. For discussion see M Klamert, "Loyalty and Solidarity as General Principles" in KS Ziegler, PJ Neuvonen and V Moreno-Lax (eds), *Research Handbook on General Principles in EU Law* (Edward Elgar Publishing 2022) p 128.

¹⁰⁷ *Ibid.*

¹⁰⁸ Case C-15/22, *RF v Finanzamt G* [2023] ECLI:EU:C:2023:636, para. 60.

¹⁰⁹ *Ibid.*, para. 61.

¹¹⁰ Case C-156/21, *Hungary v. Parliament and Council* [2022] ECLI:EU:C:2022:97, para. 232; Case C-157/21 *Poland v European Parliament and Council* [2022] ECLI:EU:C:2022:98, para. 264.

preventing potentially irreparable damage to Member State institutions and the proper functioning of the EU legal order.

Acknowledgments. This article was presented at the 7th Young European Law Scholars Conference 2024 in Ljubljana. We would like to thank the organisers Jaka Kukavica and Marjan Kos, as well as Iris Goldner Lang for her insightful comments on our paper. We would further like to thank the anonymous reviewer for their valuable feedback.

Competing interests. The authors have no conflicts of interest to declare.