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Volume Editors

The European Union 2004–2024

Twenty Years of Legal Experience, Challenges and Growth after Unprecedented EU Enlargement

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Foreword

All opinions expressed herein are personal to the author.

Becoming a Member of the European Union: A Constitutional Moment

1 May 2004 represented the fulfilment of a struggle for freedom, justice and democracy that was six decades in the making, becoming unstoppable in 1989 with the Solidarity movement, the Baltic Chain, the fall of the Berlin Wall, and the Velvet Revolution. What united that generation of Europeans was their unbreakable resolve to tear down the Iron Curtain, which had immersed them in the darkness of authoritarian rule since the end of World War II.

Above all, the 2004 accession, the largest single enlargement ever, put to rest the idea of a divided Europe. The European family was again reunited in a project that revolves around building together a "common legal order" based on the values of freedom, democracy and justice.[1] For the Czech Republic, Estonia, Cyprus, Latvia, Lithuania, Hungary, Malta, Poland, Slovenia and Slovakia, becoming a member of the EU was a constitutional moment.

I used the expression "constitutional moment" because, *looking back*, those ten Member States had to undergo institutional reforms and adopt new laws that sought to demolish the remains of an authoritarian past and replace it with a democratic system of governance, while implementing the EU *acquis*. It was a constitutional moment because, *looking forward*, those ten Member States had, as an act of national sovereignty, decided to take part in European integration. This meant being loyal to the EU, by respecting the values on which it is founded and the principles on the basis of which it operates.

[1] Judgments of 16 February 2022, Hungary v Parliament and Council, C-156/21, EU:C:2022:97, para 127, and of 16 February 2022, Poland v Parliament and Council, C-157/21, EU:C:2022:98, para 145.

To some extent, this idea of "looking back" and "looking forward" underpins my speech. In constitutional terms, that idea has been translated into two founding constitutional principles that are attached to EU membership: the principle of constitutional alignment and the principle of no regression in value protection. I will examine these two principles in the light of the case law of the Court of Justice of the European Union (the "Court of Justice").

Before accession, the constitution—and even the national identity—of the candidate State for EU membership must align itself with the values on which the EU is founded. The *raison d'être* of that principle is to prevent any conflicts between the national identity of that State and the EU identity, whilst creating synergies between them. Based on common values, both types of identity enter into a mutually reinforcing dynamic, which allows room for mutual trust. *After* accession, compliance with the principle of no regression in value protection precludes a Member State from passing reforms that lead to democratic backsliding. In the EU legal order, there is no room for authoritarian drifts. More freedom, more democracy and more justice are the only way forward.

I shall now explore the meaning, content and impact of those two constitutional principles.[2]

I. The Principle of Constitutional Alignment

A candidate State for EU membership must align its own constitution and national identity with the values on which the EU is founded as a *condidío sine qua non* for accession. It must commit itself to respecting "the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights", which are contained in Article 2 TEU.

As the Court of Justice held in the ***Conditionality Judgments***, "[the] values contained in Article 2 TEU have been identified and are shared by the Member States. They define *the very identity of the European Union as a common legal order*. Thus, the European Union must be able to defend those values, within the limits of its powers as laid down by the Treaties".[3] This means, in essence, that those values draw inspiration from the constitutional traditions common to the Member States. Those values are not the result of a "top-down" approach but follow a "bottom-up" dynamic. They encapsulate the struggle of previous generations of Europeans who

[2] See, generally, Lenaerts K (2023) On Checks and Balances: the Rule of Law Within the EU 29(2) *Columbia Journal of European Law*, p. 25, and On Values and Structures: The Rule of Law and the Court of Justice of the European Union. In: Södersten A and Hercock E (eds) (2023) *The Rule of Law in the EU: Crisis and Solutions* (Stockholm, Swedish Institute for European Policy Studies), p. 12.

[3] Judgments of 16 February 2022, Hungary v Parliament and Council, C−156/21, EU:C:2022:97, para 127, and of 16 February 2022, Poland v Parliament and Council, C−157/21, EU:C:2022:98, para 145 (emphasis added).

strived for freedom, democracy and justice. They form part of our common heritage as Europeans.

For example, the values contained in Article 2 TEU can be found in the Lithuanian Constitution. Its preamble contains references to "the innate rights of the human being" and to "an open, just, and harmonious civil society under the rule of law".

The "Copenhagen Criteria" require, *inter alia*, strict adherence to that alignment. The decision to align its own constitutional arrangements with EU values is a sovereign choice of a candidate State for EU membership.[4] And, if a candidate State fails to do so, Article 49 TEU bars it from becoming a member of the EU.[5]

Whilst EU law protects the national identity of the Member States within the meaning of Article 4(2) TEU, a Member State may not invoke its national identity in order to disregard the values contained in Article 2 TEU and the Treaty provisions that give concrete expression to those values.[6] This normative conflict is precisely what the principle of constitutional alignment seeks to avoid.

For example, national identity may not be invoked as a means of calling into question the principles of effective judicial protection and judicial independence, as provided for by Article 19(1) TEU, which gives concrete expression to the value of respect for the rule of law. This was made crystal clear by the Court of Justice in ***Commission v Poland (Independence and private life of judges)***. There, the Court held—and I quote—that "there is no ground for maintaining that the requirements arising, as conditions for both accession to and participation in the European Union, from respect for values and principles such as the rule of law, effective judicial protection and judicial independence … are capable of affecting the national identity of a Member State, within the meaning of Article 4(2) TEU".[7]

What the Court is really saying is that, by acquiring membership status, the national identity of a Member State, as protected under EU law, is deemed to be in keeping with the values contained in Article 2 TEU. This is because, otherwise, the Member State in question would not have been able to join the EU in the first place. Logically, this means that a Member State is precluded from relying on its own identity in order to breach those values.

Therefore, Article 4(2) TEU must be read taking into account the provisions, of the same rank, enshrined in Article 2 and Article 19(1) TEU, and cannot exempt

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[4] The same applies where a Member State decides to withdraw from the EU. See judgment of 10 December 2018, Wightman and Others, C-621/18, EU:C:2018:999, para 50.

[5] That provision states 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." (emphasis added). Judgment of 20 April 2021, Repubblika, C-896/19, EU:C:2021:311, para 61.

[6] Judgment of 5 June 2023, Commission v Poland (Independence and private life of judges), C-204/21, EU:C:2023:442, para 72. The same holds true for the provisions of the Charter giving concrete expression to the values on which the EU is founded. See, in this regard, judgment of 5 June 2018, Coman and Others, C-673/16, EU:C:2018:385, paras 42 to 51, and judgment of 14 December 2021, Stolichna obshtina, rayon 'Pancharevo', C-490/20, EU:C:2021:1008, paras 53 to 65.

[7] Judgment of 5 June 2023, Commission v Poland (Independence and private life of judges), C-204/21, EU:C:2023:442, para 72.

Member States from the obligation to comply with the requirements arising from those provisions.

It follows that acquiring membership status is a "constitutional moment" for the Member State concerned since, at that very moment, the legal order of that new Member State is deemed by the "Masters of the Treaties" to uphold the values on which the EU is founded. As a result, mutual trust between the new Member State and the others and, in particular, between their courts and tribunals may take place, since "[it] is based on the fundamental premiss that [all] the Member States [, the old and the new ones,] share those common values".[8]

As a matter of fact, mutual trust is one of the key features that distinguish the relationship between the 27 Member States from that between a Member State and a third country. That explains in particular why the Court, in ***Achmea***, rejected the idea that "mistrust" concerning access to effective judicial protection could become the premise between two or more Member States, even in the specific context of disputes between an investor and a public authority.[9] The principle of mutual trust thus serves to draw the dividing line between the Member States and third countries. Unlike its findings in *Achmea*, the Court suggested in **Opinion 1/17** that a third country does not necessarily share the same degree of commitment towards those values and in respect of which "trust" therefore cannot be presumed.[10] Such a third country may, however, gain that trust by building a special relationship with the EU and by being equally committed to the values on which the EU is founded.[11]

Moreover, the principle of constitutional alignment does not rule out diversity altogether. This is because the values contained in Article 2 TEU do not impose a "particular constitutional model".[12] They only impose a framework of reference within which a Member State may make its own constitutional choices in keeping with its culture, history and tradition. The concept of a "framework of reference" is also referred to by academics as "not crossing red lines".[13] Allow me to illustrate this point by looking at an example taken from the case law of the Court.

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[8] Judgment of 5 June 2023, Commission v Poland (Independence and private life of judges), C-204/21, EU:C:2023:442, para 66.

[9] Judgment of 6 March 2018, Achmea, C−284/16, EU:C:2018:158.

[10] Opinion 1/17 (EU-Canada CET Agreement), of 30 April 2019, EU:C:2019:341, para 129 (holding that "the principle of mutual trust, with respect to, inter alia, compliance with the right to an effective remedy before an independent tribunal, is not applicable in relations between the [EU] and a non-Member State").

[11] Judgment of 2 April 2020, Ruska Federacija, C−897/19 PPU, EU:C:2020:262, paras 44 and 77.

[12] Judgments of 21 December 2021, Euro Box Promotion and Others, C−357/19, C−379/19, C−547/19, C−811/19 and C−840/19, EU:C:2021:1034, para 229 and the case-law cited, and of 22 February 2022, RS (Effect of the decisions of a constitutional court), C−430/21, EU:C:2022:99, para 43.

[13] Von Bogdandy A (2021) Towards a Tyranny of Values? In: Von Bogdandy A and Others (eds) *Defending Checks and Balances in EU Member States,* Berlin, Springer, p. 91 (observing that the values contained in Article 2 TEU "do not constitute "laws of construction", but rather "red lines"").

In ***Runevič-Vardyn and Wardyn***,[14] which involved a reference made by the First District Court of the City of Vilnius, the Court of Justice was asked to examine the compatibility of national rules requiring names and surnames on civil status certificates to follow the spelling rules of the host Member State's official language with the right of EU citizens to move freely within the EU. The Court held that it was legitimate for Lithuania to protect and promote its official language. Referring to Article 3(3) TEU and Article 22 of the Charter, it observed that the EU is committed to respecting its rich cultural and linguistic diversity. Most importantly, it stated that the protection of a State's official language is part and parcel of its national identity which, in accordance with Article 4(2) TEU, the EU must protect. Subject to compliance with the principle of proportionality, a Member State may therefore adopt such spelling rules. Needless to say, the fact that other Member States may consider it unnecessary to adopt those spelling rules in order to protect their official language has no bearing on the application of the principle of proportionality. That principle does not require national courts to embark on a comparative study of the national laws on the protection of the official language in order to identify the one that is the most practical for free movers. Instead, it focuses on striking the right balance between individual interest (a person's name is a constituent element of his or her identity and of his or her private life, the protection of which is enshrined in Article 7 of the Charter) and a collective interest (the protection and promotion of the host Member State's official language).

In the EU legal order, the importance of national identity is not limited to protecting the official languages of the Member States, given that, as Article 4(2) TEU states, it also guarantees their fundamental structures and essential functions. The EU is not a State,[15] nor does it seek to become one. On the contrary, it serves to protect the Member States' statehood by creating a "pool of sovereignty" amongst them. Member States become stronger together, since they can achieve goals that would be unachievable acting alone. The protection of national identity is of paramount importance for States that have lived under Soviet occupation or that were within the Soviet Union's sphere of influence. Unfortunately, the war in Ukraine has resurrected old demons, showing that the threat of military aggression against the EU exists. That is why the EU and its Member States must be able to defend themselves effectively.

For example, disinformation is a serious threat to our democracies and to the European way of life. That is why EU law, as interpreted by the Court of Justice, serves to protect our democratic societies against that threat. For example, in ***Baltic Media Alliance***,[16] the Regional Administrative Court of Vilnius asked the Court of Justice to interpret the Audiovisual Media Services Directive.[17] In that case, the Court of Justice interpreted the directive in a way that enabled the Lithuanian authorities to

[14] Judgment of 12 May 2011, Runevič-Vardyn and Wardyn, C−391/09, EU:C:2011:291.

[15] Opinion 2/13 (Accession of the European Union to the ECHR) of 18 December 2014, EU:C:2014:2454, para 156 ("the EU is, under international law, precluded by its very nature from being considered a State").

[16] Judgment of 4 July 2019, Baltic Media Alliance, C−622/17, EU:C:2019:566.

[17] Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in

combat Russian propaganda targeting the Russian-speaking minority in Lithuania, whilst upholding the application of the country of origin principle. This meant, in concrete terms, that those authorities could oblige Lithuanian media providers to distribute a channel broadcast by a UK-based company only in pay-to-view packages, on the ground that its programmes incited hatred based on nationality.

Another example in this regard is ***RT France v Council***.[18] In that case, the General Court dismissed an action for annulment, brought by a media outlet that was wholly funded by the Russian State, against a Council Regulation that temporarily prohibited that media outlet from broadcasting content, on the grounds that it had engaged in a propaganda campaign, targeting civil society in the EU, justifying and supporting Russia's military aggression against Ukraine. The General Court reasoned *inter alia* that the Council had limited RT France's freedom of expression in a way that was in keeping with the Charter, since the challenged Regulation pursued two legitimate aims—namely, the protection of the Union's public order and security and the application of pressure on the Russian authorities in order to bring an end to the war—whilst also complying with the principle of proportionality.

In my view, the *Baltic Media Alliance* and *RT France* judgments show that in interpreting EU law, the Court of Justice and the General Court strive to protect civil society from disinformation that can cause civil unrest and threaten the democratic process, whilst guaranteeing that any restrictions on the freedom of expression are limited to what is strictly necessary. When war is at the EU's doorstep, that protection serves to maintain law and order and safeguard national security, which are components of the Member States' essential functions and thus, of their national identities.

II. The Principle of No Regression in Value Protection

After accession, the Member State in question commits itself to respecting the values contained in Article 2 TEU for as long as it remains a member of the EU. That ongoing commitment means that there is "no turning back the clock" when it comes to respecting those values. Accession is the starting point in value protection, not the finish line. A Member State can always improve its level of value protection.

The principle of no regression in value protection precludes a Member State from drifting towards an authoritarian regime or from falling into democratic backsliding. "Compliance with those values", the Court of Justice has held, "cannot be reduced to an obligation which a candidate State must meet in order to accede to the [EU]

Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive), [2010] OJ L 95/ 1.

[18] Judgment of 27 July 2022, RT France v Council, T-125/22, EU:T:2022:483.

and which it may disregard after its accession".[19] The Member States must respect those values "at all times".[20]

The prohibition of value regression is highlighted by contrasting the judgments of the Court of Justice in *A. K. and Others (Independence of the Disciplinary Chamber of the Supreme Court)* and *A.B. and Others (Appointment of judges to the Supreme Court – Actions)*, with that in *Repubblika.* In those cases, the Court of Justice held that the principle of judicial independence does not prevent the executive from appointing judges, provided that "once appointed, they are free from influence or pressure when carrying out their role".[21] That proviso means, in essence, that the substantive conditions and procedural rules governing the adoption of those appointment decisions must not give rise to reasonable doubts as to the internal and external independence of those judges.[22] Those doubts arise where the reforms at issue bring about a regression of the rule of law. This may occur where the constitutional body in charge of evaluating the suitability of candidates for judicial office is no longer independent.

In ***A. K. and Others (Independence of the Disciplinary Chamber of the Supreme Court)*** and ***A.B. and Others (Appointment of judges to the Supreme Court – Actions)***, that appeared to be the case since the reforms at issue sought—subject to confirmation by the referring courts – to undermine the independence of the Polish National Judicial Council (the "KRS"), which, as the constitutional body entrusted with protecting judicial independence, submits proposals for appointment to judicial positions to the Polish President. Following the judgment of the Court of Justice in *A. K. and Others (Independence of the Disciplinary Chamber of the Supreme Court)*, the referring court found that the KRS was not an independent body.[23] Similarly, in the context of an infringement action brought by the Commission that challenged the new disciplinary regime for Polish judges, the Court made the same findings in respect to the KRS.[24] It noted, drawing on its previous case law, that the law reforming the KRS had shortened the mandate of incumbent members, and that 23 of the 25 members of the KRS were appointed by the Polish executive or legislature (or were

[19] Judgments of 16 February 2022, Hungary v Parliament and Council, C-156/21, EU:C:2022:97, para 126, and of 16 February 2022, Poland v Parliament and Council, C-157/21, EU:C:2022:98, para 144.

[20] Judgments of 16 February 2022, Hungary v Parliament and Council, C-156/21, EU:C:2022:97, para 234, and of 16 February 2022, Poland v Parliament and Council, C-157/21, EU:C:2022:98, para 266.

[21] Judgments of 19 November 2019, *A. K. and Others (Independence of the Disciplinary Chamber of the Supreme Court)*, C585/18, C624/18 and C625/18, EU:C:2019:982, para 133; of 2 March 2021, *A.B. and Others (Appointment of judges to the Supreme Court—Actions)*, C824/18, EU:C:2021:153, para 122, and of 20 April 2021, Repubblika, C896/19, EU:C:2021:311, para 56.

[22] Judgments of 19 November 2019, *A. K. and Others (Independence of the Disciplinary Chamber of the Supreme Court)*, C585/18, C624/18 and C625/18, EU:C:2019:982, paras 134 and 135; of 2 March 2021, *A.B. and Others (Appointment of judges to the Supreme Court—Actions)*, C824/18, EU:C:2021:153, para 123, and of 20 April 2021, Repubblika, C896/19, EU:C:2021:311, para 57.

[23] Polish Supreme Court, judgment of 5 December 2019. For a summary of that judgment, see order of 8 April 2020, Commission v Poland, C791/19 R, EU:C:2020:277, para 19.

[24] Judgment of 15 July 2021, *Commission v Poland (Disciplinary regime for judges)*, C791/19, EU:C:2021:596.

members thereof), whereas previously 15 out of 25 were elected by the Polish judges themselves.[25] Moreover, it observed that some of the new members of the KRS had, according to the referring court, been appointed in spite of significant irregularities. When compared with the appointment process in force at the time Poland acceded to the EU in 2004, the reforms at issue – which were passed in 2017 and 2018 – were a step backward.

Similarly, the finding of regression in protecting judicial independence was crucial in the seminal judgment of the Court in ***Krajowa Rada Sądownictwa (Continued holding of a judicial office)***, in which it ruled, for the first time, that a chamber of a court, namely the Chamber of Extraordinary Control and Public Affairs of the Polish Supreme Court, was not independent and, as a result, could not be considered to be a "court or tribunal of a Member State" within the meaning of Article 267 TFEU. It therefore could not make a reference for a preliminary ruling to the Court of Justice.[26]

By contrast, in ***Repubblika***, the reforms in question had actually strengthened the guarantee of judicial independence in Malta.[27] They established a body, the Judicial Appointments Committee, that gave advice to the Prime Minister of Malta about the eligibility and merit of the candidates for appointment to judicial positions. Since the independence of that body was not questioned by the referring court, it contributed to objectivising the appointment process to judicial positions. When compared with the appointment process in force at the time Malta acceded to the EU in 2004, the reforms at issue – which were passed in 2016 – were a step forward.

I would like to make three additional remarks regarding the principle of no regression in value protection. First, regarding its scope *ratione personae*, I do not believe that it only applies to Member States that have acceded to the EU. In the light of the principle of equality of Member States before the Treaties, which is enshrined in Article 4(2) TEU, the principle of no regression in value protection applies to all Member States, including the original six. As a matter of fact, the judgment in ***Asociaţia 'Forumul Judecătorilor din România' and Others*** and subsequent case law contain no reference to accession.[28] In the relevant passage of that judgment, the Court held – and I quote – 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… 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

[25] *Ibid*, para 104.

[26] Judgment of 21 December 2023, Krajowa Rada Sądownictwa (Continued holding of a judicial office), C−718/21, EU:C:2023:1015.

[27] Judgment of 20 April 2021, Repubblika, C−896/19, EU:C:2021:311, para 69.

[28] Judgments of 18 May 2021, Asociaţia 'Forumul Judecătorilor din România' and Others, C−83/19, C−127/19, C−195/19, C291/19, C−355/19 and C−397/19, EU:C:2021:393, para 162; of 15 July 2021*Commission v Poland (Disciplinary regime for judges)*, C−791/19, EU:C:2021:596, para 51, and of 21 December 2021, Euro Box Promotion and Others, C−357/19, C−379/19, C−547/19, C−811/19 and C−840/19, EU:C:2021:1034, para 162.

from adopting rules which would undermine the independence of judges".[29] Accession is therefore a relevant benchmark for examining the existence or absence of regression, but it is not the only one.

Second, regarding the scope *ratione materiae*, the principle of no regression in value protection is not limited to the value of respect for the rule of law, but may include the other values contained in Article 2 TEU, such as respect for democracy. That principle therefore precludes democratic backsliding that, for example, undermines the freedom of the press.

Third and last, in the ***Conditionality Judgments***, the Court of Justice held that "Article 2 TEU is not merely a statement of policy guidelines or intentions, but contains values which… are an integral part of the very identity of the European Union as a common legal order, values which are given concrete expression in principles containing legally binding obligations for the Member States".[30] Logically, this raises the question of whether a value contained in Article 2 TEU, such as human dignity or democracy, requires a Treaty provision that gives it concrete expression in order for that value to be operational or whether Article 2 TEU may operate as a stand-alone provision. In a pending case, ***Commission v Hungary***,[31] it appears that the Court of Justice will be confronted with that complex question.

III. Concluding Remarks

The 2004 accession is a success story, for both the ten Member States concerned and the EU as a whole. Membership has brought freedom, prosperity and progress to all. In particular, the Baltic States have become one of the most prosperous regions in Europe, leading the way in digital transformation. At the same time, the EU has been reinvigorated in its fight for freedom, democracy and justice, given that the recent history of those Member States reminds us that those values cannot be taken for granted.

EU membership is, in my view, a "two-way street". On the one hand, the Member States must strive to keep the Union strong, by showing to their citizens the added value of working together and the importance of building and maintaining an area without internal borders where citizens may move freely and securely. On the other hand, the EU protects the Member States against "value backsliding", by preventing them from deviating from the constitutional traditions common to the Member States. This means, in essence, that the values on which the EU is founded are here to stay.

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[29] Judgments of 18 May 2021, Asociația 'Forumul Judecătorilor din România' and Others, C−83/19, C−127/19, C−195/19, C−291/19, C−355/19 and C−397/19, EU:C:2021:393, para 162.

[30] Judgments of 16 February 2022, Hungary v Parliament and Council, C−156/21, EU:C:2022:97, para 232, and of 16 February 2022, Poland v Parliament and Council, C−157/21, EU:C:2022:98, para 264.

[31] Case C-769/22 *Commission v Hungary* (pending).

They must operate as a moral compass that allows both the EU and its Member States to navigate through the uncharted waters of an ever-changing world.

Civil society, and in particular academics must be active in shaping future generations so that one day, they become active citizens who know "the real value of European values", share and cherish them and are willing to defend them. It is not only in the courtroom where values become a living truth, but also in the classroom. There is no bigger danger to freedom, democracy and justice than to have citizens who take everything for granted and who cannot be bothered to stand up for what is right. Paraphrasing the famous words of Benjamin Franklin, the EU is a Union of liberal values, if we, Europeans, "can keep it".

May 2024

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