

## Hungary and the *Indirect* Protection of EU Fundamental Rights and the Rule of Law

By Mark Dawson\* & Elise Muir\*\*

### A. Introduction

According to Article 2 of the Treaty on European Union, the European Union is a political and economic union founded on a respect for fundamental rights and the rule of law, referred to hereafter as EU fundamental values.<sup>1</sup> The central place of this commitment in the EU Treaties suggests a founding assumption: That the EU is a Union of states who themselves see human rights and the rule of law as irrevocable parts of their political and legal order. Reminiscent of the entry of Jorg Haider's far-right Freedom Party into the Austrian government in 2000, the events of 2012 have done much to shake that assumption; questioning both how interwoven the rule of law tradition is across the present-day EU, and the role the EU ought to play in policing potential violations of fundamental rights carried out via the constitutional frameworks of its Member States. Much attention in this field, much like the focus of this paper, has been placed on events in one state in particular: Hungary.<sup>2</sup>

Although Article 2 TEU firmly asserts fundamental values as constituting the foundations of the European Union, the EU Treaties are actually remarkably ambiguous as to how the EU may address disrespect for these foundational values internally. What tools does the EU have to tackle serious threats to the rule of law, democracy, and fundamental rights in its Member States?

EU institutions went through considerable pains to identify the appropriate angle for addressing serious concerns for violations of Article 2 TEU in Hungary. As in the Roma Crisis

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<sup>1</sup> Consolidated Version of the Treaty on European Union art. 2, Oct. 26, 2012, 2012 O.J. (C326) 17 [hereinafter Consolidated TEU].

<sup>2</sup> See generally Mark Dawson & Elise Muir, *Enforcing Fundamental Values: EU Law and Governance in Hungary and Romania*, 4 MAASTRICHT J. OF EUR. & COMP. L. 469 (2012); István Pogány, *The Crisis of Democracy in East Central Europe: The 'New Constitutionalism' in Hungary*, 19 EUR. PUB. L. 341 (2013).

that triggered a war of words between the European Commission and France in 2010,<sup>3</sup> the Hungarian case illustrates the significant weaknesses of EU mechanisms for the enforcement of fundamental values. Despite the wealth of fundamental rights instruments developed since the Maastricht Treaty,<sup>4</sup> the Hungarian affair exemplifies the recurrent need for the European Union to demonstrate that fundamental value violations fall within the scope of EU law.

Political and legal weaknesses in the EU framework for the enforcement of fundamental values often lead the Union to promote *indirect* means of tackling potential violations. Lacking either the necessary tools or the political legitimacy to censure rule of law violations head-on, EU institutions often rely on a dense web of instruments to place Member States under pressure to rectify potential threats to core fundamental values. Such indirect routes to enforce these fundamental values may be preferred to direct mechanisms—such as the procedure contained in Article 7 of the TEU, or more narrowly defined EU fundamental rights policies, as will be explained in Section C.<sup>5</sup> In the Hungarian example, key political actors first relied on internal market instruments—such as harmonization techniques setting standards for non-economic values or infringement actions—in order to better protect fundamental rights and the rule of law. While such an approach has been limited by the substantive scope of EU internal market arguments, as will be explained in Section D, more recent policies of the EU have provided fertile leverage instruments. This is true for both targeted EU fundamental rights policies and for the economic governance package, as detailed in Section E. EU economic integration processes thus remain powerful indirect sources of intervention for the protection of EU values.

The Hungarian example illustrates the complementarities between EU internal market policy and the protection of EU fundamental values, as well as its limits. This, in turn, sheds light on the importance of emerging EU competences that empower EU actors to strengthen their grip on core domestic policies concerned with fundamental rights protection, as well as those concerned with deeper threats to the rule of law. The paper will conclude in Section F by discussing the normative limits of an indirect strategy in policing EU fundamental values. To begin, let us briefly review the legal and constitutional reforms that have taken place in Hungary since the Orbán government's rise to power in 2010.

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<sup>3</sup> See generally Mark Dawson & Elise Muir, *Individual, Institutional and Collective Vigilance in Protecting Fundamental Rights in the EU: Lessons from the Roma*, 48 COMMON MKT. L. REV. 751 (2011); Roos Buijs & Morag Goodwin, *Making Good European Citizens of the Roma: A Closer Look at the EU Framework for National Roma Integration Strategies*, 14 GERMAN L.J. 2041 (2013).

<sup>4</sup> See Gráinne de Búrca, *The Evolution of EU Human Rights Law*, in THE EVOLUTION OF EU LAW 465 (Paul Craig & Gráinne de Búrca eds., 2011).

<sup>5</sup> See Consolidated TEU, *supra* note 1, at art. 7.

## B. The ‘Hungarian Problem’

What has now become known as the Hungarian problem<sup>6</sup> is a reference to the multi-faceted set of events that occurred in the aftermath of the 2010 election. This election brought the government of Viktor Orbán to power with the support of more than two-thirds of Parliament. The new political authorities introduced a set of reforms that raised concerns across Europe for the respect for fundamental rights, democracy, and the rule of law in Hungary.

New media regulations were adopted in 2010<sup>7</sup> and remain worrisome,<sup>8</sup> despite changes pushed forward by the European Commission before the Hungarian Presidency of the Council,<sup>9</sup> and a ruling of the Hungarian Constitutional Court requesting that changes be effectuated.<sup>10</sup> More broadly, a new Constitution—the Fundamental Law of Hungary<sup>11</sup>—was swiftly adopted in April 2011 and entered into force in January 2012, despite limited public debate.<sup>12</sup> As stated by the Commission itself, the new Constitution’s entry into force calls into question the existence of “a legally stable environment, based on the rule of law,

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<sup>6</sup> See generally Editorial, *Hungary’s New Constitutional Order and “European Unity,”* 49 COMMON MKT. L. REV. 871 (2012).

<sup>7</sup> See generally MEMORANDUM FROM THE HUMAN RIGHTS WATCH TO THE EUROPEAN UNION ON MEDIA FREEDOM IN HUNGARY, HUMAN RIGHTS WATCH (Feb. 16, 2012) [hereinafter MEMO FROM THE HRW], available at <http://www.hrw.org/node/105200>.

<sup>8</sup> See generally Letter from Lotte Leicht & Hugh Williamson, Director of EU Advocacy and Director of Europe and Central Asia Division, Human Rights Watch, to Commissioner Kroes Regarding Media Freedom in Hungary (July 2, 2012), available at <http://www.hrw.org/node/108503>.

<sup>9</sup> See generally *Loi sur les Médias: La Hongrie Cède à la Pression Européenne*, LE MONDE (Feb. 16, 2011), [http://www.lemonde.fr/europe/article/2011/02/16/loi-sur-les-medias-la-hongrie-cede-a-la-pression-europeenne\\_1481169\\_3214.html](http://www.lemonde.fr/europe/article/2011/02/16/loi-sur-les-medias-la-hongrie-cede-a-la-pression-europeenne_1481169_3214.html).

<sup>10</sup> See generally HUNGARIAN CIVIL LIBERTIES UNION, SUMMARY OF THE DECISION OF THE CONSTITUTIONAL COURT OF HUNGARY ON THE MEDIA LAWS IN 2011 BY THE HUNGARIAN CIVIL LIBERTIES UNION (2013), available at [http://tasz.hu/files/tasz/imce/2011/hclu\\_const\\_court\\_media\\_law\\_dec\\_brief.pdf](http://tasz.hu/files/tasz/imce/2011/hclu_const_court_media_law_dec_brief.pdf). The Human Rights Watch also reports that there are efforts in Hungary to bring the case further to the ECHR, see MEMO FROM THE HRW, *supra* note 7.

<sup>11</sup> A MAGYAR KÖZTÁRSASÁG ALKOTMÁNYA [CONSTITUTION OF THE REPUBLIC OF HUNGARY], available at [http://tasz.hu/files/tasz/imce/alternative\\_translation\\_of\\_the\\_draft\\_constituion.pdf](http://tasz.hu/files/tasz/imce/alternative_translation_of_the_draft_constituion.pdf).

<sup>12</sup> See *Opinion of the European Commission for Democracy Through Law (Venice Commission) on the Three Legal Questions Arising in the Process of Drafting the New Constitution of Hungary*, paras. 14–19, CDL-AD (2011) 016 (Mar. 25–26, 2011), available at [http://www.europarl.europa.eu/meetdocs/2009\\_2014/documents/libe/dv/venice\\_commission\\_opinion\\_614-11/venice\\_commission\\_opinion\\_614-11en.pdf](http://www.europarl.europa.eu/meetdocs/2009_2014/documents/libe/dv/venice_commission_opinion_614-11/venice_commission_opinion_614-11en.pdf).

including respect of media freedom, democratic principles and fundamental rights. . . .<sup>13</sup> A new set of cardinal, or organic laws, and legislative reforms<sup>14</sup> accompanied the new Constitution, most notably with respect to the right to freedom of conscience and religion; the legal status of churches, denominations, and religious communities; on the legal status and remuneration of judges; and on the organization and administration of the courts. These cardinal laws may only be reversed by significant parliamentary majorities.

Hungary's constitutional reforms brought concerned responses not only from domestic actors, but also from transnational human rights bodies. The European Commission for Democracy Through Law (better known as the Venice Commission) of the Council of Europe has expressed serious misgivings about numerous aspects of these reforms over the last year.<sup>15</sup> It has also delivered opinions on a number of serious matters for which the Parliamentary Assembly of the Council of Europe took the initiative.<sup>16</sup> It is particularly interesting to observe the way the EU institutions—often accused of being more demanding on human rights and democratic standards with external partners than with its own members<sup>17</sup>—have reacted.

Faced with the reports of the Venice Commission, EU institutional actors have struggled to identify the most efficient legal and political tools with which to react. Since 2011, the European Commission, as represented by Neelie Kroes, the Vice President responsible for the Digital Agenda for Europe, has liaised with the Hungarian authorities to express

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<sup>13</sup> Press Release, European Commission, Statement of the European Commission on the Situation in Hungary on 11 January 2012 (Jan. 11, 2012) [hereinafter European Commission Statement], available at <http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/12/9&format=HTML&aged=0&language=EN&guiLanguage=en>. See generally *Opinion of the European Commission for Democracy Through Law (Venice Commission) on the New Constitution of Hungary*, CDL-AD (2011) 016 (June 17–18, 2011), available at <http://www.venice.coe.int/webforms/documents/CDL-AD%282011%29016-E.aspx> (illustrating the reaction of other institutions); Resolution on the Revised Hungarian Constitution, EUR. PARL. DOC. P7\_TA 0315 (2011), available at <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONGML+TA+P7-TA-2011-0315+0+DOC+PDF+V0//EN>.

<sup>14</sup> Several of them are available in an English version at: [http://www.venice.coe.int/WebForms/pages/default.aspx?p=01\\_main\\_reference\\_documents&lang=en](http://www.venice.coe.int/WebForms/pages/default.aspx?p=01_main_reference_documents&lang=en).

<sup>15</sup> An overview of all opinions on the situation in Hungary is available at: <http://www.venice.coe.int/webforms/documents/?country=17&year=all>.

<sup>16</sup> See generally *Opinion of the European Commission for Democracy Through Law (Venice Commission) on Act CLXII of 2011 on the Legal Status and Remuneration of Judges and Act CLXI of 2011 on the Organization and Administration of Courts of Hungary*, CDL-AD (2012) 001 (Mar. 16–17, 2012) [hereinafter *Opinion on Acts CLXII and CLXI*], available at [http://www.venice.coe.int/webforms/documents/CDL-AD\(2012\)001-e.aspx](http://www.venice.coe.int/webforms/documents/CDL-AD(2012)001-e.aspx); *Opinion of the European Commission for Democracy Through Law (Venice Commission) on Act CLI of 2011 on the Constitutional Court of Hungary*, CDL-AD (2012) 009 (Jun. 15–16, 2012), available at [http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2012\)009-e](http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2012)009-e).

<sup>17</sup> See generally Editorial, *Fundamental Rights and EU Membership: Do As I Say, Not As I Do!*, 49 COMMON MKT. L. REV. 481 (2012) [hereinafter *Editorial on Fundamental Rights*].

concern for media freedom and pluralism in Hungary.<sup>18</sup> In January 2012, the College of Commissioners also expressed its concerns regarding the general situation in Hungary.<sup>19</sup> Although it did not explicitly target the constitutional changes or cardinal laws, the College sent a clear warning by initiating the first steps of infringement procedures (only two of which were taken to Court, see Section E below) against the background of “doubt on respect for democratic principles and values” in Hungary.<sup>20</sup> On the same day the Commission expressed its concern for the general situation in Hungary, although in a clearly distinct document, the Commission also submitted a Recommendation for a Council Decision establishing that no effective action has been taken by Hungary to bring an end to its excessive government deficit.<sup>21</sup> This soon led to a finding against Hungary at the Council<sup>22</sup> and the temporary suspension of commitments from the Cohesion Fund for 2013 (now overturned).<sup>23</sup>

Throughout this tense period, the European Parliament also voiced its misgivings about the problematic Hungarian reforms. This reached an apex when the European Parliament

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<sup>18</sup> Letter from Neelie Kroes, Vice-President of the European Commission, to Tibor Navracsics, Deputy Prime Minister of Hungary (Jan. 1, 2011), [http://cmcs.ceu.hu/sites/default/files/domain-69/cmcs-archive/EC\\_lettertoHungary\\_2011Jan21.pdf](http://cmcs.ceu.hu/sites/default/files/domain-69/cmcs-archive/EC_lettertoHungary_2011Jan21.pdf) [hereinafter 2011 Letter]; Letter from Neelie Kroes, Vice-President of the European Commission, to Tibor Navracsics, Deputy Prime Minister of Hungary (Jan. 17, 2012), <http://blogs.rftdata.co.uk/brusselsblog/files/2012/01/KroesHungaryLetter1.pdf>. The conclusions of the High Level Group on Media Freedom and Pluralism in Hungary are attached to the letter dated January 17, 2012.

<sup>19</sup> See European Commission Statement, *supra* note 13.

<sup>20</sup> Press Release, European Commission, European Commission Opens Accelerated Infringement Proceedings Against Hungary (Jan. 17, 2012), *available at* <http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/12/17>.

<sup>21</sup> *Recommendation for a Council Decision Establishing That No Effective Action Has Been Taken by Hungary in Response to the Council Recommendation of 7 July 2009*, COM (2012) 5 final (Jan. 11, 2012), *available at* <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2012:0005:FIN:EN:PDF>. For an overview of the economic monitoring of the situation in Hungary see *2004-2013 Hungary-Specific Procedures*, EUROPEAN COMMISSION, [http://ec.europa.eu/economy\\_finance/economic\\_governance/sgp/deficit/countries/hungary\\_en.htm](http://ec.europa.eu/economy_finance/economic_governance/sgp/deficit/countries/hungary_en.htm).

<sup>22</sup> See Council Decision 2012/139, 2012 O.J. (L 66) 6, *Establishing Whether Effective Action Has Been Taken by Hungary in Response to the Council Recommendation of 7 July 2009*, *available at* [http://ec.europa.eu/economy\\_finance/economic\\_governance/sgp/pdf/30\\_edps/104-08\\_council/2012-01-24\\_hu\\_126-8\\_council\\_en.pdf](http://ec.europa.eu/economy_finance/economic_governance/sgp/pdf/30_edps/104-08_council/2012-01-24_hu_126-8_council_en.pdf).

<sup>23</sup> See *generally* Council of the European Union, *Recommendation to Hungary with a View to Bringing the Situation of an Excessive Government Deficit to an End*, 7141/12 (Mar. 12, 2012), *available at* [http://ec.europa.eu/economy\\_finance/economic\\_governance/sgp/pdf/30\\_edps/126-07\\_council/2012-03-13\\_hu\\_126-7\\_council\\_en.pdf](http://ec.europa.eu/economy_finance/economic_governance/sgp/pdf/30_edps/126-07_council/2012-03-13_hu_126-7_council_en.pdf). See also Council Implementing Decision 2012/156, 2012 O.J. (L 78) 19, *Suspending Commitments from the Cohesion Fund for Hungary with Effect from 1 January 2013*, *available at* <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2012:078:0019:0020:EN:PDF>; Council Implementing Decision 2012/323, *Lifting the Suspension of Commitments from the Cohesion Fund for Hungary*, 2012 O.J. (L 165) 46, *available at* <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2012:165:0046:0047:EN:PDF>.

threatened to use the Article 7 TEU procedure designed to protect fundamental EU values through a range of possible penalties including the possible suspension of voting rights in the Council.<sup>24</sup> Nevertheless, the majority political party at the European Parliament—the European People’s Party to which Fidesz belongs—soon proved reluctant to follow up.<sup>25</sup> Although this idea has been dropped for now, a similar threat to activate the Article 7 TEU procedure was made by Neelie Kroes in early 2012.<sup>26</sup> Article 7 TEU would allow the Union to address any “serious and persistent breach by a Member State”<sup>27</sup> of the fundamental values listed in Article 2 of the TEU, yet the difficulty of putting it into practice is a painful reminder of the need for EU actors to establish a clear link with EU law in order to identify other ways to take legal action. While historically EU internal market policy has provided a central avenue to indirectly bring non-economic arguments within the scope of EU law, this option suffers from significant limitations.

### C. The *Indirect* Protection of EU Fundamental Values

What is notable about Hungary’s enforcement action is not what line of attack was pursued, but instead what was left out by the EU institutions. There has been no prosecution, for example, of the cardinal laws, but only of matters that many would consider less significant, such as the independence of the data protection supervisor and the retirement age of judges. This “Hungarian story” thus illustrates some of the difficulties faced by EU institutions in directly addressing constitutional and fundamental rights violations by its Member States. Furthermore, it is our opinion that the Hungarian affair also highlights the importance of the tools that allow EU institutions to indirectly address threats to fundamental rights and the rule of law in Europe.

The importance of this indirect protection of fundamental values in EU law is a powerful reminder of the complementarities of EU fundamental freedoms and fundamental rights policies that have perhaps too often been understood to be in conflict.<sup>28</sup> The very inability

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<sup>24</sup> See Consolidated TEU, *supra* note 1, at art. 7.

<sup>25</sup> See generally Editorial on Fundamental Rights, *supra* note 17.

<sup>26</sup> See generally Nikolaj Nielsen, *Kroes Threatens Nuclear Option Against Hungary*, EU OBSERVER (Feb. 9, 2012), <http://euobserver.com/9/115209> (expanding upon Art. 7 of the TEU as proposed by the Commission—the discussion relates to media law).

<sup>27</sup> Consolidated TEU, *supra* note 1, at art. 7, § 2.

<sup>28</sup> See generally Case C-438/05, *Int’l Transp. Workers’ Fed’n v. Viking Line ABP*, 2007 E.C.R. I-10779 (illustrating the tension between the freedom of establishment and the movement of services on the one hand, and the fundamental right to strike on the other), available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62005J0438:EN:HTML>; Case C-341/05, *Laval un Partneri Ltd. v. Svenska Byggnadsarbetareförbundet*, 2007 E.C.R. I-11767 (same), available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62005J0341:EN:HTML>; Norbert Reich, *Free Movement v. Social Rights in an Enlarged Union: The Laval and Viking Cases Before the European Court of Justice*, 9 GERMAN L.J.

of EU fundamental rights to act as a free-standing area of EU competence may require fundamental rights-based arguments to be anchored within an internal market-based argument; the internal market being the oldest and perhaps most powerful EU policy. Rather than sit in a relationship of tension, fundamental freedoms may thus be used as *activating conditions*, allowing fundamental rights and rule of law violations to come within the substantive scope of EU law.

More recently, several other policies have developed alongside the internal market that allow for EU constraints on domestic policies that would otherwise be beyond the reach of internal market tools. The EU has acquired both competences to protect certain fundamental rights and more broad economic means of placing pressure on national authorities. The Hungarian situation is therefore also an illustration of the potential expanse and limits of EU legal domains—which are much younger than the market freedoms—in pushing forward the process of European integration well beyond the realm of cross-border matters.

The protection of EU values in the context of the Hungarian affair is primarily indirect. Such protection is seldom worded in principled terms and suffers from a serious lack of available tools for the explicit and direct enforcement of the values enshrined in Article 2 TEU. While in recent years much attention has been devoted to the tension between fundamental rights and freedoms, the Hungarian example provides an opportunity to stress the complementarities between the EU internal market and fundamental rights policies, as well as to reflect more broadly on the relationship between EU law, fundamental rights, and the rule of law. This case study demonstrates that economically based arguments (either related to the internal market or more broadly to economic governance) remain the strongest leverages against a Member State questioning fundamental rights and the rule of law.

#### **D. Fundamental Rights and the EU Internal Market Arguments**

There is a significant strand of academic literature and judicial practice that views fundamental rights protection and the implementation of the market freedoms in conflict with one another.<sup>29</sup> Whereas fundamental rights are concerned with placing a circle of protection around the individual or with asserting basic normative values, the implementation of the market freedoms is a functional project whose realization may often require fundamental rights to be limited or breached altogether.

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125 (2008); John Morijn, *Balancing Fundamental Rights and Common Market Freedoms in Union Law: Schmidberger and Omega in the Light of the European Constitution*, 12 Eur. L. J. 15 (2006). See also Gareth Davies, *The Price of Letting Courts Value Solidarity: The Judicial Role in Liberalizing Welfare*, in PROMOTING SOLIDARITY IN THE EUROPEAN UNION 106 (Malcolm Ross & Yuri Borgmann-Prebil eds., 2010).

<sup>29</sup> See *id.*

This tension is exemplified in the famous *Laval-Viking* cases.<sup>30</sup> In both of these cases, the European Court of Justice sought to mediate between fundamental rights guarantees on the one hand, such as the right to strike, and fundamental freedoms on the other hand, such as the freedom of service providers to establish themselves abroad. These two sets of objectives were clearly in conflict, given that strike action was being used to simultaneously defend Scandinavian jobs and working conditions, and to make it more difficult for foreign providers to enter new markets. The Court was faced with a stark choice: Either see the right to strike as outside the scope of internal market law, thereby providing it with a *de facto* priority, or subject the right to strike to the normal tests of justification and proportionality. By choosing the second route, the Court exposed itself to criticism that market freedoms were being prioritized over fundamental rights, which were only allowable where proportional to those freedoms.<sup>31</sup> In this sense, many of the most controversial cases of internal market law concern the precarious need to balance opposing market and non-market values.

Yet, the Hungarian case also illustrates that the relationship between the internal market and fundamental rights does not always follow this pattern. Rather than functioning as a limit to fundamental rights, fundamental freedoms can also be used as activation conditions for fundamental rights. In other words, a violation of market freedoms may be a necessary condition to raise fundamental rights claims in the first place. For example, a case may be prosecuted as a violation of a fundamental freedom, either in lieu of a fundamental rights claim or as a means of bringing a fundamental rights issue into the normative sphere that is governed by EU law.

Understanding this point requires revisiting discussions surrounding the scope of EU law.<sup>32</sup> As explored in the section above, one limit on the effective enforcement of EU

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<sup>30</sup> Case C-341/05, *Laval un Partneri*, 2007 E.C.R. I-11767; Case C-438/05, *Viking Line*, 2007 E.C.R. I-10779; Case C-346/06, *Rüffert v. Land Niedersachsen*, 2008 E.C.R. I-01989, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62006J0346:EN:HTML>; Case C-319/06, *Comm'n of the European Cmty. v. Grand Duchy of Luxemburg*, 2008 E.C.R. I-04323, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62006CJ0319:EN:HTML>.

<sup>31</sup> For critical accounts, see generally Christian Joerges & Florian Rödl, *Informal Politics, Formalized Law and the 'Social Deficit' of European Integration: Reflections After the Judgments of the ECJ in Viking and Laval*, 15 EUR. L. J. 1 (2009); Anne C. L. Davies, *One Step Forward, Two Steps Back? The Viking and Laval Cases in the ECJ*, 37 INDUS. L. J. 126 (2008).

<sup>32</sup> See generally Elise Muir, *Of Ages in – and Edges of – EU Law*, 48 COMMON MKT. L. REV. 39 (2011); CATHERINE BARNARD & OKEOGHENE ODUDU, *THE OUTER LIMITS OF EU LAW* (2009). See also Opinion of Advocate General Poiares Maduro: Case C-380/05, *Centro-Europa 7 Srl v. Ministero delle Comunicazioni e Autorità per le Garanzie nelle Comunicazioni*, 2008 E.C.R. I-349, paras. 14–20, available at <http://curia.europa.eu/juris/document/document.jsf?text=&docid=62786&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=2328137>.

fundamental rights is the limited institutional machinery to claim a breach of fundamental rights in practice (see, for example, the limited use of the Article 7 procedure).<sup>33</sup> A second limitation is the need to demonstrate that a violation of a fundamental right is within EU law's substantive scope. The question of how this test is met is still one of the more contested elements of EU human rights law.<sup>34</sup> There is, for example, a divergence between the traditional test applied by the ECJ whereby fundamental rights apply to the action of the Member States when acting "within the scope of EU law"—and the test mentioned in Article 51 of the Charter of Fundamental Rights, which states that Charter rights apply to the Member States "when implementing" EU law.<sup>35</sup> Yet even if one takes the broader interpretation adopted by the courts,<sup>36</sup> EU fundamental rights are still not considered self-standing rights when used to challenge national law. A link to broader EU legal frameworks is necessary.

One linkage could include the establishment of a cross-border element. This core tenant of the Court's case law is currently in a state of rapid evolution following the Court's *Zambrano* judgment, in which the Court argued that the EU's citizenship provisions could be invoked in certain wholly internal situations (such as the deportation of a father of a minor child who is an EU citizen from a country in which the child has lived its entire life).<sup>37</sup> Subsequent case law nonetheless limits the removal of this wholly internal rule to the core of the EU's citizenship provisions.<sup>38</sup> For EU fundamental rights law, the requirement of establishing a cross-border element is likely to remain.<sup>39</sup> This requirement may often

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<sup>33</sup> For an expansion on this theme, see generally Mark Dawson, Elise Muir & Monica Claes, *Enforcing the EU's Rights Revolution: The Case of Equality*, 3 EUR. HUM. RTS. L. REV. 276 (2012).

<sup>34</sup> See, e.g., Sionaidh Douglas-Scott, *The European Union and Human Rights after the Treaty of Lisbon*, 11 HUM. RTS. L. REV. 645 (2011).

<sup>35</sup> On the scope of the application of the Charter, see Joined Cases C-411/10 & C-493/10, *N. S. v. Sec'y of State for the Home Dep't and M. E. v. Refugee Applications Comm'r*, paras. 64–69.

<sup>36</sup> This methodology has been confirmed in case law following the Lisbon Treaty's formal incorporation of the Charter of Fundamental Rights. See, e.g., Case C-145/09, *Land Baden-Württemberg v. Tsakouridis*, 2010 E.C.R. I-12013.

<sup>37</sup> Case C-34/09, *Zambrano v. Office National de L'emploi*, 2011 E.C.R. I-01177.

<sup>38</sup> Note also the much more cautious approaches of the Court in subsequent cases. See generally Case C-434/09, *McCarthy v. Sec'y of State for the Home Dep't*, 2011 E.C.R. I-03375; Case C-256/11, *Dereci v. Bundesministerium für Inneres* (2013), available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62011CJ0256:EN:HTML>; Case C-40/11, *Iida v. Stadt Ulm* (2013), available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62011CJ0040:EN:HTML>. These cases suggest that the *Zambrano* formula is only relevant to protect EU citizens against forced removal from the EU. See generally Anne Pieter van der Mei, Stefaan C. G. van den Bogaert & Gerard-René de Groot, *De Arresten Ruiz Zambrano en McCarthy: Het Hof van Justitie en Het Effectieve Genot van EU-Burgerschaprechten*, 6 DUTCH J. OF EUR. L. 17 (2011); Chiara Rauceo, *Fundamental Rights: The Missing Pieces of European Citizenship?*, 14 GERMAN L.J. 2021 (2013).

<sup>39</sup> See Opinion of Advocate General Sharpston, Case C-34/09, *Zambrano*, 2011 E.C.R. I-01177.

impede the ability of EU citizens to use EU fundamental rights against national law. Many, if not all, of the actions of the Hungarian government that raised constitutional concerns pertained to legislation and events carried out exclusively within Hungarian territory (with only an incidental link to activities in other states).

A second related possibility is to demonstrate that a violation of a fundamental right is connected with the implementation (or non-implementation) of an obligation established by EU Treaties or legislation. Here, the potential complementary nature of market freedoms and fundamental rights may come into play. By establishing that a breach of fundamental rights is also a breach of a legal duty established vis-à-vis internal market legislation, a breach of fundamental rights is brought within the scope of EU law.

The exchange between the Commissioner for the Digital Agenda, Neelie Kroes, and the Hungarian government over media freedom in early 2011 exemplifies this second link. As mentioned above, restrictions on media freedom have been one of the central fault lines in the debate over constitutional reform in Hungary. The perception that the Orban government was using constitutional reforms to silence media critics was a key focus of the reports of the Venice Commission.<sup>40</sup> Following this controversy, Commissioner Kroes sent a number of letters to the Hungarian government in January 2011 outlining concerns that Hungarian reforms may create an “unjustified restriction of the fundamental right of expression and information.”<sup>41</sup>

While such a right is protected under Article 11 of the Charter, what is notable in Kroes’ dispute with Hungary is the use of arguments based on the internal market to address restrictions on media freedom. Kroes’ main legal objection was that Hungary’s media law was in contravention of the 2010 Audiovisual Media Services Directive (AVMS Directive), adopted on the basis of the Treaty’s freedom of establishment provisions. According to Kroes, while the AVMS directive permitted national governments to adopt an obligation for broadcasters to provide balanced coverage, this provision had to comply with general principles of EU law such as fundamental rights and the principle of proportionality. Given that the balanced coverage provision extended beyond television broadcasting into all forms of media (from online blogs to local stations), its scope was disproportionate. Nonetheless, at the same time:

[T]hese provisions could constitute an unjustified restriction of the freedom of expression and information. More generally, such wide imposition of the balanced coverage obligations – which in addition is

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<sup>40</sup> See *supra* note 16 and accompanying text.

<sup>41</sup> 2011 Letter, *supra* note 18.

drafted in quite general terms, leaving a rather large room for interpretation – could create an obstacle to the freedom of establishment and the free provision of services [...] as it could deter the establishment in Hungary of media service providers from other Member States and the provision of media services in Hungary.<sup>42</sup>

Here “the argument from trans-national effects,” as Alex Somek has put it, is used as a bridging device, allowing what would otherwise be an internal matter to be brought within the scope of EU law.<sup>43</sup> Rather than be seen as in opposition to fundamental rights, the market freedoms are used as provisions that can allow fundamental rights to enter into the European legal discourse.

This substantive use of the market freedoms to bring fundamental rights questions into play is linked to some of the institutional points raised above. Whereas the mechanisms to enforce fundamental rights on a self-standing basis may be limited (see, for example, the weak nature of the Article 7 TEU procedure), framing a dispute in terms of *both* fundamental freedoms and fundamental rights may bring legal as well as political advantages. In a legal sense, the market freedoms (or, alternatively, newer areas of policy—see Section E below) may bring a wider range of procedural, legal, and political remedies into play. Furthermore, framing a dispute in this manner may allow central EU institutions to limit both the risk of political back-lash and the risk of being seen as intervening in an area of policy central to national constitutional identity (as explicitly protected under Article 4(2) of the EU Treaty).<sup>44</sup>

Consider, in this regard, the wide range of remedies that have been used to subtly place pressure on the Hungarian government in 2012 (discussed in greater detail in Section E). Since 2012, the Hungarian government has been the subject of 3 (currently 2) separate infringement proceedings,<sup>45</sup> has undergone excessive deficit procedures for the reduction

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<sup>42</sup> *Id.*

<sup>43</sup> Alexander Somek, *The Argument from Transnational Effects I: Representing Outsiders through Freedom of Movement*, 16 EUR. L. J. 315, 1 (2010).

<sup>44</sup> See generally Armin von Bogdandy & Stephan Schill, *Overcoming Absolute Primacy: Respect for National Identity Under the Lisbon Treaty*, 48 COMMON MKT. L. REV. 1417 (2011).

<sup>45</sup> Press Release, European Commission, European Commission Launches Accelerated Infringement Proceedings Against Hungary Over the Independence of its Central Bank and Data Protection Authorities as Well as Over Measures Affecting the Judiciary (Jan. 17, 2012) [hereinafter Press Release on Accelerated Infringement Proceedings], available at <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/12/24>.

of its public debt,<sup>46</sup> and has faced the temporary suspension of cohesion funding based on its poor budgetary position.<sup>47</sup> While these different measures are not explicitly connected, they may also be mutually re-enforcing, establishing a climate whereby cumulative pressure is placed on a domestic government to enact systematic reforms.

Such a strategy also makes political sense. In previous disputes, such as the dispute between the Commission and France over the Roma in the summer of 2010, the Commission tended to avoid framing its legal challenges to Member States in explicitly fundamental rights terms; instead the Commission focused its claims on violations of free movement law.<sup>48</sup> In other words, it is easier for the Commission to claim that it is merely enforcing existing EU law rather than politically evaluating the constitutional frameworks of the Member States.<sup>49</sup> While the Union playing the latter role has been defended by some commentators,<sup>50</sup> this also increases the likelihood of confrontations with the Member States.

Similarly, framing the Hungarian dispute in terms of market freedoms may aid the Commission politically by bringing the legal dispute onto terrain where the role of the EU is more firmly defined (and thus avoiding the prospect of the Commission's agenda in other areas being upset). The speech by Neelie Kroes to the European Parliament on 9 February 2012 is particularly revealing.<sup>51</sup> While expressing concern over media and religious freedom to the European Parliament, Kroes repeatedly pointed to the Council of Europe rather than EU law as the primary forum to address fundamental rights issues not related to her existing dispute with Hungary over the AVMS directive (a dispute that was later

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<sup>46</sup> The EDP now also looks likely to be withdrawn due to action taken by the Hungarian government. See *Assessment of Action Taken by Hungary in Response to the Council Recommendation of 13 March 2012 with a View to Bringing an End to the Situation of Excessive Government Deficit*, COM (2012) 276 final (May 30, 2012).

<sup>47</sup> See Council of the European Union, Recommendation to Hungary with a View to Bringing the Situation of an Excessive Government Deficit to an End, 7141/12 (Mar. 12, 2012). See also Council Implementing Decision 2012/156, Suspending Commitments from the Cohesion Fund for Hungary with Effect from 1 January 2013, 2012 O.J. (L 78) 19; Council Implementing Decision 2012/323, Lifting the Suspension of Commitments from the Cohesion Fund for Hungary, 2012 O.J. (L 165) 46.

<sup>48</sup> See generally Dawson & Muir, *supra* note 2.

<sup>49</sup> This point is also noticeable in respect to the existing infringement actions against the Hungarian government. The action in respect to the retirement of judges is not, for example, based on the Charter or any norm regarding the independence of the judiciary, but on age discrimination and potential violations of Council Directive 2000/78, 2000 O.J. (L 303) 16 (EC).

<sup>50</sup> See generally Armin von Bogdandy et al., *Reverse Solange—Protecting the Essence of Fundamental Rights Against EU Member States*, 49 COMMON MKT. L. REV. 489 (2012).

<sup>51</sup> See generally Neelie Kroes, Vice President of the European Commission Responsible for the Digital Agenda, Speech: The Hungarian Media Environment (Feb. 9, 2012), available at [http://europa.eu/rapid/press-release\\_SPEECH-12-80\\_en.htm?locale=en](http://europa.eu/rapid/press-release_SPEECH-12-80_en.htm?locale=en).

addressed through Hungarian amendments to the media law).<sup>52</sup> As an unelected body, acting in a novel area of EU policy, central institutions like the Commission may well have greater political leverage in enforcing EU fundamental rights where their link to *traditional* market freedoms is clearest.

At a conceptual level, it is perhaps useful to consider the extent to which the relationship between fundamental freedoms and fundamental rights can be seen as complementary rather than antagonistic. Both fundamental freedoms and fundamental rights represent claims made by individuals seeking protection against state intrusion.<sup>53</sup> Both use an appeal to values and procedures to re-enforce a claim for individual protection.<sup>54</sup> In addition, fundamental freedoms have themselves been incorporated into the body of the EU Charter.<sup>55</sup> It is therefore only natural that both can jointly be used to influence domestic reforms threatening EU values.

In this way, the Hungarian example illustrates both the mutually re-enforcing role of market and fundamental rights policies as well as some limits of tying one to the other. In the absence of a cross-border situation or internal market legislation bringing the matter within the scope of EU law, fundamental rights questions may either be eluded or stretched so that some (often rather tenuous) link to ordinary EU law can be identified. Recent developments in EU law—such as the *Zambrano* judgment mentioned above—come at an opportune moment. Such cases that stretch existing conceptual boundaries of EU law also allow us to question whether existing restrictions on the invocation of EU fundamental rights can really be robustly defended. Hungary illustrates how the outer limits of EU human rights law continue to evolve in new directions, a point that we shall now explore in a different context: That of “newer” EU competences.

### **E. EU Fundamental Rights and the Rule of Law Beyond the Internal Market**

Despite the possible complementarities between EU fundamental freedoms and fundamental rights, EU institutions did not use them to tackle the Hungarian situation,

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<sup>52</sup> For critical views on the satisfactory nature of the reform undertaken, see generally Letter from the Human Rights Watch, to Commissioner Kroes Regarding Media Freedom in Hungary (July 2, 2012), available at <http://www.hrw.org/node/108503>.

<sup>53</sup> See R. Daniel Kelemen, *Eurolegalism and Democracy*, 50 J. OF COMMON MKT STUD. 55, 66 (Mar. 2012). See generally R. DANIEL KELEMEN, *EUROLEGALISM* (2011).

<sup>54</sup> See generally Elise Muir, *Fundamental Rights as an Ambiguous EU Competence* (Working Paper) (on file with the author).

<sup>55</sup> See generally the free movement rights contained in the Charter of Fundamental Rights of the European Union, art. 45, 2000 O.J. (C 364) 1, available at [http://www.europarl.europa.eu/charter/pdf/text\\_en.pdf](http://www.europarl.europa.eu/charter/pdf/text_en.pdf).

unlike in the dispute over the treatment of Roma.<sup>56</sup> Instead, EU institutions opted for legal tools made available by more recent areas of EU law. The three infringement procedures against Hungary were concerned with: (1) The independence of the national central bank; (2) measures concerning the judiciary and, in particular, mandatory early retirement of judges and prosecutors at the age of 62 instead of 70; and (3) the independence of the national data protection authority.<sup>57</sup>

The European Commission did not seek to directly challenge the Constitutional reform and new Cardinal Laws adopted in Hungary. It instead took a rather fragmented approach for which the legal bases were, respectively: (1) Articles 130 and 127 TFEU, Article 14 of the Statute of the European System of Central Banks and of the European Central Bank as well as Article 4 of Council Decision 98/415 on timely consultation of the European Central Bank;<sup>58</sup> (2) Directive 2000/78 prohibiting discrimination at the workplace on grounds of age;<sup>59</sup> and (3) Article 16 TFEU, Article 8 of the Charter of Fundamental Rights<sup>60</sup> and Directive 95/46 that requires Member States to establish a supervisory body to monitor the application of the so-called Data Protection Directive in complete independence.<sup>61</sup>

The young age and scope of these legal tools should be noted. Unlike the age-old fundamental freedoms, the European monetary union formally took shape with the Maastricht Treaty,<sup>62</sup> EU competences to tackle age discrimination date back to the Amsterdam Treaty, and the EU system for data protection developed through internal market legislation in the 1990s. Despite the young age of these competences, enough support exists for the European Commission to resort to such legal means as a part of a

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<sup>56</sup> See generally Press Release, European Commission, European Commission Assesses Recent Development in France, Discusses Overall Situation of the Roma and EU Law on Free Movement of EU Citizens (Sept. 29, 2010), available at [http://europa.eu/rapid/press-release\\_IP-10-1207\\_en.htm](http://europa.eu/rapid/press-release_IP-10-1207_en.htm); Press Release, European Commission, Statement by Viviane Reding, Vice-President of the European Commission, EU Commissioner for Justice, Fundamental Rights and Citizenship, on the Recent Developments Concerning the Respect for EU Law as Regards the Situation of Roma in France (Oct. 19, 2010), available at [http://europa.eu/rapid/press-release\\_MEMO-10-502\\_en.htm](http://europa.eu/rapid/press-release_MEMO-10-502_en.htm).

<sup>57</sup> See Press Release on Accelerated Infringement Proceedings, *supra* note 45.

<sup>58</sup> *Id.*

<sup>59</sup> Broader concerns relate to the independence of the judiciary.

<sup>60</sup> The relationship between the EU data protection regime and internal market law is explained below.

<sup>61</sup> On the protection of individuals with regard to the processing of personal data and on the free movement of such data, see Directive 95/46, of the European Parliament and of the Council of 24 October 1995 on the Protection of Individuals with Regard to the Processing of Personal Data and on the Free Movement of Such Data, 1995 O.J. (L 281) 31 (EC).

<sup>62</sup> See Francis Snyder, *EMU—Integration and Differentiation: Metaphor for European Union*, in *THE EVOLUTION OF EU LAW* 687 (Paul Craig & Gráinne de Búrca eds., 2011).

package of measures designed to place pressure on the Hungarian authorities. These new policies may thus be used by EU authorities to enhance the protection of fundamental rights and the rule of law in the Member States, despite the limits of the substantive scope of EU internal market policy. Indeed, these new domains of EU law have a broad scope of application in so far as, unlike the market freedoms, EU data protection law, anti-discrimination law, and the rules governing the monetary union apply also to non cross-border settings.

Based on the provisions thereby identified, the approach to tackling the Hungarian problem is both firm in appearance and hesitant with regard to content. In a single public document, the Commission reminded Hungary of the constitutional conflict and threatened to initiate three infringement proceedings.<sup>63</sup> Nonetheless, the tone of the document remained cautious, and the document was framed in pragmatic or even technocratic terms. The two threatened infringement procedures, and the one eventually pursued by the Commission before the Court of Justice, were concerned with fundamental rights matters.<sup>64</sup>

The possibility for the European Commission to initiate two of its infringement procedures *directly*, based on EU fundamental rights arguments, reveals the potential of EU anti-discrimination and data protection policies to provide EU institutions with instruments to monitor respect for EU values in the Member States beyond the scope of EU internal market policy. Both policies are perhaps the most well established EU fundamental rights policies, with self-standing legal bases in Articles 16(2) and 19 TFEU, allowing for the adoption of legislation specifically designed to address fundamental right violations. Thus, EU intervention in these fields does not, in theory, require an internal-market rationale, although it is perhaps useful here to point out the ambivalent nature of EU data protection law.

The main Data Protection Directive<sup>65</sup> was initially adopted as an internal market instrument, harmonizing domestic data protection rules in order to facilitate the functioning of the internal market while ensuring a high level of protection. Academics, such as de Witte, have long argued that EU internal market decision-making could be used

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<sup>63</sup> See generally Press Release, European Commission, Hungary—Infringements: European Commission Satisfied with Changes to Central Bank Statute, but Refers Hungary to the Court of Justice on the Independence of the Data Protection Authority and Measures Affecting the Judiciary (Apr. 25, 2012), available at [http://europa.eu/rapid/press-release\\_IP-12-395\\_en.htm](http://europa.eu/rapid/press-release_IP-12-395_en.htm).

<sup>64</sup> See *id.*

<sup>65</sup> See generally Directive 95/46, of the European Parliament and of the Council of 24 October 1995 on the Protection of Individuals with Regard to the Processing of Personal Data and on the Free Movement of Such Data, 1995 O.J. (L 281) 31 (EC).

to establish minimum standards for the protection of non-market values.<sup>66</sup> The EU data protection regime is the clearest example of an instrument adopted upon the legal basis for internal market decision-making. Yet, it is explicitly—if not primarily—designed to ensure fundamental rights protection.<sup>67</sup> Remarkably, the Treaty of Lisbon has granted EU data protection policy an independent status. The new relevant legal base (Article 16(2) TFEU) is now disconnected from the provisions devoted to the internal market, and Articles 16(1) TFEU and 8 of the Charter of Fundamental Rights herald a fundamental right for the protection of personal data. The EU data protection regime is thus an example of an internal market tool, which evolved into an independent fundamental right policy.<sup>68</sup>

It is remarkable that the fundamental rights arguments at hand in the Hungarian case (points (2) and (3) above) were ancillary to the underlying constitutional problem in Hungary. Age discrimination was used to address a manipulative, large-scale attempt at restructuring the domestic judiciary.<sup>69</sup> Similarly, the action concerned with data protection is merely a timely objection to broad reforms compromising the independence of national institutional powers designed to limit the power of the executive. Furthermore, the possibility of using the Article 7 TEU procedure remained hypothetical for the reasons explained.<sup>70</sup> This points at the significant weaknesses of these so-called EU fundamental rights policies: Despite their status as some of the most well established EU fundamental rights policies, EU anti-discrimination and data protection law is rarely used to address the large scale constitutional problems arising in Hungary. In this context, anti-discrimination and data protection law simply provide the legal basis for addressing very limited aspects of the constitutional conflict through court-based litigation.

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<sup>66</sup> See Bruno de Witte, *Non-Market Values in Internal Market Legislation*, in REGULATING THE INTERNAL MARKET 75 (Niamh Nic Schuibhne ed., 2006).

<sup>67</sup> See Directive 95/46, of the European Parliament and of the Council of 24 October 1995 on the Protection of Individuals with Regard to the Processing of Personal Data and on the Free Movement of Such Data, 1995 O.J. (L 281) 31, art. 1(1) (EC). We are grateful to Vasiliki Kosta for bringing this to our attention at the Public Law Workshop of the 2012 Annual Ius Commune Conference held in Amsterdam on Nov. 28–29, 2012.

<sup>68</sup> Although the wording of Art. 16(2) of the TFEU actually restricts legislative powers to the protection of personal data that falls within the scope of EU law and relates to the free movement of such data. Consolidated Version of the Treaty on the Functioning of the European Union art. 16(2), Sep. 5, 2008, 2008 O.J. (C 83) 55 [hereinafter TFEU].

<sup>69</sup> See, for example, the concerns voiced by the Venice Commission on the powers of the president of the National Adjudication Office. *Opinion of the European Commission for Democracy Through Law (Venice Commission) on Act CLXII of 2011 on the Legal Status and Remuneration of Judges and Act CLXI of 2011 on the Organization and Administration of Courts of Hungary*, CDL-AD (2012) 001 (Mar. 16–17, 2012) [hereinafter Opinion on Acts CLXII and CLXI], available at [http://www.venice.coe.int/webforms/documents/CDL-AD\(2012\)001-e.aspx](http://www.venice.coe.int/webforms/documents/CDL-AD(2012)001-e.aspx)

<sup>70</sup> See *supra* Part B.

Although considerably strengthened by successive Treaty amendments, the system for the protection of fundamental rights in the EU is thus focused on a few narrowly defined *active* fundamental rights policies. As pointed out by Armin von Bogdandy, advancing a fundamental rights policy on the basis of selected (progressive social<sup>71</sup>) rights with specialized fundamental rights institutions such as a data protection authority does not amount to securing the rule of law.<sup>72</sup> Securing the rule of law is a much more ambitious task that requires education, media freedom, and sound political and judicial infrastructures for which EU law actually provides limited competences. The technocratic focus on infringement proceedings aimed at challenging the validity of certain isolated national laws are highly unlikely to alter the substance of the problem in Hungary, even if successful.<sup>73</sup>

It is thus not surprising that the European Commission seems so keen on enhancing *soft* policy tools to bolster political change in Hungary. This point may be illustrated by the proposal of Commission Vice-President Viviane Reding to meet Supreme Court judges from around Europe to discuss the independence of the Hungarian judiciary.<sup>74</sup> Viviane Reding argued for the establishment of a “Justice Scoreboard” evaluating the strength, independence, and reliability of national judiciaries.<sup>75</sup> This illustrates the added value of a hybrid approach to fundamental rights policies.<sup>76</sup> Governance structures, which include

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<sup>71</sup> See Armin von Bogdandy, *The European Union as a Human Rights Organization? Human Rights and the Core of European Union Law*, 37 COMMON MKT. L. REV. 1307, 1334 (2000).

<sup>72</sup> See *id.* at 1312.

<sup>73</sup> Hungary has indeed been found in violation of EU anti-age discrimination law. See generally Case C-286/12, European Commission v. Hungary, 2013 E.C.R. I-nyr, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62012CJ0286:EN:HTML>. The infringement action based on the independence of the data protection authority is Case C-288/12, European Commission v. Hungary, 2013 E.C.R. I-nyr, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2012:227:0015:0016:EN:PDF>. See also the decision of the Hungarian Constitutional Court declaring that the reform of the retirement age of judges is unconstitutional. Kim Lane Scheppelle, *How to Evade the Constitution: The Hungarian Constitutional Court's Decision on Judicial Retirement Age*, VERGASSUNGSBLOG, Aug. 9, 2012, <http://www.verfassungsblog.de/de/how-to-evade-the-constitution-the-hungarian-constitutional-courts-decision-on-judicial-retirement-age-part-i/#.UhwoThZrqFY>.

<sup>74</sup> See generally Press Release, European Commission, Supreme Court Judges Meet to Discuss Independence of Hungarian Judiciary (June 27, 2012), available at <http://europa.eu/rapid/midday-express-27-06-2012.htm>. The Commission also announced that it would convene a meeting with the Network of the Presidents of the Supreme Judicial Courts of the EU to discuss ongoing concerns about the independence of the judiciary in Hungary more generally. See Press Release, European Commission, Hungary—infringements (Apr. 25, 2012), available at [http://europa.eu/rapid/press-release\\_IP-12-395\\_en.htm](http://europa.eu/rapid/press-release_IP-12-395_en.htm).

<sup>75</sup> See generally Nikolaj Nielsen, *EU Keen to Rank Justice Systems in Member States*, EU OBSERVER, Sept. 13 2012, <http://euobserver.com/justice/117535>.

<sup>76</sup> See Gráinne de Búrca, *EU Race Discrimination Law: A Hybrid Model?*, in LAW AND NEW GOVERNANCE IN THE EU AND THE US 97, 120 (Gráinne de Búrca & Joanne Scott eds., 2006). See also *Hungary's New Constitutional Order and "European Unity," supra* note 6.

monitoring procedures and mechanisms to incentivize change (through funding and capacity building), are more likely to realize legal reforms. At the same time, legal interventions can trigger these reforms or act as a “shadow of hierarchy” when things go wrong. Initiatives such as the creation of a new EU Special Envoy for Human Rights, a renewed and strengthened role for the Fundamental Rights Agency, or the Open Method of Coordination might be seen as (limited) EU contributions towards creating the conditions necessary for a culture of legality to take hold more firmly in Hungary.

The weaknesses of EU fundamental rights instruments shed light on other tools available to EU institutions to encourage respect for EU values. These tools may complement EU internal market policy as an *indirect* means of pressure on domestic authorities beyond the strict definition of EU fundamental rights policies. One instrument potentially more powerful than EU anti-discrimination and data protection law is the EU economic governance package. The EU economic governance package allows the Commission and the Council to express political concerns in a Member State by threatening reduced financial support and sanctions against the state. In this sense, the process of economic integration—based not only on internal market policy but also on a deeper effort to further EU economic integration—remains a strong form of political leverage to demand more fundamental rights protection and a greater respect for the rule of law.

The Commissioner in charge of Economic and Monetary Affairs and the Euro explicitly links infringement procedure (regarding the independence of the national central bank) to negotiations on financial assistance from the European Union and the International Monetary Fund (IMF).<sup>77</sup> Although the IMF’s executive board ultimately makes decisions on IMF financial assistance, such decisions are often heavily influenced by Commission assessments.<sup>78</sup> As such, the threat of a negative assessment by the Commission is likely to receive significant consideration by the Hungarian government. Out of the three infringement procedures initiated, the central bank proceeding was the only one in which the Commission’s demands were met, thus suggesting that the threat may well have been effective.<sup>79</sup>

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<sup>77</sup> See generally *Assessment of Action Taken by Hungary in Response to the Council Recommendation of 13 March 2012 with a View to Bringing an End to the Situation of Excessive Government Deficit*, COM (2012) 276 final (May 30, 2012), available at [http://ec.europa.eu/economy\\_finance/economic\\_governance/sgp/pdf/30\\_edps/communication\\_to\\_the\\_council/2012-05-30\\_hu\\_communication\\_en.pdf](http://ec.europa.eu/economy_finance/economic_governance/sgp/pdf/30_edps/communication_to_the_council/2012-05-30_hu_communication_en.pdf).

<sup>78</sup> See generally Franz Seitz & Thomas Jost, *The Role of the IMF in the European Debt Crisis* (Univ. of Applied Scis. Amberg-Weiden (HAW), Working Paper No. 32, 2012), available at <https://www.econstor.eu/dspace/bitstream/10419/56452/1/689266685.pdf>.

<sup>79</sup> See generally *Putsch-up Job: Another Ricketty European Country Turns Ugly—and Also Points to Deeper Problems in the European Union*, THE ECONOMIST, July 14, 2012.

Although less explicit, parallels may also be drawn between the constitutional concerns over the situation in Hungary and the initiation of an excessive government deficit procedure. Observers indeed pointed to this 1997 procedure as a way of exerting pressure on the Hungarian authorities to address the political concerns of the European and international communities.<sup>80</sup> Having repeatedly failed to bring its deficit below the 3% benchmark, Hungary was at risk of being deprived of support from the EU's Cohesion Fund in 2013. This threat has now been lifted.<sup>81</sup>

As these examples illustrate, the ever increasing scope of EU law and policy may allow the Union to pressure Member States into re-considering internal reforms at odds with EU values to a greater degree than EU fundamental rights policies. Nevertheless, such indirect pressures may also prove limited. First, the credibility of EU structures to press a domestic government to reinstall the rule of law on the basis of EMU governance mechanisms may be questioned by the record of the EU institutions and all 27 Member States in terms of transparency and democratic accountability in that field.<sup>82</sup> The pre-crisis Monetary Union's influence was greatly affected by the perception that procedures such as the Excessive Deficit Procedure were overly politicized<sup>83</sup> and easily manipulated. The use of such a procedure for purposes other than its initial aim is hardly likely to quell such criticism.

Second, policy leverages based on the granting of specific advantages (or the withholding of financial and other privileges) are likely to disappear as soon as the benefit sought by the Member State whose behavior is under scrutiny is actually granted. It is more difficult to withdraw benefits than to prevent them from being granted in the first place. A comparison between the recent set of events in Romania, which is also considered a threat to the rule of law,<sup>84</sup> and Hungary prompted observers to state that "Romania's Mr. Ponta has one advantage over Mr. Orbán: An IMF deal."<sup>85</sup> Romania, unlike Hungary, does not need financial assistance and is therefore less subject to reform pressures from the

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<sup>80</sup> See generally *Hungary's New Constitutional Order and "European Unity," supra* note 6; Editorial on Fundamental Rights, *supra* note 17.

<sup>81</sup> The threat was nonetheless lifted; it would seem that "a deal was struck." See *Viktor and Victor: Lessons from Budapest to Bucharest*, THE ECONOMIST, July 14, 2012.

<sup>82</sup> See generally the concerns raised in Mark Dawson & Floris de Witte, *Constitutional Balance in the EU After the Euro Crisis*, 76 MOD. L. REV. (forthcoming 2013); Matthias Ruffert, *The European Debt Crisis and European Union Law*, 48 COMMON MKT. L. REV. 1777 (2011).

<sup>83</sup> See, for example, the failure to enforce EDP's against France and Germany in 2003.

<sup>84</sup> See generally Press Release, European Council, Remarks Following the Meeting of President of the European Council, Herman Van Rompuy with Prime Minister of Romania, Victor Ponta (July 12, 2012), available at [http://www.consilium.europa.eu/uedocs/cms\\_Data/docs/pressdata/en/ec/131707.pdf](http://www.consilium.europa.eu/uedocs/cms_Data/docs/pressdata/en/ec/131707.pdf); Valentina Pop, *EU Warns Romania on Rule of Law*, EU OBSERVER, July 6, 2012, <http://euobserver.com/843/116896>.

<sup>85</sup> *Putsch-up Job*, *supra* note 79.

European Commission. One may legitimately question whether a country's financial strength should determine their ability to resist central measures designed to bring violations of fundamental rights to an end.

#### **F. Conclusion**

The Hungarian situation illustrates the extent to which EU intervention for the protection of EU fundamental rights and the rule of law may heavily depend on the scope and strength of a wide range of EU policies. Although the EU has acquired a strong fundamental rights mandate in recent years, even the most well established EU fundamental rights policies do not provide the EU with much leverage against domestic threats to the rule of law and democracy. EU fundamental freedoms may be a useful conveyor of fundamental rights concerns—for example, to constrain state discretion through individual empowerment—while more recent mechanisms of EMU governance may offer promising avenues due to their ability to provide policy leverage. The power of EU law on matters of fundamental rights protection and respect for the rule of law thus remains dependent on EU economic competences to a large extent.

In spite of the promises of these indirect means of pressure, the Hungarian situation is nonetheless a reminder of the limits of the process of integrating EU fundamental values across the European legal and political order. The powerlessness of EU institutions is more than a political choice; it is the inevitable consequence of the absence of EU tools to act upon structural threats to fundamental rights and the rule of law in Member States.

While indirect routes for the enforcement of EU fundamental rights and the rule of law may make up for some of these limitations, enforcing fundamental rights and the rule of law indirectly through internal market or economic based arguments may also impose particular costs. While covert means of political pressure may allow the EU to have a say in issues otherwise left to the national sphere, such strategies are vulnerable to the accusation of "integration by stealth." An EU that is not transparent in monitoring rule of law violations could fall prey to the worst criticisms of both worlds; both decried by supporters of national sovereignty as interfering in policies beyond the remit established by the EU Treaties, and given little credit by those who would otherwise defend a strong transnational role in enforcing fundamental values. Moreover, by using new areas of EU competence for purposes that are clearly distinct from their initial function, the very credibility of these mechanisms could be called into question. This could potentially undermine areas of coordination, such as monetary policy, which are crucial for the broader legitimacy and effectiveness of EU policymaking. Thus, indirect protection can both provide policy leverage and expose the Union to charges of hypocrisy and lack of transparency.

This paper illustrates that enforcing fundamental rights may remain more a question of power politics than of legally established procedures. While the strong legal basis for the internal market may allow fundamental *freedoms* to be enforced in a manner that is perceived by the Member States as relatively objective, the indirect protection of fundamental *rights* may lead to a perception that different Member States are treated in different ways. A parallel may be drawn with the Roma case discussed in early parts of this paper. Owing to the absence of human rights enforcement procedures in the Roma case, the protection of fundamental rights was easily perceived as a question of power in which established Member States (France, for example) may have the political connections to evade enforcement, while weaker, newer and more marginalized Member States are more likely to see strong intervention.<sup>86</sup>

While offering real opportunities for EU intervention, the indirect protection of EU fundamental rights may still leave fragmented and patchwork-like European machinery for the protection of Europe's most fundamental values. Although the Treaty of Lisbon heralded the strongest EU fundamental rights mandate yet, the Hungarian example shows that the legal tools for EU intervention in this field remain rather limited in practice. The theory-practice dichotomy sharply contrasts with the assumption that Member States of the EU share not just a set of fundamental freedoms, but of fundamental values too.

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<sup>86</sup> See generally Editorial on Fundamental Rights, *supra* note 17.

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