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## **FREE AND FAIR ELECTIONS IN THE MEMBER STATES – THE LIMITS OF EUROPEAN UNION COMPETENCES AND THE CONSEQUENCES THEREOF**

### **Abstract**

The purpose of this article is to analyse the scope of the European Union's regulatory and supervisory powers regarding elections, both within the scope of the European Union law, i.e., elections to the European Parliament and municipal elections as well as outside its scope, such as parliamentary or presidential elections. The article on the recent developments of EU authorities regarding the protection of electoral processes attempts to unify standards across Member States, as well as to expand current competences. The analysis thereby seeks to anticipate whether, in the current state of development of EU law, a violation of the principle of free and fair elections can amount to a breach of Article 2 TEU and the values expressed therein.

### **KEYWORDS**

electoral law, European Convention of Human Rights, Article 2 TEU, founding values of EU law, Article 51 of the Charter of Fundamental Rights

### **SŁOWA KLUCZOWE**

prawo wyborcze, Europejska Konwencja Praw Człowieka, art. 2 TUE, wartości leżące u podstaw prawa UE, art. 51 Karty praw podstawowych

## I. PRELIMINARY REMARKS

There is currently a widespread view that the European Union (EU) is in a constitutional crisis, which, in a multidimensional way, touches upon the founding principles of the Union as set out in Article 2 of the Treaty on European Union (TEU).<sup>1</sup> In line with *Republika's* judgment of the Court of Justice of the European Union ('CJEU' or 'the Court'), the EU is composed of States that have freely and voluntarily committed to shared values, respect those values, and undertake actions to promote them.<sup>2</sup> Nevertheless, it is evident that certain EU Member States are or were exhibiting significant deficiencies in their adherence to the principles of the rule of law, democracy, and respect for fundamental rights. Consequently, the question of their conformity with fundamental EU standards is a matter of considerable concern.<sup>3</sup> Despite the fact that the EU is unable to adopt a passive approach in the face of such circumstances, the question of how potential responses are compatible with the overarching EU constitutional framework is repeatedly addressed.<sup>4</sup> One of the numerous reasons behind the crisis of the rule of law seems to be the limited possibility of supervising and enforcing the course of electoral processes in Member States.<sup>5</sup> Although free and fair elections are not explicitly overridden as a supreme treaty value of the EU, it is evident that while democracy and the rule of law cannot be reduced to elections or explained solely by elections, very few questions can be answered without referring to elections.<sup>6</sup> In turn, respect for the rule of law is a condition for the enjoyment of all the rights deriving from the application of the Treaties to that Member State.<sup>7</sup>

Conclusions by OSCE Office for Democratic Institutions and Human Rights ('ODIHR') international observers demonstrate that national elections in individual EU Member States are not free of serious irregularities, mainly in the area of equal opportunities (unlevel playing field) or a polarised and biased

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<sup>1</sup> Consolidated Version of the Treaty on European Union [2012] OJ C326/13.

<sup>2</sup> Case C-896/19 *Republika v Il-Prim Ministru* [2021] EU:C:2021:311, para 61.

<sup>3</sup> See, e.g., Case C-769/22 *Commission v Hungary* [2022, pending]; Case C-896/19 *Republika v Il-Prim Ministru* [2021] EU:C:2021:311; Case C-156/21 *Hungary v European Parliament and Council* [2022] EU:C:2022:97; Case C-157/21 [2022] *Poland v European Parliament and Council* EU:C:2022:98.

<sup>4</sup> Lucia S Rossi, "'Concretised", "Flanked", "Standalone"? Some Reflections on the Application of Article 2 TEU' (2025) 1 *European Papers* 10 <<https://www.europeanpapers.eu/en/e-journal/concretised-flanked-standalone-reflections-application-article-2-teu>> accessed 31 December 2025.

<sup>5</sup> Miriam Schuler, 'Why the EU Should Care about National Elections' (2023) *European Law Blog* <<https://doi.org/10.21428/9885764c.553e4651>> accessed 31 December 2025.

<sup>6</sup> Boris Makarenko, 'The Role of Elections in Democracy' in Adam Przeworski (ed), *Democracy in a Russian Mirror* (CUP 2015).

<sup>7</sup> Case C-896/19 *Republika v Il-Prim Ministru* [2021] EU:C:2021:311, para 63.

media landscape.<sup>8</sup> Based on the information provided in the ODIHR Electoral Recommendations Database,<sup>9</sup> the most irregularities and recommendations have so far been identified with Bulgaria (170), Hungary (111), Poland (82), Slovakia (80), Romania (65), Lithuania (63), and Latvia (61). By adding up all the recommendations addressed to the European Union countries, most of them were related to Campaign Finance (182), Election Administration (139), and Media (155).<sup>10</sup> A smaller number of recommendations concerned Candidate Registration (74), Complaints and Appeals (71), Voter Registration (54), Election Day (51), Electoral Campaign (47), Legal Framework (46), New Voting Technologies (36), Citizen and International Observation (34), Electoral System (23). However, Rule of Law Report 2024<sup>11</sup> does not directly reference the conduct of elections, nor an assessment of their free or fair nature. Solely selected problems during the electoral procedure and findings of ODIHR are referenced in individual Member States' reports on their rule of law compliance.<sup>12</sup> Yet, it does not seem that any of those irregularities or *ex-post* non-compliance with the priority recommendations of ODIHR have triggered any legal or financial consequences of possible violation of EU's founding values. In the present stage of development of EU law, *inter alia*, Regulation 2020/2092 on a general regime of conditionality for the protection of the Union budget ('Conditionality Regulation'),<sup>13</sup> central to foundational values enforcement, does not situate elections – neither European nor strictly domestic – as a central element of respecting the rule of law.<sup>14</sup>

Therefore, the question arises whether a sufficiently serious breach of the principle of free and fair elections would fall within the disposition of Article 7

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<sup>8</sup> Meijers Committee, 'Policy Brief on Free and Fair Elections in the European Union' CM2302 <<https://www.commissie-meijers.nl/wp-content/uploads/2023/03/CM2302-policy-brief-on-free-and-fair-elections-in-the-EU.pdf>> accessed 31 March 2025; cf Final Report of ODIHR Election Observation Missions cited therein, 1.

<sup>9</sup> OSCE/ ODIHR Electoral Recommendations Database <<https://paragraph25.odihr.pl/>> accessed 31 December 2025.

<sup>10</sup> The data collected on the recipients of recommendations, the number of recommendations made, and their categories are valid as of 5 March 2024.

<sup>11</sup> Commission, 'Communication on 2024 Rule of Report – The rule of law situation in the European Union' COM (2024) 800 final; European Commission 'Annex to the 2024 Rule of Law Report – The rule of law situation in the European Union' COM (2024) 800 final.

<sup>12</sup> Cf Commission '2024 Rule of Law Report Country Chapter on the rule of law situation in Poland' SWD (2024) 821 final, 23–24, indicating that transparency of political party financing, party donations and undue influence in elections campaigns remain an issue.

<sup>13</sup> Regulation 2020/2092 of the European Parliament and of the Council on a general regime of conditionality for the protection of the Union budget [2020] OJ L 4331/1.

<sup>14</sup> Cf Regulation 2020/2092, *ibid*, motive 3 and Art 4.

paragraph 1 or 2 TEU (a clear risk of a serious breach or a severe and persistent breach by a Member State of the values referred to in Article 2) or Article 258 TFEU<sup>15</sup> (failure of the Member State to fulfil an obligation under the Treaties). Could a violation of the principle of free and fair elections constitute a violation of Article 2 TEU in the absence of inclusion of parliamentary or presidential elections at the national level within the scope of EU law? Even though there are firm voices that the values of Article 2 TEU apply to *any* act by any Member State irrespective of *any* other link to EU law, there is no clarity if and how the values of Article 2 TEU produce legal and justiciable effects.<sup>16</sup> Although it seems they become judicially enforceable *ex-post*, i.e. only once a violation has occurred, some scholars rightly and logically point out their capability to require actions to prevent EU values from violations and regressions.<sup>17</sup>

The primary research question thus concerns the extent of possibilities for enforcing and ensuring a free and fair electoral ecosystem of Member States within the EU regulatory (e.g., Article 223 TFEU) or supervisory competences (e.g., Article 2 and 7 TUE or Article 258 TFEU). This issue is particularly salient in contemporary reflections on the boundaries of constitutional pluralism,<sup>18</sup> juxtaposed with the necessity of uniformisation and the protection of fundamental values at the EU level (value unity).<sup>19</sup> The article's objective is firstly, to provide an overview of the fundamental direct and indirect competences of the EU in the domain of elections (Section No 1), and secondly, to analyse the possibility of application of Article 2 TEU to free and fair principle violations (Section No 2). To complement these findings, this article provides answers to whether it is possible to uniformly understand 'free and fair' elections in the EU legal framework and establish a binding benchmark for assessing the conduct of electoral processes in Member States (Section No 3). The final section of the article comprises conclusions and potential recommendations (Section No 4).

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<sup>15</sup> Treaty on the Functioning of the European Union [2016] OJ C 326/47.

<sup>16</sup> Armin von Bogdandy & Luke D Spieker, 'Countering the Judicial Silencing of Critics: Article 2 TEU Values, Reverse Solange, and the Responsibilities of National Judges' (2019) 15(3) European Constitutional Law Review 409.

<sup>17</sup> Cf Miariam Schuler & Darren Harvey, 'A New Approach to Constitutional Crisis Prevention?: Article 2 TEU as an Obligation to Take Preventive Action' (2025) European Journal of Risk Regulation 2. Cf also the thought experiment conducted therein concerning a Member State's awareness of interference in upcoming elections.

<sup>18</sup> Julian Scholtes, *The Abuse of Constitutional Identity in the European Union* (Oxford Studies in European Law, OUP 2023).

<sup>19</sup> Cf Luke D Spieker, 'Breathing Life into the Union's Common Values: On the Judicial Application of Article 2 TEU in the EU Value Crisis' (2019) 20 German Law Journal 1182–1213.

## II. EU COMPETENCES IN RESPECT OF ELECTORAL LAW

From the point of view of the principle of conferral, expressed in Article 5 paragraphs 1 and 2 TEU, the EU possesses minimal competence in the domain of electoral law. Those are embedded in Article 14 paragraphs 2 and 4 TEU (national representatives in the European Parliament and the rules for their election), Article 20 paragraph 2 point b TFEU (EU citizenship and the associated right to vote and stand for election to the European Parliament and in local elections in the Member State), Article 22 TFEU (the electoral rights of any EU citizen residing in a Member State of which they are not citizens) and Article 223 TFEU (legal basis for the election of members of the European Parliament). Following Article 224 TFEU, the European Parliament and the Council shall lay down the regulations governing political parties, particularly the rules regarding their funding, but only at the European level.<sup>20</sup> It is also an irrefutable fact that the result of purely national elections influences the composition of EU bodies (e.g., Article 300 paragraph 3 TFEU).

The substantive rights related to the status of a Union citizen were also concretised in the Charter of the Fundamental Rights ('CFR' or 'the Charter')<sup>21</sup>. Article 39 paragraph 1 of the Charter establishes the right of every citizen to vote and to stand as a candidate at elections to the European Parliament in the Member State of residence, under the same conditions as nationals of that State.<sup>22</sup> In turn, Article 40 CFR guarantees the right of every citizen of the Union to vote and to stand as a candidate at municipal elections in the Member State in which they reside under the same conditions as nationals of that State.<sup>23</sup>

Some of the indirect, but prominent links may be found through provisions of democratic principles and values (Article 10 TEU)<sup>24</sup> and rule of law, democracy and human rights values (Article 2 TEU).<sup>25</sup> Recent years have demonstrated an exceptional capacity for mobilisation of Article 2 TEU, and operationalisation of

<sup>20</sup> Regulation 1141/2014 of the European Parliament and of the Council on the statute and funding of European political parties and European political foundations [2014] OJ L317/1.

<sup>21</sup> Charter of Fundamental Rights of the European Union [2012] OJ C326/02.

<sup>22</sup> Cf Paulo Rangel, 'Article 39' in Alessandra Silveira and others (eds), *The Charter of Fundamental Rights of the European Union: A Commentary* (2024) <<https://ssrn.com/abstract=4999183>> accessed 31 March 2025.

<sup>23</sup> Cf Pedro M Froufe & Joaquim F da Rocha, 'Article 40', *ibid* accessed 31 March 2025.

<sup>24</sup> See, e.g., Case C-418/18 P *Puppinck and Others v Commission* [2019] EU:C:2019:1113 para 64; Case C-502/19 *Junqueras Vies* [2019] EU:C:2019:1115 para 63.

<sup>25</sup> Cf Commission, 'Communication on the European democracy action plan' COM (2020) 790 final.

the values expressed therein.<sup>26</sup> Although those values are aleatory, unstructured and are reflected in a more descriptive than normative way, their more detailed embodiment may be found in a number of provisions of primary law.<sup>27</sup> However, as those provisions of primary law or the secondary legislation adopted in their implementation<sup>28</sup> indicate, the scope of European Union law directly covers only local elections and elections to the European Parliament (EP).

There is no **direct** connection between the regulatory or supervisory competence of the European Union and the domestic – parliamentary or presidential – elections held in Member States. Therefore, only regarding municipal<sup>29</sup> and EP elections, the EU is directly allowed to supervise the reflection of the corresponding standard of the principle of free elections from the European Convention of Human Rights (Article 3 of the Protocol No 1) through Article 39 and Article 40 CFR under the horizontal clause from Article 52 (3) CFR.<sup>30</sup> In other respects, national elections remain, in principle, the responsibility of Member States.

Therefore, in principle, the EU takes a variety of measures aimed at protecting solely the electoral processes in the European Parliament elections, based mainly on Article 2 TUE and other relevant Treaty provisions, such as Article 20 TUE, as well as Article 205 TFEU.<sup>31</sup> In a similar vein, the European Commission advocates, through its activities, to safeguard European democracy, promote free and fair elections and uphold the electoral rights of EU citizens, which provides

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<sup>26</sup> Luke D Spieker, *EU Values Before the Court of Justice: Foundations, Potential, Risks*, Oxford Studies in European Law (OUP 2023).

<sup>27</sup> Exemplification of democracy may be mentioned in, e.g., Art 39 and 40 of the Charter. Cf Tom Boeckstein, ‘Making Do With What We Have: On the Interpretation and Enforcement of the EU’s Founding Values’ (2022) 23 German Law Journal 431. Cf the table contained therein, assigning specific values from Art. 2 TEU to the further TEU, TFEU and CFR provisions reflecting them in bigger detail.

<sup>28</sup> Cf, e.g., Council Directive 94/80/EC laying down detailed arrangements for the exercise of the right to vote and to stand as a candidate in municipal elections by citizens of the Union organisation residing in a Member State of which they are not nationals [1994] OJ L368/38; Consolidated Version of the Act concerning the election of the members of the European Parliament by direct universal suffrage [1976] OJ L278/5.

<sup>29</sup> Cf some reservations expressed in Section No 3.

<sup>30</sup> Cf Art 52 para 3 of the CFR. In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection.

<sup>31</sup> European Parliament, ‘Factsheet on Promoting Democracy and Observing Elections’ (April 2024) <<https://www.europarl.europa.eu/factsheets/en/sheet/166/promoting-democracy-and-observing-elections>> accessed 31 December 2025. Cf Art 21 (2) TUE 2, p. a, b to which Art 205 TFEU refers.

measures to reinforce democracy and protect the integrity of elections.<sup>32</sup> The European Union is thereby concentrated on regulating the conduct and conditions of the organization of elections to the European Parliament,<sup>33</sup> safeguarding and enhancing European elections<sup>34</sup> through protection of their information environment from any unlawful usage of personal data,<sup>35</sup> illegal use of artificial intelligence,<sup>36</sup> manipulation and voter dissuasion<sup>37</sup> or counteracting external interference.<sup>38</sup> No less attention is paid to the transparency of targeting and political advertisement,<sup>39</sup> as well as political parties' financing.<sup>40</sup> Particular and far-reaching responsibilities of the Member States to foster broad and inclusive democratic participation and to promote free, fair and resilient elections in the Union were therefore repeatedly underlined in the EU documents.<sup>41</sup>

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<sup>32</sup> Cf Commission, 'Democracy and electoral rights' (2023) <[https://commission.europa.eu/strategy-and-policy/policies/justice-and-fundamental-rights/eu-citizenship/democracy-and-electoral-rights\\_en](https://commission.europa.eu/strategy-and-policy/policies/justice-and-fundamental-rights/eu-citizenship/democracy-and-electoral-rights_en)> accessed 31 December 2025. Cf the initiatives mentioned therein such as: European Democracy Action Plan, Regulation on the transparency and targeting of political advertising, Commission Recommendation on election cooperation networks, online transparency, protection against cybersecurity incidents and fighting disinformation campaigns in the context of elections to the European Parliament or Commission guidance on the application of Union data protection law in the electoral context.

<sup>33</sup> Act concerning the election of the members of the European Parliament by direct universal suffrage [1976] OJ L 278/5.

<sup>34</sup> Commission, 'Recommendation 2018/234 on enhancing the European nature and efficient conduct of the 2019 elections to the European Parliament' [2018] L 45/40.

<sup>35</sup> Commission, 'Guidance document on the application of Union data protection law in the electoral context. A contribution from the European Commission to the Leaders' meeting in Salzburg on 19–20 September 2018 COM (2018) 638 final.

<sup>36</sup> Commission, 'Study on the impact of new technologies on free and fair' (2021) <[https://commission.europa.eu/system/files/2022-12/Annex%20LiteratureReview\\_20210319\\_clean\\_dsj\\_v3.0\\_a.pdf](https://commission.europa.eu/system/files/2022-12/Annex%20LiteratureReview_20210319_clean_dsj_v3.0_a.pdf)> accessed 31 March 2025.

<sup>37</sup> Commission, 'Recommendation 2023/2829 on inclusive and resilient electoral processes in the Union and enhancing the European nature and efficient conduct of the elections to the European Parliament [2023] OJ L2023/2829.

<sup>38</sup> Cf actions undertaken by European Parliament, 'Foreign interference: how Parliament is fighting the threat to EU democracy' (2024) <<https://www.europarl.europa.eu/topics/en/article/20240404STO20215/foreign-interference-how-parliament-is-fighting-the-threat-to-eu-democracy#eu-legislative-action-against-foreign-interference-7>> accessed 31 March 2025.

<sup>39</sup> Regulation 2024/900 of the European Parliament and of the Council on the transparency and targeting of political advertising [2024] OJ L2024/900.

<sup>40</sup> Cf Regulation 1141/2014 (n 17) and Regulation 2025/2445 of the European Parliament and of the Council on the statute and funding of European political parties and European political foundations [2025] OJ L 2025/2445.

<sup>41</sup> Cf Commission Recommendation 2023/2829 (n 31), recital 4; Commission, 'Securing free and fair European Elections' (2018) <<https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=COM:2018:0637:FIN>> accessed 31 December 2025.

While it is evident that the EU possesses the authority to elevate standards for European Parliament elections within its regulatory sphere set forth in TUE and TFUE, it is equally clear that it lacks the capacity to directly introduce and enforce analogous standards for national elections. Even so, the question arises whether the EU is able to exert any effective, domestic-level influence on electoral rights, conduct of the elections and the protection of the formation and expression of political opinions as the central element of free elections,<sup>42</sup> and whether this influence can be exercised within the limits of the powers conferred on the EU.

It is essential to keep in mind that the EU shall pursue its objectives by appropriate means commensurate with the competences which are conferred upon it in the Treaties (Article 3 paragraph 6 TEU). The Union, however, has no competencies in the area of elections, democracy or human rights. Therefore, the objective of domestic-level influence on elections is hampered by at least two factors: limited treaty regulatory and supervisory powers and an indeterminate scope of the principle of free and fair elections at the EU level. A creation of free and fair elections standard takes place through external law regimes such as the European Court of Human Rights (ECtHR) or ODIHR,<sup>43</sup> therefore outside the institutional framework of the EU. An unquestionable impediment in this instance is also the failure to adhere to the obligation stipulated in Article 6 paragraph 2 TEU, namely the European Union's accession to the European Convention on Human Rights (ECHR).<sup>44</sup>

However, one particularly salient method of circumventing the EU's competence limits is to establish horizontal obligations on the part of private entities, as illustrated by the Digital Services Act (DSA)<sup>45</sup> and Artificial Intelligence Act (AI Act).<sup>46</sup> As a result, elections cease to be solely a matter for Member States and become a category of risk and a source of obligations during the electoral campaigns, inter alia, through the necessity to adjust the moderation process and enhance the infor-

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<sup>42</sup> Cf justification of this position in Section No 3.

<sup>43</sup> ODIHR's recommendations and reports play in initiating public discourse, influencing potential legislative initiatives, and serving as a dependable source of public information, as evidenced by the utilisation of these conclusions by both EU bodies and the European Court of Human Rights.

<sup>44</sup> Cf inter alia Tobias Lock, EU Accession to the ECOrganisationHR: when, how and implications (2024) SSRN <<https://ssrn.com/abstract=4766356>> accessed 31 December 2025.

<sup>45</sup> Cf, e.g., Regulation 2022/2065 of the European Parliament and of the Council on a Single Market For Digital Services and amending Directive 2000/31/EC [2022] OJ L 277/1, Art 34 (1) c. Providers of very large online platforms and of very large search engines are obligated to carry out the risk assessments including any actual or foreseeable negative effects **on civic discourse and electoral processes**, and public security, as well as put in place mitigation measures tailored to the identified risk, pursuant to Art 34. Cf Art 35 (1) DSA.

<sup>46</sup> Cf, e.g., Regulation (EU) 2024/1689 of the European Parliament and of the Council laying down harmonised rules on artificial intelligence [2024] OJ L2024/1689, Art 27, recitals 62, 120, 136.

mational autonomy of voters (Article 27 DSA). Potential failure to comply with obligations and the resulting irregularities during the election period may therefore be enforced and punished, *inter alia*, in the form of financial penalties.<sup>47</sup>

On the other hand, there is a discernible tendency in the CJEU's jurisprudence, particularly evident in the domain of personal data protection, characterised by a progressive narrowing of the concept of 'falling outside the scope of EU law' or, conversely, a progressive extension of the 'implementation of Union law' in the other spheres of EU law. Both formulas are decisive in determining whether Union law or the specific instruments, such as the CFR (Article 51 paragraph 1 of the CFR), will apply in a case. To illustrate this point, CJEU prejudged that Article 2(2)(a)<sup>48</sup> of Regulation (EU) 2016/679 (GDPR)<sup>49</sup> must be interpreted as meaning that the processing of personal data in the context of the organization of elections in a Member State is not excluded from the scope of that regulation.<sup>50</sup> The Court's ruling determines that the processing of personal data for parliamentary and presidential elections is covered by the provisions of the GDPR, even though they do not fall within the scope of EU law. Thus, if the Court determined that a particular matter does not fall outside the scope of Union law, would this also signify that there is an implementation of Union law by the Member States in this area, as defined in Article 51 of the CFR?

In the current state of development of the CJEU's jurisprudence, we encounter an imbalanced interpretation of the concepts of 'implementing EU law' (Article 51 CFR)<sup>51</sup> and 'falling outside the scope of EU law' (e.g., Article 2 paragraph 2 GDPR). In the latter case, it results mostly from adopting a much broader catalogue of cases covered by the concept of 'EU matter'.<sup>52</sup> It seems, however, basing on the jurisprudence under Article 19 TEU, that the wording 'is covered

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<sup>47</sup> Cf, *inter alia*, Case C-260/89 ERT [1991] EU:C:1991:254, paras 42, 43, 44; Case C-390/12, Pflieger [2014] EU:C:2013:747, para 36; Case C-617/10 Fransson [2013] EU:C:2013:105, para 27; Case C-482/10 Cicala [2011] EU:C:2011:868, para 17; Case C-27/22 Volkswagen [2023] EU:C:2023:663 para 37.

<sup>48</sup> '[...] This Regulation does not apply to the processing of personal data: (a) in the course of an activity which falls outside the scope of Union law'.

<sup>49</sup> Regulation (EU) 2016/679 of the European Parliament and of the Council on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC [2016] OJ L119/1.

<sup>50</sup> Case C-306/21 Komisia za zashtita na lichnite danni, Tsentralna izbiratelna komisia przeciwko Koalitsia Demokraticzna Bulgaria Obedinenie [2022] EU:C:2022:813, paras 34–42.

<sup>51</sup> Cf.

<sup>52</sup> Case C-439/19 Latvijas Republikas Saeima [2021] EU:C:2021:504, para 63; Case C-33/22 Österreichische Datenschutzbehörde [2024] EU:C:2024:46, para 45; Case C-306/21 Komisia za zashtita na lichnite danni, Tsentralna izbiratelna komisia przeciwko Koalitsia Demokraticzna Bulgaria Obedinenie [2021] EU:C:2022:813, para 39.

by Union law' is not necessarily equivalent to implementing European Union law within the meaning of Article 51(1) of the Charter.<sup>53</sup> Nevertheless, an affirmative answer to their tantamount understanding would imply that all the guarantees developed under the provisions of the Charter would be applicable during national parliamentary or presidential elections, at least in the context of data protection.

The shown ruling in case C-306/21, as well as actions concerning the amendment of the Act on European Parliament Elections,<sup>54</sup> suggest indeed some further ambitions and tendencies of the EU to influence and unify some of the electoral standards between Member States. Such a fledging tendency seems to correspond with the idea to treat finding on 'the unfairness of elections 'or 'undemocratic elections' as a clear risk of serious breach by Member States of the EU values within the meaning of Article 7 TEU or a failure to fulfil an obligation under the Treaties within the meaning of Article 258 TFEU,<sup>55</sup> triggering the mechanisms expressed therein. Suggestively, potential violations of Article 2 TEU could also be equated with EU law application in the sense of Article 51 (1) of the CFR.<sup>56</sup> The acceptance of this line of reasoning would result in the Charter becoming a binding standard for the assessment of respect for fundamental rights in the context of flawed or potentially flawed elections. However, it appears that the initiation of any control mechanisms would only be a conceivable course of action in the event that the Member State had failed to implement any corrective measures, such as the annulment and subsequent re-run of the elections.

Conversely, the absence of acceptance of the above position necessitates a reflection on whether fundamental values and fundamental rights in the electoral context bind Member States solely to the extent that they apply Union law or are directly covered by EU law, so only in the European Parliament and municipal elections (Article 2 TEU and Article 51 paragraph 1 CFR). Adopting such an interpretation and excluding severe violations of the principle of free and fair elections during parliamentary or presidential elections from Article 2 TEU cata-

<sup>53</sup> Case C-192/18 *Commission v Poland* [2019] EU:C:2019:924, para 101.

<sup>54</sup> Council Decision 2018/994 amending the Act concerning the election of the members of the European Parliament by direct universal suffrage [2018] OJ L 178/1.

<sup>55</sup> Cf on the enforcement of Art 2 TEU values through centralized mechanism of EU law established in Arts 258 – 260 TFEU and Art 263 TFEU: Yasmine Bouzora, 'The Value of Democracy in EU Law and Its Enforcement: A Legal Analysis' (2023) 8(2) *European Papers*, 836 and further. Some scholars argue that Article 2 is too vague to be a separate subject of infringement action under Art 258 TFEU – cf Andrzej Wróbel in *Traktat o Unii Europejskiej. Komentarz*, Robert Grzeszczak, Dagmara Kornobis-Romanowska (eds) [2023], Art 2.

<sup>56</sup> Vesna Ćorić & Aleksandra Rabrenović, 'How to ensure free and fair elections in the EU and Beyond: A Need For Rule of Law, Democracy and Human Rights Principles to Stand Together' (2024) 8 *EU and Comparative Law Issues and Challenges Series (ECLIC)* 982–983. Cf literature cited therein.

logue would be rather peculiar. In accordance with the CJEU jurisprudence in the area of justice organization in Member States, even if specific field falls within the competences of Member States, they are required to comply with their obligations deriving from EU law, mainly when their actions are of cardinal importance to safeguarding the values common to the Member States set out in Article 2 TEU, in particular the value of the rule of law.<sup>57</sup> Although such a necessity has not so far become apparent, it is challenging to conceive of a scenario in which severe and internally unaddressed infringement of the principle of free and fair elections could be in any way exempt from the perspective of founding values.

It is evident that establishing Article 2 TEU as a standalone basis in the event of violating the principle of free and fair elections would serve as a remedy to the limited EU competencies in the regard of elections outside the scope of EU law. So far, however, CJEU has decided cases relating to Article 2 TEU always in connection with other EU law provisions.<sup>58</sup> Founding values may be enforced insofar as EU law implements them through the law, thus their enforcement cannot fall outside its scope. It seems that the possibility of enforcement of Article 2 TEU has been so far dependent on the concrete expression in the other provision of EU law, inter alia, Article 19 TEU.<sup>59</sup> Thus far, CJEU enforces laws, not values. Therefore, it seems complicated to maintain that Article 2 TEU could alone activate the Charter or that Article 2 TEU could be applied alone within the limits of the competence of the Union.<sup>60</sup> It is, therefore, imperative to elucidate the substance of Article 2 TEU values, a process that can be facilitated through external concretisation, i.e., by referencing the common constitutional traditions of Member States, the contributions of the Venice Commission and the jurisprudence of the European Court of Human Rights.<sup>61</sup> The operationalisation of the values enumerated in Article 2 is therefore realised through their concretisation, which occurs through the application of Article 2 in conjunction with the provisions that concretise it. For example, value of democracy (Article 2 TUE), may be concretized through references not only to the other provisions of primary law (Article 10 paragraph 1 and Article 14 paragraph 3 TUE), but also to the principle of universal suffrage and free, secret, and regular elections, normatively embedded in Article P1-3 ECHR, the recommendations of the Venice Commission and the electoral standards of ODIHR.

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<sup>57</sup> Cf by analogy Case C-192/18 *Commission v Poland* [2019] EU:C:2019:924, paras 102–106; Case C-430/21 RS [2022] EU:C:2022:99, para 37 and the case-law cited therein.

<sup>58</sup> Cf Rossi (n 4) 13.

<sup>59</sup> Cf, e.g., Case C-64/16 *Associação Sindical dos Juizes Portugueses v Tribunal de Contas* [2018] EU:C:2018:117, para 32.

<sup>60</sup> Rossi (n 4) 16.

<sup>61</sup> Boeckstein (n 27) 441.

Through such operationalisation, CJEU could delineate the concept of ‘unfree’ and ‘unfair’ elections and not just consider it as a conceptual vestibule for the existence of democracy, but more as specifically defined violations that must occur for an election not to be considered free or fair.<sup>62</sup> However, CJEU would be confronted with a challenging undertaking, as there is no uniform benchmark for assessing the free and fair nature of national elections from the EU law perspective.<sup>63</sup>

### III. EUROPEAN ELECTORAL LAW – LANDSCAPE AND INTERDEPENDENCIES. SEEKING FOR APPLICABLE STANDARD

Potential developments in the character and meaning of Article 2 TUE, aimed at equating violations of free and fair elections at the national level with breaches of the values indicated therein, would require delineating the violations that must occur for an election not to be considered free or fair. At this point, the resultant understanding of the standard of free and fair elections is the outcome of interdependence, intersection and co-creation, particularly by the ECHR, ODIHR<sup>64</sup> and the European Commission for Democracy through Law (Venice Commission).<sup>65</sup> Those standards may not necessarily be of directly binding character. For example,

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<sup>62</sup> Such a clarification of the understanding of Article 2 TEU by CJEU does not seem to be excluded, should the necessary circumstances arise. The interpretation which, in the exercise of the jurisdiction conferred upon it by Article 267 TFEU, the Court gives to a rule of EU law clarifies and defines where necessary the meaning and scope of that rule *as it must be, or ought to have been*, understood and applied from the time at which it entered into force – cf Case C-430/21 (n 47), para 77 and case-law cited therein. Conversely, the values set out in Article 2 of the TEU are the result of long-standing constitutional processes, and so far there have been no explicit references to the freedom and fairness of elections in their context.

<sup>63</sup> In the absence of cases on this matter, the Court has not yet directly addressed the issue of free and fair elections. However, in the issues it has addressed, CJEU has relied on Article 3 of the Additional Protocol to the European Convention on Human Rights (‘Right to free elections’) and ECtHR standards. Cf inter alia Case C-808/21 *Commission v Czech Republic* [2024] EU:C:2024:964 and Case C-814/21 *Commission v Poland* [2024] EU:C:2024:963. Cf Nora Vissers, ‘Join the (political) party: The CJEU’s emerging role as a guardian of democracy in Cases C-808/21 and C-814/21’ (2025) 32 (5-6) *Maastricht Journal of European and Comparative Law* 613–627.

<sup>64</sup> Cf footnote No 9 and Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE (1990) <<https://www.osce.org/files/f/documents/7/3/19113.pdf>> accessed 31 December 2025.

<sup>65</sup> Cf, e.g., *Hirst v the United Kingdom* [2005] (App No 74025/01) ECHR 2005-IX, where ECtHR have firstly taken advantage of Code of Good Practices in the Electoral Matters – the vital guideline developed by the Venice Commission.

soft-law recommendations of the Venice Commission, despite their undisputed significance, usually require some form of confirmation and reinforcement ('hardening of the soft-law'), e.g., in ECtHR case law.<sup>66</sup> However, ECtHR case law may also be of variable applicability, depending on the type of elections assessed (local, European, presidential or parliamentary).<sup>67</sup> Nonetheless, Article 3 of Protocol No 1 to the ECHR (P1-3), which binds all EU Member States, provides the most valid, supra-national interpretive clue of the principle of free and fair elections.<sup>68</sup> The elections, in accordance with P1-3, are aimed at guaranteeing an electoral result that will 'ensure the free expression of the opinion of the people'. However, under P1-3, ECHR has discerned the wide margin of appreciation of Contracting States regarding the organisation of their electoral system.<sup>69</sup> In a similar vein, Article 8 of the Act of 1976 concerning the election of the members of the European Parliament by direct universal suffrage in free and secret ballot, states that subject to the provisions of this Act, the electoral procedure shall be governed in each Member State by its national provisions. For obvious reasons, it leads to considerable disparities in the methodologies employed for the organisation of electoral systems and their practical conduct.

Although there is no uniform definition of free or fair elections, it is possible to delineate the common points that need to be followed to claim elections as free and fair. The most vital obligation is, however, ensuring 'free expression of the will of the people in a democratic society'. Simply avoiding irregularities during the vote or the counting of ballots is nonetheless not enough for elections to be considered in conformity with free and fair elections. There are a certain number of conditions that must also be respected prior to the vote for it to be considered

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<sup>66</sup> Jukka Viljanen, 'The Role of the European Court of Human Rights as a Developer of International Human Rights Law' (2011) 62/63 Cuadernos constitucionales de la Catedra Fadrique Furio Ceriol 251, accessible through <<https://www.corteidh.or.cr/tablas/r26759.pdf>> accessed 31 December 2025.

<sup>67</sup> Cf European Courts of Human Rights, 'Guide on Article 3 of Protocol No 1 to the European Convention on Human Rights and explanations' <[https://ks.echr.coe.int/documents/d/echr-ks/guide\\_art\\_3\\_protocol\\_1\\_eng](https://ks.echr.coe.int/documents/d/echr-ks/guide_art_3_protocol_1_eng)> accessed 31 March 2025, as to the meaning and scope, reduced only to 'the choice of legislature'. It is thus possible that in municipal elections only the CFR will be applicable, while presidential elections (such as in Poland) will fall outside the scope of EU law and the Convention.

<sup>68</sup> 'The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature'.

<sup>69</sup> Cf, e.g., *Bowman v the United Kingdom* [1998] (App No 24839/94), ECHR 1998-I, para 42. Traditionally, the existence of a European common ground in the law and practice of the Contracting States may lead to a narrow margin of appreciation and thus a stricter scrutiny by the Strasbourg authorities, but on the other hand, if the law and practice are very different among the Contracting States, the margin of appreciation may be wider.

free and fair, respect for fundamental rights – freedom of expression, of assembly and association, as well as equal access to the media and financing of electoral campaigns, regarding both elections and referendums.<sup>70</sup> It is essential to consider the recent opinion of the Venice Commission on the annulment of the first round of the presidential elections in Romania.<sup>71</sup> On the grounds of information from Romania’s intelligence agencies revealing voter manipulation, distortion of equal opportunities for electoral competitors, through non-transparent use of digital technologies and artificial intelligence in the electoral campaign, as well as through the financing of the electoral campaign from undeclared sources, the domestic court ruled that presidential elections should be resumed in their entirety.<sup>72</sup> The deficiencies were linked not strictly to the electoral process itself, but to the preparatory phase of elections and non-transparent influence on the voters.<sup>73</sup> In the context of this study, it is imperative to acknowledge that under the most referential P1-3 (violation of the principle of free elections), electoral irregularities only impede the free expression of the people’s opinion if they result in a genuine prejudice to the outcome of the election and distort the election results.<sup>74</sup> This implies that evidence of illegality, dishonesty, unfairness, malfeasance or other misconduct is clearly established and where such improper behaviour has distorted election results.<sup>75</sup> This statement suggests two requirements: (1) the decision must be based on clearly established facts which prove significant irregularities; and (2) those irregularities *may* have distorted election results, as it will not always be possible to firmly establish an actual effect on the outcome of elections.<sup>76</sup>

It is sufficient, but also necessary to show convincingly that the results of the elections could have been different in the absence of irregularities.<sup>77</sup> The concepts of ‘principle of minimum interference’<sup>78</sup> or ‘margin of victory’<sup>79</sup> may constitute

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<sup>70</sup> Cf apt term of ‘overarching’ or ‘macro-level’ obligations in terms of election. Carter Center, ‘Election Obligations and Standards: A Carter Center Assessment Manual’ (2014), Atlanta: The Carter Center. Cf ODIHR, ‘Election handbooks, particularly concerning Observation of Election Campaigns and Political Environments’ <<https://www.osce.org/odihr/elections/handbooks>> accessed 31 December 2025.

<sup>71</sup> Venice Commission, Urgent Report on the cancellation of election results by Constitutional Courts (2025) <[https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2025\)003-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2025)003-e)> accessed 30 December 2025.

<sup>72</sup> Ibid para 5.

<sup>73</sup> Ibid para 7.

<sup>74</sup> Ibid para 39 and the ECtHR jurisprudence cited therein.

<sup>75</sup> Venice Commission, CDL-AD (2020)025, Report on election dispute resolution, para 128.

<sup>76</sup> Ibid para 40.

<sup>77</sup> Cf *I.Z. v Greece* [1994] (App No 18997/91); *Babenko v Ukraine* [1999] (App No 43476/98).

<sup>78</sup> Cf Venice Commission (n 71) para 45.

<sup>79</sup> Cf Case: W I 6/2016-125 Constitutional Tribunal of Austria [2016] <[https://www.vfgh.gv.at/downloads/VfGH\\_W\\_I\\_6-2016\\_EN.pdf](https://www.vfgh.gv.at/downloads/VfGH_W_I_6-2016_EN.pdf) accessed 31 December 2025>.

efficacious tools for argumentation and evidence in that regard.<sup>80</sup> However, the law must guarantee safeguards such as impartiality, precise norms to limit the discretion of the authority entitled to annul the elections, guarantees of a fair, objective and reasoned decision, to prevent arbitrary decisions and to be in accordance with the ECHR.<sup>81</sup> However, it remains evident that the regulation and assessment of the correctness of the conduct and outcome of elections remain a matter of broad procedural autonomy of Member States.

Nevertheless, the standards set out by the Venice Commission and the ECtHR provide a well-established *in abstracto* guideline for the assessment of electoral irregularities and their impact on electoral results. However, evaluations of these aspects – in accordance with the principle of free and fair elections – continue to present an ongoing challenge, primarily because of the progressive advancements in the domains of social media, data-driven electoral campaigns, artificial intelligence, and the external influences that exert influence on the electoral process. The established standards of European electoral law provide a foundation for further discourse on the challenges to proving an influence on free and fair elections and to an academic discussion on their assessment in the context of the fundamental values of the EU under Article 2 TUE and the external sources of its operationalisation.

#### IV. CONCLUSIONS

The increasingly stronger attempt of the EU to safeguard the regularity and resilience of electoral processes, mostly in the context of elections to the EP, is contrasted with the limitation of the EU's regulatory and supervisory competence in the field of elections. It influences the difficulties in reconstructing the binding standard of free and fair elections, monitoring its effectiveness, or enforcing it also in the context of national, parliamentary or presidential elections. The present state of EU law development does not provide direct answers on the permissibility of isolated enforcement of Article 2 TEU due to violations of the principle of free and fair elections, both in elections within the scope of EU law (European and

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<sup>80</sup> See also a seemingly non-exhaustive list of reasons for cancellation of election results prepared by Venice Commission, CDL-AD(2009)054, Report on the cancellation of election results, para 79: failure to comply with the turnout requirements; errors in voter registration or candidate nomination; violations of campaign regulation (including regulation on campaign finances); violations of legislation applicable to the voting process; violations in counting or reporting; violations in allocation of mandates.

<sup>81</sup> Cf Venice Commission (n 71) paras 59 and 78.

local elections) and elections outside its scope (parliamentary and presidential elections). Concurrently, the identified tendencies to impose, in secondary law, horizontal obligations to monitor threats to electoral processes, the jurisprudential expansion of the ‘scope of EU law’ in terms of GDPR, as well as the progressive operationalization of Article 2 TEU and the values expressed therein in the CJEU jurisprudence, suggest that the EU – should the need arise – could be potentially ready to link violations of free and fair elections principle to the breaches of the values of the rule of law, democracy or respect for human rights. The operationalisation of Article 2 TEU through external references to ECHR case law (Article 3 to Protocol of 1 of the ECtHR) and Venice Commission recommendations is a conceivable proposition, since these sources contain a consistent and unified position on the understanding of the principle of free and fair elections and the grounds for considering this principle to have been violated. Although the Court employed a comparable operationalisation in judgements C-808/21 and C-814/21, there is still considerable scholarly debate surrounding the question of whether the violations of Article 2 TEU – such as the principles of free and fair elections, as outlined in this study – could result in the initiation of control procedures under Article 7 TEU or Article 258 TFEU.

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