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**#values
#democracy**

European values

A debate to be clarified, a struggle to be fought

• Introduction

For several years now, liberal democracy has been challenged in Europe and elsewhere, in particular under pressure from national-populist and extremist political forces. Opinion polls demonstrate a growing public dissatisfaction with how democracy operates: endangered democratic freedoms, “illiberal democracy”¹, a risk of democratic “deconsolidation” or “regression”², a “populist century”³, etc. are just some expressions which aim to bear witness to these changes within liberal democracies.

Outside the European Union, against a backdrop of authoritarian, dictatorial and totalitarian regimes asserting themselves worldwide, particularly in China, the reversion to violence in Europe, with Russia’s invasion of Ukraine, highlights the key role of the fight between liberal democracy and an authoritarian regime, which is in practice increasingly dictatorial, with fascistic characteristics and even rhetoric with totalitarian undertones⁴. The tragedy of the war in Ukraine is a democratic opportunity, as it forces us to consider our most deeply-rooted values, the society model in which we wish to live and the price we are willing to pay to live in free and open societies.

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- 1 Krastev, I. and Holmes, S. (2019), *The Light that Failed: A Reckoning*, Allen Lane.
- 2 Mounk, J. (2018), *People vs. Democracy. Why our Freedom Is in Danger & How to Save It*, Harvard University Press. Part 1, Chap. 3; see also the collective work, *The Great Regression, Polity*, 2017.
- 3 Rosanvallon, P. (2021), English translation: *The Populist Century. History, Theory, Critique*, Polity Press
- 4 V. Hassner, P. (2015) “La transition autocratique en Russie”, in *La revanche des passions. Métamorphoses de la violence et crises du politique*, Fayard, p. 241-255 (in French).

Yet, as Jacques Delors commented: “The fight [for values] is not very clear as it sometimes gets dressed up as a conflict between modernists and those who look back towards the past”⁵. In other words, the debate on the issue of “European values” is often marred by the confusion between legal and political aspects on the one hand, and cultural and societal on the other. This confusion leads to adverse effects and undermines the reach of any effort to combat those seeking to thwart the founding values of liberal democracy.

In view of this, the aim of this paper is specifically to make a modest attempt to clarify the terms of this thorny issue, which is a necessary step to heighten the efficacy of any strategy striving to defend the values of liberal democracy at the foundation of the European Union. The following sections aim to: define as clearly as possible the fundamental “political values” placed at the heart of the European political project (1.), to put into perspective challenges to these values in a bid to disprove the rhetoric that asserts the commonplace nature of illiberalism, without overstating the East-West divide on this issue (2.), to contribute to providing elements of methodology for a strategy aimed at the successful “cultural” fight over European political values (3.).

I • The values embodied by the European political project

I WHICH “EUROPEAN VALUES”?

The different Member States all have specific national identities and memories and this “Europe of values” neither breaks down national borders, nor enforces a monolithic perception on what European values, and therefore identity, are. This perception varies between Member States and between their political groups. A series of surveys conducted since 1981 in Europe –the European Values Study⁶– identifies a range of collective preferences concerning the “Europe of values”, around which groups of States converge⁷. Religious freedom is a prime example of this. Beyond the principles of religious freedom and tolerance, the relationships between the Church and the State vary from one EU Member State to another. France is the only EU State to have enshrined secularism in its Constitution. By doing so, it has come to represent an original model within Europe, since other Member States do not have such a strict separation of Church and State. Another clear example is that the Greek Orthodox Church enjoys a specific status in Greece’s Constitution. Yet, on the whole, European societies stand out for a high level of secularisation (with a few special cases like Poland for example) and therefore are different from the other western centre that is the USA, a secular country (assertion of the separation between the Church and the State) which nevertheless attaches a greater importance to religion in the public arena⁸.

However, despite these national differences, the EU was founded on a community of values defined by treaty: “respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail”⁹. “European values”, thereby defined and

5 Jacques Delors, “Dissertation sur les valeurs”, four-yearly international Congress of Benedictine Abbots, San Anselmo, Rome, 8 September 2000, in *Relire Delors. Discours de Jacques Delors depuis 1996*, Jacques Delors Institute, 2021, p. 102 (in French).

6 <http://www.europeanvaluesstudy.eu>.

7 Galland, Olivier and Lemel, Yannick (2017), “The Frontiers of Values in Europe”, in Bréchon, Pierre and Gonthier, Frédéric (dir.) (2017), *European Values. Trends and Divides Over Thirty Years*, Brill.

8 This is very evident in political rhetoric and symbolism (the oath of the President of the United States of America, the motto on dollar bills, etc.).

9 Article 2 of the Treaty on European Union (TEU).

placed at the foundation of the EU's community of law, make up the set of liberal and democratic values that have been developed over Europe's history and fully asserted since the Enlightenment –respect for human dignity and human rights, all fundamental freedoms, equality of citizens before the law, the rule of law and representative democracy. These values –and this is their more specifically “European” aspect– have been and continue to be asserted in light of the historical experiences of European peoples, particularly since the horrors and tragedies of the 20th century, in relation to several core elements:

- The combination of democracy (universal suffrage, representative government, citizens' exercise of their political rights, etc.) and of political liberalism (rule of law, observance of fundamental rights, separation of powers);
- The stability and respect of a system relying on checks and balances to power: respect for the opposition, decentralisation of power, an independent judiciary and free press, as well as an education system that favours critical thinking;
- A relative renunciation of the use of force and a preference for peaceful settlement of conflicts through negotiation and mutual respect;
- Emphasis on solidarity and the goal of achieving a high level of social justice, entrusting the State with an important role in market regulation and redistribution;
- An approach to international relations which tempers State sovereignty;
- A strong sense of moderation and compromise, tolerance, openness and a distrust of political passions, particularly those which are unleashed in the name of religious or national allegiances.

All of these values are embodied in the European political project, as it was launched and driven by the founding fathers in the 1950s, and which is tending to become a value in itself: declaring (or not) oneself to be “European”, meaning a “champion and defender of European construction”, has become a key marker of political affiliation, comparable to the left/right divide.

I THE EUROPEAN UNION: A COMMUNITY OF LAW AND VALUES THAT CANNOT BE DEFINED AS A MERE ALLIANCE BETWEEN SOVEREIGN STATES

The principles of liberal democracy and the rule of law have constituted the backbone of European construction over the years, reflecting the desire to promote fundamental rights and human dignity following the unparalleled crimes committed during World War Two. These principles constitute the foundation of the EU, both legally and politically.

EU Member States come together within a “union of law” and are bound to comply with the legal commitments they have undertaken to uphold, whether by virtue of the treaties or through the production and implementation of the laws derived from these treaties, with the actual application of these commitments being guaranteed by jurisdictional mechanisms. This community is based on a specific legal order, whose independence from national legislations has been firmly established. In this respect, the power approach (in other words, the law of the strongest), which is typical in conventional relations between European States, must yield to the law which limits the power and sovereignty of States. After the Second World War, the focus was on fundamental rights, as evidenced in the case law of the European Court of Justice and the ECHR from the end of the 1960s and the early 1970s, along with the rejection of Spain's application to join in 1962.

On a more directly political level, the provision that “any European State may apply to become a member of the Community¹⁰” only concerned, until the fall of the Berlin Wall, the countries located to the west of the Iron Curtain, then southern countries (Spain, Greece, Portugal) following the end of dictatorships and authoritarian regimes. It was only after the collapse of the Soviet Union that the countries of Central and Eastern Europe and the Baltic States were able to join the EU. In 1991, the Treaty on European Union provided that: The Union is based on the “principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States” (art. 6) and that “any European State which respects [these] principles [...] may apply to become a member of the Union” (art. 49). In 1993, the Copenhagen European Council defined some economic and also political “criteria” that require compliance. These criteria are as follows:

- The presence of stable institutions guaranteeing democracy, the rule of law, human rights as well as respect for and protection of minorities,
- The existence of a functioning market economy along with the capacity to cope with competitive pressure and market forces within the Union,
- The ability to take on the obligations of membership, in particular the ability to implement effectively the rules, standards and policies that form the EU’s legislative corpus (the “acquis”) and to adhere to the aims of the political, economic and monetary union.

The Charter of Fundamental Rights, adopted in 2000 and incorporated in the Treaty of Lisbon in 2009, stresses that the EU is not only a major marketplace but also enshrines values and guarantees freedoms. Today, compliance with article 2 of the TEU is a pre-requisite for accession, as well as for participation within the EU.

This has a profound implication: European integration cannot be reduced to a mere alliance between sovereign States¹¹. If this were true, the EU would simply be an intergovernmental entity and would not have gone as far in its integration to enshrine it in treaties that take precedence over national legislations¹² and to create supranational institutions with a clear mandate to guarantee effectiveness or establish a European citizenship¹³. We are united by historical and geopolitical factors. This is where the founding value of Europe lies: first integration created the conditions for peace and anchored democracy before it built strength through unity. In other words, the European Union’s founding principles and values lie in the need to remain geopolitically united, to protect itself from authoritarian and even totalitarian temptation, to replace the law of the strongest with law and equality between States, to prefer peaceful settlements over conflicts between States, and to champion a vision of inter-State relations as a positive-sum game –which implies a widespread consensus on the idea that a country’s wellbeing cannot be built upon the neighbouring country’s misfortune.

¹⁰ Art. 237 of the Treaty of Rome.

¹¹ Contrary to the claims of Gideon Rachman, for example, in “Europe is an alliance, not a union of values”, *Financial Times*, 21 January 2019. For another point of view, see Thierry Chopin, “L’Union européenne n’est pas une simple alliance entre Etats souverains”, *Le Monde*, 19 October 2021 (in French). We would like to thank Jean-François Jamet for our discussions on this point.

¹² Cf. Chopin, T. and Roche, J.-B. (2021), “En finir avec le mythe d’une Union politique sans primauté juridique”, *Le Grand Continent*, 5 November 2021 – <https://legrandcontinent.eu/fr/2021/11/05/en-finir-avec-le-mythe-dune-union-politique-sans-primaute-juridique/> (in French)

¹³ Article 9 of the Treaty on European Union (TEU) and article 20 of the Treaty on the Functioning of the European Union (TFEU) provide that “every person holding the nationality of a Member State shall be a citizen of the Union”.

Europeans feel European in that they know that their fate, both past and future, is inseparable and that they make up a community of shared destiny. European construction redeemed the collective suicide of the world wars and sublimated national political rivalries by rejecting power politics. The “de facto” solidarity (to use Robert Schuman’s expression) created by the internal market was intended to foster common interests and a high degree of interdependence that would discourage national egoisms. This logic was achieved thanks to the initiative of Jacques Delors, supported by François Mitterrand and Helmut Kohl. After peace and reconciliation, the idea was that prosperity and solidarity should guide the project for a Unified Europe. The euro has become a symbol of this union because it provides a concrete guarantee that we will not separate: attacking one of the members means attacking the single currency and thus attacking all Member States as a whole¹⁴. Both logics (integration into a community of destiny and the intergovernmental approach) coexist and Member States can lean towards one State or another, according to their immediate interpretation of their national interests. Yet they must not lose sight of the deep meaning of the commitment they freely undertook when joining the Union. European integration does not aim to make State sovereignty disappear. Rather, it regulates it, puts it into perspective and “civilises” it –and in doing so ultimately makes it more effective. The current situation in Ukraine is both a tragic and striking example of this: here is a State which, when its sovereignty is brutally violated by a neighbouring State acting solely according to a “conventional” power approach, expresses a desire to join the European project as quickly as possible. By sharing a portion of national sovereignty, belonging to the European Union entails giving up on the purity of theoretical sovereignty, while enjoying significant benefits in terms of actual sovereignty.

The original feature of this ‘union’ lies precisely in the fact that it is very different in nature from an alliance that is solely based on the sovereignty of States. An alliance does not create a new form of sovereignty, whereas EU law does¹⁵. Lastly, a simple alliance offers no guarantees regarding the permanence of any established peace. Conversely, the stability of a legal order, composed of States that have freely and under sovereignty decided to associate themselves in a wider Union to exclude any risk of conflict between them for the long term, requires a minimum degree of political homogeneity which in turn implies a certain level of consensus on shared political values.

II • European political values under pressure: liberal democracy put to the test

I THESE VALUES ARE BEING CHALLENGED DUE TO EXTERNAL AND INTERNAL DEVELOPMENTS

In recent years, the question of “European values” has been raised with growing relevance as the assumption of a gradual convergence towards Western-inspired universal values has been undermined by several developments. First of all, these changes occur outside the European Union through the rise of authoritarian, dictatorial and totalitarian regimes in particular with China’s increased presence, though its economic development has not gone hand in hand with any liberal poli-

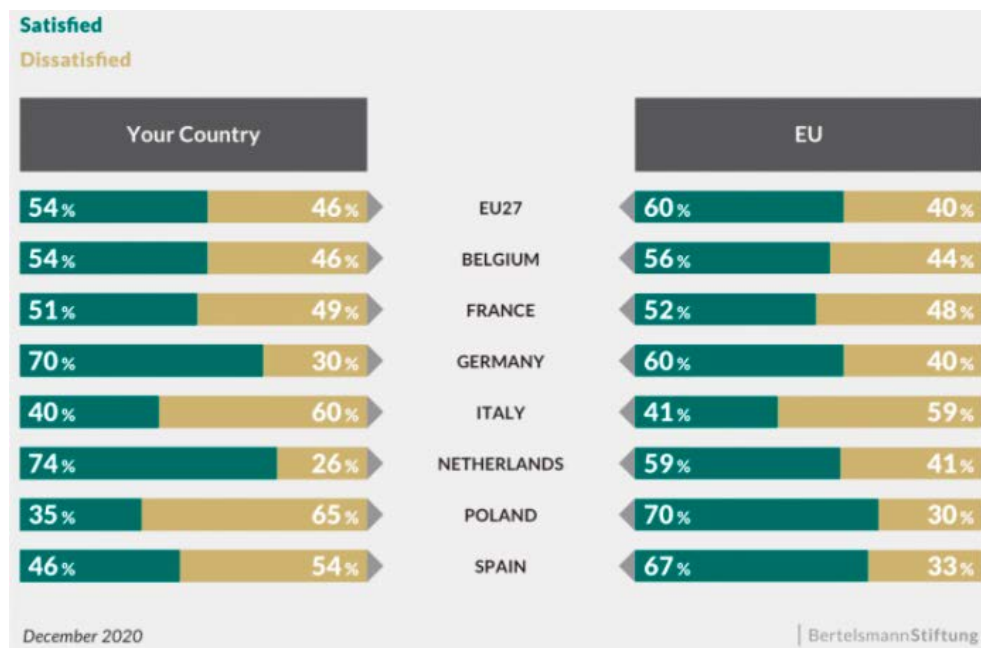
¹⁴ For example, for several years, the Baltic States have felt threatened in terms of their borders and security by Russia, which has resulted in a strategy of strengthening integration with the adoption of the euro, perceived as a guarantee of greater solidarity. This idea of solidarity is also expressed in article 42.7 of the TEU: “If a Member State is the victim of armed aggression on its territory, the other Member States shall have towards it an obligation of aid and assistance by all the means in their power”.

¹⁵ On the concept of “European sovereignty” introduced by Emmanuel Macron in the address he gave at the Sorbonne (26 September 2017), for a recent contribution see “La souveraineté européenne : entre interdépendance et autonomie”, *Revue des juristes de Sciences Po*, Lexis-Nexis, March 2022.

tical development. With Russia, due to its military expansionism and aggressively anti-Western ideology, the initially gradual breach is now sudden in relation to this entire set of principles. The return to violence in Europe, with the Russian invasion and war in Ukraine, under the effect of Russian military expansionism and against a backdrop of resentment and desire for revenge, highlights the importance of the fight between liberal democracy and a regime that is now openly dictatorial. The “open society” model has never had as many enemies since the end of World War II¹⁶... This situation is a game-changer: values that may have appeared to prevail during the 1990s are now under significant pressure, which, paradoxically, heightens their “European” nature. This development makes these values less universal and brings nuances, and even major differences, into focus between the two sides of the Atlantic. This allows us to identify a specific European characteristic within a Western group.

Moreover, a second development tends to call into question the political values of liberal democracy with the return of authoritarian tendencies in Europe, such as the development of illiberalism in certain EU Member States, with Hungary and Poland being the two most striking examples, although illiberal tendencies are present in other European nations, East and West, North and South. For several years now, liberal democracy has been challenged¹⁷ as demonstrated by the repeated electoral victories of national-populist and extremist political groups, in addition to opinion polls, which convey a risk of democratic regression¹⁸.

CHART 1. EU27: How satisfied are you with the way democracy works in your country and in the EU?



▲ Source: “Democracy and the Rule of Law in the European Union” poll, Eupinions, 13 July 2021

European “political values”, as defined above, are now being challenged by what looks like an increasing number of authorities in EU Member States. This crisis of the European project is related to the crisis facing liberal democracies, although the

¹⁶ In reference to the book by Karl Popper (1945), *The Open Society and its Enemies*, London, Routledge.

¹⁷ See for example the section entitled “L’idée libérale en question” in *Esprit* magazine, issue 474, May 2021 (in French).

¹⁸ See the Report by the Fondation pour l’innovation politique, “Freedoms at risk: the challenge of the century”, 2022 – <https://www.fondapol.org/en/study/freedoms-at-risk-the-challenge-of-the-century/>

latter does not concern Europe specifically. However, in recent years, opinion polls are highlighting growing dissatisfaction with democracy that may be interpreted as a risk of democracy becoming “deconsolidated”, rather than necessarily a rejection.

Moreover, liberal democracy in Europe is under significant pressure from national-populist and extremist political forces which, despite their diversity, lay claim to being an ‘illiberal democracy’ in certain Member States. The rise of forms of populism is accompanied by a desire to dissociate the two components of constitutional and liberal democracy that have been at the heart of our democratic systems since the end of the Second World War. Deprived of the principles of limiting and moderating power, “illiberal democracy” is in reality a smokescreen that masks an evolution towards “majority authoritarianism”¹⁹, whose characteristics are becoming increasingly clear: reference to the sovereignty of the people as the exclusive basis for the democratic legitimacy of power; strengthening of executive power; authoritarian leaders’ desire not to have their power challenged; reducing uncertainty in electoral competition in order to closely control political life; (legal or illegal) capture of, and subsequently operation within, the institutions ensuring the system of checks and balances to reduce their role and weaken them at the expense of the rule of law in order to better control the State apparatus; interference in the media to control information and communication; reduction of academic freedoms and domination of the educational policy; and a desire to establish hegemonic control over the economy through political power.

I THE STRUGGLE FOR VALUES: A NEW EAST-WEST DIVIDE? INVALIDATING THE NARRATIVE OF WIDESPREAD ILLIBERALISM WITHOUT OVERSTATING THE EAST-WEST DIVIDE

Thirty years on from the collapse of the Soviet Union, a new East-West divide seems to be emerging regarding the EU’s political values. The wave of contestation of European political values, while taking specific forms in each Member State, is a general phenomenon that affects the EU as a whole.²⁰

In this situation, it is important to avoid two very common mistakes of perception and interpretation. In the West there is a strong tendency to overstate the “otherness”, the specificity of Central and Eastern Europe in terms of values. This perception ignores the internal diversity of these countries, the often extremely strong resilience of the checks and balances as well as the gaps between rhetoric and political acts. Conversely, the very same perception tends to minimise the scale of the problem in the West, where European values also face many strong challenges and where, in terms of migratory issues for example, a sometimes more policed discourse can mask policies that all in all are comparable to what is happening in Central Europe.

On an equal footing between these two approaches, we believe that the wave of contestation against European values, whilst being shrouded in narrative, symbols and specific themes linked to the past and the specific identity of each country, is a global phenomenon that is affecting Europe as a whole, both in the East and the West. However, the ability to resist the latter varies according to several splits, including the one which separates the oldest democracies in the West from those that have been built up in the East since 1989. Democracy’s weaker capacity to resist in Central and Eastern Europe is not surprising because it can mainly be explained by

¹⁹ Chopin, T. (2019), “Démocratie illibérale ou autoritarisme majoritaire ? Contribution à l’analyse des populismes en Europe”, *Policy paper* No.235, Jacques Delors Institute, 19 February 2019 – <https://institutdelors.eu/wp-content/uploads/2020/08/Democratieilliberaleouautoritarismemajoritaire-Chopin-fevrier2019.pdf> (in French)

²⁰ Chopin, T. and Macek, L. (2018), “In the face of the European Union’s political crisis: the vital cultural struggle over values”, *European Issues*, Robert Schuman Foundation, July 2018.

different factors that distinguish – to various degrees – this part of Europe from the kind that was able to develop in a liberal-democratic framework as of 1945.

- First, the young Central and Eastern European democracies are based on more fragile structures, as evidenced, for example, by the chronically low levels of voter turnout and the structural weaknesses of the media sector.
- Second, the societies of Central and Eastern Europe have, by and large, not overcome their traumas that fuel mistrust and even resentment towards the West. The rejection of European values is further stimulated by a number of feelings, including resentment, that must be taken seriously: conviction of always being the victim, dread of living under a “diktat”, obsessive attachment to the homogenous ethnic and cultural character of society, obtained through tragic circumstances over the 20th century, but which has become “second nature” in these societies after forty years of communism.
- In addition, Central and Eastern European public opinion is very sensitive, even susceptible, to anything that may create feelings of being or appearing to be ‘second-class Europeans’. In terms of political values, the typical issue is the application of a ‘double standard’ on the memory of the two totalitarian regimes that bloodied European history in the 20th century. Under these conditions, it is key not to exaggerate, misinterpret or instrumentalise these real differences between Western and Eastern Europe²¹,
- Lastly, in cultural terms: a conservative social vision may resonate more in certain Central and Eastern European societies (for example in Poland or Hungary, where the EU is perceived by some as a Trojan horse of anti-religious modernity, the bearer of societal values and choices that are denounced as decadent and ultimately destructive of what should be the true European identity).

Nevertheless, while it is important to take all these specific features into account when understanding the political positions and dynamics in Central and Eastern Europe, we must not draw the conclusion that there is an irrevocable and definitive difference between the East and the West of Europe: the West also has its demons, traumas and resentments, be they in relation to the 1930s and 1940s or the colonial past, to list but two obvious examples. The specific feature of the European project is precisely to rise above all of this, with humility and a strong desire for reconciliation with other European nations, and also with itself. It must absolutely not be made an alibi to excuse or mask its current turpitude. No historical or cultural argument can justify the violations of media pluralism, of the independence of the judiciary, the freedom of civil society or academic liberties²².

I THE DEBATE ON VALUES MUST BE CLARIFIED

The debate on values within the EU is often impacted by the confusion of two different registers:

- Firstly, that of respecting the values which set the rules of politics and which may be deemed “fundamental”, to the extent that they determine the very foundation

²¹ Rupnik, J. (2019), “East-West, reality and relativity of a divide”, *Policy Brief*, Jacques Delors Institute, 19 March 2019.

²² This idea was expressed strongly by Donald Tusk in his speech to the European People’s Party summit in 2018 in which he stressed the incompatibility between Christian-democrat convictions and non-compliance with fundamental values – <https://www.consilium.europa.eu/fr/press/press-releases/2018/11/08/speech-by-president-donald-tusk-at-the-epp-helsinki-summit-2018/>

of democratic political life. Whether or not this set of values is endorsed creates a divide between forces that are “pro-system” or “anti-system” and it is therefore legitimate and necessary, on an EU level, to make them a prerequisite of EU membership and full access to its benefits.

- Secondly, that of values which guide citizens and their representatives in their selection of partial rules that will govern our societies. These values develop within a framework set by fundamental political values and concern policy choices. Endorsement of any of these values –which are particularly expressed in the area of social and cultural issues– comes down to individual freedoms, as long as it does not give rise to an extreme interpretation that would oppose the lawfulness defined by the national and/or European legal framework.

For example: citizens’ equality before the law, the illegal nature of arbitrary imprisonment, the prohibition of torture, an independent judiciary, freedom of expression and media pluralism are all fundamental elements of our political system that are non-negotiable, in which the room for “specific national traits” must be kept to a minimum and is subject to scrutiny from other Member States and EU institutions. Conversely, the specific procedures regarding the right to strike, the social security model, the degree of separation between religions and the State and the definition of marriage as an institution are examples of ideological and political choices that we naturally have the right to condemn, support or fight for in the political arena but which must be respected, conceding that strong specific national traits can be expressed. In other words: the government of a Member State is entitled to defend a system of conservative values and conduct a conservative or progressive policy. It does not, however, have the right to impose its political agenda through means that run against the EU’s fundamental values.

As stated above, these are defined in article 2 of the TEU which sets the values (“respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities”) and the principles of our societies (pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men). This article sums up the European model of liberal democracy as it has roughly evolved since 1945 in the West and since 1989 in the East. This model stands out for the utmost importance given to representative democracy (implying political pluralism and the soundness of the electoral process) which is overseen by robust checks and balances: the principles of rule of law (elected representatives must abide by the rules enshrined in law, or amend them in compliance with the procedures defined for this purpose, supervised by an independent judicial power) and the delegation of some powers to independent institutions governed by the principles of expertise and impartiality, and not by politics or party-related approaches (constitutional courts, central banks, courts of auditors, etc.).

Yet, in the debate on political developments in Hungary and Poland, these two registers are often confused, resulting in a conflation between the denouncement of authoritarian excesses and the gap between “progressives” and “conservatives”. To name but one example, in its opinion on the “Sargentini report²³”, the European Parliament’s Committee on Women’s Rights and Gender Equality stated, among the grounds justifying recourse to article 7 (cf below), the fact that the Hungarian constitution gives “a definition of family [...] that is obsolete and based on conservative convictions”. Is it legitimate and wise to leverage this argument, while only 13 EU Member States have legalised same-sex marriage and most have only done so

²³ Resolution of the European Parliament of 12 September 2018 on a proposal calling on the Council to determine, pursuant to Article 7(1) of the Treaty on European Union, the existence of a clear risk of a serious breach by Hungary of the values on which the Union is founded, https://www.europarl.europa.eu/doceo/document/A-8-2018-0250_EN.html

recently? **This type of conflation between violations of democratic rules and the policies conducted as part of these rules can only serve the proponents of illiberal regimes.** To do so means falling into the trap laid by Viktor Orbán of being drawn into discussions about societal issues. This fuels his rhetoric which denounces the criticism of his democratic backsliding to be a smokescreen, obscuring the desire to enforce a “progressive” ideological agenda in Hungary; one that does not reflect the wishes of Hungarian voters.

Member States do not all share the same mainstream sensitivity regarding certain major issues that are closely related to value challenges. Whether we are talking about bioethics, social rights, the right to asylum and the integration of migrants or the family model, differences exist, and not only between East and West or between “liberal” and “illiberal” States. Therefore, any binary interpretation is both false and counter-productive: there is no single “good” model, there are a diversity of approaches that are raised in the arena of free and pluralistic public debate. **The real question is knowing where to place the limit between this mutually tolerant diversity of approaches and the unacceptable.** Examples from Hungarian current affairs are insightful in this respect: criticising Hungary for defending the conventional family model is the wrong call. However, a law which –under the guise of the very legitimate aim of protecting children against paedophilia– tends to conflate paedophilia and homosexuality and subjects all representations of homosexuality to the rules commonly imposed on pornography is an unacceptable excess that we believe is in direct conflict with the values and principles enshrined in article 2 of the TEU.

The cohesion and stability of the European legal and political order supposes a minimum of consensus regarding shared political values which, roughly speaking, correspond to so-called “first-generation” fundamental rights and to the political principles which underpin liberal democracy and the rule of law: freedom of expression, of opinion, right of assembly and the right to organise, media independence and pluralism, independence of the judiciary, separation of powers, etc. This is a foundation that ensures a minimal degree of political homogeneity, without which the European Union would lose its coherence. **With regard to this foundation of common political values, no differentiation may be justified or tolerated.** However, this differentiation seems possible specifically by virtue of pluralism and freedom of expression, of thought and of conscience –when addressing the social manifestations of values such as solidarity or equality: in these areas, the rights of citizens in each Member State to make their own ideological and political choices must be respected, meaning that they can change over time, alongside developments in collective preferences and political majorities.

Naturally, this distinction between two types of values, or rather between two different levels of application of values, is not easy to define. Rather than trying to draw the red lines between the tolerable and the unacceptable with precision in areas as complex and sensitive as the principle of non-discrimination, the pluralism of opinions or gender equality, we should focus our attention on outlining a methodology for public and political debate which is essential to allow the European Union to meet the illiberal challenge.

III • How can the “cultural” fight be waged concerning European political values? Analysis of the shortcomings of existing tools and political strategy

I THE KEY ROLE OF THE COURT OF JUSTICE

As seen above, the EU is a community of values set out in the treaties. Some Member States do not comply with EU law or the principle of rule of law²⁴, thereby challenging the fundamental political values which form the foundation of the EU²⁵. Article 7 of the TEU allows the Council to “determine that there is a clear risk of a serious breach by a Member State of the values referred to in Article 2” and, where appropriate, to “determine the existence of a serious and persistent breach by a Member State” of those values and suspend the voting rights of the Member State in question within the Council. In addition, since 2020, the European Commission has been publishing an annual report that presents a qualitative assessment about the state of rule of law both at EU level and on a national level in each Member State²⁶. While these provisions may act as a deterrent in some Member States which have attempted to solve some of the problems highlighted by the Commission, the effectiveness of these mechanisms can be called into question regarding their ability to correct departures from the rule of law in Hungary and Poland, particularly in terms of the media situation and the independence of the judiciary. Triggering Article 7 requires unanimous agreement among Member States, which is clearly a source of deadlock²⁷. While the Commission’s annual reports on the rule of law do stimulate necessary debate on this topic and promote the development of a dialogue between Member States within the Council²⁸, it does not follow suit that peer pressure alone can stop illiberal developments in the countries concerned. Moreover, the Commission is becoming increasingly politicised, in particular because of its political responsibility vis-à-vis the European Parliament²⁹. This politicisation necessarily affects the perception of its independence and neutrality and thus its ability to exercise some of its powers, particularly of a judicial nature in its role as the guardian of the treaties. Thus, in addition to strengthening existing legal instruments (soft law and instruments provided for by the Treaties)³⁰, the Court of Justice of the European Union has a key role to play in protecting fundamental European values and the rule of law. This applies regardless of (or in addition to) the cases and procedures laid down in Article 7 which are held back by the need for unanimity in the Council, making them barely operational in practice.

The Court of Justice has demonstrated its proactiveness in protecting the independence of national jurisdictions by formulating a doctrine stemming from its

²⁴ According to the European Commission, the concept of rule of law in Europe presupposes the following elements: legality, which implies an accountable, democratic and pluralistic process for enacting laws; legal certainty; prohibition of arbitrariness of the executive powers; independent and impartial courts; effective judicial review including respect for fundamental rights; and equality before the law. See Communication from the Commission to the European Parliament and the Council, “A New EU Framework to Strengthen the Rule of Law”, COM(2014) 158 final, p. 4.

²⁵ Cf. Chopin, T. (2019), “Europeans face the Risk of Democratic Regression: What can be Done?”, *New Beginnings*, Jacques Delors Institute, 2 September 2019.

²⁶ European Commission (2021), *Rule of Law Report. The Rule of Law Situation in the European Union*, COM/2021/700 final, 20.7. 2021 – <https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1634551652872&uri=CELEX%3A52021DC0700>

²⁷ See Michelot, M. (2019), “The ‘Article 7’ Proceedings Against Poland and Hungary: What Concrete Effects?”, Blogpost, Jacques Delors Institute, 6 May 2019.

²⁸ It will be interesting to see to what extent these reports on the rule of law could become useful tools for the opposition in the countries concerned.

²⁹ Art. 17, §8, TEU.

³⁰ Pech, L., Kochenov, D. (2019), “Strengthening the Rule of Law Within the European Union: Diagnoses, Recommendations, and What to Avoid”, Policy Brief, Reconnect, June 2019.

2018 judgement in the so-called Portuguese judges case³¹. The reasoning behind the judgement was based on article 19 of the TEU, establishing the Court of Justice, and beyond this institution alone, also the obligation for Member States to ensure effective jurisdictional protection within their legal orders. This case law, which has been referred to regularly in many subsequent judgements, sets out amongst other things that a jurisdiction under the meaning of EU law must be independent, not subject to subordination in relation to another power and that its members must be protected from all types of external influence. On this basis, the Court of Justice has in particular ruled on the Disciplinary Chamber of Poland's Supreme Court and the provisions aimed at lowering the retirement age of Supreme Court judges, deemed to be in breach of the principle of judicial independence³². Several judgements were issued on this topic and others are being prepared. The Court has taken up an ambitious position on this matter, at the vanguard of the reaction of other Member States and also of other European institutions. It should be noted that the Court has also proved itself to be sensitive to the issue of protecting other fundamental values against illiberal excesses, in particular with the ruling on Hungarian NGO law³³, in which the Court presents itself in the role of champion for freedom of association. Another example is the ruling on the Hungarian law about foreign universities³⁴ which concerns, inter alia, academic freedoms.

This proactiveness comes with risks as the Court exposes itself to the danger of issuing judgments that will not be respected³⁵, thereby challenging the effectiveness of the EU's legal system as a whole. It is therefore important to go beyond this legal response and provide the appropriate political support alongside it. This raises the issue of the instruments which may or may not be relevant in this regard.

Furthermore, given the deeply political nature of these matters, the Court's necessarily legal approach can also come up against certain limits, as is the case on the issue of competences when assessing compliance with the principle of subsidiarity. It is therefore necessary to consider the opportunity of **creating another body which can contribute to the definition of limits between what comes under legitimate specific national traits and what constitutes an unacceptable breach of an EU Member State's duty**. The most appropriate type of body would most likely be a sort of "committee of wise persons" or an "ethics committee".

Lastly, we must acknowledge that there are more or less relevant fields to wage a political fight and that it is not necessarily a clever move to mix them up: the defence of fundamental values, enshrined in article 2 of the TEU, falls indisputably within the scope of EU institutions' interventions : the Court, as we have seen, but also the Commission, bearing in mind the reservation discussed above, or the Council and above all the European Council, where the other Member States can and must put pressure on their counterparts in breach of the rule of law. Conversely, **clashes on major social issues should remain within the remit of the European Parliament on an EU level, or concern the activities of European political parties**.

³¹ Court of Justice of the European Union, *Associação Sindical dos Juizes Portugueses*, 27 February 2018, case C-64/16.

³² In its judgment *European Commission v Republic of Poland* dated 24 June 2019, the ECJ held that these provisions are contrary to EU law (Case C-619/18). See Pech, L., Platon, S. (2019), "The beginning of the end for Poland's so-called 'judicial reforms'? Some thoughts on the ECJ ruling in *Commission v Poland* (Independence of the Supreme Court case), *EU Law Analysis*, 30 June.

³³ CJEU, case No. C-78/18, Judgment of the Court, *European Commission v Hungary*, 18 June 2020

³⁴ CJEU, case No. C-66/18, Judgment of the Court, *European Commission v Hungary*, 6 October 2020

³⁵ However, it should be noted that in the two aforementioned Hungarian cases, the Hungarian government expressed its wish to abide by the Court's ruling. This power struggle seems to be longer and more complex with Poland regarding judicial independence.

I BUDGET CONDITIONALITY OR A STRENGTHENED FIGHT AGAINST FRAUD AND CORRUPTION?

As part of negotiations concerning the current Multiannual Financial Framework (MFF) which began in 2021, and against the backdrop of talks regarding the implementation of the recovery plan decided in July 2020 by Heads of State or government, a new procedure was introduced with a view to making the payment of EU budget resources conditional on compliance with the rule of law³⁶. Some works have demonstrated that budget conditionality can be a useful instrument to influence the actions of Member States in areas where there are common consensual objectives but no common legally binding rules (for example, making the disbursement of European funds to promote growth and convergence conditional on measures that support these objectives)³⁷. However, budget conditionality is unlikely to be an effective solution to highly-publicized political conflicts over the violation of fundamental European values and the rule of law³⁸. In the latter case, the threat and implementation of financial sanctions could easily be politically instrumentalized by using the victimhood resentment that characterizes Central and Eastern European societies in particular and by intensifying the denunciation of the EU, presented as a means for Western political elites to apply pressure against the wishes of the citizens in the countries concerned. In addition, many recent studies show that the rise of populism is linked to the issue of regional inequalities³⁹. In this respect, **the relevance of financial sanctions, in particular the lack of disbursement of cohesion funds by the EU, must be rigorously assessed in advance as there is a risk of further promoting the rise of “illiberal” populist political forces.**

At the same time, it is essential to strengthen control over the use of community funds in order to ensure that they are not misappropriated or subject to fraud. It is therefore necessary to strengthen the EU's role in the fight against corruption, which is an aspect of the current democratic regression⁴⁰. A concrete initiative would be to strengthen the mechanisms for monitoring the use of European funds, for example by **strengthening the role and political independence of the European Anti-Fraud Office (OLAF)**. In addition, it is necessary to step up the common fight against corruption by relying on the new European Public Prosecutor's Office⁴¹. In response to national public opinion in the countries concerned, it would be much more effective and well-received to present pressure on compliance with the rule of law (and in particular an independent judiciary) as a pragmatic and not ideological matter: if the taxpayers of other Member States agree to financial transfers to another Member State, it is perfectly legitimate and understandable that they would want strong guarantees regarding the oversight on the use of this public funding. In this respect, **it is regrettable that the topics relating to the “progressives vs. conservatives” divide attract more political and media attention than questions concerning the use of European funds, particularly in Hungary**⁴².

³⁶ On this point, see the work of Eulalia Rubio, “Rule of Law Conditionality”, *Brief*, Jacques Delors Institute, October 2020.

³⁷ Schneemelcher, P., Haas, J. (2019), “Rules Enforcement in the EU: ‘Conditionality’ to the Rescue?”, *Policy Paper*, Jacques Delors Institute, Bertelsmann Stiftung, 28 May 2019.

³⁸ Michelot, M. (2018), “How can Europe repair breaches of the rule of law?”, Jacques Delors Institute, *Policy Paper No. 221*, 4 April.

³⁹ See Wishlade, F. (2019), “The Rise of Populism, Regional Disparities and the Regional Policy Response”, *Research Paper, N°109*, European Policies Research Centre, University of Strathclyde, Glasgow; Dijkstra, L., Poelman, H., Rodriguez-Pose, A. (2018), “The Geography of EU Discontent”, *Working Paper, 12/2018*, European Commission.

⁴⁰ See the Corruption Perceptions Index assessed by Transparency International.

⁴¹ On this point, see Reynders, D. (2022), “Le parquet européen : une arme efficace contre la fraude et la corruption”, *Revue des Juristes de Sciences Po*, March 2022.

⁴² According to the 2020 annual report published by OLAF (https://ec.europa.eu/anti-fraud/system/files/2021-12/olaf_report_2020_en.pdf), the volume of financial recommendations (recovery of amounts used irregularly) issued to Hungary accounted for 2.2% for the period from 2016 to 2020, whereas the EU-27 average was 0.29% and the percentage did not exceed 0.69% for any other Member State.

I A POLITICAL STRATEGY: THE CHALLENGE LIES IN THE METHODOLOGY

Beyond institutional, legal and financial registers, the question of methodology appears essential here. Whether this concerns EU institutions, political representatives at the European or national levels, or experts and journalists working on these topics, “prudential rules” and principles should be upheld to a greater degree in public debate that aims to oppose deviations from the EU’s fundamental values. This means avoiding both false debates and counterproductive effects. In this regard, it is key to remember that, ultimately, **the political defeat of an illiberal force can only come from opposition on a national level**. Given the political nature of the European Union, it is perfectly legitimate for other Europeans to make national debate their “business”. Yet these “outside” stakeholders should never forget to ask themselves the following question: is there no risk my criticism of the government in the country concerned might be a poisoned chalice for the opposition?

In addition, the strategy of opposition forces must be observed and understood. For example, the Hungarian opposition’s decision to gamble on a conservative leader was meaningful. Even though it did not pay off, the fact remains that most voters who oppose Viktor Orbán clearly believed, during the opposition primaries, that he could not be beaten through a left/right or progressive/conservative divide, but by proposing an alternative on issues such as the regime’s authoritarian excesses, the geopolitical positioning between “East” and “West”, and corruption. The opposition failed to convince voters that these were the topics that should determine their vote, but the comparison between the election results and those of the referendums conducted at the same time shows that Fidesz’ advantage would be even more overwhelming in terms of societal values⁴³.

– Be precise, practical, compare what is comparable and avoid excesses

It is not easy to be knowledgeable about the details of a country’s political life, particularly if we don’t speak the language. It is very tempting to interpret facts through the prism of what is familiar to us. Yet a factual mistake or an argument that exposes a lack of understanding of the local situation, or which seems excessive to most citizens in the country concerned are likely to discredit the rest of the content, regardless of whether or not it is accurate. To give an example, many comments were made in France in response to the new Hungarian constitution, shocked by the fact that the text did not mention the “Republic of Hungary” but instead simply “Hungary”, with some going as far as claiming that Viktor Orbán was abolishing the Republic. Clearly, given the importance of the term “Republic” in a country like France, this may be shocking. However, the term is much less politically and historically charged with meaning in Central Europe and while the 2011 Hungarian constitution preferred the term “Hungary” (as had the Romanian constitution in 2003, without any reaction from France), it does state clearly that “Hungary’s form of government shall be that of a republic”. This does not mean that there should be no criticism of this constitution, but rather than going up the wrong track of an alleged abolition of the Republic, it would have been wiser to focus, for example, on the terms of its adoption, which were a far cry from the spirit of achieving a basic national consensus.

The best way to make criticism audible and convincing is to have sound knowledge of the facts and to state them precisely, which also involves an ability to monitor over time and, where necessary, to oppose the real effects of a controversial measure rather than stopping at a temporary surge of indignation based on accusations

⁴³ The total of “yes” and invalid votes to the four questions of the referendum on the place of homosexuality and trans identity in the education of minors remains slightly below the total number of votes obtained by the opposition on a national level. In other words, some opposition voters voted “no” (which was the response recommended by Fidesz).

at the time of adoption. This is also a key condition to be able to counter rhetoric of widespread agreement or of apology that the advocates of illiberal regimes develop. Most often, their method involves seizing upon their public's lack of knowledge or uncertainty on the facts to justify their claims by making comparisons with realities in the West. In this way, they will claim that the Hungarian electoral system is identical to that of Germany, which may appear true at first glance, but could not be further from the truth when considered in greater detail. They also suggest that the majority effect of this very system remains low in relation to the French legislative voting system –while leaving out the existence of the highly significant second round, which is lacking in the Hungarian system.

– **Exemplarity: a fundamental requirement**

The best criticism of authoritarian excesses or the “capture of the State” is to lead by example in terms of compliance with our values, transparency and good governance. Conversely, the greatest gift for “illiberals” would be criticising their principles while sharing some of their practices. One particularly important example is freedom of expression in which exemplarity should be applicable with absolutely no concessions made. Any deviation from this, or from any related values such as academic freedom, only gives the advocates of illiberal regimes more arguments to work with.

Media pluralism, freedom of expression and the independence of the judiciary are everyday struggles in each of our countries. Before faulting a country on these matters in the name of a purity of ideals, we must first question our own situation in relation to these very ideals. A State deemed to be drifting towards illiberalism should not be compared to a theoretical ideal of perfection, but rather to the reality in the other EU countries. The facts should not be criticised in absolute terms. Instead, we should focus with a high degree of accuracy on what constitutes a considerable departure from what is “common practice” within the EU.

Once again, such action avoids leaving ourselves too easily open to a response which would discredit the criticism by framing us as people who like to tell others what to do but should instead be putting their own house in order. In addition, this also constitutes a means of countering the rhetoric of widespread approval that prevails around the idea that “they are all the same”. The recent appointment of some members of France’s Constitutional Council is an unfortunate development in this regard⁴⁴. Does this mean that France cannot make any criticism of Poland on these matters? Absolutely not. We can acknowledge that, in many Member States, including France, there is a problem of politicising constitutional bodies. Yet in this case, there is a key difference between a constitutional court that is slightly too much under the influence of a pluralist political class and a court that is dominated by a single party. Lastly, such a requirement of exemplarity applies to all Member States, naturally, but it should also be upheld by the European institutions themselves: relations with interest groups and lobbies, prevention of conflicts of interest, public procurement, communication, etc.

– **Beware of the risk of double standards**

As we have already discussed, societies in Central and Eastern Europe are highly sensitive when it comes to the issue of equal treatment. There are apparently strong suspicions of being treated, according to the Latin proverb “Quod licet Iovi, non licet bovis” (What is permissible for Jupiter may not be permissible for a bull), where the role of Jupiter is played by Western States. Again, we need to be able to explain, allow a nuanced picture and clarify. For example, regarding the conflict over the pri-

⁴⁴ Jacquin, J.-B. (2022), “Conseil constitutionnel : trois propositions de nominations politiques qui posent question”, *Le Monde*, 15 February 2022 (in French).

macy of EU law, some Central European media outlets expressed concern that the West reacted with indignation to Poland's position, but had nothing to comment on a similar issue raised by the German Constitutional Court. No valid comparison can be made as the two situations are significantly different⁴⁵. That said, few of those who criticised Poland took the time to explain the difference between the two cases, thereby leaving room for doubt and counter-attacks that exploit the Central European tendency towards victimhood.

Beyond the geographical dimension, it is also important to avoid political or ideological double standards. We must remember that the conservative right does not have the monopoly on illiberalism. Complacency regarding totalitarian regimes inspired by communism, authoritarian tendencies, revolutionary distrust of the rule of law and "bourgeois freedoms" or "Bolivarian" and Putin-like temptations – all of this also exists on the left of the political spectrum and some political forces which flirt with these ideas sometimes come to power, as has been the case in Greece, Italy or Spain, to name but three recent examples. Focusing solely on the conservative component of the illiberal universe is another gift on the latter's apologists.

– Do not be quick to forget the past

All forms of criticism should take into account the temporality of the developments in the given field. Indeed, it would be quite unconvincing to state the ORTF broadcasting company in the de Gaulle era to defend the fact that, in 2022, the leader of the Hungarian opposition only had 5 minutes of public airtime. Yet before berating the very conservative turn taken in Hungary and Poland, it is useful to stop and remember what the legislation on various issues concerning the "conservative vs. progressive" divide looked like until recently in various European nations⁴⁶. We are witnessing a spectacular acceleration of societal developments which often affect the most intimate sphere. It is not very surprising or undue that this acceleration sometimes causes tension, which is cleverly exploited by certain political forces⁴⁷. Those who advocate for these issues in the countries concerned will not be helped by stigmatisation and external attempts to enforce these developments. At the same time however, we must be aware of attempts to instrumentalize these topics with a view to "unravelling" the European Union's legal order. On this issue, the controversies surrounding the CJEU's recent case law are very insightful⁴⁸.

• Conclusion

There are many who oppose the Western liberal democratic model and the power of their ideas to seduce a large portion of voters in our nations cannot be denied. This is not a time for denial, complacency⁴⁹, blind faith in our model's "automatic" victory,

⁴⁵ Cf. Maurice, E. (2021), "The rule of law in Poland or the false argument of primacy of European law", European Issues, No. 615, Robert Schuman Foundation – <https://www.robert-schuman.eu/en/european-issues/0615-the-rule-of-law-in-poland-or-the-false-argument-of-the-primacy-of-european-law>. See also Ziller, J. (2021), "Primauté du droit européen : une fausse querelle juridique, un non problème politique", *Study*, Jacques Delors Institute, December 2021 – https://institutdelors.eu/wp-content/uploads/2021/12/Note-OPPE_DA2021.pdf (in French)

⁴⁶ We must remember that same-sex marriage was legalised in France in 2013, in Ireland in 2015 and in Austria in 2019.

⁴⁷ Cf. Schindler, John R. (2018), "Russia Has an Ideology—and It's as Entrenched as Communism Was", *The Observer*, 21/03/2018 (<https://observer.com/2018/03/russia-putin-ideology-rules-cold-war-2-0-like-soviet-communism/>)

⁴⁸ Cf. Chopin, T. and Roche, J.-B. (2021), "En finir avec le mythe d'une Union politique sans primauté juridique", *Le Grand Continent*, *op. cit.* (in French).

⁴⁹ Let us note here the strong tendency of champions of liberal democracy to treat their opponents and above all their voters with disdain, embodied by Hillary Clinton's infamous expression (which was detrimental to her electoral campaign) in which she called Donald Trump voters "deplorable". While this example comes from the USA, it is highly representative of a trend that is also keenly felt in Europe.

or resigned defeatism. Our political, economic and social model, built upon a foundation of values and principles that guide its implementation, as we have attempted to define in this paper, is showing its weaknesses but also a staunch resistance. Inside the EU, the electoral luck of “illiberals” often runs out (with the exception of Hungary and Poland). Outside the EU, despite the setback of Brexit, the European model continues to shine and inspire. The tragedy in Ukraine –which resulted in three new candidacies for accession to the European Union– is an example that speaks volumes, which appeals to and engages Europeans.

Faced with what could potentially be the most severe challenge to the European Union, raised by the emergence and entrenchment of illiberal regimes in some Central and Eastern European countries and in Hungary and Poland in particular, the new reality resulting from Russia’s invasion of Ukraine brings with it both risks and opportunities. The main risk is that the noise of weapon fire, solidarity regarding the hosting of the massive wave of Ukrainian refugees and the common perception of the Russian threat make us forget the ideological gap between these two countries and the other EU Member States and institutions. The requirements dictated by the acute crisis we are experiencing should not become excuses to ignore the violations of the set of fundamental values which have been outline above. On the other hand, **the reinvigorated feeling of common belonging and solidarity in response to the Russian threat and Vladimir Putin’s demonstration of the vulnerability of the most fundamental acquis of European construction, provide an opportunity to present a united front when it comes to the fundamental values that characterise the European model** and the European project itself, by reducing the political space afforded to illiberal and Europhobic narratives.

To increase the chances of this opportunity being taken, we must clarify and structure the debate regarding values, on the basis of the distinction proposed above: uncompromising and homogenous respect for fundamental political values by all Member States, for which the rule of law is the backbone; a convergent but pluralistic and tolerant approach⁵⁰ to the values which underpin the economic, social and societal choices of Europeans. In short, an approach that remains loyal to the European motto “united in diversity” •

⁵⁰ This approach is similar to the spirit of the principle of subsidiarity, dear to Jacques Delors (“The acceptance of the subsidiarity principle implies the respect of pluralism and thus of diversities”, address given in Bruges, 17 October 1989). Cf. also Maillard, Sébastien (2021): “Respectons les valeurs propres à chaque pays membre de l’Union européenne !”, *Le Figaro*, 12 October 2021 (<https://www.lefigaro.fr/vox/monde/pologne-respectons-les-valeurs-propres-a-chaque-pays-membre-de-l-union-europeenne-20211012>) (in French).

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