

## **Responding to populist politics at EU level: Regulation 2018/673 and beyond**

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### **1. Introduction**

In recent times the European Commission (Commission) and European Parliament (Parliament) have launched legal and political actions against two EU Member States led by populist governments in an attempt to safeguard the rule of law in these countries, and by implication in the EU more widely. Politically explosive and legally complex, these procedures have entailed an attempt, based on Article 7(1) Treaty on European Union (TEU), at triggering pressure to secure compliance with the foundational EU values laid down in Article 2 TEU. They have benefited from considerable scholarly attention.<sup>1</sup>

What is much less known is that in the shadows of these discussions another Article 2 TEU compliance mechanism was recently beefed up as well. Regulation 1141/2014 on the statute and funding of European Political Parties and European Political Foundations (Regulation)<sup>2</sup>, recently further amended to Regulation 2018/673<sup>3</sup>, reconfirmed that European Political Parties (EuPP) and European Political Foundation (EPF) can only receive EU funding if they respect Article 2 TEU values. The Regulation very considerably strengthened verification possibilities by setting up the

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<sup>1</sup> **Include some references – Kochenov, Pech, Scheppele etc**

<sup>2</sup> Regulation 1141/2014 on the statute and funding of European Political Parties and European Political Foundations, OJ EU L 317/1, 4 November 2014.

<sup>3</sup> Regulation (EU, Euratom) 2018/673 amending Regulation 1141/2014, OJ EU L 114 I/1, 4 May 2018.

independent Authority for Political Parties and Foundations (APPF) to register, monitor and sanction EuPP and EPF, and a Committee of Independent Experts to help it with values research.

Negotiations about adapting the Regulation, which had been controversial since its conception with Member States having populist governments or relying on populists for support, took place between 2012 and 2014. They were two discussions wrapped into one. First there was the new mechanism itself. The concern was how and by whom EU values compliance by EuPP/EPF should be undertaken for it to be credible yet at the same time (politically) balanced and effective. A second, underlying concern was with how it would spill over into the functioning of Article 7 TEU. Which lessons flowed from the wording and practice of said Article and, now that it was discussed by proxy, what practical precedents should be developed or avoided? The Regulation's drafting history and final set-up therefore tell a story not only about how the response to populist politics was sharpened at EU level below the radar. It also constitutes a rare on the record account of a legislative discussion about normative and institutional questions about Article 2 TEU compliance.

This contribution presents and analyses the EU values compliance mechanism set up in the Regulation. It assesses the nature and usability of what was meant as a response to populist politics not at Member State but at EU level, and asks what lessons its drafting history could teach us about the application of Article 7 TEU. Based on a close reading of the drafting history the contribution argues that the Regulation's EU values compliance mechanism offers a problematically limited and limiting framework to act against political forces within the Parliament acting against EU values. While some of the most important populist elements are actually harboured by mainstream political parties, the mechanism as currently structured is likely only to enable

targeting of those populist forces who unite in a single EuPP. At the same time elements of the Regulation are identified that, if acted upon properly and in combination with Article 7 TEU, may provide previously unexplored opportunities to help safeguard the rule of law within the EU.

The analysis proceeds as follows. It begins by providing some background and context about the relation of the populist phenomenon to Article 2 TEU values and where populism appears within the Parliament (section 2). It then tracks the Regulation's history from when it was first discussed in 2001 to its three consecutive operational versions of 2003, 2007 and 2017 (section 3). Next it analyses the resulting regulatory solution, identifying questions to be answered to operationalise it to and how this could equally inform other EU values compliance mechanisms (section 4). Finally it presents a brief conclusion (section 5).

## **2. Normative and factual context**

Before analysing how the Regulation requires and monitors adherence with Article 2 TEU values and in that way targets EU level populist<sup>4</sup> political activity, it is instrumental to provide some factual and analytical context. This section will assess first what tensions populist politics can cause with the relevant "EU values"<sup>5</sup>, i.e. respect for human dignity, freedom, democracy, equality,

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<sup>4</sup> It is not the intention of this paper to enter the discussion about precisely how populism can be defined. It is concerned more with its effects on EU values. The Encyclopedia of Democracy defines populism as 'a political movement that emphasizes the interest, cultural traits, and spontaneous feeling of the common people, as opposed to those of the privileged elite ... for legitimation, populist movements often appeal to the majority will directly ... without much concern for checks and balances or the rights of minorities' (cf. Marc F. Plattner, Populism, pluralism, and liberal democracy, 21 JOURNAL OF DEMOCRACY 82, 88 (2010)). **Include some more references/literature**

<sup>5</sup> For an argument that what is actually meant as a matter of law when using 'values'-wording is a listing not just of vague aspirations but of (binding) fundamental principles of Union law, see Dimitry Kochenov, The *acquis* and its

the rule of law, respect for human rights, including the rights of persons belonging to minorities (Article 2, first sentence TEU), pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men (Article 2, second sentence TEU).<sup>6</sup> It will then indicate how populist agendas translate into the EP's composition. What emerges is a picture of complexity.

In mapping populist parties in the EU Member States, Mudde<sup>7</sup> has included such varied actors as Hungarian Fidesz and Jobbik, Polish PiS, The Finns, Danish People's Party, Greek Syriza, Spanish Podemos, German AfD, Italian Movimento 5 Stelle and Lega, French Front National, Dutch PVV, Austrian FPÖ, Slovak Smer-Direction, UK Independence Party and Belgian Flemish Interest. Looking at this list it is evident that there are both common and distinguishing factors. Populist politicians often employ similar rhetorical patterns ("us" versus "them" talk) and, when they act upon their ideas, use similar strategies and confront similar institutions. At the same time they are concerned with quite different substantive issues. This means, as an important preliminary statement of the obvious, that national and EU-level populist action depending on the precise substantive agenda will lead to a *different spread of tensions* with different Article 2 TEU values.

More specifically, *all* sustained populist action typically involves an attempt at limiting debate, delegitimising dissent and reducing political pluralism. Free media, civil society, the judiciary and

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principles – the enforcement of the 'law' versus the enforcement of 'values' in the EU, in: DIMITRY KOCHENOV & ANDRAS JAKAB, ENFORCEMENT OF EU LAW AND VALUES 1, 1 (2017).

<sup>6</sup> There is debate both about whether and to what extent the principles listed in Article 2, second sentence TEU have a different status from those in the first sentence, given some overlapping language, cf. Markus Klamert & Dimitry Kochenov; Article 2 TEU, in: MANUEL KELLERBAUER, MARKUS KLAMERT & JONATHAN TOMKIN, THE EU TREATIES AND THE CHARTER OF FUNDAMENTAL RIGHTS 15-16 (point 5) (2018) (forthcoming).

<sup>7</sup> Cas Mudde, Populism in Europe: a primer (2015), at: [opendemocracy.net/can-europe-make-it/cas-mudde/populism-in-europe-primer](http://opendemocracy.net/can-europe-make-it/cas-mudde/populism-in-europe-primer).

parliamentary authority are all targeted and systematically discredited<sup>8</sup> as part and parcel of the ‘elite’.<sup>9</sup> From the viewpoint of Article 2 TEU, it is clear that pluralism, non-discrimination and democracy are at stake if the voice and interest of those not considered part of ‘the people’ are systematically excluded. Freedom, the rule of law, justice, and political rights such as freedom of speech, are put in jeopardy by purely partisan appointments of judges, or when NGOs are undermined. In this sense any populist action strikes at the EU’s normative foundations.

Depending on the substantive agenda, however, quite *different* Article 2 TEU values are triggered. Right-wing xenophobic extremism, sometimes surprisingly combined with defense of freedom of speech and LGBTI rights, stands in tension with tolerance, minority rights and freedom of religion (particularly for European Muslims). Traditionalist nationalist populists are more specifically concerned with safeguarding national identity and autonomy, defending family values and rejecting the language and implications of the type of liberalism questioning both as a Europe-imposed norm. From the viewpoint of Article 2 TEU, this is most likely to come into tension with non-discrimination, equality between men and women as well as LGBTI rights specifically. Still other populist agendas are concerned mainly with austerity implications of dominant economic policy (including the role of the EU in it) and a general rejection of ‘the political elite’, at whatever level. From an Article 2 TEU viewpoint the value of solidarity is relevant.

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<sup>8</sup> Council of Europe, Populism – How strong are Europe’s checks and balances?, 6 (2017).

<sup>9</sup> See also JAN-WERNER MÜLLER, WHAT IS POPULISM 60 (2016): ‘Populism is inherently hostile to the mechanisms and, ultimately, the values commonly associated with constitutionalism: constraints on the will of the majority, checks and balances, protection for minorities, and even fundamental rights’

How do said populist parties, and the tensions with Article 2 TEU that their actions potentially entail, translate onto the EU-level when their representatives get elected into the EP? For this we need to explain how their political agendas can at all be pushed there. This is an organisational issue anchored in law and internal procedural rules for which we have to distinguish between EuPP and political groups. EuPP are a structured cooperation between national political parties or national politicians from a particular *famille spirituelle*<sup>10</sup> pursuing political objectives.<sup>11</sup> The membership of such a political alliance must originate from at least a quarter of the Member States.<sup>12</sup> In order to receive EU funding, at least one EuPP-member should hold an EP seat.<sup>13</sup> EU funding received can be used for organising meetings and conferences, publications, studies and advertisement, administrative, personnel and travel cost and campaign cost connected to EP elections. EPF are affiliated with EuPP and meant to observe, analyse and contribute to the debate on European public policy issues and organises seminars, trainings, conferences and studies.<sup>14</sup> At present there are some fifteen active EuPP and an equal number EPF.<sup>15</sup>

Elected MEPs organise themselves in political groups, the EP's power blocks. The EP rules of procedure state that twenty-five MEPs with similar political affinities, originating from at least one-quarter of the Member States, can form such a group.<sup>16</sup> The obvious benefits of an established

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<sup>10</sup> Simon Lightfoot, The consolidation of Europarties? The 'Party Regulation' and the development of political parties in the European Union, 42 REPRESENTATION 303, 304 (2006).

<sup>11</sup> Article 2(2) and 2(3) Regulation.

<sup>12</sup> Article 3(1)(b) Regulation.

<sup>13</sup> Article 17(1) Regulation. This was recently changed with the new Regulation - adapt

<sup>14</sup> Article 2(4) Regulation.

<sup>15</sup> An overview, including of the amounts of funding awarded, is available at: <http://www.europarl.europa.eu/contracts-and-grants/en/20150201PVL00101/Partis-et-fondations-politiques>

<sup>16</sup> Rule 32(1) and 32(2), EP Rules of Procedure, at: <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP/TEXT+RULES-EP+20170116+TOC+DOC+XML+V0//EN&language=EN>

political group revolve around both money and power: political groups are funded through a dedicated budget line that is distinct from the EuPP/EPF budget line. They gain speaking time during debates, chair meetings and Committees, and are able to draft and amend Committee reports and opinions.<sup>17</sup> At the time that this organisational practice was introduced, these establishment criteria were challenged by the French Front National as exclusionary before the Court.<sup>18</sup> Unsuccessfully.

EuPP and political groups are therefore distinct but linked. MEPs member of EuPP are components of the EPs political groups. Some groups consists of more than one EuPP, effectively making them something akin to a political meta-alliance. It is not uncommon either that MEPs change political groups during term, or that MEPs are asked to leave a group. Moreover, some groups contain national political parties or national parties or independent politicians not part of an EuPP (i.e. unaffiliated). On the other hand, some MEPs linked to specific EuPP may not be able to join or form a political group and remain non-aligned, effectively barring them from any political impact. Yet their EuPP can continue to be funded. Below is an overview of the current map.

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<sup>17</sup> Sonia Piedrafita and Vilde Renman, Euroscepticism in the next European Parliament: a reason to worry? 1 *INTERECONOMICS* 24, 26 (2014).

<sup>18</sup> C-486/01, Front National/European Parliament, 29 June 2004. FN had challenged an EP decision to disallow a grouping under the heading of Technical Group of Independent Members – Mixed Group (TDI). This Group was formed to make use of privileges for political groups while explicitly rejecting the notion of a common political goal. The Court's Grand Chamber dismissed the FN claim for reason of its lack of standing as a national political party.

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POLITICAL GROUP	AFFILIATED EuPP	AFFILIATED EPF
Group of the European People's Party (Christian Democrats)	European People's Party	Wilfried Martens Centre for European Democracy
Group of the Progressive Alliance of Socialists and Democrats (S&D)	Party of European Socialists	Foundation for European Progressive Studies
Group of the Alliance of Liberals and Democrats for Europe (ALDE)	Alliance of Liberals and Democrats for Europe Party	European Liberal Forum
	European Democratic Party	Institute for European Democrats
	Europeans United for Democracy	Organization for European Interstate Cooperation
Group of the Greens/European Free Alliance (Greens – EFA)	European Green Party	Green European Foundation
	European Free Alliance	Coppieters Foundation
European Conservatives and Reformists Group (ECR)	Alliance for Conservatives and Reformists in Europe	New Direction – The Foundation for European Reform
	<i>European Free Alliance</i>	<i>Coppieters Foundation</i>
	European Christian Political Movement	Sallux
Confederal Group of the European United Left – Nordic Green Left (GUE-NGL)	Party of the European Left	Transform Europe
	<i>Europeans United for Democracy</i>	<i>Organization for European Interstate Cooperation</i>
Europe of Nations and Freedom (ENF)	Movement for a Europe of Nations and Freedom	Foundation for a Europe of Nations and Freedom
	European Alliance for Freedom (EAF)	European Foundation for Freedom (EFF)
Europe of Freedom and Direct Democracy Group (EFDD)	Alliance for Direct Democracy in Europe (ADDE)	Institute for Direct Democracy in Europe (IDDE)
	Movement for a Europe of Liberties and Democracy (MELD)	Foundation for a Europe of Liberties and Democracy (FELD)
Non-aligned (NI)	Alliance of European National Movements	European identity and traditions
	Alliance for Peace and Freedom (APF)	Europa Terra Nostra

So where are the aforementioned populists in this picture? The Hungarian Fidesz Party is part of the European People's Party. The Slovak Smer-Direction Party belongs to the Party of European Socialists. The UK Conservatives, Polish Law and Justice (PiS), and The Finns are part of the Alliance of Conservatives and Reformists in Europe Party. The Danish People's Party (which is unaffiliated) belongs to this political group to. Greek Syriza is a member of the Party of the European Left, which is one of the components of the Greens-European Free Alliance (Greens-EFA) political group, to which unaffiliated Spanish Podemos belongs as well.

The situation on the (far) right side is as complex. UKIP is the lead-member of the Alliance for Direct Democracy (ADDE). It belongs to the Europe of Freedom and Direct Democracy (EFFD) political group that also contains Italian Movimento 5 Stelle and (one part of the) German AfD. Even if Belgian Flemish Interest, Italian Lega Nord, French Front National and Austrian FPÖ belong to the Movement for a Europe of Nations and Freedom (MENL), and the Dutch Party for Freedom (PVV) belongs to another EuPP, the European Alliance for Freedom (EAF), they jointly belong to a political group called Europe of Nations and Freedom (ENL). The (remainder of) German AfD is an unaffiliated member of this political group too. Finally, a number of MEPs coming from populist parties such as Greek Golden Dawn and Hungarian Jobbik form part of the Alliance for Peace and Freedom (APF), but are non-aligned.

Hence it is evident that national populists are surprisingly spread out over EuPP and political groups, including, crucially, over 'mainstream' ones. Oft-used characterisations of Eurosceptics as *Europopulists*<sup>19</sup> or 'anti-European extremists'<sup>20</sup> do not reflect the realities and nuances. That there are two political groups and many different EuPP with (almost) exclusive Eurosceptic elements, is in itself illustrative of the fact that there are different types.<sup>21</sup> Euroscepticism, then, is better seen as shorthand for both *Euroscepticism* and *Euro scepticism*. It is sometimes a rejection

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<sup>19</sup> Piedrafita & Renman, 25.

<sup>20</sup> In his 2017 State of the Union address the Commission President placed proposals to further change this Regulation in the key of confronting populism: 'Today the Commission is proposing new rules on [EuPP/EPF] financing ... We should not be filling the coffers of anti-European extremists', State of the Union, 13 September 2017, p 18, at: [https://ec.europa.eu/commission/sites/beta-political/files/state-union-2017-brochure\\_en.pdf](https://ec.europa.eu/commission/sites/beta-political/files/state-union-2017-brochure_en.pdf)

<sup>21</sup> Martin Steven, 'Euro-realism' in the 2014 European Parliament elections: the European Conservatives and Reformists (ECR) and the democratic deficit, 52 REPRESENTATION 1, 4 and 9 (2016) (arguing that unlike ENF and EFDD representatives, politicians from many ECR member parties would regard themselves as 'pro-European' and that the ECR is ultimately rooted in a central desire by its member party politicians to reform the EU by addressing its 'democratic deficit' without destroying the wider integration project altogether).

of the EU in and of itself or severe criticism of its current functioning. At other times it is simply a critical substantive viewpoint also known from nationally operating populist parties that happens to be expressed in the specific EP context.

### **3. Regulation 1141/2014, the birth of its horizontal EU values compliance mechanism and the further amendments of Regulation 2018/673<sup>22</sup>**

Against this background we can describe for what reasons and in what way the EU legislator worked on linking funding for EuPP to compliance with the EU's foundational values. It is worthwhile to do this in some detail. This will illustrate not only the convoluted and protracted trajectory of its birth, but more importantly that many of the elements that came to be included in the values verification mechanism were already considered in one form or another over the course of the drafting history of the Regulation, long before any direct linkage with Article 7 TEU. A longer view will ensure a better analysis.

The first proposal to regulate EuPP was tabled as far back as February 2001.<sup>23</sup> At its origin was a technical Court of Auditors demand for a proper legal basis enabling direct financing of EuPP instead of via the budget line for EP political groups.<sup>24</sup> The Commission inserted substantive conditioning. It provided for an EuPP to be allowed to register if 'its programme and its activities ... respect the fundamental principles of democracy, respect for fundamental rights and the ... the

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<sup>22</sup> All documents are publicly available from the EU institutions' websites or other repositories. One particularly helpful website for tracking older EU documents not easily found elsewhere is [parltrack.euwiki.org/](http://parltrack.euwiki.org/). **Include changes of Regulation 2018/673 as they pertain to changed rules of co-funding and the requirement that EuPP need to consist of actual MEPs, and can no longer rely on support of politicians that are present only at national level.**

<sup>23</sup> COM(2000)898, Proposal for a Council Regulation on the statute and financing of European Political Parties, 13 February 2001.

<sup>24</sup> *Ibid*, p. 2 (referring to Court of Auditors Special Report 13/2000, OJ C 81, 28 June 2000). Cf. Lightfoot, 305.

rule of law..’. Its justification was as follows:<sup>25</sup> ‘[an EuPP] must be attached to [these principles] ... it would not be acceptable for a party that preaches restrictions on rights, intolerance or xenophobia, whether it is for or against European integration, to enjoy public financial support’.

The EP in its report took this at face value, summarising it simply as a requirement to ‘provide evidence of the democratic structure of a party’.<sup>26</sup> It also tabled an amendment aimed at clarifying that in case an EuPP acted contrary to fundamental principles it was to be suspended at the Commission’s request, after consultation with the EP and the Council.<sup>27</sup> As to monitoring, the Commission initially proposed for a ‘committee of wise men’ to check compliance with *all* EuPP registration conditions.<sup>28</sup> At the EP’s instigation, however – which argued that ‘the establishment of such a body should be considered only in exceptional cases – the EP itself [being] in a position to assess compliance’<sup>29</sup> – this element was removed. The task was handed to the EP Bureau.<sup>30</sup> The Commission accepted this.<sup>31</sup>

The revised proposal did not fly in the Council where – given the then Article 251 TEC (later Article 308 TEC, now Article 352 TFEU) legal base – unanimity was required. Lightfoot<sup>32</sup> reports that values compliance was a controversial element: ‘it was felt that [it] could lead to the removal

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<sup>25</sup> Ibid, p. 3.

<sup>26</sup> EP, Report on the [EuPP] proposal (rapporteur: Ursula Schleicher), doc. A5-0167/2001, 3 May 2001, p. 19

<sup>27</sup> Ibid, p 14 (amendment 21); OJ C34 E/254 of 7 February 2002 (voting record) and the Consolidated version of the EP amendments to the Commission Proposal in OJ C34 E/341 of 7 February 2002 (where it appeared as renumber amendment 35 and article 5a).

<sup>28</sup> Ibid.

<sup>29</sup> EP, doc. A5-0167/2001, 3 May 2001, p. 10.

<sup>30</sup> COM(2001) 343, Amended proposal for a Council Regulation on the statute and financing of European political parties, 21 June 2001, p. 2.

<sup>31</sup> Ibid.

<sup>32</sup> Lightfoot, 305.

of funding from a party because it was seen to lack respect for democratic values ... Both the FPÖ in Austria and the Lega Nord in Italy were in coalition governments at the time and therefore represented at the Council. They felt this issue was an attack on them. Together with Denmark<sup>33</sup> they ended up voting against the proposal’.

With the inclusion of Article 191(2) TEC (now Article 224 TFEU), the Nice Treaty moved to provide for a specific legal basis to regulate EuPP, crucially removing the unanimity requirement.<sup>34</sup> Upon its entry into force, the Commission re-tabled its EuPP proposal<sup>35</sup> for there to be rules in place for the 2004 EP elections. Trying to navigate the last EP input<sup>36</sup> and Council discussions, it repeated the insertion of a values-clause while clarifying that ‘it would be inappropriate to establish intrusive or over-prescriptive political requirements for [EuPP] registration...’.<sup>37</sup> In terms of compliance control, the Commission re-tabled its proposal for a Committee of Wise Men.<sup>38</sup>

The EP sustained support for EU values compliance<sup>39</sup> but debated the modalities. It was focused on ‘not [appearing to] be involved in ... a ‘licensing’ procedure [but] should be empowered ... to carry out ex-post verification’.<sup>40</sup> Moreover, the EP-rapporteur favoured a ‘neutral’ body

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<sup>33</sup> The Danish government at that time relied on the support of Dansk Folkeparti, the populist Danish People’s Party.

<sup>34</sup> Its Declaration 11 related to article 191 and contained the following wording: ‘The provisions on the funding for political parties shall apply *on the same basis to all* the political forces represented in the EP.’

<sup>35</sup> COM(2003)77, Proposal for a Regulation of the European Parliament and of the Council on the statute and financing of European Political Parties, 19 February 2003, p. 2.

<sup>36</sup> Cf. EP, Report on the [EuPP] proposal (rapporteur: Jo Leinen), document A5-0170/2003, 21 May 2003, p. 24.

<sup>37</sup> COM(2003)77, p. 2.

<sup>38</sup> *Ibid*, p. 6 (article 4 – verification).

<sup>39</sup> EP, Report on the [EuPP] proposal (rapporteur: Jo Leinen), document A5-0170/2003, 21 May 2003, p. 25: “*Of course* an [EuPP] receiving financial aid from the Union’s budget must respect” basic EU values (emphasis added).

<sup>40</sup> *Ibid*, p. 9 (amendment 8).

administering the funds and proposed that the Commission be in charge of this and more generally take the initiative in triggering it.<sup>41</sup> The Commission was unenthusiastic, presumably because it considered it too political a task for itself. It was not sustained in the text. Smaller groups in the EP, such as Union for Europe of the Nations (UEN) and Europe of democracies and diversities (EDD) voted against.<sup>42</sup> In the Council the same three Member States remained opposed. But outvoted they were this time. Regulation 2004/2003<sup>43</sup> was a fact.

Several MEPs challenged the Regulation's legality.<sup>44</sup> They argued that EuPP funding rules discriminated against smaller and minority political groups.<sup>45</sup> Requirements of representation in at least a quarter of the Member States<sup>46</sup> and unconditional value endorsement in their view violated freedom of expression and association. Most ingeniously, they maintained that linking funding to political cooperation in the EP was itself a violation. Equal treatment and democracy were put under pressure by treating minority and independent politicians and political parties differently when not members of an EuPP, including because given their political preferences they might not in practical reality be capable of joining an EuPP.<sup>47</sup>

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<sup>41</sup> Ibid, p. 11-12 (amendment 12). Cf. Lightfoot, 307-308.

<sup>42</sup> Lightfoot, 307.

<sup>43</sup> Regulation 2004/2003, OJ L 297/1, 15 November 2003.

<sup>44</sup> Case T-13/04, *Bonde and others v. EP and Council*, action brought on 15 January 2004; Case T-17/04, *Le Front National and Seven Others v EP and Council*; Case T-40/04, *Emma Bonino and Others v. EP and Council*, action brought on 6 February 2004

<sup>45</sup> Case T-13/04, *Bonde and others v. EP and Council*, action brought on 15 January 2004.

<sup>46</sup> Article 3(b) of Regulation 2004/2003.

<sup>47</sup> This argument was made by the claimants in T-40/04; OJ C 94/49, 17 April 2003.

The Court dismissed their claims on procedural grounds: ‘not directly and individually concerned’.<sup>48</sup> It did however clarify two matters. It implied, significantly, that, contrary to control of other requirements for EuPP formation, the one relating to asserting values compliance was not digital but a question of gradation and judgement.<sup>49</sup> It also dismissed equal treatment arguments, stressing that disadvantages of not being part of an EuPP extended to MEPs irrespective of political ideas.<sup>50</sup>

A first Regulation 2004/2003 evaluation report did not even mention the values compliance-mechanism.<sup>51</sup> Clearly it had remained unused. In 2007 the Commission proposed changes.<sup>52</sup> They left untouched values compliance and consisted principally in including EPF in the scope and creating more financial flexibility once given funding. The EP and Council accepted the changes.<sup>53</sup> Regulation 1524/2007<sup>54</sup>, adapting Regulation 2004/2003, was therefore quickly adopted. A second 2011 EP evaluation reported no penalties imposed on any EuPP or EPF in the period of 2007-2011.<sup>55</sup>

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<sup>48</sup> Case T-13/04, 11 July 2005; Case T-17/04, 11 July 2005; Case T-40/04, 11 July 2005. Case T-17/04 was appealed, and then dismissed by the Court in C-338/05 P, *Front National and Others*, 13 July 2006.

<sup>49</sup> Case T-40/04, par. 52.

<sup>50</sup> Case T-40/04, par. 67-68.

<sup>51</sup> EP, Report on [EuPP] (2005/2224(INI)) (rapporteur Jo Leinen), document A6-0042/2006, 27 February 2006; European Parliament resolution on [EuPP] (2005/2224(INI)), P6\_TA(2006)0114.

<sup>52</sup> COM(2007)364, Proposal for a Regulation amending Regulation 2004/2003, 27 June 2007.

<sup>53</sup> EP, Draft report on [COM(2007)364] (rapporteur: Jo Leinen), document 2007/0130(COD), 24 July 2007; EP, Report on [COM(2007)364] (rapporteur: Jo Leinen), document A6-0412/2007, 25 October 2007; EP legislative resolution of 29 November 2007 on [COM(2007)364], P6\_TA(2007)0562.

<sup>54</sup> Regulation 1524/2007 of 18 December 2007 amending Regulation 2004/2003 on the regulations governing political parties at European level and the rules regarding their funding, OJ L 343/5, 27 December 2007.

<sup>55</sup> EP resolution of 6 April 2011 on [Regulation 2004/2003], P7\_TA(2011)0143, point AB; the preparatory report is EP, Report on the application of Regulation 2004/2003 (rapporteur: Marietta Giannakou), document A7-0062/2011, 18 March 2011.

The Commission proposed revising the Regulation in September 2012.<sup>56</sup> It made two highly significant additions without explaining them in the explanatory memorandum. Firstly, as to the scope of the compliance obligation it suggested adding wording to the effect that to be considered an EuPP, a political alliance must observe in *its* programme and in *its* activities, *and through those of its members*, Article 2 TEU values.<sup>57</sup> Secondly, the Commission proposed a further considerable widening of the procedure in that ‘*any natural or legal person* may, at any moment, introduce a motivated request to the EP’ to verify compliance with ... values’.<sup>58</sup> Although available documentation does not entirely clarify this, the EP seems to have embraced neither of these extensions.<sup>59</sup>

The real bottleneck in the negotiations proved to be in the Council. A document of April 2013 – 8 months after the Commission’s proposal – described as a key concern ‘an appropriate balance between respect for standards of governance and transparency ... and the freedom of association and the independence of EuPP/EPF ...’.<sup>60</sup> The Presidency was given mandate to explore possible alternatives regarding the handling of EuPP/EPF registration including values compliance.<sup>61</sup> Discussions centred on the who and how of decision-making relating to de-listing in case of a

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<sup>56</sup> COM(2012)499, Proposal for a Regulation of the European Parliament and of the Council on the statute and funding of European political parties and European political foundations, 12 September 2012.

<sup>57</sup> Ibid, p. 12 (article 3) (emphasis added).

<sup>58</sup> Ibid, p. 19 (article 7(3)) (emphasis added).

<sup>59</sup> EP, Report on [COM(2012)499] (rapporteur: Marietta Giannakou), document A7-0140/2013, 23 April 2013. Curiously, regarding the first element the text of the Commission proposal (‘and through those of its members’) is not reproduced correctly (p. 15). Regarding the second element (natural or legal person should be able to trigger verification), the explanatory memorandum suggests this to be a good idea (p. 45) (“the rapporteur believes that this verification should be carried out annually or following a motivated and duly justified request by any natural or legal person”) while the relevant amendment in fact deletes this Commission idea (p. 23-25 – amendment 45).

<sup>60</sup> Council document 8106/13, 5 April 2013, p. 4.

<sup>61</sup> Council document 15725/13, 8 November 2013, p. 2, point 4.

breach of values.<sup>62</sup> This led, in July 2013, to inter-institutional discussions about setting up an independent Authority for that purpose<sup>63</sup> - and to an agreement by December 2013.<sup>64</sup> In September 2013 discussions revealed that most Member States were in favour of limiting possibilities for de-listing only to cases of *manifest and serious* violations. A few wanted that either an EP *or* Council's objection to a decision to de-register would suffice<sup>65</sup>, but did not get their way. Most significantly, by late January 2014 the possibility to focus not only on an EuPP *as a unit* but also on its constitutive members had disappeared.<sup>66</sup>

In late February 2014 a final compromise text was circulated.<sup>67</sup> The EP agreed in April<sup>68</sup>, the Council in September.<sup>69</sup> Two Member States voted against, one abstained. The Netherlands expressed fundamental objections. It stated its attachment to the independent position of political parties and that it should be up to the voters and to the judiciary to assess programmes and activities of EuPP.<sup>70</sup> Italy, Portugal and Slovakia expressed concern over the lack of checks and balances for the situation that the Authority, contrary to the CoIEP opinion, would decide not to de-register.<sup>71</sup>

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<sup>62</sup> Ibid, p. 2, point 5.

<sup>63</sup> Ibid, p. 2, point 6.

<sup>64</sup> Council document 6457/14, 14 February 2014, p. 2, point 5.

<sup>65</sup> Council document 15725/13, 8 November 2013, p. 4, point 7.

<sup>66</sup> Council document 5517/2/14 REV 2, 29 January 2014, p. 4, par 11.

<sup>67</sup> Council document 7108/14, 28 February 2014.

<sup>68</sup> Council document 9014/14, 6 May 2014.

<sup>69</sup> Council document 14701/14, 30 September 2014.

<sup>70</sup> Council document 13274/14 ADD1 REV2, 24 September 2014, p. 1-2.

<sup>71</sup> Ibid, p. 3.

Eventually the negotiations led to establishing the APPF with the task of registering EuPP/ EPF, and controlling and sanctioning them.<sup>72</sup> A standard form was developed to declare compliance with EU values at the registration phase.<sup>73</sup> As it is specified that the Authority needs only to ascertain that the form is filled in<sup>74</sup>, this initial step is essentially one of self-certification. One of the APPF's control related roles is to verify the compliance of programmes and actions with EU values.<sup>75</sup> It needs to do so when instructed by one of the three political EU institutions<sup>76</sup>, when a Member State where the EuPP/EPF has its official seat or employs activities notifies the Authority<sup>77</sup>, or when it itself receives signals about problems with values compliance.<sup>78</sup> For a compliance check a CoIEP is to be asked for advice.<sup>79</sup> The Authority next needs to decide whether to follow its opinion and decide about de-registration.<sup>80</sup> It is only allowed to do so in the event of a 'manifest and serious breach' of values.<sup>81</sup> This decision is to be communicated to the Council and Parliament that can object to it only on grounds related to the compliance assessment.<sup>82</sup> If both object, the de-registration is blocked.<sup>83</sup> The Regulations' values compliance mechanism, and its development over time, is visualised below.

[INSERT PARA ON MINOR CHANGES TO THIS REGULATION IN THE RECENT AMENDMENT BY WAY OF REGULATION 2018/673].

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<sup>72</sup> Article 6(2), second subparagraph.

<sup>73</sup> Article 8(2)(a) and Annex.

<sup>74</sup> Article 9(3) Regulation. Copies of these forms are available on the APPF website, at: <http://www.appf.europa.eu/appf/en/transparency.html>

<sup>75</sup> Article 10(3) and 10(4) juncto Article 3(2)(c) and 3(3)(c).

<sup>76</sup> Article 10(3), first subparagraph.

<sup>77</sup> Article 10(3), first subparagraph juncto Article 16(3) first and second subparagraphs respectively.

<sup>78</sup> Article 10(3), second subparagraph.

<sup>79</sup> Article 10(3), second subparagraph, second sentence.

<sup>80</sup> Article 10(3), fourth subparagraph.

<sup>81</sup> Article 10(3), fifth subparagraph and Article 11(3), first subparagraph .

<sup>82</sup> Article 10(4), second subparagraph.

<sup>83</sup> Article 10(4), first subparagraph, last sentence.

	<b>Subject</b>	<b>Values</b>	<b>Standard of review</b>	<b>Triggering</b>	<b>Verification of compliance</b>
Commission proposal 2001 (COM(2000) 898 and COM(2001) 343)	EuPP	Fundamental principles of democracy, respect for fundamental rights and the State based on the rule of law (article 1(b))	Not specified	Not specified	Bureau of the EP (article 3)
Regulation 2004/2003	EuPP	Principles on which the EU is founded, namely liberty, democracy, respect for human rights and fundamental freedoms and the rule of law (article 3(1)(c))	Not specified	- ¼ of EP membership - Representing at least 3 EP political groups (article 5(2), first subparagraph)	- Hear representatives of relevant EuPP (article 5(2), second subparagraph) - Ask a 3-member committee of independent eminent persons for an opinion (article 5(2), second subparagraph) - Decision by majority of EP members (article 5(2), first subparagraph)
Regulation 1524/2007 (amending Regulation 2004/2003)	EuPP / EPF	idem	idem	idem	Idem, supplemented by EP rules of procedure: rule 223a, 224 and 225 (transitional regime for funding received for the 2014, 2015, 2016 and 2017 budget years)
Regulation 1141/2014	EuPP / EPF	Reference to Article 2 TEU:  Respect for dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities.  [Pluralism, non-discrimination, tolerance, justice, solidarity and	- Manifest and serious breach of Article 2 TEU (article 10(3), fifth subparagraph)	- EP, Commission or Council (article 10(3), first subparagraph) - Authority 'becoming aware of facts which may give rise to doubts concerning compliance' (article 10(3), second subparagraph)  - Member State where EuPP/EPF has its seat or Member State where EuPP/EPF employs activities that seriously fail to	- Authority requests an opinion from a 6-member committee of independent eminent persons (article 10(3), first subparagraph, second sentence) - Authority produces duly reasoned decision (having regard to committee's opinion) as to whether or not to de-register the EuPP/EPF concerned, and communicates a decision to de-register to the EP and Council (article 10(3), fifth subparagraph; article 10(4), first subparagraph) - EP and Council together either indicate they do not object, or that they do object to the Authority's decision on grounds related to the

		equality between women and men]		comply with national law linked to Article 2 TEU values (article 16(3))	compliance assessment. The latter results in the EuPP/EPF remaining registered (article 10(4), first and second subparagraph).
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#### **4. Operationalising the Regulation’s EU values compliance mechanism and beyond**

The values verification mechanism, as part of the Regulation, entered into force on 1 January 2017.

The APPF is functioning and CoIEP-members were appointed.<sup>84</sup> This section will analyse questions relating to operationalising the values compliance mechanism, placing some of the considerations in a broader perspective. First some general issues with regard to the scope and focus of the compliance check and the standard of review will be addressed. Second, challenges regarding the triggering of the mechanism will be highlighted. Finally, some topics relating to the compliance check will be considered.

A first aspect of discussing the scope may be surprising. It is not to do with the specifics of the wording, the triggering possibilities of the mechanism or the inter-institutional interplay, but with the simple prior requirement with having to register at all. If that registration involves a written pledge of allegiance with Article 2 TEU that could itself be seen very much as a statement of subjection to principles that one would want to actually reject or discuss politically. A brief analysis of registration practice (see below) suggest that the impact of the registration requirement laid down in the Regulation has indeed been very significant, particularly on the more extreme sides of the political spectrum. If registration means transparency, and transparency means an open

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<sup>84</sup> European Commission, ‘European Political Parties: Committee of independent eminent persons now complete’, 26 July 2017, at: [http://europa.eu/rapid/press-release\\_MEX-17-2168\\_en.htm](http://europa.eu/rapid/press-release_MEX-17-2168_en.htm). The members are: Meglena Kuneva, António Vitorino, Maria Emilia Casas, Carlo Casini, Rebecca Adler-Nissen, and Christophe Möllers.

subjection to the EU’s foundational values, that for some EuPP and EPF seems a bridge too far. In this way the inclusion of values language has itself had a chilling effect.<sup>85</sup>

Political group	Affiliated European Political Party	Affiliated European Political Foundation	Status (all previously recognised and/or funded after 2014)			
			Registered by APPF	Application not approved by APPF	Removed from register by APPF	Never registered
Group of the European People’s Party (Christian Democrats)						
	European People’s Party		x			
		Wilfried Martens Centre for European Democracy	x			
Group of the Progressive Alliance of Socialists and Democrats (S&D)						
	Party of European Socialists		x			
		Foundation for European Progressive Studies	x			
Group of the Alliance of Liberals and Democrats for Europe (ALDE)						
	Alliance of Liberals and Democrats for Europe Party		x			
		European Liberal Forum	x			
	European Democratic Party		x			
		Institute for European Democrats	x			
	Europeans United for Democracy					x
		Organization for European Interstate Cooperation				x
Group of the Greens/European Free Alliance (Greens – EFA)						
	European Green Party		x			
		Green European Foundation	x			
	European Free Alliance		x			
		Coppieters Foundation	x			
European Conservatives and Reformists Group (ECR)						
	Alliance for Conservatives and Reformists in Europe		x			
		New Direction – The Foundation for European Reform	x			
	<i>European Free Alliance</i>		x			
		<i>Coppieters Foundation</i>	x			
	European Christian Political Movement		x			
		Sallux	x			
Confederal Group of the European United Left – Nordic Green Left (GUE-NGL)						
	Party of the European Left		x			
		Transform Europe	x			
	<i>Europeans United for Democracy</i>					x
		<i>Organization for European Interstate Cooperation</i>				x
Europe of Nations and Freedom (ENF)						
	Movement for a Europe of Nations and Freedom		x			
		Foundation for a Europe of Nations and Freedom	x			
	European Alliance for Freedom (EAF)					X (party dissolved in 2016)
		European Foundation for Freedom (EFF)				x
Europe of Freedom and Direct Democracy Group (EFDD)						
	Alliance for Direct Democracy in Europe (ADDE)					x

<sup>85</sup> See also EU Observer, Far-right political groups miss funding deadline, 9 October 2017, at: <https://euobserver.com/institutional/139342>.

			Institute for Direct Democracy in Europe (IDDE)				x
		Movement for a Europe of Liberties and Democracy (MELD)					x (party dissolved in 2015)
			Foundation for a Europe of Liberties and Democracy (FELD)				x
Non-aligned (NI)							
		Alliance of European National Movements				x	
			European identity and traditions		x		
		Alliance for Peace and Freedom (APF)				x	
			Europa Terra Nostra			x	

Zooming in on the specifics of the values verification mechanism once EuPP and EPF are registered, an initial question relates to *which* Article 2 TEU values are to be considered. At one level this appears easy: the Regulation only spells out those in the first sentence.<sup>86</sup> As discussed earlier, there are strong arguments to consider all fundamental principles of Union law listed in Article 2 TEU, which is referred to in Article 7 TEU in general terms, as a package.<sup>87</sup> This is important because populist political action in Europe can be equally in tension with values listed in the second sentence. In any event, there is no reason to operate a more limited normative scope when it comes to EU-level values compliance than when it comes to EU compliance verification at Member State level through Article 7 TEU. After all, the same actors are involved, albeit at different levels of government.

As a result of the Council discussions, the standard of review is that of a ‘manifest and serious breach’. Interestingly, but somewhat mysteriously, this language varies from that in Article 7 TEU. 7(1) speaks of a ‘clear risk of a serious breach’. 7(2) mentions the existence of a ‘serious and persistent breach’. This raises the issue of whether the Regulation intended to lay down a different standard, and if so, in what respect and why? Its text and drafting history do not help. Considering the cumulative articulation we could think about what ‘manifest’ is intended to add to ‘serious’,

<sup>86</sup> Article 3(1)(c) and 3(2)(c) Regulation.

<sup>87</sup> Klamert & Kochenov, 15-16 (point 5).

or in what respect it was defined in opposition to (only) ‘risk’. The EU-level orientation and specific EU political context is also different from the more general focus of Article 7 TEU. Perhaps the thinking was, to avoid (European) (party) political pressure to trigger the mechanism, that not just any theoretically serious breach should be considered relevant. It should have manifested itself. But that is already covered by the notion that the compliance with the values is to relate to EuPP/EPF’s ‘programme *and* its activities’.<sup>88</sup> It therefore seems a reasonable reading that ‘manifest and serious’ in the Regulation could be considered similar to ‘serious’ in Article 7(1) TEU, but that the breach should not be purely theoretical. It must have somehow materialised. It is not a speculative assessment of likely implication, but a review of the seriousness of what has already occurred.

There are additional reasons for this reading. Although the scope of the compliance check is ‘programme and actions’, in actual practice this will be primarily focused on actions. There are various reasons for this. If the very intention of the registration was to get access to funding, it is not very likely that an EuPP/EPF will openly include language directly at odds with Article 2 TEU. Why self-incriminate at a stage of self-certification? As we have seen, this is more likely to result in not registering in the first place. Moreover in terms of actually checking the values compliance, it will also be much easier to focus on acts rather than just words as this will provide more context to any assessment.

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<sup>88</sup> Article 3(1)(c) Regulation.

At first sight, the drafting history points to a reading that the EU legislator's intention was for the compliance check to concern programmes and actions of an EuPP *as a unit*. The Commission, it will be recalled, initially proposed for this to extend to the actions of the *individual* members (i.e. national political parties) together making up an EuPP. What is this of great practical significance? As was shown, 'mainstream' EuPPs also count among their members many political actors and parties that have been characterised as populist and likely promote or undertake actions in tension with Article 2 TEU values. Therefore limiting the assessment to an EuPP *as a whole* in this way would function as a major restriction, *de facto* rendering many such actors in the EP outside of the reach of the Regulation's compliance check. This reading would result in an uneven mechanism given that it seems politically and institutionally much more likely to be triggered against EuPP with (almost) exclusive populist membership. This would of course have far-reaching and undesirable implications. It would lead to the conclusion that in its current set-up the Regulation only offers a partial response to those EP actors likely to endanger Article 2 TEU values. But it could even have wider and even further reaching consequences.

If the tendency towards an *en bloc* approach were to materialise in practice, it could if uncorrected have even wider implications of entrenching rather than alleviating the EP's populist problem. It could lead to a perverse impetus for populist actors to 'seek refuge' in more 'mainstream' EuPP. This is not as unlikely as one might hope, as the current set-up suggests that there could very much be an interest on both sides. The requirement for both the establishment of an EuPP and an EP political group for membership to come from a quarter of Member States plays an important role here. Particularly in smaller EuPP and political groups this criterium, designed to guarantee broader European representativeness, can result in making throwing out bad apples based on

Article 2 TEU issues very unattractive. Why? It is politically costly when establishment requirements are no longer fulfilled and the EuPP or political group would cease to exist.

This dilemma would of course be solved if individualised assessment of Article 2 TEU compliance for EuPP and political group members would be brought into practice in any event. This could be argued to be necessary for reason that it is paramount to avoid tension with Article 7 TEU. If it is possible to address the fall-out of populist action in a specific Member State based on Article 7 TEU, would that justify this targeted approach not being possible at EU-level if the very same national political party (now a component of an EuPP) is involved? If this reasoning would not work in practice, there is clearly a case for this to be reconsidered by the EU legislator (in the Regulation's case), and by the EP itself (in case of the political groups).

However, the fact that such a move of targeting specific components of EuPP would seriously affect the EP's governability and internal functioning illustrates the difficulty in designing a response to EU level populist actors that targets them equally based on their 'threat level'. Yet it would be a more consistent and legitimate response than 'locking in' as a matter of law and procedure a potential impetus for shielding them. In the meantime, in a self-sanitising move, nothing prevents 'mainstream' EuPPs and EP political groups to set up and implement a system of internal EU values compliance checking, or rules on cooperation with other mainstream parties that depend in part on the votes of 'bad apples', so as to put principle above power.

Moving to the provisions dealing with triggering the compliance check, the interesting first element is that next to the EP itself also the Council and Commission are now in a position to

request it. The EP has included provisions for how to do this in its Rules of Procedure.<sup>89</sup> For it to trigger the mechanism, one quarter of the component MEPs representing at least three political groups are needed.<sup>90</sup> This again likely means in practice it is virtually ruled out that populist elements within ‘mainstream’ political groups are targeted. Yet, it is quite likely to happen in a scenario where mainstream political groups would target smaller ones composed (almost) exclusively of populist actors.<sup>91</sup> The situation for the Council is different. Here again the relevance of the close connection between national and EU-level political activity of the same political party becomes evident. For one is hard pressed to think of a scenario where the collection of 28 Member States would want to trigger this mechanism vis-à-vis an EuPP, which by definition is composed of member parties from at least one quarter of them.<sup>92</sup>

The Commission’s position is more interesting. It could come to see this avenue as an additional tool for compliance with Article 2 TEU values at Member State level, for example requesting it to be triggered with regard to the EuPP which contains the ruling party in a particular Member State against which it intends to take action. But this has an evident political dimension as well. How likely is such Commission action against an EuPP that forms part of one of the EP political groups that has put forward the Commission president, and that more generally forms part of a majority

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<sup>89</sup> EP Rules of Procedure, rule 223a. Rules 224 and 225 remain in force as a transitional regime to include the 2017 budget.

<sup>90</sup> Rule 223a(2).

<sup>91</sup> In fact, it has happened in a procedure against the Alliance for Peace and Freedom EuPP. The EP Constitutional Affairs Committee (AFCO) conducted a hearing with representatives from the Alliance for Peace and Freedom (APF) on 9 February 2017 (cf. APF-representatives participated in AFCO-hearing’, at: <https://apfeurope.com/news/>). Earlier media-reports explain that the EP Bureau had asked AFCO to produce a report about this EuPP in May 2016; EU Observer, ‘MEPs crack down on funding for far right’, 13 December 2016. As shown above, this EuPP has since been removed from the register by the APPF.

<sup>92</sup> Article 3(1)(b) Regulation.

in the EP on which the Commission is reliant to get its legislation passed? The Commission did not take this route in its recent actions vis-à-vis Poland. This may illustrate the Commission's dilemma and current calculations. But an instrument in the hands of the Commission that has potential value for wider Article 2 TEU compliance induction it is.

In a scenario of a serious failure to fulfil relevant *national* legal obligations regarding matters relating exclusively or predominantly to elements affecting respect for Article 2 TEU values, Member States where EuPP/EPF have their seat may address a duly reasoned request for de-registration identifying precisely and exhaustively illegal actions and specific national requirements violated.<sup>93</sup> Member States in which EuPP/EPF do not have their seat but are nonetheless active have the same possibility. This raises two questions: what material scenarios could be relevant here? And what would lead a Member State to use this possibility?

As to the first, one could perhaps think of substantive additional registration requirements for EuPP laid down in national law, such as for example a requirement for any parties active on the territory (i.e. including EuPP) to apply strict gender equality on their lists of candidates. As to the second, one is again hard-pressed to think of a scenario where a Member State would opt to wade into an EU-level highly political compliance check that would expose its national legislative specificities when it comes to dealing with political parties. It seems much likelier, if this were at all ever considered for national political reasons that the Member State would try to generalise the problem and frame it as an issue to be triggered by the Council as a whole. Perhaps then this possibility was

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<sup>93</sup> Article 16(3).

created and listed in the Regulation not so much for putting it to use, but to reaffirm that electoral matters more generally are a jealously guarded Member State competence. It is therefore a bark with an unlikely bite. But a revealing bark all the same, as it exposes once again the close connection between Article 7 TEU and the EU values compliance mechanism in this Regulation.

One of the innovative aspects of the original Commission proposal was that *individuals* could also request to trigger the compliance check. This element did not survive in the negotiations. But the Regulation does provide a triggering possibility for the *Authority* where it becomes aware of facts which may give rise to doubts as to compliance with EU values. The relevant question therefore is how the Authority will give hands and feet to this competence in practice. There is of course nothing to prevent NGOs or private citizens from actively seeking to draw the APPF's attention to relevant facts relating to the EuPP/EPF programmes and actions if, in their view, they are problematic from an Article 2 TEU viewpoint. And 'awareness of facts giving rise to doubts' is a considerably lower standard proof than the one eventually needed to de-register: manifest and serious breach. But the Authority is to decide whether it is to act on any signals it may receive, or whether and how it intends to act on this task proactively. In any event this appears to be an extremely useful potential avenue for worried citizens to contribute to EU values compliance in a practical fashion.

Finally, the Regulation's compliance check itself raises several questions. When so requested by the Authority, the CoIEP is to give its opinion within two months.<sup>94</sup> As noted above, the Court in

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<sup>94</sup> Article 10(3), first subparagraph, last sentence.

one of the few instances in which it has given substantive guidance has described the values related registration condition in Regulation 2004/2003 as not a black and white matter, but one of judgement. That legal qualification seems to still hold true. However, in the Regulation (and unlike in Article 7 TEU) there is some guidance regarding the assessment to be made as well. Opinions are to give full consideration to freedom of association and to the need to ensure pluralism of political parties in Europe.<sup>95</sup> This was included because some Member States kept principled objections to values compliance checks for political parties specifically, given their crucial place in the DNA of the democratic process. At one level, this instruction could be seen as simply a reaffirmation of what is already inherent in any balanced legal assessment in that the whole of Article 2 TEU, the Charter and the rest of the Treaties will need to serve as the broader interpretational context. Alternatively, this could be read as an instruction to interfere with actions by political parties as a last resort only, not just keeping *de facto* implications on political pluralism in the EP in mind but putting them at the very forefront of the compliance check. After all, at this stage we would be dealing with EuPP that have registered, and that have therefore pledged their allegiance to Article 2 TEU values in theory. The democratic arena should also be able to facilitate debate about the actual meaning of these EU values in practice.

The Authority will, upon receiving the opinion, need to decide whether or not to propose de-registering. This decision is to be duly reasoned. Yet, given the resources available to the Authority and the fact that the facility to request external expertise implies the EU legislator's preference for that route, it is unlikely to involve a (second) substantive assessment of the facts or the law. As

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<sup>95</sup> Article 11(3), second subparagraph.

described above, upon adoption of the Regulation some Member States expressed worry about the scenario that the Authority would not automatically follow the CoIEP opinion. But it should not be forgotten that the Authority is independent.<sup>96</sup> Moreover, all of the decisions of the Authority are subject to the Court's review.<sup>97</sup>

The task of the EP and Council in assessing the Authority's decision would at this stage be highly charged. The fact that they would *both* need to agree to overturn a decision by the Authority to de-register an EuPP would make this step in the procedure at once more political but less likely to be politicised. Moreover, their separate or joint objection could be substantiated only on grounds related to the assessment with the conditions for registration.<sup>98</sup> Where the Authority would be unlikely to second-guess what the CoIEP would put before it, it would at that stage perhaps be different for the EP and Council. They could feel they needed a 'second opinion' on the CoIEP's opinion. After all, once again, the Court has itself underlined that this is no black and white matter.

The question is: who could provide a second opinion at that stage? And how much precious time would this add to the procedure again?<sup>99</sup> They may seem mundane questions, but they explain based on legislative practice why proposals to add yet more institutions and instruments in the context EU values compliance, such as Müller's<sup>100</sup>, should be critically assessed. For even in a

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<sup>96</sup> Article 6(2), first subparagraph, second sentence.

<sup>97</sup> Article 6(11).

<sup>98</sup> Article 10(4), second subparagraph.

<sup>99</sup> For a convincing argument that the Commission's Rule of Law Framework has had the problematic effect of actually delaying decisive EU action vis-a-vis Member States, see Laurent Pech & Kim Lane Scheppele, *Illiberalism Within: Rule of Law Backsliding in the EU*, CAMBRIDGE YEARBOOK OF EUROPEAN LEGAL STUDIES 1 (2017).

<sup>100</sup> Jan-Werner Müller, *Should the EU protect democracy and the rule of law inside Member States?* 21 EUROPEAN L.J. 141 (2015). Müller proposed 'to create an entirely new institution that could credibly act as a guardian of Europe's

setting with ever more institutional actors, independent or not, the hot political potato does not just vanish. Democratic theory, or theory of militant democracy for that matter, are not exempt from practical realities of institution building and time constraints. In confronting the populist challenge at and from EU level, there is a real danger that developing more ways to move around the hot potato distracts from considering the real issue: why does it remain so hot?

In any event, the fact that in this Regulation (just like in the case of Article 7 TEU) the EU legislator has opted to leave the final decision at the political level is itself telling. This appears wise. Not only does it underline the significance of (acting on) Article 2 TEU values, but – perhaps as importantly – it underscores that any such action to defend EU values does not only necessitate an addressee. It also requires an identifiable subject accountable for the assessment and willing to take political responsibility not only for the design of the institutional set-up, but also for the political results it produces.

## **5. Conclusion**

The story of how the Regulation's values compliance mechanism originated, and the questions of practice and principle raised by its operationalisation, illustrate the complexities to make progress in ensuring compliance with Article 2 TEU. By any standard it is not quite the jewel of better regulation. Without more it could remain a set-up that is inherently limited and limiting for confronting forces within the EP whose agendas and actions are at odds with Article 2 TEU. Yet,

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acquis normative, [a] 'Copenhagen Commission' – a body with a mandate to offer comprehensive and consistent political judgments' (at 150).

it also offers opportunities to the Commission and EU citizens in particular that could serve to remedy some of its shortcomings and ensure it develops into a useful and targeted tool to respond to populist politics at EU level.

Even in the not altogether unlikely event that the values verification mechanism will never be used, the Regulation's drafting history offers a rich account of the EU legislator considering options to refine such efforts. This could serve as one more stepping-stone to rethink options with the ultimate aim of facilitating EU institutions in their effort to come to a comprehensive and concerted way to act upon their legal obligation to protect Union law principles. For this is an area where the twin imperatives of co-ordinated decisive action to protect the EU's very foundation and surgical precision to avoid unwanted and unintended political, institutional and legal consequences could not be more finely matched.