

**Issue: Is there any alternative/complementary legal basis to justify the adoption of a more ambitious “Rights and Values Programme” (RVP)?**

**I - Current situation**

RVP proposal is “based on Articles 16(2), 19(2), 21(2), 24, 167(5) and 168 of the Treaty on the Functioning of the European Union (TFEU). The combination of these articles is necessary to continue supporting policies which are developed and implemented in the current programmes. It is not meant to extend activities to new policy areas. The combination of more than one Article is necessary to achieve the programme’s general objectives in a comprehensive way and to adopt a simplified and more efficient approach to funding.”

In other words, the proposal is currently justified on the basis of the EU’s power to adopt measures in the areas of (i) personal data; (ii) anti-discrimination; (iii) citizens’ free movement rights; (iv) citizens’ initiatives; (v) culture; (vi) physical/mental health

**Main problem:** It has been reported that the dominant view in the Commission’s Legal Services is that there is no “sufficient” legal basis to adopt a more “ambitious” RVP which could provide financially adequate and urgently needed support to Civil Society Organisations promoting European Values as defined in Article 2 TEU

**Key questions:** 1/ Are there **alternative** legal bases? 2/ is a more ambitious proposal possible based on the **current** ones?

**II – Possible alternatives**

**First possible and theoretically speaking best alternative: Article 352 TFEU**

Article 352 TFEU for precedent, this Article was the legal base in the establishment of the EUFRA. However, it is politically unrealistic due to the unanimity requirement in the Council in a context where two countries are subject to Article 7 proceedings, hence the choice by the Commission to adopt the legal basis described above so as to provide for the use of the ordinary legislative procedure.

**Second possible alternative:** A more ambitious “legal basis cocktail” can be proposed to follow precedent of the Whistleblowing Directive<sup>1</sup> and which one could justify on the basis of the multifaceted and cross-border nature and impact of Article 2 TEU related challenges, shortcomings and violations.

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<sup>1</sup> See Proposal for a Directive of the European Parliament and of the Council on the protection of persons reporting on breaches of Union law which “is based on Articles 16, 33, 43, 50, 53(1), 62, 91, 100, 103, 109, 114, 168, 169, 192, 207 and 325 of the Treaty on the Functioning of the European Union (TFEU) and Article 31 of the Treaty establishing the European Atomic Energy Community (the Euratom Treaty)”

This “legal basis cocktail” could consist of all the provisions listed in the Commission’s explanatory memorandum (see “synergies with several policies and their funding programmes”: pp. 5-6) and emphasise all relevant provisions connected to the area of freedom, security and justice and giving the EU a power to adopt relevant measures.

One may also suggest consider adding the following legal bases to the current “cocktail” and “beef up” the regulation accordingly:

Article 165 and 166 TFEU (Title XII: Education, Vocational Training, Youth and Sport): With respect to its legal basis, the proposed new Erasmus+ Regulation (COM(2018) 367 final) refers to Articles 165 and 166 TFEU<sup>2</sup>. These two treaty provisions are used to justify the adoption of a regulation which among things seeks inter alia to strengthen the European commitment to European common values/promote European common values through sport, education, etc. Arguably, the two provisions could be used to make financing available to NGOs seeking to do the same as long as they are active in the areas of “Education, Vocational Training, Youth and Sport” (Title XII TFEU).

In this respect, it may be worth mentioning that the Council Recommendation of 22 May 2018 on promoting common values, inclusive education, and the European dimension of teaching, also refers to Articles 165 and 166 TFEU.

There may also be scope for the use of Articles 173 and 185, as they were the basis of Regulation (EU) No 1291/2013 establishing the Horizon 2020 programme, which supports innovation and research into the priority of societal challenges – referring explicitly to the promotion of fundamental values as one of its specific objectives under “secure societies - Protecting freedom and security of Europe and its citizens”, stating ‘such as freedom, democracy, equality and the rule of law must be the base of any activity undertaken in the context of this challenge to provide security to European citizens’. The advantage of the use of Article 173 is that it falls under the ordinary legislative procedure.

Where it can be established (as implicitly acknowledged by the Commission in (EU) No 1291/2013) that there is a strong connection between the security of society and strong fundamental values, then there may be scope for the use of Article 84 TFEU,<sup>3</sup> or in the promotion of economic, social and territorial cohesion under Articles 174-175 TFEU<sup>4</sup>

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<sup>2</sup> Union action in the field of education, training, youth and sport is enshrined in Articles 165 and 166 TFEU which give the Union a supporting competence with the aim to contribute to the development of quality education, the implementation of a vocational training policy and of a youth policy and the promotion of European sporting issues.

<sup>3</sup> Article 84 TFEU covers the establishment of measures which promote or support Member States in the field of crime prevention.

<sup>4</sup> Article 174 promotes the strengthening of economic, social and territorial cohesion.

The key objectives of the fund (“help to sustain open, democratic, pluralist and inclusive societies”, etc.) could be more compellingly connected and justified by Articles 2-3 TEU and as far as the rule of law is concerned, mention could be perhaps made of the second subparagraph of Article 19(1) TEU in light of the ECJ’s “Portuguese case” in which the ECJ held that EUMS are under an EU obligation to “ensure that the bodies which, as ‘courts or tribunals’ within the meaning of EU law, [which] come within its judicial system in the fields covered by that law, meet the requirements of effective judicial protection”.

Another aspect arguably insufficiently emphasised is mutual trust. As recalled by ECJ in the same case, “mutual trust between the Member States and, in particular, their courts and tribunals is based on the fundamental premiss that Member States share a set of common values on which the European Union is founded, as stated in Article 2 TEU”. This “fundamental premiss” can arguably justify a more ambitious RVP on the basis of Articles 67, 81 and 82 TFEU to the extent that any EU funding of NGOs which pursue the aim of promoting Article 2 TEU values necessarily also helps the strengthening of mutual trust which then helps the strengthening of mutual recognition of judgments, etc.

### **III- Looking beyond the present proposed RVP regulation:**

To the best of our knowledge, there is no legal obstacle to the redefining of the geographical scope of the mandate of the European Endowment for Democracy (EED), which is a grant-giving organisation that supports local actors of democratic change in the European Neighbourhood and beyond: <https://www.democracyendowment.eu/about-eed/>

In other words, it may be worth advocating for EUMS to make additional voluntary contributions to the budget of the EED to finance local NGOs which promote Article 2 values within the EU.

There is furthermore no argument for the position that a RVP cannot support a more substantive promotion of European values articulated in Article 2 TEU, which is a transversal principle of Union action, as demonstrated by the Regulations herein cited.

### **IV – Key points**

- The cocktail of legal bases could refer to additional ones (e.g. Articles 165 and 166 TFEU) which would strengthen the foundation of a more ‘ambitious’ RVP
- Regardless, it is not clear the extent to which the current legal bases prevent in any way the drafting of a more ambitious RVP