THE METAMORPHOSIS OF EU LAW THROUGH ARTICLE 19(1) TEU: FROM LOYALTY TO VALUE-LADEN INTERPRETATION

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This article aims to demonstrate the evolution of the scope of EU law by examining Article 19(1) TEU, a key legal provision of the EU. Having succeeded former Articles 164 EEC and 220 EC, Article 19(1) TEU incorporates the concept of 'effective legal protection' into the 'law is observed' (first paragraph, second sentence of Article 19(1) TEU) provision of its predecessors with a new second paragraph. This addition has enabled the Court to develop robust case law alongside Article 4(3) TEU (the principle of loyalty), Article 47 of the EU Charter Fundamental Rights and Article 2 TEU, the latter of which sets out values such as the rule of law (in its first sentence) and solidarity (in its second sentence). On 29 April, in the case of Commission v Malta, the Court relied on Article 2 TEU to determine that the national legislation was contrary to EU law. In this case, the Court also referred to the values of democracy and solidarity. This case marks a drastic change in the application and interpretation of EU law. This article analyses this transformation, in which the Court relies on a value-laden interpretation of Article 19(1) TEU.

> "Did you understand a word of it", the Chief clerk was asking? "Surely, he can't be trying to make fool of us?" "Oh dear" cried his mother in tears, "perhaps he is terribly ill, and we are tormenting him".[1]

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1 Franz Kafka, The Metamorphosis, in N Glatzer (ed) The Complete Stories (Schock Book, New York 1971) 98.

Europarättslig tidskrift, open access 2026-11-16

1. INTRODUCTION: THE MORNING AFTER (THE METAMORPHOSIS)

In EU law, there is now a day before and after the 29th of April 2025. In Sweden, the 30th of April is a day of celebration marking the arrival of spring, with bonfires, singing and public gatherings. It also coincides with the King's birthday. By contrast, in EU law, it will be known as the day after the Court of Justice of the European Union (the Court or CJEU) delivered its 'spring bombshell' in the case of *Commission v Malta*.[2] This is a day when EU law scholars will start to understand the implications of this spectacular ruling for EU law, and how the majority of judges in this Grand Chamber case came to agree on the extensive reasoning behind such a decision, which will lead to a metamorphosis of EU law as we know it by 28 April 2025.

This article aims to demonstrate the evolution of the scope of EU law by examining Article 19(1) TEU, a key legal provision of the EU. Having succeeded former Articles 164 EEC and 220 EC, Article 19(1) TEU incorporates the concept of 'effective legal protection' into the 'law is observed' (first paragraph, second sentence of Article 19(1) TEU) provision of its predecessors with a new second paragraph.[3] This addition has enabled the Court to develop robust case law alongside Article 4(3) TEU (the principle of loyalty), Article 47 of the EU Charter Fundamental Rights (EUCFR) and Article 2 TEU, the latter of which sets out values such as the rule of law (in its first sentence) and solidarity (in its second sentence). On 29 April, in the case of *Commission v Malta*, the Court relied on Article 2 TEU to determine that the national legislation was contrary to EU law. In this case, the Court also referred to the values of democracy and solidarity. This case marks a drastic change in the application and interpretation of EU law. This article analyses this transformation, in which the Court relies on a value-laden interpretation of Article 19(1) TEU.

In this article, we will first examine the origins of Article 19(1) TEU, second paragraph, which is a specific expression of Article 4(3) TEU and the principle of loyalty (Section 2). We will then examine the Court's use of Article 19(1) TEU in relation to backsliding on the EU rule of law (Section 3). This will be followed by an analysis of case law relating to Article 19(1) TEU, primarily outside the context of backsliding on the rule of law (Section 4). Section 5 will study the recent use of Article 2 TEU in conjunction with Article 19(1) TEU, first paragraph. This section will underline the weaknesses related to the reason-

[2] Case C-181/23 Commission v Malta, EU:C:2025:283, now referred as 'Commission v Malta'.

[3] See Sacha Prechal, Article 19 TEU and National Courts: A new role for the principle of effective judicial protection?, Review of European Administrative Law Blog, 29 November 2022. According to Prechal, Article 19(1) TEU, 'the second paragraph is an institutional provision of fundamental importance dealing with the structure and mission of judicial power in the EU'.

Europarättslig tidskrift, open access 2026-11-16

ing of the Court in *Commission v Malta*. Finally, section 6 will elaborate on the constitutional dangers related to the use of Article 2 TEU in conjunction with Article 19(1), first paragraph TEU, viewing the new situation as an expression of EU rule by law. Section 7 concludes the essay.

2. THE ORIGIN OF ARTICLE 19(1) TEU AS A SPECIFIC EXPRESSION OF LOYALTY

Article 19(1) TEU, second paragraph, is an expression of the loyalty principle enshrined in Article 4(3) TEU within the specific context of effective judicial protection.[4] It has now found its optimal expression in the Court's case law dealing with judicial independence. While most cases concerning judicial independence were previously decided based on Article 47 EUCFR, the Court has used Article 19(1) TEU to overcome the limitations imposed by Article 51(1) EUCFR.[5] The matter of judicial independence was not, in fact, extraneous to the Court or its jurisprudence relating to admissibility in preliminary rulings. Under Article 267 TFEU, national courts referring questions to the Court must meet, inter alia, the independence requirement.[6] However, this requirement merely serves as a legal standard for a body to qualify as a court or tribunal under EU law, and is therefore capable of referring questions to the CJEU.[7] The only consequence of non-compliance is that the body in question does not qualify as a court under Article 267 TFEU and is therefore unable to refer questions to the Court.[8]

By contrast, Article 19(1), second paragraph, TEU imposes a general obligation of judicial independence on all Member States' courts that may be called

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4 See Markus Klamert, The Principle of Loyalty in EU law (OUP 2014) 138. Klamert shows the close link between Article 4(3) TEU and Article 19 TEU. He also highlights the close link between loyalty and effectiveness (at 123). See also, Xavier Groussot and Anna Zemskova, The Rise of Procedural Rule of Law in the European Union – Historical and Normative Foundations, in Antonina Bakardjieva Engelbrekt et al., 30 Years After the Fall of the Berlin Wall: Rule of Law in the European Union (Hart Publishing, Oxford, 2021).

5 For cases concerning the application of Article 47 EUCFR limited by the scope of the Charter see: Joined cases C-245/19 and 246/19 État luxembourgeois, EU:C:2020:795 para 55 confirmed in C-824/18 A.B., EU:C:2021:153 para 88, now referred as 'A.B.'.

6 C-54/96 Dorsch Consult, EU:C:1997:413 para 23; C-53/03 Synetairismos Farmakopoion Aitolias (Syfait) and Others, EU:C:2005:333 para 29, referred now as 'Syfait'; Joined Cases C-110/98 to C-147/98 Gabalfrisa EU:C:2000:145 para 33; Case C-506/04 Graham J. Wilson v Ordre des avocats du barreau de Luxembourg EU:C:2006:587 para 48, now referred as 'Wilson'; Case C-274/14 Proceedings brought by Banco De Santander S.A., EU:C:2020:17 para 51; and see G Butler, Independence of Non-judicial Bodies and Orders for a Preliminary Reference to the Court of Justice, (2020) 45 European Law Review 870.

7 Ibid.

8 See Syfait para 38.

Europarättslig tidskrift, open access 2026-11-16

upon to apply EU law.[9] In *Getin Noble Bank*, the Advocate General (AG) suggests two different standards of review to assess independence: one related to courts and tribunals under Article 267 TFEU, and one related to independence under Article 19(1) TFEU and Article 47 of the EUCFR.[10] Although the concept of judicial independence is a single one at EU level, the Court may still use different standards of review for the two articles.[11] In this instance, the Court states that, concerning the admissibility of the questions, there is a rebuttable presumption that national courts are also courts or tribunals under Article 267 TFEU.[12] However, in substance, the Court may still find that the body in question does not satisfy the requirements of Articles 19 TEU and 47 EUCFR.[13] The first time the Court resorted to Article 19(1) TEU to address matters of judicial independence as a general obligation was in the *Portuguese Judges* case, concerning a preliminary question referred by the Portuguese Supreme Administrative Court.[14] This related to the interpretation of Articles 19(1) TEU and 47 EUCFR, specifically raising the issue of whether these provisions preclude national measures that reduce the remuneration of the Portuguese judiciary in order to preserve judicial independence.[15] These measures were set out in Law No. 74/2014 and involved temporary salary reductions for various categories of public sector employees, as part of Portugal's response to its excessive budget deficit.[16]

After establishing the admissibility of the request, the Court reformulated the national court's question to focus only on the second subparagraph of Article 19(1) TEU, thereby excluding the direct application of Article 47 EUCFR.[17] Regarding the scope of application of Article 19(1) TEU, the Court clarified that it refers to 'the fields covered by Union law', irrespective of whether Member States are implementing EU law within the meaning of Article 51(1) EUCFR.[18] The most striking aspect of the judgment is that the Court relied on Article 19(1) TEU without considering Article 47 EUCFR, even though it could have deemed the national measure an 'implementation of EU law' under

9 Matteo Bonelli and Monica Claes, Judicial Serendipity: How Portuguese Judges came to the rescue of the Polish Judiciary (2018) 14 European Constitutional Law Review 622, 634.
10 Case C-132/20 Getin Noble Bank S.A, EU:C:2022:235, referred now as 'Getin Noble Bank'; Opinion of Advocate General Bobek in Getin Noble Bank EU:C:2021:557 para 71.
11 AG Opinion in Getin Noble Bank paras 35 and 36; Opinion of Advocate General Bobek in Joined Cases C-748/19 to 754/19 Criminal proceedings against WB and Others EU:C:2021:403.
12 Getin Noble Bank para 69.
13 Ibid., para 72.
14 Case C-64/16 Associação Sindical dos Juízes Portugueses, EU:C:2018:117, now referred as 'Portuguese Judges'; Michal Krajewski, Associação Sindical dos Juízes Portugueses: The Court of Justice and Athena's Dilemma, (2018) 3 European Papers 395.
15 Portuguese Judges para 18.
16 Ibid., para 11.
17 Ibid., para 27.
18 Ibid., para 29.

Europarättslig tidskrift, open access 2026-11-16

Article 51(1) EUCFR.[19] This contrasts with the view of the Commission, which did not consider Article 19(1) TEU, and the Advocate General, who considered it primarily a procedural provision, not relating to the right to a fair hearing before an independent court.[20] Furthermore, the Court reaffirmed the importance of Article 2 TEU and the rule of law as founding values of the Union, identifying Article 19(1) TEU as a 'concrete expression' of these values.[21] It underlined here that the duty to guarantee the right to a fair trial is shared between the EU courts and national courts in a system based on the principle of sincere cooperation (loyalty) under Article 4(3) TEU.[22] This requires Member States to provide legal remedies in all fields covered by Union law. Subsequently, the Court stressed that the effective judicial protection is also a general principle of EU law, enshrined in Article 47 EUCFR and reflected in Articles 6 and 13 of the European Convention on Human Rights (ECHR).[23] As it is 'of the essence of the rule of law', effective judicial protection requires that courts and tribunals meet certain standards, notably judicial independence.[24] The Court's use of an interpretation of Article 47 EUCFR when applying Article 19(1) TEU does not mean that it is applying Article 47 EUCFR outside its scope.[25] Rather, the Court suggests that the provisions have the same substantive content and that, therefore, Article 19(1) TEU mirrors Article 47 EUCFR in everything but its scope of application.[26] The judgment emphasised that the independence of both national and EU courts is a prerequisite for ensuring effective judicial protection. Drawing on its earlier case law regarding the meaning of judicial independence, the Court then assessed the Portuguese salary-reduction measures and concluded that they did not violate Article 19(1) TEU.[27]

Portuguese Judges is of paramount importance for at least three reasons.[28] Firstly, it imposes substantive independence obligations on national courts that

[19] Case C-258/14 Florescu, EU:C:2017:448 paras 43–48.

[20] The AG found that the right to a fair hearing before an independent tribunal is to be found in Article 47 CFR and that therefore 19 TEU only covers the right to effective judicial protection without the right to a fair hearing (reference to the ECHR where effective judicial protection is laid down in Article 6 while the right to a fair hearing in Article 13 ECHR). See Krajewski 398; Opinion of AG Saugmandsgaard Øe in Portuguese Judges, EU:C:2017:395 paras 57–68 for the Commission's view on the matter see para 37 of the AG Opinion.

[21] Portuguese Judges para 32.

[22] Ibid., para 34.

[23] Ibid., paras 35 and 36.

[24] Ibid., para 45; Monica Parodi, Il controllo della Corte di giustizia sul rispetto del principio dello Stato di diritto da parte degli Stati membri: alcune riflessioni in margine alla sentenza Associação Sindical dos Juízes Portugueses, (2018) 3 European Papers 985.

[25] Krajewski 402–405.

[26] Portuguese Judges, paras 35–44.

[27] Ibid; Wilson paras 49 and 51; and Case C-685/15 Online Games and Others, EU:C:2017:452 para 60.

[28] See Xavier Groussot and Johan Lindholm, General Principles: Taking Rights Seriously and Waiving the Rule of Law Stick' in Katja Ziegler et al, Research Handbook on General Principles of EU Law: Constructing Legal Orders in Europe (Edward Elgar, 2022).

Europarättslig tidskrift, open access 2026-11-16

may be required to apply EU law. Secondly, it links judicial independence to the essential feature of effective judicial protection and recognises that effective judicial protection is essential for safeguarding the rule of law enshrined in Article 2 TEU. Thirdly, it establishes that national obligations under Article 19(1) TEU extend to 'the fields covered by Union law', thus overcoming the limitations imposed by Article 51(1) EUCFR. With the *Portuguese Judges* ruling, the Court sent a clear message that national judges' application of EU law is sufficient to impose a requirement of judicial independence on Member States.[29] As seen in the *Portuguese Judges* ruling, Article 19(1) TEU also gives justiciability to Article 2 TEU, which, until now, has only been applied in conjunction with Article 19 TEU and Article 47 EUCFR, and never as a stand-alone provision.[30]

The Court's use of Article 19(1) TEU was welcomed by the Commission, which initiated a series of infringement proceedings based on that article to safeguard the rule of law in the EU. In turn, the Court also interpreted Article 19(1) TEU and developed its use. The ruling in *Portuguese Judges*, the application of Article 19(1) TEU, and its connection to the rule of law, set the basis for addressing the so-called rule of law crisis.[31] In this context, the Court issued several significant rulings that contributed to the development of the right to effective judicial protection, while also clarifying the use and scope of Article 19(1) TEU following the *Portuguese Judges*' rulings.[32] These cases generally follow the same logic as that of *Portuguese Judges*, in that the Court takes the requirement of judicial independence from the 47 EUCFR and states that it is also applicable when only Article 19(1) TEU is applicable.[33] Moreover, these provisions are always considered in light of their importance in guaranteeing the rule of law in the EU.[34] There are many significant rulings relating to judicial independence in the context of the rule of law crisis. The next section will

[29] Benedikt Riedl, ECJ Encroachment on Domestic Judicial Autonomy? An evaluation of ECJ value operationalizing case law in Juízes Portugueses and subsequent cases, (2024) 30 European Public Law 157; Koen Lenaerts, New Horizons for the Rule of Law Within the EU, (2020) 21 German Law Journal 29.

[30] Ibid.

[31] Laurent Pech and Dimitry Kochenov, Respect for the Rule of Law in the Case Law of the Court of Justice of the EU, (2021) SIEPS 8, 93–110; Peter Van Elsuwege and Femke Grimmelprez, Protecting the Rule of Law in the EU Legal Order: A Constitutional Role for the Court of Justice (2020) 16 European Constitutional Law Review 8.

[32] Case C-625/18 A. K. and Others, EU:C:2019:982 para 167, referred now as 'A.K.'; Case C-378/17 The Minister for Justice and Equality, EU:C:2018:979 para 49; A.B.; C-357/19 EuroBox Promotion and others, EU:C:2021:1034, referred now as 'Eurobox'; Case C-430/21 R.S., EU:C:2022:99, referred now as 'R.S.'; and Joined Cases C-647/21 and C-648/21 D.K (Dessaisissement d'un juge), EU:C:2025:143, referred now as 'D.K'.

[33] Ibid.

[34] This logic is not new. The Court has always connected European judicial protection to the rule of law. See for instance: Case C-50/00 P Unión de Pequeños Agricultores v Council of the European Union, EU:C:2002:462 para 38; Case C-294/83 Partie écologiste "Les Verts", EU:C:1986:166 para 23.

Europarättslig tidskrift, open access 2026-11-16

address some of the most significant cases to explore the development of Article 19(1) TEU. Some of these cases, such as *A.K.* and *A.B.*, address the general possibility of disapplying national legislation contrary to the effective judicial protection, while cases such as *EuroBox*, *R.S.* and *D.K.* address the more specific possibility of disapplying a national court's decision in the name of effective judicial protection.[35]

3. BACKSLIDING CASE LAW AND ARTICLE 19(1) TEU AS THE *LEITNORMEN*

Understanding the development of effective judicial protection in Article 19(1) TEU and its importance in safeguarding the rule of law requires an examination of both the *A.K.* and the *A.B.* cases.[36] The cases originated in Poland in the context of a judicial reform that changed the composition of the body proposing candidates for the Supreme Court (the KRS).[37] These reforms meant that the composition of the KRS was heavily influenced by Parliament. The *A.K.* case concerned three Polish Supreme Court judges affected by the new Polish Law on the Supreme Court, which lowered the retirement age for Supreme Court judges to 65.[38] This case is relevant because, as mentioned in the previous chapter, the Court found that judicial independence was a key feature of the effective judicial protection. Nevertheless, it is also noteworthy that, after setting out its reasoning on the concept of 'independence' under EU law, the Court confirmed the connection between Articles 19 TEU and 2 TEU, and between Article 19 TEU and Article 47 EUCFR.[39] According to the Court, the two provisions have the same substantive content and effects, and both work in connection with Article 2 TEU. Ultimately, the Court opted for the application of Article 47 EUCFR, stating that an assessment considering the other two provisions would be redundant, as the outcome would be the same.[40] In summary, while it is for the referring court to rule on the independence of the Disciplinary Chamber, a national court may still disregard a national provision to guarantee judicial independence.[41]

The *A.B.* case originates from the same context as the previous judgment and stems from the claims of several judicial candidates to the Polish Supreme Court

35 See n 32.
36 Ibid. See also in connection to European Court of Human Rights Case of Dolińska-Ficek and Ozimek v. Poland, Applications nos. 49868/19 and 57511/19.
37 Ewa Zelazna, The Rule of Law Crisis Deepens in Poland after A.K. v. Krajowa Rada Sadownictwa and CP, DO v. Sad Najwyzszy, (2019) 4 European Papers 907.
38 A.K. para 17.
39 Ibid., paras 167 and 168.
40 Ibid., para 169.
41 Ibid., para 171.

Europarättslig tidskrift, open access 2026-11-16

who were not selected by the KRS.[42] The candidates appealed to the Supreme Administrative Court, which granted interim suspension of the KRS's resolutions.[43] However, Polish laws governing the finality and efficacy of the KRS's decisions rendered this appeal completely ineffective.[44] Given these circumstances, the referring court asked whether the practical impossibility of challenging the KRS's resolutions breached EU law, particularly the rule of law and the right to an effective judicial remedy.[45] Furthermore, the national court asked whether EU law is breached if the finality of KRS decisions prevents national courts from reviewing judicial appointments, which could violate the right to an effective judicial protection.[46] Following a request for expedited proceedings and a development in Polish legislation, the referring court asked a third question. This law eliminated the right to appeal KRS decisions and extinguished all pending judicial proceedings, thereby removing the referring court's jurisdiction.[47] Thus, the third question concerns whether EU law is violated when pending judicial proceedings are eliminated, thereby preventing a national court from completing the preliminary reference procedure and undermining the right to an effective judicial protection and sincere cooperation.[48] When answering the questions, the Court immediately ruled out the application of Article 47 EUCFR because the Directive mentioned by the referring court was not applicable, leaving no rights conferred on individuals by EU law.[49] However, as in previous cases, the Court relied on the broader scope of Article 19(1) TEU, reinforcing its content with Articles 47 EUCFR and 6 and 13 ECHR.[50] The Court applied Article 19(1) TEU on the basis that it has the same content as Article 47 EUCFR, and stated that, like the latter, Article 19(1) TEU also has direct effect and can therefore be invoked by individuals before national courts.[51] Indeed, the latter imposes clear and precise obligations on Member States and is not subject to any conditions.[52] Besides, the Court recalled the primacy of EU law, which it had previously invoked in relation to Article 19(1) TEU and reaffirmed that national provisions undermining the effective judicial protection must be disapplied.[53] The Court reiterated this in *Hungary v Par-*

42 A.B. para 34; Mathieu Leloup, The Untapped Potential of the Systemic Criterion in the ECJ's Case Law on Judicial Independence, (2024) 24 German Law Journal 995.
43 See A.B.
44 Ibid., para 35.
45 Ibid., paras 45 and 58.
46 Ibid.
47 Ibid., paras 54–58.
48 Ibid.
49 Ibid., paras 88 and 89.
50 Ibid., para 110.
51 Ibid., para 146.
52 Ibid; Case 26/62 Van Gend & Loos, EU:C:1963:1; Case C-453/99 Courage and Crehan, EU:C:2001:465 para 19.
53 A.B. paras 140–149; Case C-6/64 Costa, EU:C:1964:66, now referred as 'Costa'.

Europarättslig tidskrift, open access 2026-11-16

liament and Council, when Hungary attempted to contest the Conditionality Regulation adopted by the EU institutions.[54]

In *Eurobox*, the Court was asked whether EU law, and specifically the effective judicial protection principle, precludes national legislation or practice that binds lower courts to the decisions of the Constitutional Court.[55] Consequently, lower courts cannot disapply decisions of the Constitutional Court, even if they believe them to be contrary to the effective judicial protection. Indeed, such a disapplication would be considered a disciplinary offence.[56] After reiterating the importance of judicial independence in guaranteeing the essence of the right to effective judicial protection, the Court ruled that national legislation binding lower courts to the decisions of the Constitutional Court may be permitted, provided the latter's independence is guaranteed by national law.[57] However, lower courts cannot incur disciplinary liability for failing to comply with those decisions. They must be able to disapply the case law of the Constitutional Court on their own authority if they deem it to be contrary to the right to effective judicial protection under Article 19(1) TEU.[58] Finally, in *D.K.*, the Court considered the case of a Polish judge who had been removed from 70 pending cases by the College of Judges of the Regional Court. In two of these cases, the judge referred questions to the Court to determine whether she still had the authority to examine them despite the resolution of the college of judges.[59] The Court ruled that national legislation that does not provide clear criteria for withdrawing cases or require reasons for the decision is contrary to Article 19(1) TEU.[60] The Court also ruled that Article 19(1) TEU and the primacy of EU law require national courts to disapply that decision and subsequent ones adopted in breach of Article 19(1) TEU.[61] All in all, the case law of the Court shows that Article 19(1) TEU is a very effective provision for ensuring judicial independence as a fundamental guarantee. The provision's broad scope has enabled the Court to rule in circumstances beyond the mere 'implementation of EU law' and enforce the value of the rule of law in such circumstances. While the relationship between Articles 19(1) and 2 TEU will be discussed in detail

[54] Case C-156/21 Hungary v European Parliament and Council of the European Union, EU:C:2022:97 para 162, now referred as 'Hungary v EP and Council'. See also C-157/21 Poland v European Parliament and Council of the European Union EU:C:2022:98.
[55] Eurobox paras 33–35 and 54–58.
[56] Ibid. See also R.S.
[57] Ibid., paras 54–58.
[58] Ibid., paras 230–243; at para 243 the Court does what it had previously done in the A.B. case namely it states that an assessment in the light of Article 47 CFR is unnecessary because it would lead to the same result as the assessment per Article 19 (1) TEU. The fact that the provisions are switched in this case if compared to A.B. is even a further confirmation that the Court gives them the same substantive value.
[59] See D.K.
[60] Ibid., para 86.
[61] Ibid., para 97.

Europarättslig tidskrift, open access 2026-11-16

in Section 5, the next section will explore the recent development of Article 19(1) TEU in relation to effective judicial protection and Article 47 EUCFR in a context not solely related to backsliding on the rule of law.

4. BEYOND BACKSLIDING AND THE SPLIT BETWEEN ARTICLE 19(1) TEU AND ARTICLE 47 EUCFR

The application of Article 19(1) and effective judicial protection, as discussed previously, lies at the heart of case law on independence. The origins of Article 19 TEU and effective judicial protection are also closely linked to the principle of loyalty (Article 4(3) TEU, Article 10 EC and Article 5 EEC) and the doctrine of general principles of EU law.[62] Following the entry into force of the Lisbon Treaty, Article 19(1) TEU has repeatedly been linked to the EUCFR and its Article 47, which includes the principle of effective judicial protection. This is not an unusual development. Article 47 of the EUCFR has replaced the rhetoric of the general unwritten principle of effective judicial protection, playing a similar role to that of the *Rewe* doctrine in terms of judicial review and interpretation of national legislation, while also acting as a complement to the limited 'effectiveness review'.[63] For example, in *FMS*, the Court interpreted the Directive in question in light of Article 47 EUCFR and ruled that national legislation preventing those affected by a return decision from challenging it before at least one judicial body is incompatible with EU law.[64] Here, the Court referenced the direct effect of Article 47 EUCFR, as established in *Egenberger*, and reiterated that, in accordance with primacy, national courts must disregard national legislation that prevents them from exercising jurisdiction over administrative decisions if there is no possibility of judicial review of those decisions.[65] Similarly, in *Barouk*, the Court affirmed that, building on the *Torubarov* logic,[66] Article 46(3) of Directive 2013/32, when read in light of Articles 47 EUCFR and 4(3) TEU, grants national courts the power to order a medical examination of an applicant for international protection where necessary for assessing the application.[67] These cases demonstrate how effective judicial protection, through Article 47 EUCFR, imposes positive obligations, such as the creation

[62] Xavier Groussot and Anna Zemskova; The Rise of the Procedural Rule of Law, now referred as 'Groussot and Zemskova'. See Case C-69/10 Brahim Samba Diouf, EU:C:2011:524, para 2, paras 57–70; and Case C-348/16 Moussa Sacko, EU:C:2017:591.
[63] Case C-432/05 Unibet (London) Ltd, EU:C:2007:163; Joined Cases C-245/19 and C-246/19 État Luxembourgeois, EU:C:2020:795, paras 66, 79 and 110.
[64] Case C-924/19 PPU FMS, EU:C:2020:367, paras 143–147.
[65] Ibid.
[66] Case C-556/17 Torubarov, EU:C:2019:626.
[67] Case C-283/24 Barouk, EU:C:2025:236.

Europarättslig tidskrift, open access 2026-11-16

of specific remedies, whereas the *Rewe* doctrine merely imposes negative constraints, requiring that national procedures do not obstruct access to EU rights.

In the context of backsliding, in *A.K.*, as seen in the previous section, the Court applied analogous reasoning based on the direct effect of Article 47 EUCFR, the primacy of EU law, and the potential necessity to disapply national legislation that would prevent the effectiveness of this provision.[68] In addition, *A.K.* is an emblematic case because the Court established a direct link between Article 47 EUCFR and Article 2 TEU, specifically in the context of the Polish rule of law crisis.[69] Firstly, the Court considers the applicability of the EU Charter, which, in this case, does not appear to be problematic due to the presence of a Directive provision reaffirming effective judicial protection and conferring rights on individuals.[70] Secondly, the Court considers the substance of Article 47 EUCFR, focusing on the right to be heard by an independent and impartial tribunal.[71] Thirdly, the Court states that the requirement of independence is essential to the right to effective judicial protection, and is crucial to protecting the rights of individuals under EU law, as well as the values common to the Member States enshrined in Article 2 TEU – particularly the rule of law.[72] Finally, the Court reiterates the direct effect of Article 47 EUCFR, the primacy of EU law over national law, the duty to interpret in accordance with EU law and the need to disapply national law.

Given its centrality to the rule of law crisis, it is unsurprising that Article 47 EUCFR has also worked in conjunction with Article 19(1) TEU to preserve the rule of law.[73] The Court has emphasised that both Article 19(1) TEU and Article 47 EUCFR are concrete expressions of the rule of law enshrined in Article 2 TEU.[74] In these cases, concerning the rule of law, the Court relies on Article 19(1) TEU as a structural guarantee to ensure judicial independence, which in turn is necessary for Article 47 EUCFR to be applied effectively.[75] It appears that, with regard to judicial independence, the Court bases the obligations stemming from Article 19(1) TEU on Article 47 EUCFR.[76] In truth, the two provisions appear to have the same content with regard to judicial inde-

68 A.K., para 171.
69 Ibid., para 115–120.
70 Ibid., para 81.
71 Ibid., para 115–120.
72 Ibid., para 120; Joined Cases C-554/21, C-622/21 and C-727/21 Hann-Invest, EU:C:2024:594, paras 45–47, now referred as 'Hann-Invest'.
73 Case C-204/21 Commission v Poland (Indépendance et vie privée des juges), EU:C:2023:442; Hann-Invest; A.K.; Portuguese Judges; Commission v Poland (Independence of the Supreme Court); A.B.; and Joined Cases C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19 Asociația 'Forumul Judecătorilor din România', EU:C:2021:393.
74 Portuguese Judges, para 32.
75 Case C-791/19 Commission v Poland (Disciplinary regime for judges), EU:C:2021:596, paras 52–57.
76 Ibid.

Europarättslig tidskrift, open access 2026-11-16

pendence in the Member States. Article 19 TEU enables the Court to apply the standards of Article 47 EUCFR to Member State courts in cases where EU law is not being implemented for the purposes of Article 51 EUCFR.[77] This trend began with the famous *Portuguese Judges* case, in which the Court stated for the first time that, even though Article 47 EUCFR was not applicable, Article 19(1) TEU was, as it relates 'to the fields covered by Union law', regardless of whether Member States are implementing EU law within the meaning of Article 51(1) EUCFR.[78] The Court went on to say that Article 19(1) TEU gives concrete expression to the rule of law, making national courts responsible for ensuring a complete system of judicial review.[79] Therefore, Member States' courts are obliged to ensure that EU law is observed within their borders in the 'fields covered by Union law', in cooperation with EU courts. The Court also reaffirmed that effective judicial protection of individuals' rights in Article 19(1) TEU is a general principle of EU law, now codified in Article 47 EUCFR. In this case, the Court has again used Article 47 EUCFR to give substantive value to Article 19(1) TEU with regard to the requirement for the independence of national courts.[80] While the Court has often applied Articles 19(1) TEU and 47 EUCFR together (the latter giving substantive value to the former), in *PT*, a recent case from December 2024 outside the context of backsliding, the Court applied Article 19(1) TEU differently; this may represent a fundamental change in how the Court will deal with effective judicial protection in the future.

In *PT*, the Court appeared to deviate from its previous approach of applying Article 19(1) TEU and Article 47 EUCFR in tandem for the first time.[81] The Court's legal reasoning is important for at least two reasons. First, it clarifies the scope of Article 47 EUCFR's application in criminal matters. Second, the Court applies Article 19(1) TEU independently, giving it substantive value that is not dependent on the application of Article 47 EUCFR.[82] This is the first time the Court has applied effective judicial protection based on the Treaties, specifically Article 19(1) TEU, in cases where the application of the Charter has been explicitly ruled out. In *PT*, 41 individuals were charged with criminal offences involving drug trafficking.[83] PT and another defendant entered into

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77 A.K. para 169. The Court states that once Article 47 CFR is applicable an assessment of Article 2 and Article 19 (1) TEU is redundant since it would only reinforce the same conclusions.

78 Because the text of 19(1) TEU refers to the 'fields covered by Union law' and has therefore a broader application than Article 47 EUCFR which is 'only' applicable when the Member States are 'acting in the scope of EU law'. See Portuguese Judges.

79 Ibid., para 32.

80 Ibid., paras 35, 40 and 41.

81 Case C-432/22 Criminal proceedings against PT, EU:C:2024:987, now referred as 'PT'.

82 Giulio Dipietro and Ilaria Gambardella, In the Shadow of the Charter: Article 19(1) TEU and Effective Judicial Protection as a Source of the Rights of Defence in Criminal Matters, EU Law Live, 19/12/2024, now referred as 'Dipietro and Gambardella'.

83 See PT para 15.

Europarättslig tidskrift, open access 2026-11-16

a plea bargain with the public prosecutor; these agreements provided for the possibility of more lenient penalties.[84] The referring court had doubts about the compatibility of national laws concerning these agreements with EU law. Firstly, it considered whether a national rule giving jurisdiction to a court other than the referring court to examine the substance of a plea-bargaining agreement because other co-accused persons had not entered into the agreement was compatible with Article 47 EUCFR and Article 19(1) TEU.[85] Secondly, it considered whether a national rule that makes judicial approval of an agreement conditional upon the consent of all co-defendants is in line with the aforementioned EU provisions.[86]

The Court clarified that Article 47 EUCFR is inapplicable, reiterating its previous case law that Article 51(1) CFR presupposes 'a certain degree of connection between an act of EU law and the national measure in question, above and beyond the matters covered being closely related or one of those matters having an indirect impact on the other'.[87] In other words, a link must exist between EU law and the national measure in question, and an obligation must be imposed on Member States that can trigger the application of EU fundamental rights.[88] The Court held that these conditions were not satisfied, as there was no link between the EU law provisions establishing substantive criminal law rules and the national procedural provisions.[89] Furthermore, the EU rules were adopted under the legal basis of Article 83(1) TFEU, which permits the EU to establish minimum rules regarding the definition of criminal offences and sanctions in specific areas of crime.[90] However, the national rules were procedural in nature, and the legal basis for the EU to legislate in criminal procedure is Article 82 TFEU. Furthermore, no secondary legislation concerning plea bargaining had been adopted. Therefore, Article 47 of the EUCFR was deemed inapplicable.[91]

Having excluded the applicability of the Charter, the Court turned to Article 19(1) TEU, deeming it applicable to assess national criminal procedural rules in a field not affected by EU legislation.[92] This corresponds to the broad scope of effective judicial protection in Article 19(1) TEU regarding the organisation of justice at a national level, particularly with respect to matters of judicial independence, as discussed previously.[93] Nonetheless when addressing the second question in PT, the Court stated that the right to a fair trial and the rights

[84] Ibid., para 19.
[85] Ibid., para 30.
[86] Ibid., paras 33–43.
[87] Ibid; see Hann-Invest paras 31 and 32 where the Court reiterates the principle of conferral and C-206/13 Siragusa, EU:C:2014:126 para 24.
[88] Ibid.
[89] Ibid.
[90] See PT paras 37–43.
[91] Ibid.
[92] Ibid., paras 44–48.
[93] See Portuguese Judges.

Europarättslig tidskrift, open access 2026-11-16

of the defence are integral to Article 19(1) TEU.[94] The Court thus included the requirement for judicial independence within the scope of effective judicial protection, as well as the parties' rights to examine and respond to facts and documents before a judicial decision is adopted and the balance of rights between witnesses and victims.[95] These guarantees are no longer derived from a joint reading of Articles 47 EUCFR and 19(1) TEU but instead flow directly from Article 19(1) of the TEU. This marks a shift from the Court's earlier jurisprudence, in which the substantive content of Article 19(1) TEU was often derived from Article 47 EUCFR.[96] In contrast, in *PT*, these procedural rights are derived solely from Article 19(1) TEU. Likewise, whereas the application of Article 19(1) TEU was previously limited primarily to issues of judicial independence, in *PT*, the provision becomes a direct basis for individual rights in criminal proceedings.[97] The Court has explicitly compared effective judicial protection under Article 19(1) TEU with Article 6 ECHR, a comparison which is normally made in the context of Article 47 EUCFR and the general principle of effective judicial protection.[98] This interpretation reinforces the idea that the Court is gradually conferring a standalone position and substantive scope on Article 19(1) TEU, which may extend beyond judicial independence to broaden its scope of application.[99] Finally, the Court found that the national laws were compatible, as they aimed to preserve, on the one hand, the impartiality of the referring court, and, on the other hand, the rights of the defence.[100]

5. THE LIMITLESS NATURE OF VALUE-LADEN INTERPRETATION THROUGH ARTICLE 2 TEU

The right to an effective and independent judicial protection in Article 19(1) TEU and Article 47 EUCFR is, according to the Court, a 'concrete expression' of the rule of law in Article 2 TEU.[101] The increasing prominence of Article 2 TEU in the Court's case law is clearly linked to the delivery of Opinion 2/13 in December 2014, which for the first time articulated the conceptual link between Article 2 TEU and the network of general principles established by the CJEU. As we shall see, this has now culminated in the delivery of the judgment

94 PT para 70.
95 Ibid., para 71.
96 See Dipietro and Gambardella.
97 Ibid.
98 PT para 70.
99 See Dipietro and Gambardella.
100 PT para 73.
101 Laurent Pech and Sébsastien Platon, Court of Justice. Judicial independence under Threat: The Court of Justice to the Rescue in the ASJP case, (2018) 55 Common Market Law Review 1827; Portuguese Judges para 32.

Europarättslig tidskrift, open access 2026-11-16

in the case of *Commission v Malta*, which relied on Article 2 TEU to expand the limits established by Article 19(1) TEU regarding the scope of EU law. To fully understand the implications of *Commission v Malta* on the scope of EU law, it is important to examine the development of Article 2 TEU since 2014 (5.1) and then to have a closer look at *Commission v Malta* (5.2.). *Commission v Malta* explodes the limits previously established by the case law of the Court on Article 2 TEU; thus constituting an exceptional case in terms of judicial interpretation in light article 19(1) TEU.

5.1. Article 2 TEU before Commission v Malta

The logic of *Opinion 2/13* is deeply rooted in the rationales of the autonomy and effectiveness of EU law, which may conflict with the ideals of the substantive rule of law, thus forming a true constitutional paradox and a kind of 'Dworkinian administration'.[102] More pragmatically, *Opinion 2/13* aimed to 'regulate' the EU's accession to the European Convention on Human Rights (ECHR) by rejecting the 2011 Draft Accession Agreement.[103] In this *Opinion 2/13*, the Court refers to 'a structured network of principles, rules, and mutually interdependent legal relations linking the EU and its member states, and its member states with each other'.[104] This network is based on Article 2 TEU, which sets out values (including the rule of law) that are shared by the Member States.[105] These common values justify the principle of mutual trust on the one hand, but perhaps more importantly, they constitute the reason why Member States comply with and implement EU law, taking these values into account.[106] Therefore, *Opinion 2/13* establishes Article 2 TEU as a constitutional provision for the EU, and the Court's wording suggests that it has become a condition sine qua non for the EU's existence as an autonomous legal order.[107] One of the main reasons for the EU's failure to accede to the ECHR lies in the principle of mutual trust. As mentioned above, this principle stems directly from the premise that the Member States comply with EU values. Although this premise has never been codified in primary law, Lenaerts argues that it stems from the rationale of

[102] See Andrew Williams, 'Taking Values Seriously: Towards a Philosophy of EU Law' (29) 2009 Oxford Journal of Legal Studies 549, 558. Contrast with Gil Carlos Rodrigues Iglesias 'Reflections on the General Principles of Community Law', 1998 (1) Cambridge Yearbook of European Legal Studies, 1–17.
[103] Opinion 2/13 (Accession of the European Union to the European Convention on Human Rights and Fundamental Freedoms), EU:C:2014:2454, now referred as 'Opinion 2/13'.
[104] Ibid., para 167.
[105] Ibid., para 168.
[106] Ibid., para 168; Xavier Groussot and Eleni Karageorgiou, Solidarity and the Crisis of Values in the European Union, (2023) 2 Nordic Journal of European Law 29.
[107] Opinion 2/13 paras 167–170.

Europarättslig tidskrift, open access 2026-11-16

Article 4(2) TEU, which provides for the principle of equality.[108] This implies that Member States are treated equally by the EU because they uphold EU values, particularly the rule of law, in the same way.[109] In *Opinion 2/13*, the Court takes this a step further by explaining the reasons for mutual trust, which is connected to the presumption of compliance with Article 2 TEU, as well as to the right to effective judicial protection.[110] Therefore, one of the main implications is that, under the principle of mutual trust, Member States must presume that the national courts of other Member States are independent and comply with the requirements of the effective judicial protection.[111] However, this approach contradicts the requirements of the ECHR and the case law of the European Court of Human Rights (ECtHR).[112] The Court's reasoning in *Opinion 2/13* was heavily criticised, with the Court being accused of prioritising mutual trust over fundamental rights.[113] The problems with the Court's legal reasoning are exacerbated when considered in the context of backsliding on the rule of law.[114] The Court was faced with the difficult task of determining the extent to which Member States should trust each other, and the implications this could have for

[108] Koen Lenaerts, La Vie Après L'Avis: Exploring The Principle Of Mutual (Yet Not Blind) Trust (2017) 57 Common Market Law Review 805, now referred as 'La Vie Après l'Avis'; This approach has been confirmed by the Court in Eurobox. At para 249 of that judgment the Court States that '[i]t must be added that Article 4(2) TEU provides that the Union is to respect the equality of Member States before the Treaties. However, the Union can respect such equality only if the Member States are unable, under the principle of the primacy of EU law, to rely on, as against the EU legal order, a unilateral measure, whatever its nature.' The principle of equality is only guaranteed when also the Member States are guaranteeing the effectiveness of EU law provisions. It follows that reliance on national provisions cannot undermine the effectiveness of EU law and set primacy of EU law aside.

[109] Ibid.

[110] Opinion 2/13 para 168.

[111] Ibid., para 175; see also Opinion 1/09 (On the creation of a unified patent litigation system) EU:C:2011:123 para 68.

[112] Giacomo Biagioni, Avotinš v. Latvia: The uneasy balance between mutual recognition of judgments and protection of fundamental rights, (2016) 1 European Papers 579; Case C-7/98 Dieter Krombach, EU:C:2000:164; Bosphorus Hava Yollari Turizm, Application no. 45036/98 paras 160–165 the doctrine developed in Bosphorous (the manifest breach test build on the grounds of Article 34 of the Regulation 1215/2012 providing for a public policy exception) was also confirmed by the Court in Avotiņš v. Latvia, Application no. 17502/07; in the field of public policy exceptions see also Case C-34/17 Eamonn Donnellan, EU:C:2018:282 see also Case C-633/22 Real Madrid Club de Fútbol, EU:C:2024:843 where the Court created a public policy exception in case of serious violations of fundamental rights in the field of recognition and enforcement of judgments in civil and commercial matters.

[113] Steve Peers, The EU's accession to the ECHR: The dream becomes a nightmare, (2015) 16 German Law Journal 805; Elenor Spaventa, A Very Fearful Court? The Protection of Fundamental Rights in the European Union aft er Opinion 2/13, (2015) 22 Maastricht Journal 35.

[114] Dariusz Adamski, The Social Contract of Democratic Backsliding in the "New EU" Countries, (2019) 57 Common Market Law Review 623; Laurent Pech and Kim Lane Scheppele, Illiberalism Within: Rule of Law Backsliding in the EU, (2017) 19 Cambridge Yearbook of European Legal Studies 3.

Europarättslig tidskrift, open access 2026-11-16

fundamental rights, particularly with regard to effective judicial protection.[115] As a concrete expression of the rule of law, effective judicial protection and the requirement of judicial independence become even more important when Member States trust each other.[116] Indeed, as set out in the Court's reasoning in *Opinion 2/13*, implementing the rulings of non-independent national courts that are manifestly contrary to the rule of law would jeopardise the very existence of the EU.

In *Aranyosi*, concerning the execution of an arrest warrant under the Council Framework Decision on the European Arrest Warrant, the Court ruled that mutual trust does not equate to blind trust.[117] In this ruling, the Court mentions Article 2 TEU only once to state that a serious breach of that provision may lead to the European Arrest Warrant being suspended, effectively making the European Arrest Warrant an expression of the principle of mutual trust.[118] However, the Court also creates an exception to the principle of mutual trust in upholding it would breach the essence of a fundamental right.[119] This exception will be analysed and expanded further by the Court in the *LM* case, in which the Court also refers to the two-step test applied in *Aranyosi* and discussed below. This judgment reshapes the logic of the principle of mutual trust, denying the existence of blind trust between Member States.[120] In February 2018, in the aforementioned *Portuguese Judges* case, the Court formulated Article 19(1) TEU and Article 47 CFR as a concrete expression of the rule of law.[121] Once again, the Court refers to *Opinion 2/13* to invoke Article 2 TEU as a basis for mutual trust. Therefore, respecting effective judicial protection, which is at the essence of the rule of law enshrined in Article 2 TEU, becomes essential in a system regulated by the principle of mutual trust.[122] In summary, the obligation of judicial independence stems from Article 19(1) TEU, which gives operative value to the rule of law in Article 2 TEU. In July 2018, in *the LM case*, the Court dealt with another European Arrest Warrant case, despite having already addressed many issues in previous cases.[123] This case arose in the context of the Polish judiciary, which was already characterised by widespread issues of judicial independence. Therefore, the referring court was concerned that the individual might be exposed to a breach of their right to effective judicial protection, particularly their right to a fair trial.[124] The Court recalls the excep-

[115] Lenaerts, 'La Vie Après l'Avis', 821; Joined Cases C-404/15 and 659/15 Pál Aranyosi and Robert Căldăraru [2016] EU:C:2016:198, now referred as 'Aranyosi'.
[116] Ibid.
[117] See Aranyosi.
[118] Ibid., para 81.
[119] Ibid., para 88.
[120] Ibid.
[121] Portuguese Judges para 32.
[122] Ibid., para 30.
[123] Case C-216/18 PPU LM, EU:C:2018:586.
[124] Ibid., para 24.

Europarättslig tidskrift, open access 2026-11-16

tion to mutual trust (refusing the execution of a decision of another Member State) where a two-step test is met (in this case, in relation to the right to a fair trial).[125] The first step of this test requires systemic or generalised deficiencies to be present in the judicial apparatus of the issuing Member State. The second step involves an individual assessment of the situation of the person cited in the decision. If there is a real risk of the right to effective judicial protection being breached, then the receiving Member State should refrain from giving effect to the European Arrest Warrant.[126] However, in one passage, the Court highlights the importance of judicial independence as a means of safeguarding the shared values enshrined in Article 2 TEU. Article 2 TEU and the values enshrined therein therefore become something to be actively protected. In *Opinion 2/13*, the Court sends the message that Article 2 TEU is vital for the EU; in *LM*, the Court raises the need to protect the values enshrined in Article 2 TEU.

Subsequent case law will actively protect the values enshrined in Article 2 TEU by operationalising them.[127] In that sense, *Repubblika* is probably one of the most significant cases for understanding the implications of the rule of law in the Member States. The case arose from Repubblika's claim that the Republic of Malta was in breach of its obligations under Article 47 EUCFR and Article 19(1) of the Treaty on European Union (TEU).[128] More specifically, *Repubblika* was concerned about the system of appointing judges, which it claimed violated the principle of judicial independence.[129] In its judgment, the Court explicitly states that the rule of law is realised through the separation of powers.[130] This is safeguarded in the EU by the principle of judicial independence, which in turn constitutes the essence of the right to an effective judicial remedy. The Court went on to say that, as it is a foundational and common value for both the Member States and the EU, the Member States cannot amend their legislation in such a way as to reduce the protection of the rule of law in their territories (the principle of non-regression).[131] Citing *A.K.* and *A.B.*, the Court also recalled that Article 19(1) TEU precludes national legislation relating to the organisation of justice that reduces the protection of the rule of law, especially if these measures reduce judicial independence.[132] Therefore, it seems that the right to an effective judicial protection, and the obligations of Member States that stem from it, can be linked to Article 2 TEU, read in conjunction

[125] Ibid., paras 73–79.
[126] Ibid.
[127] Case C-896/19 Repubblika, EU:C:2021:311, now referred as 'Repubblika'; Dimitry Kochenov and Aleksejs Dimitrovs, Non-Regression: Opening the Door to Solving the 'Copenhagen Dilemma'? All the Eyes on Case C-896/19 Repubblika v Il-Prim Ministru, (2021) 15 Reconnect Working Paper 3.
[128] See Repubblika paras 9–14.
[129] Ibid.
[130] Ibid., para 54.
[131] Ibid., para 64.
[132] Ibid., para 65.

Europarättslig tidskrift, open access 2026-11-16

with Article 19(1) TEU. Thus, by guaranteeing the right to an effective judicial protection, national judges are also safeguarding the rule of law. This reasoning is important because the Court is not limiting its assessment to the principle of effective judicial protection; it is also directly involving national courts in the protection of the rule of law. In the case of *Hungary v Parliament and Council (Budget Conditionality)*, the Court considered an action for annulment brought by Hungary against the Conditionality Regulation enacted by the two EU institutions in 2022.[133] The Court stated in its reasoning that, since the values in Article 2 TEU define the EU legal order's very identity, the EU must be able to defend those values within the limits of the Treaties.[134] The action for annulment was dismissed, thereby confirming the validity of the Conditionality Regulation, which aims to protect the rule of law.[135] In such cases, the Court treats the values of Article 2 TEU as binding constitutional principles that must be defended by the Court when Member States threaten them.[136]

Section 2 of this article addresses how *Portuguese judges* sparked many Commission infringement actions. Although these actions are not based on Article 2 TEU, but rather on Article 19(1) TEU and/or Article 47 EUCFR, they are de facto protecting the rule of law in accordance with the Court's reasoning in the *Portuguese Judges* case.[137] Nevertheless, the analysed cases, particularly the *Repubblika* and *Budget Conditionality* cases, have suggested a new approach to Article 2 TEU for the Commission as well. Indeed, in *Commission v Hungary* (LGBTIQ+ case), which has not yet been decided, the Commission based a claim solely on Article 2 TEU, which had never been seen before.[138] The implications of this judgment will probably be significant, especially if the Court approves the Commission's legal reasoning and allows claims based solely on Article 2 TEU, and therefore on EU values alone.[139] Consequently, the impli-

[133] See Hungary v EP and Council; and see Groussot and Zemskova for developments.
[134] Ibid., para 127.
[135] Regulation (EU, Euratom) 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a general regime of conditionality for the protection of the Union budget [2020] OJ L 433I.
[136] See Matteo Bonelli, Constitutional Language and Constitutional Limits: The Court of Justice Dismisses the Challenges to the Budgetary Conditionality Regulation, (2022) 7 European Papers 507, now referred as 'Constitutional Limits'.
[137] Case C-619/18 Commission v Poland (Independence of the Supreme Court) [2019] EU:C:2019:531; C-192/18 Commission v Poland, EU:C:2019:924; Case C-791/19 Commission v Poland (Disciplinary Regime for Judges), EU:C:2021:596 and in Case C-204/21 Commission v Poland (Indépendance et vie privée des juges), EU:C:2023:442; C-441/17 R Commission v Poland (Białowieża Forest) EU:C:2017:877; and Eurobox.
[138] Bonelli, Constitutional Limits, 508; Case C-769/22 Commission v Hungary (Valeurs de l'Union) (nyg), now referred as 'Commission v Hungary'.
[139] Walter Bruno, Three Questions to rule (on) them All: the full Court Hearing in the Case Commission v. Hungary on the Justiciability of EU Values against Member States (C-769/22), EU Law Live; this contribution argues that the Commission has taken a step back in the hearing in front of the Court and that therefore connected Article 2 TEU to other provisions.

Europarättslig tidskrift, open access 2026-11-16

cations relating to effective judicial protection can also be noteworthy, as this principle is 'at the essence of the rule of law'.[140] The case originated from Hungarian legislation which was presented as aiming to protect children against paedophilia. However, most of the measures seemed to target the LGBTIQ+ community, attracting strong disagreement from the community and EU institutions.[141] In 2021, the Commission initiated an infringement procedure under Article 258 TFEU, issuing a reasoned proposal, and in 2022, Hungary was referred to the Court.[142]

In both the letter of formal notice and the decision to refer Hungary to the Court, the Commission claimed violations of numerous EU law provisions and fundamental rights enshrined in the Charter.[143] Given the gravity of these violations of fundamental rights, the Commission also claims a violation of the EU's common values set out in Article 2 TEU. This formulation seems to suggest a more standard use of Article 2 TEU where the latter cannot be enforced, but is protected by other provisions, supporting the interpretation of these EU law provisions. In any case, the fact that the Commission has made an explicit reference to Article 2 TEU is unusual in previous case law.[144] More surprisingly, in the referral to the Court, Article 2 TEU plays a different role, as the Commission directly states that Hungarian legislation breaches Article 2 TEU.[145] This use of Article 2 TEU is unprecedented because it suggests the provision can be used autonomously and EU values can be enforced.[146] This case raises the question of whether the values enshrined in Article 2 TEU are enforceable, particularly whether Article 2 TEU can be enforced as a stand-alone provision. Having Article 2 TEU as an autonomous provision would mean that EU values could essentially be enforced whenever they are breached, even outside the scope of EU law.[147] Or is the scope of EU law becoming unlimited? While the Court has already recognised the legal value of Article 2 TEU in previous cases, the current question is whether Article 2 TEU is precise enough in its content to be enforced without the need for any other EU law provisions. Previous case law suggests that the application of Article 2 TEU is generally to be complemented by other provisions, such as Article 19(1) TEU. However, this case may represent a turning point if the Court agrees with the Commission's claim.[148] While some scholars have supported the enforcement of values, others have criticised

[140] See Portuguese Judges para 36.
[141] Ibid.
[142] Ibid.
[143] Commission Press Release, Commission refers Hungary to the Court of Justice of the EU over violation of LGBTIQ rights, 15 July 2022, IP/22/2689.
[144] Bonelli, 'Constitutional Limits', 508.
[145] Ibid.
[146] Ibid.
[147] Ibid.
[148] See Portuguese Judges.

Europarättslig tidskrift, open access 2026-11-16

this approach as lacking legal grounds.[149] These criticisms are understandable, especially given all the steps the Court has already taken to address rule of law backsliding and protect EU values.[150] Indeed, the legal reasoning of *Portuguese Judges* has already been revolutionary, both for the effective judicial protection and for the rule of law, and the Court's jurisdiction based on Article 19(1) TEU has been a key tool in protecting Article 2 TEU.[151] Still, the independent application of Article 2 TEU based on the enshrined values would essentially give the Court unlimited jurisdiction, which could undermine the logic of mutual trust grounded in Article 4(2) TEU (which enshrines the principle of equality).[152] The Court should not lose its legitimacy, particularly in Member States that already question the primacy of EU law and EU values.[153] In other words, it is important that the Court appears to respect the rule of law, legal certainty, and independence.

5.2. Article 2 TEU after Commission v Malta

Regarding the enforcement of values, the recent *Commission v Malta* case, released in spring 2025, is notable.[154] In case C-181/23 *Commission v Malta* the Court ruled in favour of the Commission's infringement action against Malta over Maltese 2014 and 2020 'investor citizenship scheme'.[155] The 2014 scheme allowed foreigners to obtain Maltese and thus also EU citizenship in exchange for predetermined payments and investments. The Commission entered into dialogue with Malta concerned that the 'sale' of the EU citizenship could

[149] Kim Lane Scheppele et al., 'EU Values Are Law, after All: Enforcing EU Values through Systemic Infringement Actions by the European Commission and the Member States of the European Union', (2020) 39 Yearbook of European Law 3; Jan Werner Müller, 'Should the EU Protect Democracy and the Rule of Law inside Member States?', (2015) 21 European Law Journal 141; Jan Wouters, 'Revisiting Art. 2 TEU: A true Union of values?' (2020) 5 European Papers 256; and Armon von Bogdandy and Luke Dimitrios Spieker, 'Countering the Judicial Silencing of Critics: Article 2 TEU Values, Reverse Solange, and the Responsibilities of National Judges', (2019) 15 European Constitutional Law Review 391.

[150] See for instance Hungary v EP and Council or the legal reasoning of the Court in Portuguese Judges in order to apply Article 19 (1) TEU in the context of judicial independence in the Member States.

[151] See Chapter two, see also cases: Case C-83/19 Asociația 'Forumul Judecătorilor din România' v Inspecția Judiciară EU:C:2021:393; and Eurobox.

[152] Particularly the Member States are guaranteed that EU law is respected by the EU Institutions and safeguarded by the Court, in particular the principle of direct effect, legal certainty and the principle of conferral. The action of the Court and the enforcement of EU values is always delimitated by these concepts.

[153] See for instance Polish cases: Constitutional Court Case P 7/20 and Constitutional Court Case K 3/21, for more discussion on the matter see the recent Opinion of Advocate General Spielmann in Commission v Poland, EU:C:2025:165, dealing with Article 4(2) TEU and constitutional identity.

[154] See Commission v Malta.

[155] Ibid.

Europarättslig tidskrift, open access 2026-11-16

jeopardise the principle of sincere cooperation between Malta and the other Member States. In the letter of formal notice the Commission reiterated that the Maltese scheme was incompatible with Article 20 TFEU and Article 4(3) TEU. In its reply Malta clarified that it had revised the national framework with the '2020 act' and that the provisions of 2014 were no longer applicable. The Commission, however, found no substantial changes and considered also the 2020 act to be contrary to EU law.[156] Due to the parties' disagreement in the pre-litigation stage, the Commission brought the matter before the Court.

The Court started by analysing the concept of citizenship stating that, while it is for the Member States to decide the conditions for the grant or loss of citizenship, this power must be exercised with due regard to EU law.[157] Drawing on the wording of Article 3(2) TEU the Court reiterated that the EU offers to its citizens an area of freedom and security where freedom is exercised in an appropriate security framework. This is for the Court essential to the existence for the principle of mutual trust/recognition which touch the very essence EU rationale of an area without internal borders. Moreover, since EU citizenship also confer on the person political rights it follows that EU citizens participate to the democratic life of the EU and are therefore giving expression to a founding value of Article 2 TEU, namely democracy.[158] Therefore, since granting EU citizenship has an impact on the EU objectives and not only on the single Member State, it becomes an expression of solidarity, essential to the EU integration process and an essential part of the EU identity.[159] The Court continues by saying that pursuant to Article 4(3) TEU, Member States should refrain from measures that may undermine EU objectives. It follows that if granting citizenship may have an impact on EU objectives, Member States do not have unlimited freedom while exercising this power.[160] According to the Court the bedrock of the bond of nationality is the relationship of solidarity and good faith between the State and its nationals. This is also true at the EU level since according to Article 20(2) TFEU EU citizens must be subject to rights and duties provided for in the Treaties. Thus, the special relationship between Member States and nationals also forms the basis for the exercise of rights and duties under EU law. It follows that, while having broad discretion in determining the criteria for granting citizenship, Member States must always comply with EU law.[161] Transactional naturalisation is therefore, for the Court, contrary to the principle of sincere cooperation and to mutual trust because the 'trust' is based on the premise that granting nationality respect this relationship of good faith and

[156] Ibid., paras 16–40.
[157] Ibid., para 81; Case C-369/90 Micheletti, EU:C:1992:295 para 10.
[158] Commission v Malta, paras 84–89.
[159] Ibid., para 93; Eurobox para 246 (explaining the concept of 'reciprocity' also used in Commission v Malta).
[160] Commission v Malta, paras 94 and 95.
[161] Ibid., paras 96–99.

Europarättslig tidskrift, open access 2026-11-16

solidarity. Accordingly, the Court held that Malta had failed to fulfil its obligations under Articles 20 TFEU and 4(3) TEU and ordered it to pay the costs.[162]

Commission v Malta will certainly be remembered in the history of the Court's jurisprudence and will further impact the scope of application of EU values, including the rule of law, thereby indirectly extending the scope of application of effective judicial protection.[163] While the Advocate General recommended that the Court dismiss the action and require the Commission to pay the costs due to an absence of EU law violations, the Court rejected every point of AG Collins's Opinion.[164] The Court's reasoning essentially links Member States' grants of EU citizenship, and the rights stemming from it, to the 'functioning of the EU as a common legal order'.[165] The principle of mutual trust plays a key role here because it guarantees the existence of an area without internal borders, as set out in Article 3(2) TEU, which is an essential feature of EU citizenship.[166] EU citizenship is thus seen as a concrete expression of the principle of mutual trust, as well as a primary expression of solidarity among Member States.[167] Therefore, as in the *LM* case, if a Member State grants EU citizenship but does not comply with the values set out in Article 2 TEU, this leads to a breach of the principle of mutual trust, as set out in Article 4(3) TEU and 20 TFEU.[168] Although the main criticism is that the Court did not legally ground how Maltese legislation breached this relationship of solidarity, this case is interesting for the purposes of this article, which focuses on Article 19(1) TEU, beyond its specific legal reasoning, which does not explicitly mention Article 19(1) TEU, but refers instead to Articles 2 and 4(3) TEU. Although the Court only mentions Article 2 TEU twice, it makes six references to 'solidarity', one of the twelve values listed in that provision (even though it is listed in the second sentence of Article 2 TEU).[169] Finally, it is solidarity that prevented the Court from dismissing the case and setting a significant precedent whereby values alone were used to rule on a case.[170] The Court concluded that the national naturali-

[162] Ibid., paras 100–103 and 122.

[163] Dimitry Kochenov; Never Mind the Law, again: Commission v. Malta (C-181/23), EU Law Live, 30/04/2025; Dimitry Kochenov, EU Citizenship's New Essentialism: The Solidification of the Illiberal Union VerfBlog, 2025/5/05.

[164] Opinion of AG Collins in Commission v Malta, EU:C:2024:849.

[165] Commission v Malta para 89.

[166] Ibid., paras 84 and 85.

[167] Ibid., para 93.

[168] Ibid., para 99. It, according to the Court, 'thus breaks the mutual trust on which Union citizenship is based, in breach of Article 20 TFEU and the principle of sincere cooperation enshrined in Article 4(3) TEU'.

[169] One in relation to the value of democracy (para 89) and one in relation generally to the values (para 95), according to which 'Union citizenship is based on the common values contained in Article 2 TEU'.

[170] See Martijn Van Den Brink, Why Bother with Legal Reasoning? The CJEU Judgment in Commission v Malta (Citizenship by Investment), (2025) EUI Global Citizenship Observatory.

Europarättslig tidskrift, open access 2026-11-16

sation scheme contravened Articles 4(3) TEU and 20 TFEU by interpreting them considering the principles of solidarity and mutual trust. In *Commission v Malta*, the Court adds the multiple and varied values enshrined in Article 2 TEU to the equation for deciding a breach of EU law in order to ensure that the 'law is observed' according to Article 19(1), first paragraph, TEU, which grants the Court the power and legitimacy to ensure that 'the law is observed', in line with the long tradition of Article 164 EEC and Article 220 EC.[171]

This case represents a significant development in the enforcement of EU values under Article 2 TEU, as these values appear to be becoming increasingly free from legal constraints. In this respect, it differs significantly from previous case law on Article 2 TEU, as it extends the scope of EU law by judicially expanding the EU's competences in citizenship matters beyond the limits set by the Treaties. This extensive judicial interpretation is based on an interpretation of the value of solidarity that enables the Court to assert that Member States are no longer sovereign in deciding who can acquire their national citizenship, only retaining sovereignty in matters relating to the loss of citizenship. The Court's reasoning is problematic not only in relation to the issue of competences, but also in terms of the reasoning itself. Indeed, in our view, the distinction made by the Court between the loss and acquisition of citizenship is not justifiable per se. Furthermore, the Court's reasoning does not consider the principle of proportionality when determining breaches of Article 4(3) TEU and 20 TFEU. However, as we will discuss further in the next section, the Court's reasoning is particularly weak in its use of the rule by law (rather than the rule of law) to reach such a conclusion.

6. THE CROWNING OF THE RULE BY (EU) LAW AND ITS DANGERS

Though it is easy to sympathise with the ruling in *Commission v Malta* in the name of protecting EU values and citizenship rights against the commercialisation of EU citizenship via national naturalisation schemes, it seems to us that this case constitutes 'bad law' since it promotes rule by law rather than rule of law, expanding the scope of EU law regardless of the division of competences by Article 20 TFEU, Article 4(1)-(2) TEU and Declaration 2 Annexed to the Treaty. This unlimited application and interpretation of EU law undermines the European Union's legitimacy by nullifying the meaning of respecting the limits guaranteed by *Kompetenz-Kompetenz*, which ordinarily ensures that only Member States can determine the allocation of powers, and which thereby regulates

[171] According to Article 164 EEC, The Court of Justice shall ensure that in the interpretation and application of this Treaty the law is observed.

Europarättslig tidskrift, open access 2026-11-16

the relationship between the EU and its Member States through the principle of division of competences. In this respect, Article 20 TFEU is clear on the issue of the attribution of EU citizenship in relation to national citizenship. The outcome of the case was to interpret EU citizenship as an autonomous concept of EU law, disregarding the competences explicitly granted to Member States in the conferral of national citizenship.

The *Commission v Malta* case is the constitutional trigger for the transformation of EU law, in which Articles 2 TEU (explicitly) and 19(1), first paragraph, TEU (implicitly)[172] are used to find a breach of EU law when the Court deems the 'common legal order' to be under threat.[173] This value laden interpretation of Article 19(1) can result in a limitless extension of the scope of EU law. Some would argue that the present situation simply reflects a necessary continuum of development that started with *Portuguese Judges*. However, we consider that this development is, in fact, a revolution (or metamorphosis), made possible only by an expansive interpretation of Article 2 TEU. *Commission v Malta* does not only confirm the trajectory already taken in the *Budget Conditionality* cases, in which the Court stated for the first time that values form an integral part of the European Union's identity as a common legal order; but also takes it a step (much further) by extending the scope of EU law through a value-laden interpretation of Article 19(1), first paragraph, TEU.[174]

Here, we will develop three points looking at the past, present and future of the EU's common legal order to emphasise the constitutional dangers of *Commission v Malta*, and of the Court attributing limitless competence to itself through Articles 2 and 19(1) TEU to find a breach of EU law. *Commission v Malta* is clearly not a citizenship case, since no such case could support its logic; rather, it is a constitutional case of the highest magnitude. It will guide the constitutional interpretation of EU law for years to come. Unfortunately, this is problematic in many respects. *Commission v Malta* is anything but normal. The ruling could be used in future to extend the scope of EU law to any situation that threatens the 'common legal order' and its values. This would mean that the scope of EU law could be determined by the Court under Article 19(1) TEU, regardless of the competences of the Member States. We will now evaluate the

[172] As we know, from section 5, Article 19(1) TEU is a specific expression of Article 2 TEU and is closely associated to Article 4(3) TEU, the principle of loyalty (which lies as the basis of the Commission's action against Malta.

[173] Compare here with AG Collins Opinion in Commission v Malta and para 89 of Commission v Malta. The AG considers that there is no breach of EU law since the Commission has failed to prove that, in order to lawfully grant citizenship, EU law requires the existence of any 'genuine' or 'prior genuine' link between a Member State and an individual other than that required under a Member State's domestic law.

[174] See Hungary v EP and Council para 232. This paragraph was repeated by the Court in subsequent judgments: see eg Joined Cases C-29/22 P and C-44/22 P KS, EU:C:2024:725, para 68; and Case C-814/21 Commission v Poland (Ability to stand for election and membership of a political party), para 157.

Europarättslig tidskrift, open access 2026-11-16

extent of the Court's activism in this ruling by considering three constitutional momentums (past, present and future).

Past Constitutional Momentum: Before the Lisbon Treaty came into force, discussions about judicial activism mainly focused on the doctrine of general principles of EC law. There were numerous discussions about the legitimacy of the Court's activity in developing EU fundamental rights through this doctrine. Article 164 EEC (and Article 220 EC), which grants the Court the power to interpret and apply EU law, was at the heart of the debate. At that time, the majority view was that the Court's actions were legitimate due to the use of comparative law in developing the general principles. The Court was careful to extract new general principles from an in-depth comparative analysis. However, the Court's new approach to Article 2 TEU is very different. The interpretation of EU values such as solidarity gives the CJEU an extraordinary margin of interpretation without appropriate constitutional control. Compared to the doctrine of general principles used in the pre-Lisbon era, the new approach to Article 2 TEU (the so-called 'doctrine of values') is very far-reaching and constitutes an example of judicial ultra-activism, reflecting an unprecedented situation of over-constitutionalisation. The current situation bears little resemblance to the *International Handelsgesellschaft* era, in which the German constitutional court pushed the Court to develop solid constitutional protection for EU citizens through the doctrine of general principles. The Court new approach inn *Commission v Malta* is a conscious choice made by the Cout's judges to develop the legalization of values without any external influence. Can the Court's authority now be challenged by a national constitutional or supreme court for overprotecting the functioning of our 'common legal order' through values? Has the Court gone too far in its interpretation of Articles 2 TEU? And has it overreached its powers under Article 19(1), first paragraph, TEU?

Present Constitutional Momentum: The reasoning used in *Commission v Malta* cannot be explained in terms of citizenship case law. It can only be understood in constitutional terms, taking into account the doctrine of constitutional democracy and the Court's recent interpretation of solidarity. Regarding the first argument, citizenship case law is irrelevant to understanding the case. The Court does not engage with the *Nottebohm* decision[175] of the International Court of Justice or Declaration No. 2[176] annexed to the TEU, which form the basis of Malta's defence and reasonably posit citizenship as a core sovereign right. Furthermore, the Court does not engage fully with the 'genuine link

[175] See from the International Court of Justice, Nottebohm Case (Liechtenstein v Guatemala) ICJ Reports 1955.

[176] The Conference declares that, wherever in the Treaty establishing the European Community reference is made to nationals of the Member States, the question whether an individual possesses the nationality of a Member State shall be settled solely by reference to the national law of the Member State concerned.

Europarättslig tidskrift, open access 2026-11-16

argument' used by the Commission as its main argument, which is based on EU citizenship case law. Instead, which brings us to our second argument, the Court developed a constitutional line of reasoning based on Article 2 TEU, the principle of mutual trust, and the values of democracy and solidarity. In terms of citizenship case law, we also find it interesting to compare the reasoning used in *Commission v Malta* with that in *Ruiz-Zambrano*,[177] which is undoubtedly the Court's most progressive and intrusive interpretation of the citizenship provisions to date. While *Ruiz-Zambrano* is characterised by judicial minimalism and an attempt to avoid constitutionalising[178] by refraining from referring to human rights; the ruling in *Commission v Malta* is based on the opposite constitutional approach. The Court provides extensive reasoning to demonstrate the fundamental importance of EU values and Article 2 TEU within the framework of principles, particularly with regard to the principle of mutual trust. *Commission v Malta* will probably be known as the 'Costa v Enel' of EU values.[179] It echoes Armin von Bogdandy's theory from a few years ago that Article 2 TEU allows values to feature prominently in the Court's case law. As such, these judicial actions can be seen as 'a veritable stepping stone towards a "Union of values" and stand on a par with the Court's constitutionalizing jurisprudence in *Van Gend en Loos* and *Costa/ENEL*'.[180] In our view, the Court skilfully reproduces this academic position on Article 2 TEU in the present case by ruling that Union citizenship is one of the main concrete manifestations of the solidarity that underlies EU integration and is an integral part of the EU's identity as a distinct legal system. Furthermore, it is worth noting that *Commission v Malta* also addresses the issue of citizenship in relation to the constitutional value of democracy and Article 10 TEU. This is a recent development in case law that began with *Junqueras*.[181] According to the Court, 'In exercising the political rights conferred on them by Articles 10 and 11 TEU, Union citizens participate directly in the democratic life of the European Union. Its functioning is based on representative democracy, which gives concrete expression to democracy as a value. Under Article 2 TEU, this value is one of those on which the European Union is founded'.[182] The link between political rights and repre-

[177] Case C-34/09 Ruiz Zambrano, ECLI:EU:C:2010:560.

[178] See for development Xavier Groussot, Gunnar Thor Petursson and Alezini Loxa, The Fundament of the Fundaments? Family Rights and the EU Charter of Fundamental Rights, in Alina Tryanofidou and Marja-Liisa Öberg (eds), The Family in EU Law (CUP, 2024).

[179] Commission v Malta para 93. The court makes here notably reference to the 'iconic' Costa v Enel case.

[180] Armin von Bogdandy, Principles of a Systemic Deficiencies Doctrine: how to protect checks and balances in the Member States (2020) 57 Common Market Law Review 705, 712–13.

[181] See Case C-502/19 Oriol Junqueras Vies, EU:C:2019:1115. For example, the Court relied on Article 10(1) TEU – which provides that the functioning of the Union is to be founded on the principle of representative democracy – in ruling on whether the composition of the European Parliament may be restricted by national legislation.

[182] Commission v Malta, para 89.

Europarättslig tidskrift, open access 2026-11-16

sentative democracy broadens our understanding of the EU as a constitutional democracy, indicating the over-constitutionalisation of EU law.

Future Constitutional Momentum: The next point concerns the consequences of the case of *Commission v Malta* for the legitimacy of the EU law, and whether it constitutes an example of over-constitutionalisation. These two issues are closely interconnected, as over-constitutionalisation undermines the legitimacy of the EU project, which is based on respecting the respective competences established by Article 4(1) TEU. This article states that, 'in accordance with Article 5, competences not conferred upon the Union in the Treaties remain with the Member States'. By relying on Article 2 TEU and the value of solidarity (unlike the rule of law, this value is not explicitly enshrined in Article 19(1) TEU) to find a breach of Article 4(3) TEU and Article 20 TFEU, the Court has upset the balance of competences required by the Treaties and is arguably engaging in illegitimate judicial activism. The text of Article 19(1) TEU only mentions the rule of law value through reference to 'effective legal protection' and the general obligation of the Member States to abide to it. There is no reference to the other values enshrined in Article 2 TEU. This claim of illegitimacy is further supported by the phenomenon of over-constitutionalisation, as exemplified by the application and interpretation of Article 2 TEU in *Commission v Malta*. It is important here to define what is meant by 'over-constitutionalisation'. We adopt Dieter Grimm's definition, as set out in his book '*The Constitution of European Democracy*', in which he specifically criticises the Court for its broad application and interpretation of the Treaties as 'constitutional implementation', which excludes the other institutions since there is no possibility of amendatory legislation.[183] Over-constitutionalisation undermines democracy and is defined as the addition of unnecessary elements to a constitution ('more constitutional law means less democracy').[184] This damage to democracy is exacerbated by the fact that the Court tends to review national law strictly and EU law generously in its case law.[185] According to Dieter Grimm, 'over-constitutionalisation is not the only cause of the illegitimacy problem the EU faces. But it is the most neglected one'.[186]

The *Commission v Malta* case prominently brings this neglected matter to light. Using the values enshrined in Article 2 TEU to combat the commercialisation of EU citizenship undermines the democratic foundations of the EU legal order. This is because it disregards the principle *of division of competence* in favour of morality, natural law and circular reasoning when deciding whether a breach of EU law has occurred. If this is the correct interpretation, it ultimately suggests that looking at competences is no longer required when applying and

[183] Dieter Grimm, The Constitution of European Democracy (OUP, 2017) 31-32.
[184] Ibid., 101.
[185] Ibid., 240–241.
[186] Ibid., 101.

Europarättslig tidskrift, open access 2026-11-16

interpreting EU law under Article 19(1) TEU if national legislation is deemed morally wrong and threatens the 'common legal order'. Furthermore, this interpretation (where the division of competence is not respected) would arguably enable the Court to develop its social rights jurisprudence based on Article 2 TEU and solidarity, even when there is no specific EU competence on the matter – which might be considered good news. However, this is unlikely to happen, as the logic of *Commission v Malta*, based on EU values, exacerbates the double standards in judicial protection, particularly the discrepancies between EU law (generous review) and national law (strict review), and between economic (generous review) and social (strict review) rights. A value-laden interpretation of EU law leads to more constitutional law and less democracy. This is why it should be opposed. Over-constitutionalisation not only has a sobering effect but also brings the limits of liberalism and constitutional democracy to the fore.[187] Any ruling based on Article 2 TEU that extends the scope of EU law by disregarding the principle of division of competence should be carefully reconsidered, but by whom?

7. CONCLUDING REMARKS

This article has attempted to demonstrate how EU law has recently evolved through the interpretation of Article 19(1) first paragraph TEU alongside Article 2 TEU. This sharply contrasts with the loyalty interpretation relied in Article 19(1) second paragraph, TEU. From a genealogical perspective, Article 19(1) TEU and its predecessors have always formed the foundation of the Court's authority and legitimacy in EU legal adjudication. Here, we argue that the Court exceeded its powers in the case of *Commission v Malta*, which possibly poses a threat to the EU legal order itself as it is an obvious example of over-constitutionalisation and rule by law. Article 19(1) TEU only indirectly references the value of the rule of law through 'effective legal protection'. There are no other references to the values enshrined in Article 2 TEU within the text of Article 19(1) TEU itself. Therefore, interpreting Article 19(1) TEU in a way that uses values other than the rule of law to expand the scope of EU law to find a breach of EU law is arguably illegitimate. This extraordinary act of judicial activism weakens the legitimacy of the Court. To borrow the words of Dieter Grimm, such a value-laden interpretation of EU law leads to more constitutional law and less democracy. Ultimately, the *Commission v Malta* case

[187] See Opinion of AG Capeta in Commission v Hungary, who talks about 'EU Constitution'. This Opinion follows only a few months after Commission v Malta. According to para 157, 'The vision of what a good society is in the EU constitution is different. That vision is expressed in Article 2 TEU. The values enumerated in that provision: respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights'.

Europarättslig tidskrift, open access 2026-11-16

highlights the limitations of our EU constitutional and liberal democratic system, which is in a precarious position and in need of consolidation. In this article, we discuss the Court's new and weak reasoning in *Commission v Malta* in detail. This reasoning relies on Article 2 TEU to extend the scope of EU law. This approach enables the Court to apply EU law to situations where the EU lacks explicit competence, as long as it deems intervention necessary to ensure compliance with Article 19(1) TEU. This is the main reason why *Commission v Malta* constitutes 'bad law'. The inherent logic of the case is based on rule by law rather than rule of law.

Europarättslig tidskrift, open access 2026-11-16