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Institutional accountability in the light of Article 2 TEU

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Summary

Article 2 of the Treaty on European Union (TEU) establishes the values upon which the European Union (EU) is founded. Potential breaches of the founding values are often discussed in the light of Member State action, where Article 7 TEU, although difficult to apply in practice, serves as a sanction mechanism to attain Member State accountability. Regarding institutional accountability, the EU has recently been criticized by human rights organizations and scholars who argue that certain secondary legislative acts do not fully align with the values of Article 2 TEU. In parallel with this discussion, the interpretation of Article 2 TEU by the CJEU (Court of Justice of the European Union) has developed significantly in recent years. In the landmark judgment of *Commission v Hungary* of April 2026, the CJEU for the first time, confirmed that Article 2 TEU is a self-standing provision and that the institutions are as equally bound by the obligations stemming from Article 2 TEU as the Member States.

Given the criticized legislation and the recent interpretative developments on Article 2 TEU by the CJEU, the aim of the thesis is to examine to what extent Article 2 TEU can be invoked to establish a violation of the article in the context of secondary legislative acts. The thesis examines institutional accountability in the light of Article 2 TEU by applying the legal dogmatic method and the EU legal method. The thesis further explores the development of Article 2 TEU in the Treaty and case law, the legal arguments that support and challenge a self-standing application of Article 2 TEU and the possible means of enforcement of Article 2 TEU in relation to the institutions.

It can be concluded that the interpretation by the CJEU in *Commission v Hungary* is a result of prior case law that started with the delivery of *Portuguese Judges* in 2018. When the CJEU found a self-standing breach of Article 2 TEU, it introduced the “manifest test” which established the criteria for finding a violation of Article 2 TEU per se. While the test is applied in relation to Member State action in *Commission v Hungary*, it might potentially in theory, also be applicable to the actions of EU institutions and its secondary legislation. Now when it is clarified that the same obligations stemming from Article 2 TEU apply to the institutions and the Member States, would it not be reasonable to invoke the test towards the EU institutions? In practice however, challenges and unanswered questions remain, specifically since the finding of a breach of Article 2 TEU regarding secondary legislation would imply that the EU has violated its own constitutional core and identity. Nonetheless, the recent interpretation of Article 2 TEU in *Commission v Hungary* is likely to have an impact on how the legal argumentation in enforcement proceedings against institutions are formulated and broaden the possibilities of invoking Article 2 TEU in such proceedings, notably concerning secondary legislation.

Sammanfattning

Artikel 2 i Fördraget om Europeiska unionen (FEU) stadgar att Europeiska unionen (EU) byggs och grundas på värden. Eventuella åsidosättande av dessa värden diskuteras ofta i ljuset av medlemsstaters agerande, där artikel 7 FEU trots dess tillämpningsproblematik, fungerar som en sanktionsmekanism för ansvarsutkrävande av medlemsstater. Avseende institutionernas ansvar, har EU kritiserats av människorättsorganisationer och forskare som menar att viss sekundärrätt inte beaktar artikel 2 FEU i tillräcklig utsträckning. Samtidigt har EU-domstolens tolkning av artikel 2 FEU utvecklats avsevärt de senaste åren och i april 2026 meddelandes det vägledande målet *Kommissionen mot Ungern*. EU-domstolen fastslog för första gången att artikel 2 FEU kan åsidosättas per se och att EU-institutionerna måste respektera de skyldigheter som följer av artikel 2 FEU i samma utsträckning som medlemsstaterna.

Mot bakgrund av kritiken mot institutionernas lagstiftning och utvecklingen gällande tolkningen av artikel 2 FEU, är syftet med uppsatsen att utreda i vilken utsträckning artikel 2 FEU kan användas för att etablera ett åsidosättande av artikeln avseende sekundära lagstiftningsakter. Uppsatsen behandlar institutionernas ansvarsskyldighet i ljuset av artikel 2 FEU genom att tillämpa rättsdogmatisk metod och EU-rättslig metod. I uppsatsen utforskas framväxten av artikel 2 i fördraget och dess utveckling i praxis, juridiska argument för och emot en tillämpning av artikel 2 FEU per se, samt möjliga förfarande för åberopandet av artikel 2 FEU mot institutionerna.

Det går att dra slutsatsen att EU-domstolens tolkning av artikel 2 FEU i *Kommissionen mot Ungern* är ett resultat av flera domar som följde efter målet *Portuguese Judges* från 2018. Vid etablerandet av åsidosättandet av artikel 2 FEU per se, introducerade EU-domstolen ett ”manifest test” med särskilda kriterier för hur en överträdelse av de grundläggande värdena skulle fastställas. I *Kommissionen mot Ungern* tillämpades testet mot en medlemsstat, men i teorin skulle det möjligen kunna tillämpas även mot EU-institutionerna och sekundära lagstiftningsakter. Eftersom det klargjorts att institutionerna har samma skyldigheter som medlemsstaterna under artikel 2 FEU – kan testet inte då även tillämpas mot institutionerna? I praktiken kvarstår dock utmaningar och obesvarade frågor, särskilt då en överträdelse av artikel 2 FEU av institutionerna skulle innebära att EU har åsidosatt sin konstitutionella kärna och identitet. Tolkningen av artikel 2 FEU i *Kommissionen mot Ungern* kommer troligen påverka hur den juridiska argumentationen förs i juridiska processer mot institutionerna och utöka möjligheterna att använda artikel 2 FEU mot institutionerna, särskilt avseende sekundära lagstiftningsakter.

Preface

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Abbreviations

CFR	Charter of Fundamental Rights of the European Union
CJEU, Court	Court of Justice of the European Union
Commission	European Commission
ECHR	European Convention on Human Rights
EU, Union	European Union
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
The Pact	EU Pact on Migration and Asylum
Parliament	European Parliament

“It follows that the values enshrined in Article 2 TEU are, per se, legally binding, as a result of which there is an obligation, for the Member States and institutions of the Union, to respect, maintain and promote those values.”

Judgment of the Court of Justice of the European Union in the case of *Commission v Hungary*, para 536, delivered on April 21, 2026.

1 Introduction

The introductory chapter provides a description of the purpose of the thesis by defining the research questions and presenting the background and structure of the thesis including delimitations and methodology and materials.

1.1 Background

As enshrined in Article 2 of the Treaty on European Union (TEU), the European Union (EU) is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of people belonging to minorities. The article further states that the values are common to Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail. Article 2 TEU has received increasing attention in recent years as the “rule of law crisis” continues to unfold, notably in Hungary and Poland.¹ In the context of value breaches, Article 7 TEU specifically provides for a political sanction mechanism, designed to apply solely in relation to Member State action.² In practice, Article 7 TEU is associated with difficulties since its activation requires unanimity among Member States, which has resulted in new interpretative approaches of Article 2 TEU by the Court of Justice of the European Union (CJEU).³ However, there is no specific equivalent provision applicable in cases of value breaches where the EU institutions in their actions would risk infringing Article 2 TEU.

Following that statement, it should be acknowledged that the EU in recent years has been criticized for undermining and neglecting human rights concerns in its legislation regarding for example immigration and asylum.⁴ Ever since the EU Pact on Migration and Asylum (the Pact) was introduced and entered into force in June 2024, several human rights organizations and scholars have underlined the risks that the Pact poses to the protection of fundamental rights and the rule of law.⁵ The protection of fundamental rights and the rule of law are two of the twelve founding values of the EU, codified in Article 2 TEU.

There are additional examples of when the actions of the EU institutions can be called into question for possibly not fully aligning with the values pursuant to Article 2 TEU. The recent launch of the Omnibus I package concerning sustainability has resulted in critical discussions where the EU is accused of

¹ Craig and de Búrca (a) p. 36.

² Geiger, Khan and Kotzur pp. 59–60.

³ Bonelli and Claes (a); Cf. Kochenov paras 29–30; Klamert and Kochenov para 15.

⁴ Craig and de Búrca (a) p. 410; Amnesty International, ‘The Human Cost of Fortress Europe’.

⁵ PICUM; EU Migration Blog; Borneman and Maiani pp. 379–380, 390–392.; Cf. Manzotti p. 20.

lowering fundamental rights protection as well as rule of law safeguards.⁶ The same has been said about the Omnibus VII proposal on simplification measures connected to the digital sphere and digital rights.⁷ Consequently, it has even been implied that the Omnibus project weakens the democratic oversight that symbolizes the essence of the EU.⁸ In a pending interinstitutional case before the CJEU between the European Commission (Commission) and the European Parliament (Parliament), the Commission allegedly breached its own framework which has the purpose of upholding the rule of law and fundamental rights, by disbursing funds to Hungary without sufficient motivation.⁹

In doctrine, the values in Article 2 TEU are considered to constitute an “untouchable” core of the EU legal order as well as “the very identity of the EU as a common legal order”.¹⁰ Therefore, it is of relevance to shed light on the fact that EU legislation is under scrutiny for not upholding and protecting the EU’s own founding values. Article 2 TEU has been described as a primary law provision that entails obligations for the EU institutions to respect and promote its values, which stem from Article 13 TEU and Article 3 TEU.¹¹ In the recent judgment of *Commission v Hungary*, the CJEU even established, for the very first time, that the obligations deriving from Article 2 TEU are of legally binding nature to the Member States and the EU institutions.¹²

The present era of democratic backsliding characterized by a weakened respect for the founding values is reflected in recent case law from the CJEU.¹³ After the landmark case of *Associação Sindical Dos Juizes Portugueses v. Tribunal de Contas*, hereafter *Portugues Judges*, delivered in 2018, other cases concerning the values of the EU have followed.¹⁴ The *Conditionality Judgments*, *Repubblika v II-Prim Ministru*, hereafter *Repubblika*, and *Commission v Malta* are a few examples in which the CJEU took an increasingly constitutional approach.¹⁵ The application of Article 2 TEU in *Commission v Malta* was unprecedented and is likely to have a

⁶ Open letter to Committee on Legal Affairs of the European Parliament; European Environmental Bureau.

⁷ Amnesty International, Joint Statement.

⁸ Ouyang; CEPS.

⁹ Opinion of Advocate General Ćapeta in Case C-225/24 *Parliament v Commission* [2026] EU:C:2026:88.

¹⁰ Klamert and Kochenov para. 1; Case C-156/21 *Hungary v Parliament and Council* [2022] EU:C:2022:97.

¹¹ Geiger para. 10.

¹² Case C-769/22 *Commission v Hungary* [2026] EU:C:2026:326, para 536.

¹³ Cf. Case C-64/16 *Associação Sindical dos Juizes Portugueses v Tribunal de Contas* [2018] EU:C:2018:117; C-769/22 *Commission v Hungary*; C-156/21 *Hungary v Parliament and Council*; Case C-157/21 *Poland v Parliament and Council* [2022] EU:C:2022:98.

¹⁴ C-64/16 *Portuguese Judges*.

¹⁵ Cf. Ovádek (a).

substantial impact on the forthcoming case law.¹⁶ The case of *Commission v Hungary* has not only been described as the “biggest human rights case in the history of the European Union”, but was also the first case where a self-standing plea of an infringement of Article 2 TEU was raised.¹⁷ The evolving legal approach to Article 2 TEU has led to a discussion among scholars, because the mere existence of binding obligations might not necessarily institute justiciability and successful enforcement of Article 2 TEU in relation to secondary legislative acts.

1.2 Purpose and Research Questions

The current criticism against EU legislation and the EU institutions, in conjunction with recent case law development on Article 2 TEU, makes it of academic relevance to further examine the role of the founding values in the EU legal order. The purpose of this thesis is therefore to turn to the question of institutional accountability and examine to what extent a violation of Article 2 TEU can be found in relation to the actions of the institutions and specifically EU secondary legislation.

The principal research question is formulated as follows:

- To what extent can the invocation of Article 2 TEU, following the recent interpretation by the CJEU, result in violations of Article 2 TEU regarding secondary legislative acts?

The main research question is complemented with three sub-questions:

- How has Article 2 TEU developed historically and been interpreted by the CJEU?
- Which are the legal arguments that support and challenge a self-standing interpretation of Article 2 TEU?
- What can be said about the means of enforcement of Article 2 TEU in relation to the institutions?

1.3 State of the Art

Even though Article 2 TEU is a central provision of the Treaty, the academic discussion on the judicial applicability of the article has remained on a limited and general level.¹⁸ Nevertheless, it is possible to observe a shift in the interest in Article 2 TEU, as the political developments in Member States have

¹⁶ Groussot and Valera pp. 587–590; Case C-181/23 *European Commission v Republic of Malta* [2025] EU:C:2025:283.

¹⁷ Riedl (a); Opinion of Advocate General in C-769/22 para 24.

¹⁸ Spieker (a) p. 1198; Bonelli and Claes p. 14.

resulted in new case law on the interpretation of the article accompanied with a further discussion on what it entails for the EU legal order.¹⁹

By now directing attention to EU legislation, the new EU Pact on Migration and Asylum has, as mentioned above, been criticized for not safeguarding the values enshrined in Article 2 TEU in a sufficient manner. Article 2 TEU has generally been invoked in contexts of Member State action, and there has not been much academic discussion on what impact the latest interpretation of Article 2 TEU might have in relation to secondary legislative acts adopted by the institutions.²⁰ The Member States and the institutions are undoubtedly bound by the obligations imposed by Article 2 TEU, but the question of invoking Article 2 TEU with the purpose of challenging the legality or validity of secondary legislative acts has not been thoroughly discussed in literature.²¹

The position of Article 2 TEU in the EU legal order has also not been entirely clear.²² Such interpretation of the Article 2 TEU that enables it to function as a self-standing provision has also left the scholarly discussion fragmented.²³ It was not until the recently delivered judgment of *Commission v Hungary* that some clarity was provided on the character of Article 2 TEU.²⁴

Parts of the material regarding the status of Article 2 TEU as a constitutional provision were written before the case law discussed in this thesis was delivered. It should also be mentioned that the constitutional aspect of EU law is considered less developed in comparison with the supranational dimension.²⁵

1.4 Delimitations

The secondary legislative acts presented in the thesis function as examples of EU legislation that have been criticized for not aligning with the founding values pursuant to Article 2 TEU. The thesis applies a constitutional perspective of EU law which eliminates a further analysis of whether the legislation violates specific rights as found in the Charter of Fundamental Rights of the European Union (CFR) or the European Convention on Human Rights (ECHR).

It should also be highlighted that a substantial part of the case law on Article 2 TEU relates to infringements connected to the actions of Member States and not the institutions. It is often a national court that requests a preliminary

¹⁹ Cf. Section 1.1.

²⁰ Cf. Boeckestein pp. 447–450.

²¹ Cf. Boeckestein pp. 450.

²² Klamert and Kochenov para 17; Cf. Boeckestein; Cf. Theuns p. 450.

²³ Barley and Weinzierl; Cf. Fitzpatrick pp. 2–8; Cf. Kaiser (a); Cf. Boeckestein.

²⁴ C-769/22 *Commission v Hungary* paras 494–564.

²⁵ Craig and de Búrca (b) pp. 90–21.

ruling in accordance with Article 267 of the Treaty on the Functioning of the European Union (TFEU) or the Commission that initiates infringement proceedings pursuant to Article 258 TFEU. Consequently, the case law in question will be used to examine and understand the interpretation of Article 2 TEU, even though the focus of the thesis is institutional accountability.

1.5 Methodology and Materials

In this thesis, the legal dogmatic method and the EU legal method are both applied. The legal dogmatic method centers around the most common sources of law such as legislation, case law, preparatory works and “legally oriented” literature.²⁶ The “legally oriented” literature, can be defined as the works that interpret and systemize the applicable law.²⁷ While the thesis has a strong focus on EU primary law, the literature is of great importance since it enables the drawing of conclusions concerning the primary law. Therefore, is central that this methodology section acknowledges its legal authority as well as its value in legal argumentation.²⁸

Scholars argue that there is no such concept as one legal method applicable within all areas of EU law.²⁹ However, the EU legal method is described as a course of action of how EU legal sources can be interpreted.³⁰ On the basis that this thesis to a large extent analyzes case law from the CJEU involving Article 2 TEU, the different methods of interpretation applied by the institution, for example the teleological, have been useful.³¹ The methods of interpretation have been central in order to understand the development of the interpretation of Article 2 TEU and the place of the article in the EU legal order.

The articles in the founding Treaties constitute primary law, whereas case law and Opinions of Advocates General are secondary law.³² As secondary law can have a binding nature, the Opinions of Advocates General do not, unless the CJEU makes it clear that it has based its reasoning on the argumentation of the Advocate General.³³ Nevertheless, the Opinions are of great importance in terms of legal argumentation and interpretation of EU law.³⁴ The Opinions can include detailed analysis of case law, arguments against and in favor of adopting certain legal perspectives and have therefore been of relevance in this thesis.³⁵ It was of particular interest to include the Opinion of Advocate

²⁶ Kleineman p. 25.

²⁷ Peczenik p. 42.

²⁸ Peczenik p. 42; Kleineman p. 45.

²⁹ Neergaard, Nielsen, Roseberry p. 77.

³⁰ Reichel p. 177.

³¹ Reichel p. 201.

³² Hettne and Eriksson Otken p. 40.

³³ *Ibid.*, pp. 116–117.

³⁴ *Ibid.*, pp. 118–119.

³⁵ *Ibid.*, pp. 117–118.

General Tamara Čapeta on *Commission v Hungary* due to the judgment's expected impact on the EU legal order.

The commentary literature available on Article 2 TEU, Article 263 TFEU and Article 267 TFEU has been particularly valuable. The works of Kellerbauer, Klamert and Tomkin, as well as Geiger, Khan and Kotzur, have contributed to the understanding and origin of Article 2 TEU explained in this thesis. Craig and de Búrca have also written an extensive amount of material on the development of EU law and its constitutional dimension. Since the most recent development of Article 2 TEU is reflected in case law and scholarly discussions, contributions by for example Riedl, Bonelli, Spieker and Van den Brink have been essential for the analysis.

Binding secondary legislation such as the EU Pact on Migration and Asylum and the Omnibus I package have been exemplified with the purpose of shedding light on certain aspects relating to the constitutional dimension of EU law. The Omnibus VII proposal is also discussed.

For the sake of clarity, it is of importance to mention that the discussion on Article 2 TEU as a self-standing provision in EU law in Chapter 3 combines arguments of *de lege lata* and *de lege ferenda*. Consequently, the approach discussed will be evident by the context.³⁶

1.6 Outline

The introductory chapter of the thesis is followed by Chapter 2, which has the purpose of presenting how Article 2 TEU has evolved as a Treaty article and how the interpretation of the article developed in recent case law. This review is complemented by a section dedicated to clarifying that the obligations deriving from Article 2 TEU also apply to the EU institutions and not only the Member States. Chapter 3 contains an analysis of the question of Article 2 TEU as a self-standing provision which was raised by the Commission for the first time in *Commission v Hungary*. The interpretation of Article 2 TEU has been a part of the legal debate for a longer period of time, but the judgment of *Commission v Hungary* contributed to the discussion with new perspectives and conclusions.³⁷ Chapter 4 contains a more detailed description of the secondary legislative acts exemplified in the introductory chapter and the criticism they received from an Article 2 TEU standpoint. It also includes a discussion on the relevant provisions applicable to contest the legislation of EU institutions.

As Chapter 2, 3 and 4 focus on each sub-question in chronological order, it is the intention of Chapter 5 to answer the main research question. The main

³⁶ Kleineman pp. 44–45.

³⁷ Riedl (b).

research question is analyzed in Chapter 5, by parting it into three different sections. Chapter 6 offers a concluding statement of the findings of the thesis.

2 The evolution of Article 2 TEU

This chapter of the thesis examines and presents a clear historical overview of how Article 2 TEU has emerged in the Treaty and shed light on recent cases in which it has been possible to observe a shift in the interpretation of the article by the CJEU. The underlying objectives and reasoning behind introducing the provision will also be commented on. Article 2 TEU includes several values and there is a significant amount of material written specifically about the evolution of the values of the rule of law and human rights.³⁸ The chapter will not focus on the evolution of each value but consider Article 2 TEU in its entirety.

2.1 Article 2 TEU as a Treaty provision

The current version of Article 2 TEU states as follows:

“The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail. “

2.1.1 Leading up to the Copenhagen Criteria

To fully understand the version in force, it is of relevance to take a closer look at how Article 2 TEU was incorporated into the Treaty. Article 2 TEU was introduced in the Treaty for the very first time in 2007 with the approbation of the Lisbon Treaty, that entered into force in 2009.³⁹

The objective of the values is to lay the foundation of what constitutes the constitutional basis of each Member State and the EU, and this discussion became more profound as the interest in a strengthened European integration grew stronger.⁴⁰ Early examples on what forms European identity can be traced back to 1973, where the foreign ministers, of at the time, nine Member States expressed the intentions of establishing a European identity. The leaders concluded that fundamental elements of a European identity would entail safeguarding the respect for the values of their legal, political and moral order along with the determination to defend the principles of democracy, the

³⁸ Craig and de Búrca (b) Chapter 15; Cf. Craig and de Búrca (a) Chapter 12.

³⁹ Klamert and Kochenov para 3; Cf. European Parliament, 'Treaty of Lisbon'.

⁴⁰ Klamert and Kochenov paras. 1–4; Cf. Opinion 2/13 *Accession to the European Convention of Human Rights (ECHR II)*, EU:C:2014:2454, para 168; Case C-455/14 P, *EUPM in Bosnia and Herzegovina*, EU:C:2016:569, para 41.

rule of law, social justice, economic progress and the respect for human rights.⁴¹

In the following years towards the end of the 1970s and the 1980s, it was possible to observe how the institutions adopted several declarations underlining the importance of fundamental rights and values closely connected to what can be associated with Article 2 TEU as it stands today.⁴²

During the European Council held in Copenhagen in 1993, the leaders agreed on what is known as the “Copenhagen Criteria” which are the conditions that states seeking to accede to the EU are required to meet. Among other things, it was decided that membership of the Union obliges a candidate country to have accomplished stability of institutions guaranteeing democracy, the rule of law, human rights and the respect for and protection of minorities.⁴³ The formulation of those values in text might be viewed as one of the first steps leading up to the codification process.

2.1.2 The codification process

The codification process took form with the amendments that resulted in the Treaty of Maastricht in 1992. Article F(1) of the Maastricht Treaty stated that the EU should respect the national identities of its Member States, whose systems of government are founded on the principles of democracy.⁴⁴ Furthermore, Article F(2) underlined that the EU should respect fundamental rights.

When the Treaty of Amsterdam was signed in 1997, Article F got a new formulation that declared that the Union was founded on the principles of liberty, democracy, respect for human rights, fundamental freedoms and the rule of law and that those principles were common to the Member States.⁴⁵

As a result of the Laeken European Council in 2001, the proposal for a European constitution started to take form.⁴⁶ However, it was never adopted due to the rejection by France and the Netherlands in their respective national

⁴¹ European Council Declaration on European Identity [1973], Annex 2 Chapter II, 7th General Report EC.

⁴² European Council Declaration on European Identity [1973], Annex 2 Chapter II, 7th General Report EC; Joint Declaration by the EP, the Council and the Commission on the respect of fundamental rights [1977] OJ C103/1; EP Declaration on fundamental rights and freedoms [1989] OJ C120/51; Interinstitutional declaration on democracy, transparency and subsidiarity [1993] OJ C329/133; Cf. Klamert and Kochenov.

⁴³ European Council in Copenhagen 21–22 June 1993, Conclusions of the Presidency. 7.A.iii. SN 180/1/93/ REV 1.

⁴⁴ Klamert and Kochenov para 2.

⁴⁵ The Treaty of Amsterdam amending the Treaty on the European Union, the Treaties establishing the European Communities and certain related acts. 11997D/TXT.

⁴⁶ European Council in Laeken 14–15 December 2001, Conclusions of the Presidency. SN 300/1/01 REV 1; Cf. Craig and de Búrca (b) pp. 70–71.

referenda.⁴⁷ In this context, the Constitutional Treaty is still of relevance since it laid the foundation for the Lisbon Treaty and notably, Article 1(2) of the Constitutional Treaty became Article 2 TEU, signed in 2007.⁴⁸

2.2 Overview of recent case law development

The scope of the development of Article 2 TEU in case law is rather broad since the article includes several values. It should also be mentioned that certain values can be found in other articles of the Treaties and that some values also constitute general principles.⁴⁹

Historically, the CJEU has referred to the values of the Union on several occasions and perhaps most frequently the value of the rule of law. The very first time the CJEU pronounced the Union to be founded on the rule of law was in *Les Verts* in 1986.⁵⁰ Compliance with the rule of law has also been described as a requirement for the protection of all other fundamental values that the article includes.⁵¹ The CJEU stated in the *Conditionality Judgments* that there is no hierarchy among the values of Article 2 TEU and emphasized that the value of the rule of law is “intrinsically linked” to the respect for democracy and fundamental rights.⁵² Therefore, democracy or respect for fundamental rights cannot exist without the respect for the rule of law.⁵³ Additionally, it should be noted that Article 2 TEU was introduced as a provision of constitutional character of the legal order in *Opinion 2/13* from 2014.⁵⁴

There have been scholarly discussions on whether the two sentences which constitute Article 2 TEU have different legal statuses, where the last sentence did not fully contain founding values.⁵⁵ However, recent judgments by the CJEU might have put an end to this discussion when the CJEU drew on the last sentence of Article 2 TEU in *Commission v Malta* and *Commission v Hungary* which will be elaborated on below.⁵⁶

The legal function of the values in Article 2 TEU has been unclear in literature as mentioned in the introduction, and the following judgments will

⁴⁷ European Parliament, ‘Draft treaty establishing a constitution for Europe’.

⁴⁸ Craig and de Búrca p. 71.

⁴⁹ Klamert and Kochenov para 5.

⁵⁰ Case C-294/83 *Parti écologiste ‘Les Verts’ v European Parliament* [1986] EU:C:1986:166 para 23.

⁵¹ Craig and de Búrca (a) p. 39.

⁵² C-156/21 *Hungary v European Parliament and the Council of the European Union*; C-157/21 *Republic of Poland v European Parliament and the Council of the European Union*.

⁵³ C-156/21 *Hungary v Parliament and Council* para 18.

⁵⁴ Groussot and Valera p. 581; Cf. *Opinion 2/13* paras 167–170.

⁵⁵ Wouters pp. 258–259.

⁵⁶ C-181/23 *Commission v Malta* paras 93–101; C-769/22 *Commission v Hungary* para 529.

demonstrate how the CJEU seems to be increasingly willing to provide clarification on the matter. The examination of the following landmark cases will focus on the dimensions relating to the development in the interpretation of Article 2 TEU.

2.2.1 Portuguese Judges

The case of *Portuguese Judges* was delivered by the CJEU in 2018 as a preliminary ruling.⁵⁷ It has been described as a “precedent-setting” judgment in relation to the constitutional dimension of EU law and marked an important point in the development where Article 2 TEU was operationalized.⁵⁸

2.2.1.1 Background

The background of the case is that the Portuguese law had introduced a temporary renumeration for a substantial part of the public sector, including judges.⁵⁹ The judges argued that the national law infringed the principle of judicial independence as recognized in Portuguese law as well as in EU law.⁶⁰ The referring court did however acknowledge the fact that the introduced law was adopted within the “framework of EU law” with the purpose of reducing the Portuguese budget deficit during the year of 2011.⁶¹

The legal question that the CJEU was requested to rule on was whether the principle of judicial independence in the second subparagraph of Article 19(1) TEU and in Article 47 CFR should be interpreted as precluding the relevant remuneration measures taken by Portugal, in the light of the mandatory requirements of eliminating the budget deficit. The CJEU concluded that the principle of judicial independence did not hinder the salary reduction measures, but it was not the outcome, but the *reasoning* of the CJEU that was considered rather groundbreaking.⁶²

2.2.1.2 Importance and impact

First och all, the CJEU confirmed jurisdiction on the ground that the provision related to a field covered by EU law, which can be said to stretch beyond the formulation of “implementing” EU law.⁶³ In this context, the CJEU clarified that Article 19(1) TEU has a broader scope than the CFR which is important to highlight. Consequently, the judgment seems to imply that the actions of

⁵⁷ C-64/16 *Portuguese Judges*.

⁵⁸ Taborowski; Cf. Ovádek (b).

⁵⁹ C-64/16 *Portuguese Judges* paras 2–19.

⁶⁰ Ibid., para 13.

⁶¹ More specifically in the context of austerity measures linked to an EU financial assistance program. Cf. Bonelli and Claes (a); C-64/16 *Portuguese Judges* para 14.

⁶² C-64/16 *Portuguese Judges* para 53.

⁶³ Ibid., para 29; Cf. Case C-617/10 *Åklagaren v Åkerberg Fransson* [2013] EU:C:2013:280.

all courts that possess the competence to rule on matters relating to EU law can potentially fall within the scope of Article 19(1) TEU.⁶⁴

The CJEU noted that the EU is founded on values common to all Member States and that Article 19 TEU gives concrete expression to the value rule of law enshrined in Article 2 TEU.⁶⁵ Following this argument, national courts were, to the same extent, as well as together with the CJEU, responsible for ensuring judicial review of the EU legal order.⁶⁶ By referring to the principle of sincere cooperation in Article 4(3) TEU, the CJEU further enhanced the legal foundation in primary law.⁶⁷

The judgment is important in the context of understanding the development of Article 2 TEU because the CJEU made a very direct connection with Article 2 TEU in a way that it had not done before. When the CJEU stated that Article 19 TEU gave concrete expression to the value of the rule of law as found in Article 2 TEU, it opened the door to judicial applicability of Article 2 TEU.⁶⁸ By combining Article 19 TEU and Article 2 TEU, the latter can be understood as transformed to a legal obligation and the two provisions complement each other which results in judicial applicability.⁶⁹

To summarize, the judgment of *Portuguese Judges* broadened the scope of EU law and shed new light on Article 2 TEU as a constitutional provision.⁷⁰ It was also the first judgment in which the CJEU indirectly addressed the backsliding of the rule of law taking place in the Member States, specifically in Hungary and Poland.⁷¹ According to the current President of the CJEU, the judgment is to be considered as crucial for the constitutional development of the EU as the cases of *Costa v ENEL* and *Van Gend En Loos*.⁷²

2.2.2 Repubblika

Repubblika v Il-Prim Ministru, hereafter *Repubblika*, was delivered by the CJEU in 2021 after a request for a preliminary ruling.⁷³ *Repubblika* is a Maltese association with the purpose of promoting the protection of justice and the rule of law.⁷⁴

2.2.2.1 Background

⁶⁴ Bonelli and Claes (a) pp. 642–643.

⁶⁵ C-64/16 *Portuguese Judges* paras 30–32.

⁶⁶ C-64/16 *Portuguese Judges* paras 32–33.

⁶⁷ C-64/16 *Portuguese Judges* para 34.

⁶⁸ Spieker (b) p. 250.

⁶⁹ *Ibid.*, p. 251.

⁷⁰ *Ibid.*, p. 253.

⁷¹ Pech and Kochenov p. 22.

⁷² Riedl (a); Case C-6/64 *Costa v E.N.E.L* [1964] EU:C:1964:66; Case C-26/62 *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration* [1963] EU:C:1963:1.

⁷³ Case C-896/19 *Repubblika v Il-Prim Ministru* [2021] EU:C:2021:311.

⁷⁴ C-896/19 *Repubblika* para 2.

According to the provisions in the Maltese Constitution, judges were appointed by the President following a proposal by the Prime Minister. The legislation also included a judicial appointments committee which had the role of evaluating the candidates and advise the Prime Minister.⁷⁵ *Repubblika* challenged the national law and argued that it violated the principle of judicial independence as formulated in Article 19(1) TEU and Article 47 CFR.⁷⁶

The CJEU did not find a breach of judicial independence and stated that the committee could in fact serve as a factor which contributed to the strengthening of judicial independence.⁷⁷

2.2.2.2 *Importance and impact*

One of the most significant aspects of *Repubblika* was that the CJEU introduced the principle of non-regression, which was established by connecting Article 2 TEU and Article 49 TEU.⁷⁸ Article 49 TEU lays down the possibility for a European State to accede to the EU, under the condition that it respects and continues to stay committed to promoting the values in Article 2 TEU. The CJEU explained that, since the EU is founded on the values of Article 2 TEU, which are common to the Member States, the mutual trust between them is based on the shared common values. It was further stated that to enjoy the rights stemming from the Treaties, the Member States are obliged to comply with the values of Article 2 TEU.⁷⁹

By connecting Article 49 TEU and Article 2 TEU, the CJEU established that a Member State who, freely and voluntarily joined the EU, cannot introduce such legislation that reduces the protection of the value of rule of law, which is given concrete expression by Article 19 TEU.⁸⁰ Member States therefore have an obligation to guarantee that no regression of the value of rule of law is made in national legislation.⁸¹

When expanding the perspective, the introduction of the principle of non-regression meant that national constitutional provisions that do not comply with the rule of law as found in Article 2 TEU cannot be adopted on Member State level.⁸² The judgment can be seen as one step further in the development of Article 2 TEU compared to *Portuguese Judges* and plays an important role in the upholding of the values of Article 2 TEU.⁸³ It also showcased that

⁷⁵ Leloup; Case C-896/19 *Repubblika* para 9.

⁷⁶ Leloup; Unio EU Law Journal: The Official Blog; Cf. C-896/19 *Repubblika* para 9.

⁷⁷ Leloup; Cf. C-896/19 *Repubblika* paras 56, 69, 72.

⁷⁸ Pech and Kochenov p. 18.

⁷⁹ C-896/19 *Repubblika* paras 62–63.

⁸⁰ C-896/19 *Repubblika* paras 61, 63.

⁸¹ Cf. C-896/19 *Repubblika* para 64.

⁸² Kochenov and Dimitrovs.

⁸³ Ibid.

compliance with the value of rule of law cannot merely be seen as a requirement to accede to the EU, but as a constant obligation.⁸⁴

2.2.3 The Conditionality Judgments

The *Conditionality Judgments* delivered by the CJEU in 2022 refers to the cases of *Hungary v Parliament and Council* and *Poland v Parliament and Council* in which the two Member States respectively contested the legality of the Conditionality regulation.⁸⁵ The regulation lays down a conditionality regime with the purpose of protecting the EU budget in case of breaches of the principle of the rule of law in Member States.⁸⁶ Consequently, the financial interests of the EU would be protected in accordance with the general principles in the Treaties and the values set out in Article 2 TEU.⁸⁷

2.2.3.1 Background

Firstly, the two Member States argued that the regulation had not been adopted in accordance with the Treaties, stating that Article 322(1)(a) TFEU did not constitute an acceptable legal basis.⁸⁸ Secondly, the contested regulation was the first act of secondary legislation that included a definition of rule of law, and Hungary argued that Article 7 TEU was the only Treaty article, together with Article 269 TFEU, that could constitute the legal ground to establish a risk of a serious breach of the values of Article 2 TEU.⁸⁹ Such a procedure made possible by the regulation would thereby undermine and circumvent Article 7 TEU.⁹⁰ Thirdly, it was put forward that the regulation violated Article 4(2) TEU, which contains the principle of equality and the respect for the national identity of Member States.⁹¹ The final main argument raised in the proceedings was that the regulation was not in conformity with the general principles of EU law, more specifically legislative certainty and legal clarity.⁹² To summarize the arguments presented, the essence of the case lay in the fact that neither Hungary nor Poland supported the regulation that connected EU financing to requirements of respecting the value of the rule of law.⁹³

2.2.3.2 Importance and impact

⁸⁴ Riedl (a).

⁸⁵ C-156/21 *Hungary v Parliament and Council*; C-157/21 *Poland v Parliament and Council*; Regulation (EU, Euratom) 2020/2092 of the European Parliament and the Council of December 2020 on a general regime of conditionality for the protection of the Union budget.

⁸⁶ Progin-Theuerkauf and Berger; C-156/21 *Hungary v Parliament and Council* para 110.

⁸⁷ C-156/21 *Hungary v Parliament and Council* para 18.

⁸⁸ Ibid para 97.

⁸⁹ Groussot and Zemskova p. 98; Cf. C-156/21 *Hungary v Parliament and Council* para 81.

⁹⁰ C-156/21 *Hungary v Parliament and Council* para 155.

⁹¹ Ibid., para 202.

⁹² Ibid., para 199.

⁹³ Progin-Theuerkauf and Berger.

Groussot et al. argue that the judgments had an important impact on a micro level as well as on a macro level of the constitutional dimension of the legal order of the EU. The micro level relates to the concrete factual circumstances and outcome of the judgment whereas the macro level refers to the impact that the case had in relation to the constitutional framework.⁹⁴

On a micro level, the CJEU dismissed the actions brought to the CJEU by Hungary and Poland.⁹⁵ The CJEU found the regulation to be based on a legal and appropriate legal basis, it posed no hinderance to the procedure of Article 7 TEU and it did not infringe the principle of legal certainty. In other words, the CJEU upheld the regulation and confirmed it to be a valid instrument for the EU to make use of in case of violations of the rule of law by a Member State.⁹⁶

On a macro level, the judgments confirmed that the values in Article 2 TEU were of legally binding nature, thereby clarifying its constitutional status in the legal order.⁹⁷ The CJEU explained that Article 2 TEU cannot be reduced to “a statement of policy guidelines or intentions” but that the values constitute an “integral part of the identity” of the EU and have been given “concrete expression in principles containing legally binding obligations” for Member States.⁹⁸ It was also added that, while national identities shall be respected in line with Article 4(2) TEU, it cannot be accepted that Member States fulfill the obligations of Article 2 TEU to different degrees.⁹⁹ Since Article 2 TEU contains values that have been “identified and are shared” by the Member States and constitute the “identity” of the EU, the CJEU declared it to be of importance that the EU has the means to defend them.¹⁰⁰

Furthermore, the CJEU provided clarification on the value of solidarity stemming from Article 2 TEU, whose legal implications have been debated in literature.¹⁰¹ By shedding light on the connection between the obligations of mutual trust and solidarity, the CJEU affirmed that solidarity rests on the principle of mutual trust. The mutual trust is based on the obligations to respect Article 2 TEU, which is a result of the commitments that Member States made by acceding to the EU. The cases are of significant relevance in this context because the CJEU established a link between solidarity and the rule of law with the support of the principle of mutual trust. This interpretation suggests that the rule of law cannot be considered respected in cases where

⁹⁴ Groussot, Zemskova and Bungerfeldt p. 5.

⁹⁵ C-156/21 *Hungary v Parliament and Council* para 361 and C-157/21 *Poland v Parliament and Council* para 363.

⁹⁶ Progin-Theuerkauf and Berger.

⁹⁷ Groussot and Zemskova p. 98.

⁹⁸ C-156/21 *Hungary v Parliament and Council* para 232.

⁹⁹ Ibid para 233; Zemskova.

¹⁰⁰ C-156/21 *Hungary v Parliament and Council* para 127; C-157/21 *Poland v Parliament and Council* para 145.

¹⁰¹ Groussot, Zemskova and Bungerfeldt p. 9.

there is a lack of solidarity among the Member States. The value of solidarity is, from now on, to be defined as justiciable and enforceable to a larger extent than before.¹⁰² Moreover, by referring to Article 49 TEU and Article 2 TEU, the CJEU reaffirmed the significance of the principle of non-regression which was introduced in *Repubblika*, indicating that once a state has acceded to the Union and committed to respect Article 2 TEU, the Member State cannot amend legislation in a way that reduces the level of protection deriving from that article.¹⁰³

The *Conditionality Judgments* are essential cases in the recent development of Article 2 in case law. The character of Article 2 TEU was clarified and for the first time, it became clear that the founding values stemming from Article 2 TEU did include legally binding obligations that Member States are required to respect.¹⁰⁴ Consequently, the value of solidarity obtained the status of a legal obligation which will have an impact in cases relating to Article 2 TEU.¹⁰⁵

2.2.4 Commission v Malta

Commission v Malta is a case from 2025 in which the Commission argued that Malta had failed to fulfill its obligations in accordance with Article 258 TFEU and commenced an infringement procedure against the Member State. The factual circumstances of the case were that Malta had introduced a citizenship program that made it possible for non-nationals to be naturalized and obtain citizenship if the non-nationals contributed with “exceptional services” that benefited Malta as a country, referring to direct financial investments.¹⁰⁶ The detailed circumstances will be dealt with in the following sub-section, but the main argument raised by the Commission was that the transactional nature of the Maltese citizenship was incompatible with the nature of EU law.¹⁰⁷

2.2.4.1 Background

To elaborate on the circumstances of the case, the Commission invoked that the Maltese law infringed the principle of sincere cooperation found in Article 4(3) TEU and Article 20 TFEU which contains provisions relating to EU citizenship.¹⁰⁸ In detail, the Commission brought forward that, even though it is within the national competence of Member States to set up the requirements for the process of granting and losing citizenship, this must be done without infringing the “essence, value and integrity” of the EU citizenship and with

¹⁰² Groussot, Zemskova and Bungerfeldt p. 11.

¹⁰³ Hoxhaj p. 138; Cf. C-896/19 *Repubblika* paras 61–65.

¹⁰⁴ Groussot, Zemskova and Bungerfeldt p. 5; Cf. C-156/21 *Hungary v Parliament and Council* para 232.

¹⁰⁵ Groussot, Zemskova and Bungerfeldt p. 19.

¹⁰⁶ C-181/23 *Commission v Malta* paras 24–27.

¹⁰⁷ *Ibid.*, para 34.

¹⁰⁸ *Ibid.*, para 42.

respect to the concept of mutual trust.¹⁰⁹ The Commission also emphasized that the lack of a genuine link between the Member State and the individual applying for citizenship constituted an infringement of Article 2 TEU and the principle of sincere cooperation in Article 4(3) TEU. The Commission did not find that a financial investment could constitute such a genuine link.¹¹⁰

Malta however, argued that the principle of conferral leaves it up to the Member States to set up the requirements for the grant and loss of citizenship and that the relevant area of law fell within the exclusive competence of the Member States and was connected to the respect for national identity pursuant to Article 4(2) TEU.¹¹¹ In addition, Malta held the position that the Commission might exceed its competences in the case.¹¹² Malta also argued that, in order to guarantee that the national competence is safeguarded, a national naturalization policy could only violate EU law if it resulted in a “serious breach of the values and objectives” of the EU and that this breach was general and systematic.¹¹³ What is interesting in this case, which will be explained further in the next sub-section, is the fact that Malta raised certain concerns about the argumentation of the Commission. In essence, according to Malta, the Commission’s interpretation enabled the EU to review actions of Member States, such as naturalization policies, in a field of law where Member States have the exclusive competence to act.¹¹⁴

The CJEU started to argue that the examination of the procedure of obtaining citizenship cannot be reduced to situations of serious breaches with general and systematic character, as claimed by Malta.¹¹⁵ The Court highlighted that the functioning of the EU is built on representative democracy, which gives “concrete expression” to the value of democracy as enshrined in Article 2 TEU. The EU citizens are active in the democratic life of the EU by exercising their rights stemming from Article 10 TEU as well as Article 11 TEU. Thereby, when a Member State acts and sets up the requirements in relation to obtaining of citizenship, it has effects for the functioning of the EU legal order.¹¹⁶ The CJEU continued to explain that the EU citizenship was a concrete expression of solidarity and that the Member States must refrain from any measure hindering the objectives of the Union to be attained.¹¹⁷ It was further argued that the competence of Member States to decide on conditions for the loss of citizenship was unlimited, but not the competence of setting up the conditions for the granting of citizenship. Consequently, since citizenship was based on the values of Article 2 TEU and mutual trust,

¹⁰⁹ Ibid.

¹¹⁰ C-181/23 *Commission v Malta* paras 46, 50–53, 61.

¹¹¹ Ibid., para 65.

¹¹² Ibid., para 64.

¹¹³ Ibid., para 66.

¹¹⁴ Ibid., paras 67–68.

¹¹⁵ Ibid., paras 82–83.

¹¹⁶ Ibid., paras 88–89.

¹¹⁷ Ibid., paras 93–94.

no Member State could be allowed to exercise such power in this context, resulting in actions that would be violating the nature of EU citizenship.¹¹⁸

The CJEU emphasized that the EU citizenship is “formed” on the connection between solidarity and good faith, and while it is within Member States competence to lay down the rules of granting nationality, the competence is not unconditional.¹¹⁹ If a Member State has not respected and, “manifestly disregarded”, the connection between solidarity and good faith in this context, it was to be considered as violating the mutual trust, the principle of sincere cooperation in Article 4(3) TEU and Article 20 TFEU.¹²⁰ To conclude, Malta had disregarded the specific connection by applying a nationality scheme that entailed commercialization and the granting of nationality and EU citizenship on the grounds of financial transactions. Such practice, according to the Court, was not compatible with EU law.¹²¹

2.2.4.2 *Importance and impact*

It is no doubt that the judgment of the CJEU in *Commission v Malta* constitutes a turning point regarding the interpretation and understanding of Article 2 TEU in the EU legal order. For the first time, the CJEU based its reasoning on Article 2 TEU with reference to the values of democracy and solidarity and found, on that specific legal basis, that the Maltese nationality scheme infringed EU law.¹²² Consequently, the interpretation broadened the scope of EU law relating to the founding values to an extent that had not been seen in case law prior to this judgment.¹²³ It also confirmed the reasoning in the *Conditionality Judgments*, reiterating that Member States can be subjects to infringement proceedings relating to Article 2 TEU, if violations are given concrete expression in principles with legally binding obligations.¹²⁴

However, the judgment has triggered an extensive debate in literature with scholars arguing that an interpretation this extensive directly amounts to an overstepping of the division of competences established in EU law.¹²⁵ It is clear that Article 5(2) TEU confirms that the EU only has competence to act when power is conferred to the Union by the Treaties.¹²⁶ As explained in the section above, the CJEU drew on the value of solidarity in Article 2 TEU which, according to the CJEU, made it possible to examine the national legislation concerning citizenship in the light of EU law.¹²⁷ The fact that the CJEU decided to apply EU law to nationality law has even been described as

¹¹⁸ Ibid., para 95.

¹¹⁹ C-181/23 *Commission v Malta* paras 96–98.

¹²⁰ Ibid., para 99.

¹²¹ Ibid., paras 100–103.

¹²² Groussot and Valera p. 567.

¹²³ Ibid. p. 590.

¹²⁴ O'Neill (a) p. 482.

¹²⁵ Groussot and Valera pp. 590–591.

¹²⁶ Cf. Ibid., p. 594.

¹²⁷ Cf. C-181/23 *Commission v Malta* para 99.

“judicial gaslighting”.¹²⁸ For example, Peers argues that no link exists between EU law and the Maltese legislation and, for that reason, the principle of sincere cooperation in Article 4(3) TEU cannot be considered violated.¹²⁹

It is also of relevance to mention that the legal reasoning on which the CJEU based its judgment, has been questioned for not containing well-founded legal arguments to support its conclusions.¹³⁰ By extending the scope of Article 2 TEU in this exact manner, the CJEU risks to weaken the legitimacy of the values of Article 2 TEU, for example the rule of law, which the article in question actually has the purpose to uphold.¹³¹ To elaborate briefly on the rule of law discussion, the judgments of the CJEU have retroactive effect, meaning that Maltese citizens who obtained citizenship through the now declared illegal nationality scheme, might have their citizenships revoked?¹³²

Other scholars raised that the judgment showcased that the concept of mutual trust is central in the EU legal order and that mutual trust can function as a factor that unifies the many constitutional identities of the EU.¹³³ EU citizenship is, following this judgment, connected to mutual trust.¹³⁴

To conclude the section on the importance and impact of *Commission v Malta*, there are many interesting and relevant points raised in the academic and scholarly discussion. Since the purpose of the section has been to highlight how the case played a part in the evolution of the interpretation of Article 2 TEU, those aspects of the case have been the focus. What is particularly striking is that it seems like the CJEU by its judgment in this case, announces that there is no longer a need to connect the aspect of competences to Article 2 TEU.

Finally, it must be highlighted that *Commission v Malta* is considered to be a judgment with such significant implications on the development of the EU legal order, that it has been compared to the magnitude of *Costa v ENEL*.¹³⁵

2.2.5 Commission v Hungary

As mentioned in the chapter of introduction, the case of *Commission v Hungary* and the Opinion of Advocate General Ćapeta will be at the center of this thesis because of what the judgment entails for the placing and interpretation of Article 2 TEU in the EU legal order.¹³⁶ The following sub-

¹²⁸ Peers.

¹²⁹ Ibid.

¹³⁰ Kochenov (b); Athanasiou (a).

¹³¹ Athanasiou (a).

¹³² Van den Brink (a).

¹³³ O'Neill (b).

¹³⁴ O'Neill (a) pp. 486.

¹³⁵ Groussot and Valera, p. 593; Cf. C-6/64 *Costa v ENEL*.

¹³⁶ Groussot and Valera p. 585.

section functions as an introductory part to the case, before going into detail in Chapter 3.

2.2.5.1 Background

The case has been referred to as “the biggest human rights case in the history of the European Union” and concerns alleged breaches of primary and secondary law as well as violations of the CFR.¹³⁷ Apart from several directives, Article 56 TFEU, Article 1, 7, 8, 11 and 21 of the CFR and Article 2 TEU are included in the six different pleas that the Commission brought before the CJEU.¹³⁸

The national legislation introduced by Hungary, sought, according to Hungary, to “protect children from pedophiles” by restricting access to content that portrayed and promoted “gender identities that do not correspond to the sex assigned at birth, sex reassignment or homosexuality”.¹³⁹ In practice, the legislation prohibited any content or portrayal of the ordinary lives of LGBTIQ+ persons which Advocate General Ćapeta stated to be “in stark discrepancy” to the values of the EU and the framework of the ECHR.¹⁴⁰

The sixth plea of the Commission, which is central in this thesis, raised the legal argument of the infringement of Article 2 TEU as a self-standing provision.¹⁴¹ The plea was completely new had never been invoked before.¹⁴²

2.3 Obligations for EU institutions

Before continuing to examine the case of *Commission v Hungary* it is necessary to return to the main research question, which concerns to what extent Article 2 TEU could result in violations regarding secondary legislative acts. This cannot be properly analyzed or considered without explaining the obligations imposed on the EU institutions. As explained in the subsequent Section 2.4, Member States are obliged to respect the values of Article 2 TEU, and they can be held responsible in front of the CJEU in cases of non-compliance. Consequently, the following section is devoted to establishing and underlining that the same obligations apply to the institutions in their actions.

According to Geiger, Article 2 TEU also requires the EU as a Union to respect and promote the founding values with reference to Article 3(1) TEU.¹⁴³ The latter article states that the aim of the EU is to promote peace, its values and the well-being of its peoples. Article 13(1) TEU further lays down that the

¹³⁷ Riedl (a); C-769/22 *Commission v Hungary* paras 2–56.

¹³⁸ Cf. Opinion of Advocate General in C-769/22 para 26.

¹³⁹ *Ibid.*, paras 1–2.

¹⁴⁰ *Ibid.*, paras 39, 42.

¹⁴¹ *Ibid.*, para 142.

¹⁴² *Ibid.*, para 4; Cf. Groussot and Valera p. 585.

¹⁴³ Geiger para 10.

EU shall have an institutional framework that shall aim to, inter alia, promote its values. Read together, these articles can be interpreted as confirming legal obligations for the EU institutions.¹⁴⁴ Article 13(1) TEU poses a hindrance to the institutions to act in a manner that would compromise the values of Article 2 TEU.¹⁴⁵ The Union and the Member States also share the task of attaining the objectives of the EU, implying that the institutions are equally responsible to respect the values in Article 2 TEU.¹⁴⁶

Article 4(3) TEU includes the principle of sincere cooperation which requires Member States and the Union to assist each other in carrying out the tasks of the Treaties in full mutual respect. The reciprocity of the loyalty obligations expresses the vertical dimension of the obligations, with the result that they are binding to Member States and the Union.¹⁴⁷ In the case of *Zwartveld and Others*, the Court expressed that the institutions are “under a duty” of sincere cooperation with the judicial authority of Member States. The Member States are in turn responsible for guaranteeing that, Community law at the time and now EU law, is applied and respected on national level in the national systems.¹⁴⁸

The case of *Les Verts* was briefly mentioned in the introductory chapter and concerns the value of the rule of law. The CJEU established that since the Union is based on the rule of law, the institutions cannot avoid a review of whether their measures are in accordance with the Treaties.¹⁴⁹ Thereby, an obligation of the institutions in the context of values was established.

The CJEU often focuses on the obligations of Article 2 TEU in the context of Member State action.¹⁵⁰ Furthermore, it is argued in the literature that the CJEU does not apply Article 2 TEU against the institutions nor does the CJEU show an interest in conferring “an internal meaning” on Article 2 TEU.¹⁵¹ Taking this standpoint in literature into account, there are a few comments to be made with regard to the understanding of the obligations explained above.

While it might be true that the CJEU has not yet applied Article 2 TEU towards the institutions in a case, that does not necessarily imply that it is not possible. Several scholars argue that the obligations stemming from Article 2 TEU are equally applicable towards the institutions suggesting that the “internal” dimension is already present.¹⁵²

¹⁴⁴ Ibid.

¹⁴⁵ Klamert and Kochenov para 10.

¹⁴⁶ Mangiameli paras 53–54.

¹⁴⁷ Sommermann para 85.

¹⁴⁸ Case C-2/88 *IMM J.J Zwartveld and Others* [1990] EU:C:1990:440, para 10.

¹⁴⁹ C-294/83 *Les Verts* para 23.

¹⁵⁰ Nettesheim p. 170.

¹⁵¹ Ibid.

¹⁵² Cf. Geiger para 10; Klamert and Kochenov para 10.

The values of Article 2 TEU are called founding values, thereby suggesting that the institutions that constitute a part of the Union cannot take action in a way that directly violates the values they are founded on.¹⁵³ Riedl expresses no doubt regarding the application of Article 2 TEU towards the institutions and argues that such an application would improve institutional accountability and the legitimacy of the actions of the CJEU relating to Article 2 TEU.¹⁵⁴

It has also been put forth that the provisions applicable when the EU is acting externally require the respect of the values in Article 2 TEU. Article 8 TEU, Article 21(2)(2) TEU, Article 32 TEU and Article 42(5) TEU relate to the obligations of the external dimension of the EU and create external and internal obligations of Article 2 TEU applicable when the EU legislates or acts.¹⁵⁵

Most scholars seem to agree that Article 2 TEU does entail obligations for the EU and its institutions and not solely the Member States. As a matter of fact, the CJEU established for the first time in case law, in *Commission v Hungary*, that the binding obligations deriving from Article 2 TEU apply to the Member States and the EU institutions.¹⁵⁶

However, as has been mentioned already, the crux with Article 2 TEU tends to be the question of justiciability, operationalization and enforcement rather than establishing its meaning and content.¹⁵⁷ Consequently, it is important to separate the existence of obligations and the question of the possibility of enforcing the obligations. The question of enforcement of the obligations imposed on the institutions will be returned to in Chapter 4 and 5.

2.4 Conclusions

Firstly, this chapter explored how Article 2 TEU emerged as a Treaty provision. While it was not until the adoption of the Lisbon Treaty in 2007 that it got its current formulation, it is evident that the vision and aspiration to form a Union based on the values have been present for much longer and developed over decades.

Secondly, the chapter provided an examination of the most significant developments concerning the interpretation of Article 2 TEU by the CJEU. *Portuguese Judges* marked a turning point in the interpretation of Article 2 TEU since the CJEU connected Article 19(1) TEU with Article 2 TEU and thereby opened the door to judicial applicability of Article 2 TEU. It also

¹⁵³ Boeckestein p. 436.

¹⁵⁴ Riedl (a).

¹⁵⁵ Opinion of Advocate General in C-769/22 paras 171–172.

¹⁵⁶ C-769/22 *Commission v Hungary* para 536.

¹⁵⁷ Spieker (a) pp. 1186, 1199–1202; Cf. Opinion of Advocate General in C-769/22 para 152.

contributed to the broadening of the scope of EU law and resulted in newly gained attention to the role of Article 2 TEU.

Repubblika served as a continuation of *Portuguese Judges* and underlined the importance of compliance with the values of Article 2 TEU as the principle of non-regression was introduced. Consequently, *Repubblika* strengthened Article 2 TEU and its position and relevance. As mentioned, the enforcement of Article 2 TEU had been unclear in the literature. However, as a step forward on this matter, the CJEU established in its *Conditionality Judgments* that the invocation of Article 2 TEU was not limited to the procedure involving Article 7 TEU. In other words, such a mechanism did not circumvent the Article 7 TEU procedure. More importantly, the CJEU declared that the values of Article 2 TEU were legally binding obligations that Member States could not disregard. By introducing a link between solidarity and the rule of law supported by the principle of mutual trust, the role of Article 2 TEU was further advanced. The CJEU thereby elevated the constitutional status of Article 2 TEU.¹⁵⁸

Commission v Malta may be the most groundbreaking case of them all when it comes to the interpretation of Article 2 TEU by the CJEU. The CJEU referred to the values of democracy and solidarity in Article 2 TEU and declared that the disregarding of solidarity and good faith constituted a violation of mutual trust, Article 4(3) TEU and Article 20 TFEU. This interpretation broadened the scope of Article 2 TEU almost to an extreme, because the CJEU found competence to act within the area of citizenship which is generally a competence attributed exclusively to the Member States. The judgment resulted in intense academic discussions as well as criticism and left many questions unanswered. The most recent development is the case of *Commission v Hungary* where the Commission opened the door to a self-standing application of Article 2 TEU and the CJEU declared the plea well-founded.¹⁵⁹

Finally, following the judgment of *Commission v Hungary*, the CJEU found that the values in Article 2 TEU constitute legally binding obligations for the institutions as well, even though the article has not yet been applied towards the institutions.¹⁶⁰

¹⁵⁸ Groussot and Zemskova (b) p. 44.

¹⁵⁹ C-769/22 *Commission v Hungary* para 564.

¹⁶⁰ Cf. *Ibid.*, para 536.

3 Article 2 TEU as a “self-standing” provision

The following chapter provides a detailed examination of the legal argumentation surrounding the most recent development on Article 2 TEU, where the Commission in the case of *Commission v Hungary*, unprecedentedly, argued that a Member State’s national legislation infringed the founding values of Article 2 TEU per se.¹⁶¹ The chapter examines the Opinion of Advocate General Ćapeta and presents the arguments raised in literature that support and challenge a self-standing interpretation of Article 2 TEU. The purpose of this chapter is to draw conclusions on the second sub-question of the thesis.

3.1 Commission v Hungary

The factual circumstances of *Commission v Hungary* have already been touched upon in Section 2.2.5 and before the delivery of the judgment, it was anticipated that the case would have a crucial role in the context of the interpretation of Article 2 TEU. The contesting Member State Hungary, firmly denied the legal possibility of an interpretation of Article 2 TEU as a self-standing plea.¹⁶² The Commission was supported by the European Parliament and 16 intervening Member States, which clearly underlined the importance and relevance of the case.¹⁶³

The case raised many questions on justiciability of Article 2 TEU and particularly surrounding to what extent the article could be enforced before the CJEU.¹⁶⁴ If and how should such an enforcement be limited and how would such an interpretation of Article 2 TEU affect the scope of EU law and the division of competences?¹⁶⁵ *Commission v Hungary* was said to provide the CJEU with the possibility to address direct and autonomous enforceability of Article 2 TEU, but as will be discussed below – it is a “controversial legal construction”.¹⁶⁶ Even if the CJEU eventually found a separate breach of Article 2 TEU, the CJEU still left a few questioned unanswered.¹⁶⁷

3.1.1 Opinion of Advocate General Ćapeta

The Opinion of Advocate General Ćapeta was delivered on 5 June 2025. In her Opinion, she found that Hungary had infringed Article 2 TEU in

¹⁶¹ Cf. Opinion of Advocate General in C-769/22 para 142.

¹⁶² Ibid., para 143.

¹⁶³ Okunrobo; Bonelli and Claes (b); Cf. Opinion of Advocate General in C-769/22 para 38.

¹⁶⁴ Kaiser, Knecht, Spieker.

¹⁶⁵ Ibid.

¹⁶⁶ Bonelli and Claes (b) p. 4.

¹⁶⁷ Cf. Van den Brink (b).

accordance with the plea of the Commission and introduced certain conditions that enabled the finding of a breach of the article.¹⁶⁸

3.1.1.1 *Infringement and justiciability of Article 2 TEU*

First and foremost, Advocate General Ćapeta established that the plea raised by the Commission was within the scope of EU law.¹⁶⁹ The discussion on whether Article 2 TEU is a provision with entirely autonomous and general enforceability was thereby avoided.¹⁷⁰ According to Advocate General, it was not necessary to examine the direct or interpretive effect of Article 2 TEU since such questions were not raised by the circumstances of the case.¹⁷¹

Advocate General commenced with a discussion on the justiciability of Article 2 TEU and stated that the term should be understood as the ability to adjudicate a case.¹⁷² In this context, it entailed judicial review of the Hungarian legislation within the frame of an infringement procedure.¹⁷³

To address the question of justiciability, the Advocate General placed Article 2 TEU at the core of the constitutional identity of the EU and as a central provision for the functioning of the EU legal order.¹⁷⁴ Since Article 2 TEU gives expression to the choice of creating a Union based on certain values, the values in the article construct the identity of the EU. As a result, the EU cannot be the Union it was envisaged to be, if the founding values are not respected.¹⁷⁵ The Advocate General underlined that the “society” referred to in Article 2 TEU is a society characterized by the values of a constitutional democracy that respects human rights.¹⁷⁶ As the EU legal order consists of legislation approved on Member State and EU level, it is crucial that the common values are respected on both levels, since the two dimensions are dependent on one another.¹⁷⁷ For these reasons, the respect for the founding values in Article 2 TEU is to be considered the “political and practical” condition for the entire existence of the EU legal order.¹⁷⁸

Advocate General Ćapeta continued to build on what was established in the *Conditionality Judgments* and examined the question of Article 2 TEU as a legally binding provision.¹⁷⁹ The Advocate General along with the Parliament and the intervening Member States interpreted Article 2 TEU as the *source*

¹⁶⁸ Opinion of Advocate General in C-769/22 paras 149, 264.

¹⁶⁹ Ibid., para 144.

¹⁷⁰ Ibid., para 144.

¹⁷¹ Ibid., para 153.

¹⁷² Ibid., para 150.

¹⁷³ Ibid., para 152.

¹⁷⁴ Ibid., paras 155–163.

¹⁷⁵ Ibid., paras 155, 158.

¹⁷⁶ Ibid., para 157.

¹⁷⁷ Ibid., para 160.

¹⁷⁸ Ibid., para 163.

¹⁷⁹ Cf. Ibid., para 164.

of the legal obligation whereas Hungary argued that the obligations do not stem from the article itself but required to be concretized by other legal principles.¹⁸⁰ The fact that Article 2 TEU is a part of the Treaty and not the preamble supports the argument that it is intended to create legal obligations. Additionally, the Treaties reference to Article 2 TEU on several occasions with the objective of conferring obligations.¹⁸¹ Article 7 TEU is a separate provision with the purpose of enabling the sanctioning of a Member State that breaches Article 2 TEU, which could also function as an argument that Article 2 TEU itself confers legal obligations.¹⁸² Advocate General Ćapeta called attention to the principle of non-regression established in *Repubblika* and recommended the CJEU to confirm that the principle can be applied to all of the founding values of Article 2 TEU.¹⁸³

As reasons for justiciability, Advocate General reiterated that it is the role of the CJEU to ensure interpretation and application of the Treaties pursuant to Article 19(1) TEU.¹⁸⁴ When the CJEU performs its duties in infringement proceedings it must be able to decide whether Article 2 TEU, with its standing as a legal obligation, has been infringed.¹⁸⁵ Advocate General neglected the argument that Article 7 TEU is the only existing provision that could be used to confirm a breach of Article 2 TEU, which Hungary referred to an argument against justiciability.¹⁸⁶ While it remained true that the content of the values in Article 2 TEU was not defined in detail or determined, that did not create an obstacle in terms of interpretation.¹⁸⁷ In this particular case, the Hungarian legislation was infringing several fundamental rights presented in the CFR that were giving concrete expression to values in Article 2 TEU, such as human dignity, equality and the respect for human rights.¹⁸⁸

When it comes to the argument of Article 2 TEU as a self-standing plea, it is argued that the question of the legitimacy of the CJEU is always present.¹⁸⁹ The content of Article 2 TEU could be viewed as sensitive but in the end of the day, the CJEU must be able to decide on matters that are political and legal.¹⁹⁰ In this context, Advocate General underlined that the CJEU is in fact a constitutional court with the constitutional task to defend the constitutional democracy of the EU expressed in Article 2 TEU. Such action was therefore not a political choice.¹⁹¹ It is well-established that the EU is required to respect the national identity of each Member State, as stated in Article 4(2)

¹⁸⁰ Ibid., paras 165–166.

¹⁸¹ Ibid., paras 167, 171, 172; Cf. Section 2.3.

¹⁸² Ibid., para 173.

¹⁸³ Ibid., paras 181–183.

¹⁸⁴ Ibid., para 189.

¹⁸⁵ Ibid., paras 190–195.

¹⁸⁶ Ibid., paras 196–200.

¹⁸⁷ Ibid., paras 201–209.

¹⁸⁸ Ibid., para 213.

¹⁸⁹ Cf. Groussot and Valera pp. 592, 594.

¹⁹⁰ Opinion of Advocate General in C-769/22 paras 214–215.

¹⁹¹ Ibid.

TEU.¹⁹² With this being said, national constitutional provisions cannot overstep or disregard the common values and the common constitutional model that Article 2 TEU creates. Advocate General Ćapeta argued that Article 2 TEU included certain “red lines” for Member States and that a variety of national identities can exist if they do not cross these “red lines”.¹⁹³

3.1.1.2 *The purpose of an infringement of Article 2 TEU*

On one hand, finding a breach of Article 2 TEU in an infringement procedure does not result in any other obligations for a Member State compared to an infringement of any other article.¹⁹⁴ On the other hand, the additional examination of fundamental rights could signal the “particular significance and nature” of the infringement.¹⁹⁵ Therefore, an infringement of Article 2 TEU serves a “symbolic and diagnostic” purpose and as an indicator that violations of other EU provisions can be traced back to the infringement of the constitutional values of the EU pursuant to Article 2 TEU.¹⁹⁶ By infringing Article 2 TEU, a Member State would have crossed the “red lines” that Article 2 TEU is imposing.¹⁹⁷

3.1.1.3 *The assessment of “red lines”*

One of the central parts of the Opinion was the reasoning on how the assessment of “red lines” should be carried out and what exactly marked the crossing of such lines. It could be argued, as the Commission implied, that particularly serious, numerous and coordinated infringements activated a self-standing breach of Article 2 TEU.¹⁹⁸ However, the Advocate General centered her reasoning around the “negation of values” as the basis for finding an infringement instead of focusing on the quantity or seriousness.¹⁹⁹ In fact, the negation of values could occur when a breach of Article 2 TEU is the *root cause* of other present infringements.²⁰⁰ The entire legal order of the EU is affected when Member States depart from respecting the founding values which served as a justification for the intervention of the CJEU.²⁰¹ Even though an assessment needs to be done by taking the specific circumstances of each case into consideration, the main criterion for finding a breach of Article 2 TEU in the view of Advocate General Ćapeta was whether the negation of values which serves as the root cause of other infringements, had taken place.²⁰²

¹⁹² Cf. Ibid., para 219.

¹⁹³ Ibid., paras 220–224.

¹⁹⁴ Ibid., paras 226–227.

¹⁹⁵ Ibid., para 228.

¹⁹⁶ Ibid., paras 230–233.

¹⁹⁷ Ibid.

¹⁹⁸ Ibid., para 235.

¹⁹⁹ Ibid., paras 237–240.

²⁰⁰ Ibid., para 241.

²⁰¹ Ibid., para 242.

²⁰² Ibid., para. 247.

However, she underscored that not all breaches of fundamental rights constitute the negation of values, since different interpretations and perceptions of the content of values are a part of the constant constitutional dialogue. The negation of values would be more profound and takes place when, for example, a right enshrined in the CFR is breached because a Member State has negated the value that the specific right concretizes.²⁰³

3.1.1.4 *The finding of an infringement of Article 2 TEU*

It was the negation of equality of LGBTIQ+ persons that was the root cause of the infringements, which does not fall within the frame of the constitutional dialogue as referred to above.²⁰⁴ Instead, it constituted a “red line” as imposed by Article 2 TEU and specifically by the values of equality, human dignity and the respect for human rights.²⁰⁵ As Advocate General concluded that Hungary infringed Article 2 TEU, she noted the importance of not forgetting why the EU introduced the values of Article 2 TEU in the first place and why it is crucial to reaffirm and protect the values.²⁰⁶

3.2 The aftermath of the Opinion

An important point when discussing Article 2 TEU as self-standing is to provide a definition of “self-standing”. In her Opinion, Advocate General Ćapeta defined “self-standing” as a breach of Article 2 TEU that fell *within* the scope of EU law, whereas an “autonomous infringement” would entail a breach outside the scope of EU law and independent of other EU law breaches.²⁰⁷ As already touched upon, the case of an autonomous application of Article 2 TEU did not arise in *Commission v Hungary* in her view but has been discussed in literature. This section briefly presents an overview of the immediate scholarly reaction to the Advocate General’s Opinion, before providing a comprehensive analysis of Article 2 TEU as an independent legal basis.

As shown in recent case law of the CJEU, there is a growing acceptance of using Article 2 TEU as the legal basis and placing it at the very center of the constitutional order of the EU.²⁰⁸ One obvious argument raised by scholars against the interpretation of Article 2 TEU as interpreted in the Opinion, is that the article has so far only been invoked in conjunction with other Treaty articles and CFR provisions which might indicate that it should not be invoked independently.²⁰⁹

²⁰³ Ibid., paras 248–254.

²⁰⁴ Ibid., paras 258–263.

²⁰⁵ Ibid., para 262.

²⁰⁶ Ibid., paras 267–275.

²⁰⁷ Ibid., paras 32–33.

²⁰⁸ Cf. Chapter 2; Athanasiou (b).

²⁰⁹ Athanasiou (b).

In order to come to her conclusions, Advocate General based a part of her reasoning on the vision of “a good society”, stating that the values in Article 2 TEU are what constitute the constitutional democracy that characterizes the EU.²¹⁰ On one hand, this interpretation has been welcomed in literature because the drawing on the vision on which the European society was founded strengthens and supports the use of Article 2 TEU as a self-standing provision.²¹¹ On the other hand, the reasoning has been questioned due the ethical aspect.²¹² According to Keiser, the weakness of Article 2 TEU has been its wording, where the term “values” implies that the article mainly represents an ethical dimension instead of legal force and justiciability.²¹³ Keiser argues that the reasoning of General Advocate might give fuel to critics who view Article 2 TEU as abstract without justiciability. She argues that this might be the case even though the CJEU has stated that Article 2 TEU has legal force. The definition of “good” can also be difficult to define and the assessment risks becoming selective and unpredictable.²¹⁴

At the same time, relating to the point of defining the values of Article 2 TEU, Okunrobo claims that it is not preferable to provide a detailed definition of each value since such action might undermine the respect for national identity and autonomy. However, definitions that allow the assessment of “red lines” under Article 2 TEU are welcomed, which might leave the CJEU with the rather difficult task to balance national autonomy with standards of respecting the values of Article 2 TEU.²¹⁵

Keiser also questions the criteria that the Advocate General suggests the CJEU to apply to declare a breach of Article 2 TEU. According to Keiser, the “negation” of values could function as a synonym to “violations” and lacks a more detailed criterion. Instead, it is proposed that the criteria applied to find a breach of Article 2 TEU is clearer and more consistent, which would enable an approach characterized by legal clarity and certainty.²¹⁶ Fitzpatrick presents an argument along the same lines and questions whether the CJEU will not be likely to encounter similar difficulties in defining what constitutes a “negation” of values and a “serious breach”.²¹⁷

3.3 The Judgment of *Commission v Hungary*

Even if it is possible to find both similarities and differences in the legal reasoning of the CJEU compared to the arguments presented by Advocate

²¹⁰ Athanasiou (b); Opinion of Advocate General in C-769/22 paras 157, 177.

²¹¹ Athanasiou (b).

²¹² Kaiser (a).

²¹³ Ibid.

²¹⁴ Ibid.

²¹⁵ Okunrobo.

²¹⁶ Ibid.

²¹⁷ Fitzpatrick pp. 5–7.

General Čapeta, the judgment was aligned with the Opinion to a large extent.²¹⁸

The CJEU has divided its judgment concerning the sixth plea into two parts and started commenting the binding force of Article 2 TEU before elaborating on the question of infringement of the obligations stemming from Article 2 TEU.

3.3.1 The binding nature of Article 2 TEU

Firstly, the CJEU proceeded to argue that the EU is based on its own constitutional framework and that the unique framework includes the founding values of Article 2 TEU.²¹⁹ It also reiterated that before a country becomes an EU Member State it has to meet the requirement of Article 49 TEU related to the respect for the values of Article 2 TEU, which is done “freely and voluntarily”.²²⁰ This aspect is similar to what was brought forward by the Advocate General.²²¹ The premise that every Member State share the common values that constitute the foundation of the EU, highlights the specific and essential characteristics of EU law and justifies the existence of mutual trust according to the CJEU.²²²

That a Member State respects the values of Article 2 TEU, is a condition which enables the enjoyment of all the rights that stem from the application of the Treaties by the particular Member State.²²³ In this context, the CJEU also brought up the principle of non-regression established in *Repubblika* and further stated that Member States are required to prevent all forms of such regression.²²⁴ On this note, the CJEU confirmed that the principle of non-regression encompasses all values of Article 2 TEU and not only the value of the rule of law.²²⁵ The CJEU also referred to the *Conditionality Judgments* and confirmed that the values of Article 2 TEU are a part of the core identity of the EU legal order and not just “policy guidelines or intentions”.²²⁶

While Article 1, 6, 7, 10, 11, 20, 21 and 23 of the CFR already give concrete expression to the values of human dignity, liberty, equality, respect for human rights, non-discrimination and equality between women and men enshrined in Article 2 TEU, it cannot be understood as an argument that would undermine the binding nature of Article 2 TEU.²²⁷ The CJEU also emphasized

²¹⁸ Van den Brink (b).

²¹⁹ C-769/22 *Commission v Hungary* para 520.

²²⁰ *Ibid.*, para 521.

²²¹ Cf. Section 3.1.1.

²²² *Ibid.*, para 522.

²²³ *Ibid.*, para 523.

²²⁴ *Ibid.*, para 524.

²²⁵ *Ibid.*; Cf Opinion of Advocate General in C-769/22 paras 181–183.

²²⁶ C-769/22 *Commission v Hungary* para 525.

²²⁷ *Ibid.*, paras 526–527.

the importance of interpreting Article 2 TEU in the light of its context and origin.²²⁸

By mentioning the purpose of Article 49 TEU and several EU provisions that expressly refer to the founding values, the CJEU found that they confirmed the legally binding character of Article 2 TEU in the EU legal order.²²⁹ According to the CJEU, the interpretation of Article 2 TEU as a binding provision is supported by the preparatory works of the same article.²³⁰

An important question concerning the interpretation of Article 2 TEU of relevance in this thesis is the obligations that the article entails in relation to the EU institutions. The CJEU clearly pronounced in *Commission v Hungary* that Article 2 TEU contains binding obligations for Member States and EU institutions.²³¹ This is an important point, since it was the first time that the CJEU expressed the institutional obligation of Article 2 TEU in a judgment.

The CJEU also relied on Article 19 TEU in its argumentation and concluded that the CJEU must be considered to have the competence to rule on matters involving Article 258 TFEU and alleged breaches of Article 2 TEU, since the judicial system was set up by the Treaties to ensure consistency and uniformity in the interpretation of EU law.²³² Article 7 TEU can therefore not function as the sole avenue to establish breaches of the founding values, which Hungary pleaded.²³³

3.3.2 Infringement of the obligations stemming from Article 2 TEU

Secondly, after confirming that Article 2 TEU has binding legal character, the CJEU dealt with the question of value breaches of Article 2 TEU.

The CJEU started by declaring that Article 2 TEU does impose binding obligations, but that the mere existence of a breach of an EU provision that gives “direct or indirect” expression to the binding obligations cannot be considered an infringement of Article 2 TEU itself.²³⁴ This reasoning was also similar to the argumentation of the Advocate General.²³⁵ According to the CJEU, such interpretation would go beyond the scope of EU law and limit the effectiveness of other EU provisions such as the CFR.²³⁶ The CJEU also mentioned that the mutual trust that exists between Member States is based on the acceptance of the values in Article 2 TEU, and that the EU in fact

²²⁸ Ibid., para 528.

²²⁹ Ibid., paras 533–534.

²³⁰ Ibid., para 535.

²³¹ Ibid., para 536.

²³² Ibid., paras 537–540.

²³³ Ibid., paras 541–543.

²³⁴ Ibid., paras 546–547.

²³⁵ Cf. Section 3.1.1.

²³⁶ Ibid., para 549.

brings together states that freely and voluntarily committed to the common values.²³⁷

The violation of multiple fundamental rights enshrined in the CFR which give expression to the founding values may however constitute a value breach.²³⁸ On this note, the CJEU explained that grave and manifest violations of one or more than one of the values common to the Member States could constitute a breach of Article 2 TEU and the very identity of the EU “as a common legal order of a society in which pluralism prevails”, within the frame of an infringement procedure.²³⁹ The specific conditions for finding an infringement of Article 2 TEU thereby stem from the scope of the provision and its imposing obligations.²⁴⁰

In its reasoning, the CJEU underlined the argument of the Advocate General and stated that the contested laws were discriminating and that there was a clear intent by Hungary to do so.²⁴¹ Consequently, the national law resulted in increased marginalization and stigmatization of a group in society and sought to reinforce the “invisibility” of members of society, which is contrary to the values of Article 2 TEU, notably the respect for human dignity, equality, respect for human rights which includes the rights of persons belonging to minorities.²⁴²

Contrary to the Opinion of the Advocate General, the CJEU found that the level of manifest and particular seriousness in this case were factors enabling the establishment of an infringement of Article 2 TEU. The law resulted in violations of rights, not at all reflecting the identity of the EU common legal order but in fact, contrary to the European society in which pluralism prevails.²⁴³

The conclusion could not be contested by invoking Article 4(2) TEU, because even if Member States have a margin of appreciation in the context of national identity, it must be conformant with the common values of Article 2 TEU.²⁴⁴ Since the Hungarian law disregarded the values of respect for human dignity, equality and the respect for human rights which includes the rights of persons belonging to minorities pursuant to Article 2 TEU, Hungary could not invoke Article 4(2) TEU.²⁴⁵

²³⁷ Ibid., para 549.

²³⁸ Ibid., para 548.

²³⁹ Ibid., para 551.

²⁴⁰ Ibid., para 552.

²⁴¹ Ibid., para 553.

²⁴² Ibid., paras 554–555.

²⁴³ Ibid., para 556.

²⁴⁴ C-769/22 *Commission v Hungary* paras 559–562.

²⁴⁵ Ibid., para 564.

3.4 A broader discussion on Article 2 TEU as a self-standing provision

In the following examination of the academic discussion of Article 2 TEU as a self-standing provision, it is important to note that the use of the term “self-standing” will not be fully consistent with the interpretation and terminology of Advocate General Ćapeta. For example, self-standing and stand-alone will be utilized interchangeably, but it will be evident by the context whether the discussion on Article 2 TEU concerns a situation within the scope of EU law or not. The reason behind this choice is that the scholarly discussion on the justiciability of Article 2 TEU started before the delivery of the Advocate General’s Opinion and the judgment of the CJEU.²⁴⁶

3.4.1 The scope, competence and legitimacy

One of the most brought up argument when discussing Article 2 TEU as a stand-alone provision is the implications that the interpretation would have on the scope of EU law.²⁴⁷ Needless to say, the scope of EU law is closely connected to and intertwined with the questions of competence and legitimacy, which makes it difficult to separate the discussion into different parts. However, for the sake of clarity and structure, the following analysis starts with the introduction to the discussion on the scope of EU law before continuing to build on the arguments of competence and legitimacy.

3.4.1.1 *The scope of EU law*

At the very start of the proceedings in *Commission v Hungary*, the Commission argued that Article 2 TEU could be applied independently and thereby extend the application of Article 2 TEU outside the scope of EU law.²⁴⁸ During the hearing, the Commission neglected this interpretation and clarified that the article could only come into question in situations covered by EU law.²⁴⁹ As explained in Section 3.1, Advocate Ćapeta declared that the circumstances of *Commission v Hungary* fell within the EU legal framework and did therefore not elaborate on the possibilities of Article 2 TEU to act as a legal basis outside the scope of EU law.²⁵⁰ As the CJEU already declared that Article 2 TEU in *Commission v Hungary* under certain circumstances can stand on its own, the implications of a stand-alone application of Article 2 TEU have been raised frequently leading up to the delivery of the judgment. Therefore, they cannot be excluded from the discussion.

Scholars have argued that a self-standing Article 2 TEU could entail that the values included in the article could be enforced at all times even outside the

²⁴⁶ Cf. Kaiser (a).

²⁴⁷ Cf. Bonelli and Claes (b) p. 12; Cf. Groussot and Valera pp. 586–587; Cf. Rossi p. 23.

²⁴⁸ Riedl (a).

²⁴⁹ Ibid.

²⁵⁰ Cf. Section 3.1.

scope of EU law.²⁵¹ Without the legal technical necessity to connect Article 2 TEU to other EU law provisions, the action of a Member State can consequently be found to breach Article 2 TEU without it being associated with additional EU law. In practice, the CJEU would broaden the scope of EU law to such an extent that Groussot and Valera raise the question of whether the scope of EU law eventually metamorphoses into unlimited.²⁵² While the CJEU clearly acts within the scope of EU law, the scope of which the institution can act within would expand with a self-standing application of Article 2 TEU.²⁵³

Naturally, such an extension may result in challenges for the Member States in assessing whether a national measure will fall within the scope of EU law or not, which affects the legal certainty and the rule of law. For example, in *Commission v Malta*, the CJEU placed citizenship under the scope of Article 2 TEU even though citizenship is generally an area of law belonging to the national competence of Member States.²⁵⁴

It is clear that Article 2 TEU seems to be declared justiciable and binding if connected to other provisions of the EU legal framework.²⁵⁵ Such an application of Article 2 TEU would not result in a self-standing Article 2 TEU, but would operationalize the article in a way that extends the scope of EU law under more supervised conditions with emphasis on legal certainty.²⁵⁶ To add to this argument, several scholars highlight that a case where a breach of Article 2 TEU is found will almost exclusively include other infringements of EU law.²⁵⁷ For example, Rossi argues that serious, persistent and systematic breaches of the values of Article 2 TEU will practically always be connected to other provisions of EU legislation.²⁵⁸ For example, those were the circumstances in *Commission v Hungary*. In order to give the reader an example involving a breach of Article 2 TEU outside the scope of EU law, Rossi mentions the situation where a Member State severely diverges from the democratic system and hinders electoral procedures.²⁵⁹ That leads the discussion to another argument that may be presented in favor of invoking Article 2 TEU as a self-standing provision. Given that a Member State's national legislation risks breaching the values of Article 2 TEU as seen in Hungary and Poland, but that the legislation does not have a connection to EU law, it becomes a difficult situation.²⁶⁰ Evidently, there is an interest to

²⁵¹ Groussot and Valera p. 586.

²⁵² Ibid.

²⁵³ Groussot and Valera pp. 590–591.

²⁵⁴ Cf. Section 2.2.4.

²⁵⁵ Okunrobo.

²⁵⁶ Ibid.

²⁵⁷ Cf. Rossi p. 23.

²⁵⁸ Ibid.

²⁵⁹ Rossi p. 23.

²⁶⁰ Spieker (a) pp. 1182–1183, 1186.

address this situation on EU level, since the national legislation would go against the entire EU acquis which the Member States voluntarily joined.²⁶¹

According to Riedl, it is not Article 2 TEU itself that creates legal obligations but must always be viewed in the light of Article 5(2) TEU, since the latter confers competence and lays down the scope of EU law. Therefore, Article 2 TEU cannot be invoked without reference to other specific provisions that impose legal obligations.²⁶² An interpretation where Article 2 TEU independently creates legal obligations would be an overstep of EU competences which could result in institutional imbalance and questioning of the democratic legitimacy.²⁶³ Once again it is relevant to turn to *Commission v Malta* because, as mentioned above, the CJEU decided to disregard the question of competence and did not connect its reasoning to the limitations of competence.²⁶⁴ As a result, even though the argument of competence requirement might come across as reasonable from a legal standpoint in the light of a possible self-standing Article 2 TEU, it might have lost its relevance due to the judgment of *Commission v Malta*.²⁶⁵

3.4.1.2 Competence and legitimacy

Scholars have also argued that the values included in Article 2 TEU could always be enforced if it has capacity to stand on its own, as mentioned in the section above. Anyhow, the extended jurisdiction that such an interpretation would result in, risks to ultimately harm the legitimacy of the CJEU.²⁶⁶

The constitutional pluralism is central in the EU legal order which of course includes the respect for national identities.²⁶⁷ In the case of the *Commission v Malta*, the CJEU extended the scope of EU law which resulted in, what can be interpreted as, a possible overreach of EU competences.²⁶⁸ Applying Article 2 TEU as a self-standing provision could entail a similar expansion of oversight by the EU, which has implications for the autonomy of Member States.²⁶⁹ A direct consequence of such application will be that Article 2 TEU is applied in situations which primarily falls within the competence area of Member States.²⁷⁰ If the CJEU is perceived as acting beyond its competence without a legitimate legal basis, the authority of the CJEU might be challenged to a greater extent than it already is in certain Member States.²⁷¹

²⁶¹ Ibid.

²⁶² Riedl (a).

²⁶³ Ibid.

²⁶⁴ Groussot and Valera pp. 591–592.

²⁶⁵ Ibid.

²⁶⁶ Groussot and Valera pp. 587.

²⁶⁷ Kaiser (b).

²⁶⁸ Cf. Section 2.2.4.

²⁶⁹ Bonelli and Claes (b) p. 4.

²⁷⁰ Kaiser (b).

²⁷¹ Bonelli and Claes (b) p. 12.

The argument of weakened legitimacy as a consequence of a broadened scope of EU law is supported by several scholars.²⁷²

What the CJEU may have tried to do in its judgments where Article 2 TEU is interpreted more extensively, is to safeguard and protect the respect for the founding values and thereby create a legitimate EU that enforces its values in practice.²⁷³ According to Boeckestein, this effort might appear to have the opposite effect in terms of legitimacy, as the arguments above also have demonstrated.²⁷⁴

3.4.2 A necessity to fulfill the purpose of the Treaties?

Since the Member States made the choice to commit to the values of Article 2 TEU, justiciability of Article 2 TEU can be understood as necessary in order to fulfill the underlying purpose of the Treaties.²⁷⁵ This precise argument was relied on by the CJEU in its judgment of *Commission v Hungary* and made it possible for the CJEU to come to its conclusions.²⁷⁶ According to Article 258 TFEU, the CJEU has the power to decide on matters of infringement by Member States and this shall also include an alleged infringement of Article 2 TEU.²⁷⁷ The landmark cases of *Van Gend En Loos* and *Costa v ENEL* came to be because the common promise of a common market established in the Treaty of Rome needed to be ensured and fulfilled.²⁷⁸ It can be argued that the case of *Commission v Hungary* is another such case with fundamental importance, where the CJEU had the possibility to deliver a judgment with implications similar to *Van Gend En Loos* and *Costa v ENEL* to fulfil the objectives of the Treaty of Lisbon relating to Article 2 TEU.²⁷⁹ However, as occurred in the recently mentioned landmark cases, the transformation could not be done without rearranging the constitutional sphere or dimension of EU law.²⁸⁰

Since the values of Article 2 TEU stem from the common traditions of the Member States and that they by choice have decided to accept the values, it can be argued that the enforceability in practice should be welcomed.²⁸¹ It has also been noted that such enforceability can strengthen the legitimacy of the EU because it demonstrates a commitment to the values.²⁸²

²⁷² Cf. Okunrbo.

²⁷³ Boeckestein p. 439.

²⁷⁴ Ibid.

²⁷⁵ Barley and Weinzierl.

²⁷⁶ Cf. C-769/22 *Commission v Hungary* paras 529–535.

²⁷⁷ Barley and Weinzierl.

²⁷⁸ Cf. C-769/22 *Commission v Hungary* paras 529–535.

²⁷⁹ Barley and Weinzierl.

²⁸⁰ Ibid.

²⁸¹ Ibid.

²⁸² Boeckestein pp. 435–436.

²⁸³ Ibid.

Historically, the CJEU has been seen as one of the most suitable institutions to handle situations of crisis because of its ability to “depoliticize” conflicts and offer a legal solution.²⁸³ But as of today, as the EU is facing more challenges connected to the values of Article 2 TEU, the CJEU is criticized for politicization.²⁸⁴ The over-constitutionalization and judicial activism are points that have been raised in this context.²⁸⁵ It also becomes increasingly difficult when the cases have political character.²⁸⁶

In the context of climate change litigation and the role of the CJEU, Garben notes that the activist judiciary could be described as a court with the objective to interpret the law “beyond the legal texts” in order to advance its own status.²⁸⁷ The deferential court in turn, puts a strong focus on the textual expression of the law in its interpretation.²⁸⁸ She continues to argue that the so-called activist court is generally associated with critique, but then changes the perspective and adds that a deferential court could also be perceived as illegitimate for not acting when it concerns fundamental rights and upholding of democracy.²⁸⁹ Hence, an active judiciary might be legitimate when the objective is to enforce fundamental rights and achieve democracy, with the purpose of counterbalancing democracy deficits.²⁹⁰ As have been showcased in Section 2.4, there are legal obligations imposed on the institutions by Article 2 TEU and the CJEU is an EU institution. Could this imply that there is an obligation for the CJEU to have a more active approach within the field of fundamental rights, in the name of achieving democracy?

3.4.3 The added value and the role of Article 7 TEU

Regarding cases that can be seen as “attacks” towards the entire system of EU values and Article 2 TEU, it has been argued that a separate *reference* to Article 2 TEU is necessary. Rossi introduces a “flanked” application of Article 2 TEU which can be understood as a middle ground. Article 2 TEU is clearly breached and cannot be removed from the equation, but the other breaches of primary and secondary law are crucial in the case of *Commission v Hungary*, because those breaches make it possible to observe how Hungary’s strategy targets a vulnerable group in society. Consequently, the Hungarian legislation as a strategy, challenges the values of Article 2 TEU themselves. For this reason, it has been argued that Article 2 TEU is not dependent on other provisions to give concrete value to Article 2 TEU but can stand autonomously *flanked* by other provisions.²⁹¹ In other words, this

²⁸³ Spieker (a) p. 1185.

²⁸⁴ Nettesheim pp. 167–168.

²⁸⁵ Boeckstein p. 439.

²⁸⁶ Cf. Van den Brink (b).

²⁸⁷ Garben p. 263.

²⁸⁸ Ibid.

²⁸⁹ Ibid., pp. 263–264.

²⁹⁰ Ibid, pp. 264, 267–268.

²⁹¹ Rossi p. 22.

would mean that Article 2 TEU is independently justiciable, if other breaches of EU law exist.²⁹²

So far, different interpretations of Article 2 TEU have been presented, but one similar aspect seems to be that Article 2 TEU, in practice, is always accompanied with other provisions of EU law. This does not only refer to the scholars arguing that Article 2 TEU *needs* to be invoked in conjunction with other provisions of EU law, but also to the reality that Article 2 TEU is often actualized in company with additional EU law. Building on this argument, it might not appear entirely clear why it would be a legal necessity to invoke Article 2 TEU on its own.²⁹³ This analysis takes on a broader approach than just the specific circumstances of the case *Commission v Hungary* as initially mentioned, but the case is of course central. The case included an extensive number of alleged breaches of EU law, and it has been questioned whether the separate plea of Article 2 TEU really added any legal benefits.²⁹⁴

Riedl argues that the only situation where Article 2 TEU can be enforced on its own is in conjunction with the political process pursuant to Article 7 TEU, because that is what the Member States agreed on when drafting the Treaties.²⁹⁵ However, it is also quite evident that Article 7 TEU is almost impossible to invoke successfully and cannot remain the primary article to operationalize the values of Article 2 TEU.²⁹⁶ The reasoning implying that Article 7 TEU is the sole suitable article was rejected by the CJEU in the *Conditionality Judgments*, and confirmed once again by the CJEU in *Commission v Hungary*.²⁹⁷

In the *Conditionality Judgments* the CJEU also declared that it must be possible for the CJEU to defend the values because they constitute the identity of the EU, which was also confirmed in *Commission v Hungary*.²⁹⁸

3.5 Conclusions

Chapter 3 aimed to answer the question of which legal arguments that support and challenge a self-standing interpretation of Article 2 TEU. Evidently, that question also involves taking the implications of interpreting Article 2 TEU as a self-standing provision into account. The question has gained increased legal attention in the light of the case of *Commission v Hungary* and has been subject to a legal debate. Although the CJEU has already delivered its judgment in *Commission v Hungary* where it established that Article 2 TEU

²⁹² Ibid., p. 23.

²⁹³ Bonelli and Claes (b) p. 10.

²⁹⁴ Ibid.

²⁹⁵ Riedl (a).

²⁹⁶ Scheppele, Kochenov, Grabowska-Moroz pp. 9–10.

²⁹⁷ C-769/22 *Commission v Hungary* paras 541–543.

²⁹⁸ Cf. Section 2.2.3.2; Scheppele, Kochenov, Grabowska-Moroz p. 22; C-769/22 *Commission v Hungary* para 499.

is justiciable and can be invoked per se, the judgment must still be seen in the context of the scholarly debate.²⁹⁹

To provide a clear and structured answer to the question, the chapter commenced with a detailed review of the Opinion of Advocate General Ćapeta, followed by its immediate scholarly reaction and an examination of the recently delivered judgment.

By dividing the analysis into sections based on the most discussed arguments raised in literature, certain conclusions can be made. The arguments have centered around the scope of EU law connected to competence and legitimacy, the need to fulfil the purpose of the Treaties, the added value of a self-standing Article 2 TEU and the role of Article 7 TEU which is frequently brought up in the context of Article 2 TEU. Even though the argument concerning competence is generally brought forward as a strong argument against the legal possibility of finding a violation of Article 2 TEU per se, the CJEU and the Advocate General did not attach much importance to it. As seen in *Commission v Malta*, the CJEU seems to have “detached” the competence requirement from Article 2 TEU and there is no reasoning on Article 5(2) TEU in the judgment.

In the words of the expression that all roads lead to Rome, Rome in this context is the question of legitimacy. On one hand, the EU and the CJEU risk damaging its legitimacy when allowing a self-standing application of Article 2 TEU, because it broadens the scope of EU law. On the other hand, it can be argued that such interpretation is necessary to fulfil and uphold the true purpose of the Treaties, which is of course a crucial interest and even an obligation.

After the judgment of *Commission v Hungary*, the debate on whether Article 2 TEU could be invoked as a self-standing plea was settled. However, there are still remaining questions connected to legitimacy and legal certainty.³⁰⁰ Firstly, the CJEU acknowledged that there was a limit to Article 2 TEU and that it cannot be interpreted in a manner that would risk undermining the effectiveness other provisions of EU law.³⁰¹ What this entails in the context of scope of EU law is not entirely clear. Secondly, the introduced the criteria for determining a breach of Article 2 TEU requires a violation of one or more of the founding values in a “manifest and particularly serious manner”.³⁰² In *Commission v Hungary* it was the obvious intent of the Hungarian legislation to marginalize, stigmatize, discriminate and exclude a certain group from the society that constituted the breach and thereby fulfilled the criteria.³⁰³ The

²⁹⁹ Van den Brink (b).

³⁰⁰ Ibid.

³⁰¹ C-769/22 *Commission v Hungary* paras 547, 550.

³⁰² C-769/22 *Commission v Hungary* para 551.

³⁰³ C-769/22 *Commission v Hungary* paras 553–556.

assessment will be in the hands of the CJEU and at this moment in time it is not clear what other circumstances that could meet the requirements of the introduced criteria.

4 Existing Treaty provisions on legality review and enforcement

So far, the thesis has examined the evolution of Article 2 TEU regarding its codification as a Treaty provision and development in case law.³⁰⁴ The importance and imprint of cases such as *Portuguese Judges*, *Repubblika*, the *Conditionality Judgments*, *Commission v Malta* and *Commission v Hungary* have been explored. Most of the case law involving Article 2 TEU concerns the actions of Member States and their obligations, but what is of most interest in this thesis is Article 2 TEU in relation to the actions of the institutions. Consequently, it has been established that Article 2 TEU imposes the same obligations on institutions and Member States. The question of justiciability in the context of Member State action is at the center of *Commission v Hungary* and was analyzed in Chapter 3 – but can similar reasoning be applied to the actions of the EU institutions themselves outside the frame of infringement proceedings?

The main research question of this thesis relates to what extent Article 2 TEU could be applied to find violations of the article by secondary legislative acts. Chapter 4 intends to answer the last sub-question, namely, what can be said about the means of enforcement of Article 2 TEU in relation to the institutions when they legislate.

4.1 The necessity of examining institutional accountability

As mentioned in the introductory chapter, the Treaty includes one article with the purpose of sanctioning a Member State that specifically breaches the values enshrined in Article 2 TEU, and that is Article 7 TEU. Firstly, the article has been proven difficult to apply effectively and secondly, it is invokable in situations that concern actions of a Member State.³⁰⁵ Nonetheless, it is interesting that the EU legal order contains the separate Article 7 TEU to manage situations of possible breaches of Article 2 TEU by Member States, but no specific corresponding provision when it comes to the institutions.³⁰⁶ The secondary legislation that has been criticized in the light of the values of Article 2 TEU will be further elaborated on in the following.

4.2 Examples of EU secondary legislation

EU secondary legislation is defined as the legislative acts that have been adopted in accordance with the ordinary legislative procedure in Article 294

³⁰⁴ Cf. Chapter 2.

³⁰⁵ Kochenov (a) paras 12–13, 22–23.

³⁰⁶ Wouters p. 261.

TFEU, stated by Article 289(1) TFEU read together with Article 289(3) TFEU.³⁰⁷

4.2.1 The EU Pact on Migration and Asylum

The Pact entered into force in 2024 and is set to be applied this year from 12 June.³⁰⁸ The Pact is extensive since it consists of ten different legal acts.³⁰⁹

Human rights organizations have raised concerns related to arbitrary detention, an increase in racial profiling and the so-called “return-hubs” in third countries, where individuals can be sent even when they have no prior connection to the country.³¹⁰ What constitutes a safe third country is not clearly defined in the Pact and could for example be a country that the EU has an external agreement with. It does not rule out that the individual will be sent to a country where the individual is facing torture, wrongful detention or even death.³¹¹

In terms of the practical implications that the Pact is expected to have in Sweden, the Swedish Refugee Law Center has identified that the system of placing people in detention, even children, actualizes certain rule of law guarantees that the Pact makes it difficult to utilize in practice.³¹² For example, the deadline of appeal of a decision is decided by the Member States but cannot accede 14 days. In practice, Member States can impose a shorter time limit which makes it difficult to collect all the necessary evidence.³¹³

The Pact aims to introduce fast and efficient procedures, but the short timelines complicate the possibility for asylum seekers to safeguard their rights. With limited legal aid, the system risks posing a threat to the right to effective judicial protection and a fair trial.³¹⁴ Consequently, as the obligations of asylum seekers increase, the possibility of sufficient legal aid remains limited.³¹⁵

The provisions of the Pact also place applicants in different procedures based on nationality, and if less than 20% of a certain nationality is usually not granted asylum, then that can complicate the possibility of being granted asylum.³¹⁶ It can be argued that the new system does not take the individual circumstances into consideration in a sufficient manner, which is problematic

³⁰⁷ Cf. Craig and de Búrca p. 114.

³⁰⁸ European Commission (b); Cf. Swedish Migration Agency.

³⁰⁹ Swedish Law Refugee Center.

³¹⁰ PICUM.

³¹¹ Civil Rights Defenders (a) pp. 16–17; Cf. Article 2 and 3 ECHR.

³¹² Digital Training Session, Swedish Refugee Law Center; Cf. Article 6 CFR, Article 5 ECHR and Article 47 CFR.

³¹³ ECRE pp. 44–45.

³¹⁴ Civil Rights Defenders (a) pp. 15–16.

³¹⁵ Digital Training Session, Swedish Refugee Law Center.

³¹⁶ Ibid.

from a rule of law perspective.³¹⁷ The extended digital surveillance has also been questioned from a fundamental rights perspective and may cause more data protection violations.³¹⁸

Since the Pact was issued by the Commission without a human rights impact assessment, it has been argued that the practice was contrary to the Interinstitutional Agreement on Better Law-Making and the Better Regulation Guidelines.³¹⁹ Civil Rights Defenders underlines that an assessment of compliance with several rights are necessary, for example the principle of non-refoulement, the prohibition of torture and human or degrading treatment, personal liberty, the rights of the child, effective remedy, private and family life as well as privacy and data protection and non-discrimination.³²⁰ The vague legislative wording of important legal terms and concepts and the limited grounds of appeal ultimately weaken the quality and substance of the legal procedures. This might not be consistent with the obligations of the founding values of Article 2 TEU that entail respect for human dignity, freedom, the rule of law, respect for human rights and for people belonging to minorities.

4.2.2 The Omnibus packages

The idea of the Omnibus packages started to form in 2024 with the purpose of simplifying EU legislation and create more clear, simple and smart legislation.³²¹ The Commission has introduced several Omnibus packages in different areas of law since the beginning of 2025.³²² Even though there seems to be a common understanding that there is a demand for simplification measures of EU law, many scholars argue that such simplification needs to be carried out with the utmost of caution.³²³ As will be demonstrated below, it can be argued that the Commission has not exercised such caution which has implications on to which extent the institution can be said to respect the founding values.³²⁴

4.2.2.1 *Omnibus I*

The Omnibus I package concerns measures connected to sustainability and involves simplification of legislation on due diligence obligations and sustainability reporting with the purpose of fostering competitiveness.³²⁵

Scholars put forward that the amendment proposals constitute a risk to the compliance of the rights pursuant to the CFR and would entail the

³¹⁷ Ibid.

³¹⁸ Civil Rights Defenders (b) p. 3.

³¹⁹ Civil Rights Defenders (b) p. 4

³²⁰ Ibid.

³²¹ European Council and Council of the European Union (a).

³²² European Council and Council of the European Union (b).

³²³ CEPS.

³²⁴ Cf. European Environmental Bureau.

³²⁵ European Council and Council of the European Union (b).

undermining of legal certainty and predictability.³²⁶ Evidently, this would have consequences related to the compliance with rule of law obligations imposed on the EU and would give rise to the lowering of the current fundamental rights protection.³²⁷

Several civil society organizations filed a complaint to the European Ombudsman stating that the Commission had not done a public consultation, an impact assessment or respected the Better Regulation Guidelines.³²⁸ The compliance of the obligations on human rights, climate change and on non-regression stemming from the ECHR, the CFR and the judgments of the International Court of Justice are also at risk.³²⁹ The law-making has been described as lacking evidence and is said to undermine the functioning of the EU and its democratic core.³³⁰

4.2.2.2 *Omnibus VII*

The seventh Omnibus package involves simplification measures on rules concerning data, artificial intelligence (AI) and cybersecurity.³³¹ The proposal received similar criticism for not including a fundamental rights impact assessment, without justification of the limitations.³³²

The digital laws within the EU framework are dependent on each other which means that the simplification of GDPR weakens the entire digital framework resulting in increased legal uncertainty.³³³ The Omnibus abolishes certain safeguards put in place to protect EU citizens and their rights connected to the use of AI, and reduces obligations for actors providing AI tools.³³⁴ It could lead to more personal data being available to train AI and it would become more difficult for individuals to claim their rights and regain the control of their data.³³⁵ The digital Omnibus put EU competitiveness and economic growth at the forefront at the expense of the protection of rights, which symbolizes a shift in priorities on EU level.³³⁶

The procedure or approach used to develop legislative proposals have an impact on the constitutional dimension of the EU because it sets the constitutional standard of how legislative proposals are produced.³³⁷ If it is accepted that the institutions systemically depart from the guidelines of law-

³²⁶ Open letter to Committee on Legal Affairs of the European Parliament.

³²⁷ Ibid.

³²⁸ Ouyang; Cf Better Regulation Guidelines SWD (2021)305 final.

³²⁹ Ibid.

³³⁰ Ouyang; CEPS.

³³¹ European Commission (a).

³³² Tech Policy Press.

³³³ Ibid.

³³⁴ Amnesty International, Joint Statement.

³³⁵ Hertie School, Jacques Delors Centre.

³³⁶ Maroni and Lindroos-Hovinheimo.

³³⁷ Alemanno.

making established by regulations, there is a risk that political interests harm the legality of the EU and its fundamental rights protection.³³⁸

4.2.3 The interinstitutional dimension

This section briefly intends to demonstrate that there have been discussions about the action of the institutions in relation to each other. As mentioned in the introductory chapter, there is currently a pending case before the CJEU where the Parliament seeks to annul a decision by the Commission.³³⁹ The background of the case is that the Commission suspended funding to Hungary in 2022 due to the Member State's failure to fulfill obligations of the CFR. In 2023, the Commission adopted a decision to release the funds to Hungary which made the Parliament initiate proceedings.³⁴⁰ The Parliament pleaded that the Commission had failed to carry out sufficient assessments of whether Hungary had satisfied the relevant conditions before adopting the decision of disbursement. The judgment of the CJEU is not yet available, but the Advocate General argues in favor for an annulment of the decision. The suspension of funds came about due to the rule of law concerns in Hungary and the justification of the lifting of the suspension is therefore crucial.³⁴¹ The Advocate General found that the Commission had not carried out the assessment needed, nor applied the applicable law in a correct way.³⁴²

In the context of actions of institutions and the respect for the values of Article 2 TEU, the alleged wrongful application or even non-application of the Better Law Regulation mentioned in the sections above on Omnibus, is relevant. In conclusion, there is an ongoing discussion on how the actions of the EU institutions reflect the values of Article 2 TEU both concerning interinstitutional matters and EU legislation. In the light of the recent case law of Article 2 TEU such as *Commission v Malta*, it can even be questioned to what extent the CJEU, as an institution, respect Article 2 TEU.

4.3 Legality review and enforcement provisions

In terms of enforcement avenues applicable in relation to the actions of institutions, the thesis will focus on Article 263 TFEU on legality review and the possibility of a preliminary ruling pursuant to Article 267(1)(b) TFEU.

4.3.1 Legality review

Article 263 TFEU states that the CJEU shall review the legality of legislative acts that an applicant might consider illegitimate on four different grounds. These grounds are that an act can lack competence, infringe an essential procedure requirement, infringe the Treaties or any rule of law and their

³³⁸ Ibid.

³³⁹ Case C-225/24 *Parliament v Commission* C/2024/3063.

³⁴⁰ Ibid.

³⁴¹ EU Law Live, AG Čapeta.

³⁴² CJEU Press release No 15/26.

application or the misuse of powers. The article gives different actors, different possibilities to start proceedings before the CJEU and are divided into the groups of the privileged, semi-privileged and non-privileged applicants.³⁴³

Article 263(2) TFEU lays down that the Member States, Parliament, Council and the Commission are privileged applicants and that the Court of Auditors, the European Central Bank and the Committee of the Region are semi-privileged pursuant to Article 263(3) TFEU.³⁴⁴ The non-privileged applicants are natural and legal persons and as demonstrated by the Treaty text, the threshold for instituting procedures is higher with more requirements to meet.³⁴⁵ According to Article 263(4) TFEU, the relevant act must either be addressed to the applicant and be of direct and individual concern, or be a regulatory act of direct concern that does not entail implementing measures.

The criterion of individual concern has been interpreted rather strict by the CJEU and it has to a large extent upheld the test laid down in *Plaumann & Co v Commission* from 1963.³⁴⁶ The CJEU declared that individual concern could only come about if the decision affects the applicant by reason of attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons and thereby distinguish them individually.³⁴⁷ As a result, the threshold for meeting the criteria is set so high that individuals face difficulties in doing so.³⁴⁸ The time limit criteria of two months also impose challenges. There is a discrepancy between the possibilities of admissibility for the Member States and institutions contra natural and legal persons under Article 263 TFEU.

The criteria of standing will not be placed at the center of the discussion, but need to be mentioned because other provisions complement Article 263 TFEU with the purpose of providing a complete system of legal remedies.³⁴⁹ However, to what extent the existing system creates a complete system of legal remedies has been questioned in literature and will be further discussed in the following section.³⁵⁰

³⁴³ Craig and de Búrca (a) pp. 544–545.

³⁴⁴ Schima (b) para 13.

³⁴⁵ Schima (b) paras 15–16.

³⁴⁶ Case C-25/62 *Plaumann & Co v Commission* [1963] EU:C:1963:17; Cf. Craig and de Búrca pp. 563–564.

³⁴⁷ C-25/62 *Plaumann* Grounds of Judgment on Admissibility.

³⁴⁸ Cf. Case C-565/19 P *Carvalho and Others v European Parliament and European Council* [2021] EU:C:2021:252; Case T-141/19 *Sabo and Others v European Parliament and Council of the European Union* [2020] EU:T:2020:179; Case C-297/20 P *Sabo and Others v European Parliament and Council of the European Union* [2021] EU:C:2021:24.

³⁴⁹ Cf. Case C-583/11 P. *Inuit Tapiriit Kanatami and Others v European Parliament and Council of the European Union* [2013] EU:C:2013:625, paras 92–94.

³⁵⁰ Cf. Craig and de Búrca p. 566.

4.3.2 Preliminary rulings on validity and interpretation of institutional acts

If Article 263 TFEU is considered as the direct measure to contest a legislative act, Article 267 TFEU can be regarded as the indirect course of action.³⁵¹ As briefly mentioned above, Article 267(1)(b) TFEU enables national courts or tribunals to ask the CJEU to judge the validity and interpretation of acts of the institutions. The acts of the institutions include all the acts mentioned in Article 288 TFEU and other atypical acts.³⁵² Actions by the CJEU such as judgments, opinions and orders are not capable of being subject to Article 267 TFEU proceedings, unless the question relates to interpretation of such actions.³⁵³

It is important to underline that Article 267 TFEU does not concern the legality of the legal act but the validity and interpretation. Hence, the national court is required to send a request to the CJEU in order for the act to be declared illegal.³⁵⁴ Even if Article 267 TFEU could serve as an option in situations where the standing criteria under Article 263 TFEU cannot be met, the requirement to refer the question of legality to the CJEU has been highlighted as a difficulty for the individual.³⁵⁵ If a national court of lower instance finds that an EU act might be invalid it is obligatory for the court to refer the question to the CJEU under Article 267 TFEU.³⁵⁶

Generally, it can be said that the assessment of validity in Article 267 TFEU is similar to the assessment in Article 263 TFEU.³⁵⁷ This means that a validity review can be made on the same legal grounds as in Article 263 TFEU.³⁵⁸ If an applicant is presumed to be granted locus standi in the Article 263 TFEU procedure, the CJEU is not likely to review the situation under Article 267 TFEU.³⁵⁹

In the context of judicial review, it is important to make a difference between the discretion given to the institutions compared to the Member States.³⁶⁰ The institutions are thereby granted larger discretion in defining their political motivation and their chosen course of action.³⁶¹

In *Commission v Hungary*, the CJEU found that Article 2 TEU under certain conditions can be invoked as a separate plea, which is a first in the history of

³⁵¹ Craig and de Búrca p. 564.

³⁵² Schima (a) paras 10–11.

³⁵³ Schima (a) para 12.

³⁵⁴ Craig and de Búrca p. 566.

³⁵⁵ Ibid.

³⁵⁶ Schima (a) para 33.

³⁵⁷ Ibid., para 18.

³⁵⁸ Craig and de Búrca p. 575.

³⁵⁹ Schima (a) paras 18–19.

³⁶⁰ Craig and de Búrca (a) p. 607.

³⁶¹ Ibid.

EU law.³⁶² The development of the interpretation of Article 2 TEU might open the door to unprecedented legal constructions such as the invocation of Article 2 TEU within the frame of an Article 267 TFEU procedure.

4.4 Conclusions

As the criticism and critique against recent actions of the institutions and its legislation have been voiced, the question of institutional accountability increases in relevance. The EU Pact on Migration and Asylum and the Omnibus packages are examples of secondary legislation that have been questioned in the light of the same values that can be found in Article 2 TEU.³⁶³

After the judgment of *Commission v Hungary*, the question of justiciability was confirmed by the CJEU when it found that the self-standing plea of Article 2 TEU brought forward by the Commission was well founded.³⁶⁴ The case concerned an infringement procedure, but that does not necessarily rule out a self-standing plea of Article 2 TEU in other legal procedures as well. The legality review pursuant to Article 263 TFEU is the main legal avenue applicable to perform judicial review of an EU legislative act. While the Member States and the institutions themselves do not face any major difficulties in pursuing this route, it is much more difficult for legal and natural persons to do so. The Member States and the institutions might already have agreed on the legislation within the frame of the legislative procedure, which might decrease their incentives to challenge the legislation.³⁶⁵ Therefore, it might truly be in the interest of individuals to be able to start proceedings of legality review.

Article 267(1)(b) TFEU provides for a preliminary ruling on the validity of EU legislation which the national courts are obligated to request if they find that an EU act might be invalid. However, the national court cannot declare the act illegal since this must be done by the CJEU. Since the EU institutions are given a wider range of discretion than the Member States, it might be more challenging to succeed with a validity procedure against the acts of the institutions.

³⁶² Cf. C-769/22 *Commission v Hungary* para 551.

³⁶³ Cf. Section 4.2.

³⁶⁴ C-769/22 *Commission v Hungary* para 564.

³⁶⁵ Cf. Article 294 TFEU.

5 Article 2 TEU and institutional accountability

The purpose of this chapter is to answer the main research question: *To what extent can the invocation of Article 2 TEU, following the recent interpretation of the CJEU, result in violations of Article 2 TEU regarding secondary legislative acts?*

5.1 The enabling of the recent interpretation of Article 2 TEU

To what extent Article 2 TEU can be invoked before the CJEU today is a direct result of the case law that shaped the constitutional dimension of EU law, notably *Portuguese Judges* and the following judgments mentioned in Chapter 2. The CJEU stated in *Commission v Hungary* that Article 2 TEU needs to be interpreted in the light of its context and origin, which was examined in Chapter 2. In summary, the vision of creating a European identity and common values started to take form during the 1970s and by looking at how Article 2 TEU emerged in the Treaties, Article 2 TEU and Article 49 TEU have been closely connected since the beginning. When analyzing recent case law on Article 2 TEU it is noticeable that the CJEU continues to underline this aspect.³⁶⁶

In *Portuguese Judges*, the CJEU shed new light on Article 2 TEU and its role in the constitutional framework and opened the door to justiciability of Article 2 TEU. The reasoning in *Repubblika* was further built on in *Commission v Hungary* when the CJEU confirmed that the Member States “freely and voluntarily” have joined the EU, once again referring to the connection of Article 2 TEU and Article 49 TEU. In the *Conditionality Judgments*, the CJEU underlined that the EU must be able to defend its values which was also confirmed in *Commission v Hungary*.³⁶⁷ Furthermore, the *Conditionality Judgments* have had a significant impact in the context of Article 2 TEU since it was the first time that the Court stated that the founding values included legally binding obligations for the Member States.³⁶⁸ *Commission v Malta* marked a major development in the interpretation of Article 2 TEU when the CJEU found itself capable to act within an area of competence belonging to Member States, thereby broadening the scope of EU law.³⁶⁹

The purpose of this concluding section on the development of the interpretation of Article 2 TEU is to emphasize that the most recent

³⁶⁶ Section 2.2.

³⁶⁷ Cf. C-769/22 *Commission v Hungary* para 499; C-156/21 *Hungary v Parliament and Council* para 127; C-157/21 *Poland v Parliament and Council* para 145.

³⁶⁸ Section 2.2.3.

³⁶⁹ Section 2.2.4.

interpretation would not exist without the relevant examined prior case law.³⁷⁰ While the CJEU's stance on Article 2 TEU as a self-standing provision is new, it did not emerge out of nowhere. The fact that the CJEU highlighted the importance of the context and origin when interpreting Article 2 TEU makes it highly relevant to comment on this aspect when answering the main research question of the thesis.

5.2 The recent interpretation of Article 2 TEU by the CJEU

To build on the argumentation presented in Section 5.1 and to provide an answer to what extent the invocation of Article 2 TEU is possible following the recent interpretation of the CJEU, it is necessary to introduce a concluding discussion on the recent interpretation by the CJEU.

Before the delivery of *Commission v Hungary* on April 21, 2026, there had been an extensive debate on whether Article 2 TEU could be invoked as a self-standing article or not. After the ruling, scholars argued that the judgment must be seen in the light of the academic discussion.³⁷¹ On that note, the scholarly debate included arguments in favor of the possibility of a self-standing Article 2 TEU as well as legal arguments against such interpretation.³⁷² The most frequently brought up arguments concerned the consequences that the self-standing application might have in relation to the impact on the scope of EU law and the competence and legitimacy of the CJEU and the EU institutions.³⁷³

It has been possible to observe the extending of the scope in *Portuguese Judges*, *Repubblika* and *Commission v Malta* along with voiced concern by scholars regarding the possible negative effects for legal certainty, rule of law and ultimately the legitimacy of the CJEU. On the contrary, academics in favor of a self-standing Article 2 TEU found the interpretation necessary for the fulfillment of the purpose of the Treaties. The circumstances were considered comparable to the situation facing the CJEU before it delivered the constitutional judgments *Van Gend En Loos* and *Costa v ENEL*.³⁷⁴

Even if the reasoning of the Advocate General and the CJEU differed on certain aspects, they shared the objective to firmly address that a breach of the legally binding obligations stemming from Article 2 TEU should result in legal consequences. It can be seen as a political judgment without necessarily declaring it to be illegitimate for this reason.³⁷⁵ The question of legitimacy is interesting because whether something is to be considered as legitimate or not

³⁷⁰ Cf. Chapter 2.

³⁷¹ Chapter 3.

³⁷² Section 3.3.

³⁷³ Section 3.4.

³⁷⁴ Section 3.4.2.

³⁷⁵ Section 3.4.2.

depends on the perspective applied. From one perspective, the effort of safeguarding and enforcing the founding values with the objective to strengthen human rights protection and democracy might be perceived as legitimate. However, if it is done almost at the expense of the division of competences and possibly legal certainty, it might receive criticism.

The most recent interpretation of Article 2 TEU is found in *Commission v Hungary* when the CJEU for the very first time ruled that a breach of Article 2 TEU, per se, is possible if certain criteria are fulfilled. As already touched upon, this is a notable development in the interpretation of Article 2 TEU. First of all, the CJEU established that Article 2 TEU has a binding nature and reiterated that the Member States freely and voluntarily have decided to commit to the founding values by joining the EU.³⁷⁶ The CJEU also pointed out that it must have the competence to review an alleged breach of Article 2 TEU within the frame of Article 258 TFEU proceedings to ensure uniform and consistent interpretation of EU law.³⁷⁷ Secondly, the CJEU clarified under which circumstances the obligations stemming from Article 2 TEU could be regarded as infringed. In this context, it is important to note that Article 2 TEU is breached when the values of the article are violated. The discussion of a violation of Article 2 TEU will in other words center around the specific values that the situation involves.³⁷⁸

The CJEU limited the application and scope of Article 2 TEU when it stated that the breach of articles that directly or indirectly give concrete expression to the values of Article 2 TEU do not automatically give rise to a breach of the founding values. Such interpretation would risk depriving the effectiveness of other EU law provisions such as the CFR and not respect the scope of application.³⁷⁹ Thus, within a procedure of failure to fulfill binding obligations of Article 2 TEU, manifest and particularly serious breaches of one or more of the founding values can result in such a breach (the “manifest test”). A violation of Article 2 TEU can be established when the breach is incompatible with the identity of the EU and the legal order of the society where pluralism prevails.³⁸⁰ In the present case, the CJEU focused on the grave marginalization, stigmatization and discrimination as direct results of the Hungarian legislation. The systematic and strategic aim to exclude a group belonging to the society was also a factor that contributed to the conclusion that there had been a violation of the values of respect for human dignity, equality and the respect for human rights which includes the rights of persons belonging to minorities. The practical application of the “manifest test” will be elaborated on in the following section.

³⁷⁶ Cf. Section 5.1.

³⁷⁷ Section 3.3.1.

³⁷⁸ Cf. Section 3.3.

³⁷⁹ Section 3.3.2.

³⁸⁰ Section 3.3.2.

5.3 Violations of Article 2 TEU in the context of secondary legislative acts

Now that a conclusion of the recent interpretation of Article 2 TEU has been presented, the criteria must be put in the context of secondary legislative acts.

It has already been acknowledged that the existence of an obligation does not equal justiciability of that obligation, which was the topic of academic discussions and case law leading up to the judgment of *Commission v Hungary*.³⁸¹ After the judgment, it was no longer ambiguous whether Article 2 TEU could function as a self-standing provision in infringement proceedings. It was thereby clarified that Article 2 TEU could be invoked per se in an action for failure of a Member State to fulfill its obligation pursuant to Article 2 TEU. Since the CJEU also for the first time in a judgment clarified that the same obligations apply to Member States and EU institutions, Article 2 TEU might in theory be possible to invoke if an EU institution fails to fulfill its obligations under the article.

Does the wording of the CJEU imply that the finding of a breach of Article 2 TEU is only possible in the context of infringement proceedings or can a self-standing breach of Article 2 TEU be found in other legal enforcement avenues as well? In *Commission v Hungary*, the CJEU referred to Article 19(1) TEU and underlined that the CJEU must be able to interpret and apply EU law in a manner that results in consistency and uniformity within the frame of infringement proceedings. This might function as another argument suggesting that the CJEU intended to limit the self-standing function of Article 2 TEU to infringement proceedings. From another perspective, the relevant case concerned an infringement procedure of Article 258 TFEU which makes it understandable why the reasoning of the CJEU largely concerned Article 258 TFEU. Even if a breach of Article 2 TEU might be possible to establish in relation to secondary legislation in theory, it is important to recall that the threshold for finding a violation is set high and that there are certain practical challenges to this.

Firstly, Chapter 4 examined secondary legislation and legislative proposals that have been criticized, discussed and questioned in the light of Article 2 TEU. Are the risks and probable consequences that the EU Pact on Migration and Asylum might entail compatible with the founding values such as the respect for human dignity, freedom, the rule of law, and respect for human rights including people belonging to minorities? How about non-discrimination, tolerance and justice? Have the institutions in their adoption and proposals of the Omnibus packages respected the values of rule of law and respect for fundamental rights in accordance with the obligations stemming from Article 2 TEU? The purpose of the thesis has not been to give an answer to these exact questions, but it cannot be denied that the recent case

³⁸¹ Section 3.1.1.

law reflects the vision of the CJEU to attach greater constitutional substance to Article 2 TEU. One naturally following question is therefore what this constitutional development entails for the possibility to examine secondary legislation in the light of Article 2 TEU. It may be argued that Article 2 TEU has always been possible to invoke before the CJEU, at least in the context of interpretation of acts pursuant to Article 267(1)(b) TFEU. Concerning the task of determining validity under Article 267(1)(b) TFEU the answer might not be as clear, but after the introduction of Article 2 TEU as a self-standing provision in *Commission v Hungary* where the judicial landscape was irreversibly changed, it is a probable way forward. Ultimately, it will be a question for lawyers to try new legal constructions involving Article 2 TEU and for the CJEU to decide on the matter.

Secondly, Chapter 4 analyzed possible enforcement avenues that could be used in relation to actions of the EU institutions, specifically secondary legislative acts. It has been ascertained that the natural and legal persons face the most difficulties in commencing legality review proceedings pursuant to Article 263 TFEU because of the standing criteria.³⁸² It is problematic because individuals might have a stronger interest in requesting a legality review in comparison with the institutions themselves that adopted the legislation. Article 267(1)(b) TFEU on validity and interpretation is of relevance, but it must be recalled that the institutions have been given broader discretion to define their political motivation when they act, which makes it more challenging to successfully argue that an institution has breached Article 2 TEU when legislating.

The CJEU introducing a self-standing breach of Article 2 TEU does not equal the possibility of successfully contesting secondary legislative acts by only invoking Article 2 TEU. As analyzed above, certain criteria need to be met and a violation of Article 2 TEU is often accompanied with several violations of other EU provisions.³⁸³

In addition, since Article 2 TEU, after all, defines the very identity and constitutional core of the EU, it would be astounding if a violation was to be found in a legal procedure concerning its own secondary legislation. The criteria that were introduced by the CJEU may however have the function of establishing and setting a standard of what a breach of Article 2 TEU truly entails. By examining the reasoning of the CJEU in *Commission v Hungary*, the result of the “manifest test”, whether a violation can be found or not, seems to be closely connected to the factual circumstances of the case. First, the test lays down that breaches incompatible with the “very identity of the Union as a common legal order of a society in which pluralism prevails” are manifest and particularly serious.³⁸⁴ Second, the CJEU confirms that the

³⁸² Section 4.3.1.

³⁸³ Section 3.3–3.4.

³⁸⁴ Cf. C-769/22 *Commission v Hungary* para 551.

stigmatization and marginalization that the Hungarian law constituted, were contrary to values of the respect for human dignity, equality, the respect for human rights including the rights of persons belonging to minorities pursuant to Article 2 TEU. The consequences of the national legislation gave rise to a situation where those actions were contrary to the “very identity of the Union as a common legal order of a society in which pluralism prevails”.³⁸⁵

Therefore, it is not entirely clear what other concrete circumstances and Member State action that would lead to the CJEU establishing yet another self-standing breach of Article 2 TEU. When steering the discussion back to institutional accountability and the application of the “manifest test” to EU institutions, what action would an EU institution need to have taken for the action to be considered as “manifest and particularly serious”? The test has already been applied to a Member State in an infringement procedure in *Commission v Hungary* and the CJEU is now likely to continue to solidify its introduced case law in forthcoming legal procedures involving Member State action. The interesting and crucial question here is whether the “manifest test” can be applied to the same extent to the institutions.

As mentioned above, it would be staggering if the CJEU found a breach of one of the values of Article 2 TEU by an action of an EU institution, because it would entail that the EU itself, violated what is considered its very own identity and constitutional core. Conversely, when the CJEU now established that the institutions and Member States are equally bound by the obligations stemming from Article 2 TEU, would it not be reasonable to apply the same test in the context of institutional accountability involving Article 2 TEU? Will the CJEU expressly limit the application of the “manifest test” in future cases, or will it simply find the test inapplicable? *Commission v Hungary* being the only case where the test has been applied means that the information of which circumstances that amount to a breach of Article 2 TEU regarding *Member State* action are limited. As already mentioned, exactly which actions of the *institutions* that would constitute a breach of Article 2 TEU per se remains legal uncharted territory. This means that the CJEU, in a future case involving institutional accountability in the light of Article 2 TEU, could argue that the circumstances are not of such “manifest and particularly serious” character that Article 2 TEU has been violated. Alternatively, that the test is reserved for certain legal procedures. The CJEU would thereby, from one point of view, avoid the challenges that might come with the application of the test to the institutions.

Nevertheless, not applying the test to the institutions or limiting the application of the test, might be perceived as adopting different standards of compliance for Member States and institutions. This might weaken the

³⁸⁵ Cf. C-769/22 *Commission v Hungary* para 555 and 556 in fine.

legitimacy of the EU and could also be questioned in the light of the principle of sincere cooperation in Article 4(3) TEU.

In the current moment in time, it is difficult to predict how the “manifest test” will be enforced and applied in practice, and how the CJEU will avoid creating a double standard between the actions of the Member States and EU institutions. Even if the thesis focuses on the action of EU institutions when they legislate, it should be acknowledged that the test might be applicable to all actions by EU institutions and not merely situations involving secondary legislative acts.

The CJEU is an EU institution, and it has received criticism from academics who argue that its reasoning and approach in certain judgments can be questioned when applying a perspective of the rule of law and legal certainty. Particularly notable is the judgment of *Commission v Malta* where the CJEU might not have respected the division of competences, principles of the rule of law and legal certainty.³⁸⁶ That ultimately leads to the question of whether it will be possible to apply the “manifest test” to the CJEU itself since the it is, after all, an EU institution? The purpose of the thesis does not center around what such an enforcement procedure would look like or how it would be carried out, but the question occurs when discussing the “manifest test” and institutional accountability of *all* the EU institutions. Would the European Ombudsman or the General Court be involved in such a procedure?

5.4 Conclusions

Article 2 TEU can be invoked on its own and in conjunction with other EU provisions, and violations of Article 2 TEU may occur in an infringement procedure when a manifest and particularly serious breach of one or more of the common values of Article 2 TEU and its obligations are found. The violation needs to be incompatible with the very identity of the EU legal order of a society where pluralism prevails.³⁸⁷ To what extent Article 2 TEU can be successfully invoked on its own and for the CJEU to find a violation of the article outside infringement proceedings is not entirely clear based on the wording of the CJEU. However, by applying a teleological approach, it can be argued that the establishment of violations of Article 2 TEU can be found in other legal proceedings as well.³⁸⁸ Building on this argument, the recent interpretation of Article 2 TEU certainly opens the door to new legal constructions and an increased interest in invoking the article.

As a concrete example, Article 267(1)(b) TFEU has never been invoked along with Article 2 TEU and that could be an interesting way forward to question the legality of secondary legislation. *Commission v Hungary* is the only

³⁸⁶ Cf. Section 2.2.4.2.

³⁸⁷ C-769/22 *Commission v Hungary* para 551.

³⁸⁸ Fennelly pp. 664–668.

existing judgment in which the CJEU has found a self-standing breach of Article 2 TEU, which makes the case law limited. Nevertheless, the new interpretation enhances the possibility of establishing a violation of Article 2 TEU in relation to secondary legislative acts and the introduction of new legal constructions involving Article 2 TEU, even though Article 2 TEU *per se* is unlikely to serve as a sole legal basis for such a violation.

However, if there is any point in time where the CJEU is faced with more legal scenarios questioning the secondary legislation and the actions of the EU institutions in the light of Article 2 TEU, it must be in the forthcoming time, now that the long-awaited judgment of *Commission v Hungary* has finally been delivered.

6 A concluding statement

The thesis commenced with the citing of a paragraph from the judgment of *Commission v Hungary*, delivered by the CJEU as recently as April 21, 2026. The CJEU expressed for the very first time in a judgment, that the binding legal obligations stemming from Article 2 TEU need to be respected, promoted and maintained by the institutions to the same extent as they must be respected promoted and maintained by the Member States. As the thesis has provided a comprehensive review of the development of Article 2 TEU, it is apparent that the interpretation of the article by the CJEU in *Commission v Hungary* is likely to have a transformative impact on how legal argumentation in enforcement proceedings against the institutions are formulated. While it must be recalled that the finding of a breach of Article 2 TEU is subject to established criteria, the interpretation is a step forward regarding the possibility of invoking Article 2 TEU and finding a violation of the article in relation to secondary legislative acts. Yet, while the “manifest test” may have been intended to lay down a theoretical standard for when Article 2 TEU and the founding values can be considered violated, many questions relating to its practical application remain unanswered. This is true specifically concerning the application of the test in relation to EU institutions and the actions of those.

After all, the founding values emerged from the determination to defend the principles of democracy, the rule of law, social justice, economic progress and the respect for human rights. Therefore, it is crucial to find ways to continuously safeguard and protect the values, also in the context of actions by the EU institutions. The new legal possibility to invoke Article 2 TEU might be one part of the equation, but as the former European Commissioner and Vice-President for Values and Transparency once stressed:

*“We will have to decide ... what ... really holds us together. I am among those who believe that values are ... that glue.”*³⁸⁹

In closing, the values stemming from Article 2 TEU and the place of the article in the EU legal order will most likely continue to evolve, but the landmark judgment by the CJEU in *Commission v Hungary* marked a pivotal moment in the EU legal history concerning the interpretation of Article 2 TEU in the context of institutional accountability.

³⁸⁹ Spieker (a) p. 1213.

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