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Between Law and Politics: Enforcing European Values Before the CJEU

- **ABSTRACT:** *This article examines how the Court of Justice of the European Union (CJEU) enforces the values in Article 2 TEU through its recent case law, particularly in infringement proceedings. While Article 2 TEU sets out binding legal norms, this article argues that their enforcement by the CJEU is only legitimate when tied to the material scope of EU law. The CJEU's approach – especially since the ASJP ruling – is best understood as a doctrinally constrained method of interpreting existing obligations, not as a basis for autonomous value enforcement. The article identifies four conditions that must be met: a concrete link to EU law, a clearly defined legal obligation in primary or secondary law, limits on expanding the substance of legal norms through values, and interpretation based on the shared constitutional traditions of the Member States. The article concludes that using Article 2 TEU as an independent legal basis would breach the principle of conferral and bypass the political enforcement mechanism laid down in Article 7 TEU.*

- **KEYWORDS:** *Article 2 TEU, rule of law, CJEU, Infringement Proceedings, principle of conferral, European values*

1. Introduction

For the first time, Advocate General Ćapeta explicitly argued that Article 2 TEU provides a legal basis for infringement proceedings in her Opinion of 5 June 2025 in Case C-769/22 (*Commission v Hungary*).¹ In this case, the Commission decided

¹ Advocate General Ćapeta, Opinion of 5 June 2025, Case C-769/22 *Commission v Hungary* EU:C:2025:408.

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to challenge Hungary's law restricting LGBTI content directly for violating the values enshrined in Article 2 TEU, rather than for breaching specific secondary legislation. This marks the first time that the direct legal bindingness and applicability of Article 2 TEU itself, detached from any other secondary law, has been the focal point of a case. This Opinion represents a crucial shift by establishing the EU's core values as an independent legal standard to judge the actions of Member States.²

This builds on the CJEU's case law since the 2018 *ASJP (Associação Sindical dos Juizes Portugueses)* ruling, which for the first time imposed a binding obligation for Member States to uphold the values set out in Article 2 TEU from Article 19(1), second subparagraph TEU.

Since 2018, the CJEU has developed a new line of case law on judicial independence, based on Article 2 TEU in conjunction with Article 19(1), second subparagraph, TEU.³ This approach, referred to here as *value operationalisation*, enables the CJEU to give effect to the values listed in Article 2 TEU, which refer to the essential values of the European Union including: respect for human dignity, freedom, democracy, equality, the rule of law, the protection of human rights, and the rights of persons belonging to minorities – and to derive specific legal obligations for the Member States. The CJEU's focus so far has been exclusively on judicial independence as a concrete expression of the rule of law, one of the values named in Article 2 TEU. As a result, the CJEU has been able to penalise Member States in infringement proceedings if their judicial system fails to meet the CJEU's essential conditions for judicial independence.⁴ This approach has been widely supported in the academic literature, considering the rule of law crises in Poland⁵

2 Advocate General Ćapeta, Opinion of 5 June 2025, Case C-769/22 *Commission v Hungary* EU:C:2025:408, para. 142.

3 See: *Associação Sindical dos Juizes Portugueses*, Case C-64/16, 27 February 2018, EU:C:2018:117; on the current academic discussion; see, among many: von Bogdandy and Spieker, 2023, p. 65; von Bogdandy et al., 2021; Britz, 2023, p. 2819; Grabowska-Moroz, 2023; Hainthaler, 2024, p. 293; Mayer, 2024, p. 219; Nettesheim, 2024, p. 269; Riedl, 2024, p. 157; Spieker, 2019, p. 1182; Spieker, 2023; Wyrozumska, 2022, p. 379.

4 See: *Associação Sindical dos Juizes Portugueses*, Case C-64/16, 27 February 2018, EU:C:2018:117, para. 32; further developed in, inter alia, *Minister for Justice and Equality (Deficiencies in the system of justice)*, Case C-216/18 PPU, 25 July 2018, EU:C:2018:586, para. 48; *Commission v Poland (Independence of the Supreme Court)*, Case C-619/18, 24 June 2019, EU:C:2019:531, para. 47; see also: Gärditz, 2019, pp. 134–136; Bonelli and Claes, 2018, pp. 622–623.

5 See *Minister for Justice and Equality (Deficiencies in the system of justice)*, Case C-216/18 PPU, 25 July 2018, EU:C:2018:586, paras. 47 et seq; *Commission v Poland (Independence of the Supreme Court)*, Case C-619/18, 24 June 2019, EU:C:2019:531, paras. 42 et seq; *Commission v Poland (Independence of the ordinary courts)*, Case C-192/18, 5 November 2019, EU:C:2019:924, paras. 98 et seq; *A.K. and Others (Independence of the Disciplinary Chamber of the Supreme Court)*, Joined Cases C-585/18, C-624/18 and C-625/18, 19 November 2019, EU:C:2019:982, paras. 82 et seq, 167; *Poland v Parliament and Council*, Case C-157/21, 16 February 2022, EU:C:2022:98, para. 145; see also: Sadurski, 2019a; Sadurski, 2019b; Castillo-Ortiz, 2019, p. 48.

and Hungary,⁶ as well as rule of law concerns in other countries such as Romania,⁷ Bulgaria,⁸ and Malta,⁹ and in light of the political inability or unwillingness of the member states to impose sanctions under the Article 7 TEU procedure.¹⁰ The analysis proceeds in three steps. Section II addresses the substantive dimension of value enforcement, examining whether Article 2 TEU produces independent legal effects and delineating its normative scope. Section III focuses on procedural constraints, in particular the limits imposed by Article 7 TEU and the Treaties' allocation of enforcement roles. Section IV concludes by proposing a doctrinal framework that respects the principle of conferral and ensures that judicial enforcement of Union values remains both legally sound and democratically legitimate.

2. The Substantive Test: Is Article 2 TEU More Than Just Words?

The first step is to determine whether, and in what way, Article 2 TEU produces normative effects. This involves examining whether, from a legal-doctrinal perspective, Article 2 TEU contains binding legal principles that go beyond merely declaratory or programmatic statements. If this is affirmed, the next step is to define the substantive scope of Article 2 TEU.

6 See: *Hungary v Parliament and Council*, Case C-156/21, 16 February 2022, EU:C:2022:97; on the 'court packing' of the Hungarian Constitutional Court, see: Kovács and Tóth, 2011, p. 183; Kovács and Scheppele, 2021, p. 32; Castillo-Ortiz, 2019, p. 48; more generally Bánkuti, Halmai and Scheppele, 2012, p. 138; Halmai, 2019, p. 302.

7 In the wake of the rule of law crises in Poland and Hungary, Romania also implemented a controversial judicial reform. A central element of this reform was the establishment of a special section within the prosecution service to investigate offences committed within the judiciary, which was ultimately abolished in March 2022. This section enabled pressure to be exerted on prosecutors and judges. See: Călin, 2020, p. 1; Spieker, 2022, p. 306; Weber, 2022, p. 292; see also: Romanian Constitutional Court, Decision of 16 February 2016, No. 51/2016; Decision of 4 May 2017, No. 302/2017; Decision of 7 November 2018, No. 685/2018; Decision of 16 January 2019, No. 26/2019; Decision of 3 July 2019, No. 417/2019; see also *Euro Box Promotion and Others*, Joined Cases C-357/19, C-379/19, C-547/19, C-811/19FQ and C-840/19NC, 21 December 2021, EU:C:2021:1034; *RS (Effect of a decision of a constitutional court)*, Case C-430/21, 22 February 2022, EU:C:2022:99; for problems and progress see European Commission, 2020 *Rule of Law Report, Country Chapter on Romania*, SWD(2020)322; European Commission, *Report on the developments regarding judicial reform in Romania*, 8 June 2021.

8 See: Dimitrov and Plachkova, 2020, p. 167; Vassileva, 2020, p. 741.

9 See: *Republika* (Judgment of 20 April 2021, Case C-896/19, EU:C:2021:311).

10 See, among many: von Bogdandy and Spieker, 2020, p. 301; Spieker, 2023; Jakab and Kochenov, 2017; Scheppele, Kochenov and Grabowska-Moroz, 2020, p. 3; Spieker, 2019, p. 1182; Grabowska-Moroz, 2023; Wyrozumska, 2022, p. 379.

■ 2.1. *From Aspiration to Obligation: Confirming the Legal Force of EU Values*

According to consistent case law of the CJEU, the values of the European Union possess legal normativity. Article 2 TEU sets out the Union's fundamental values, which are not merely political aspirations but legally binding obligations for the member states. These values also shape the identity of the Union as a community based on the rule of law.¹¹

The fundamental legal normativity of these values can also be justified from a doctrinal legal perspective. At first glance, the wording of Article 2 TEU may cast doubt on its legal effect, as it refers explicitly to 'values' rather than legal principles. This impression is reinforced by the vague and open-ended language of Article 2, which closely resembles Recital 4 of the TEU Preamble.¹² A literal reading thus initially suggests that Article 2 sets out general programmatic statements, which are then given concrete form in the provisions that follow, in accordance with the intention of the contracting parties.¹³

However there are also indications supporting the view that Article 2 TEU possesses a certain degree of legal normativity, no matter how it may be defined.¹⁴ Article 2 TEU emphasises that the values listed therein form the foundation of the Union and are shared by all member states. Although this may initially appear to be merely a descriptive statement of fact, an alternative interpretation is possible. The use of the present tense in the phrase 'on which the Union is founded' can be understood to mean that these values are not only foundational at the moment of accession but are intended to remain binding over time. A similar argument can be made with regard to the second sentence of Article 2 TEU, which states that these values are 'common to the Member States.' Thus, when interpreted broadly, the wording of the provision also provides textual support for the ongoing obligation of member states to uphold these values.¹⁵

Looking at the historical development of Article 2 TEU, it becomes clear that its predecessor, Article 6(1) of the Amsterdam/Nice version of the TEU, more strongly supported the provision's legal normativity, as it referred to 'principles' rather than merely to 'values.' One might interpret this change in wording to mean that the contracting parties deliberately chose not to maintain a framework of

11 See for the first time Case C-156/21 *Hungary v Parliament and Council* EU:C:2022:97, judgment of 16 February 2022, para. 232.

12 The preamble expresses the Member States' 'attachment to the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law'. By contrast, the first sentence of Article 2 TEU provides: '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.'

13 See only Nettesheim, 2024, p. 269.

14 See, among many others: von Bogdandy, 2009, p. 22; Rossi, 2020, p. 639; Spieker, 2023, p. 33; Sommermann, 2020, Art. 3 para. 8.

15 See also, among many others: Hilf and Schorkopf, 2025, Art. 2 para. 39; Calliess, 2004, pp. 1036, 1040; Calliess, 2022, Art. 2 paras. 8 and 33; with approval Voßkuhle, 2018, p. 27.

binding legal principles. However, the drafting history of the values clause suggests otherwise: despite the vagueness of the language, the drafters did not intend Article 2 TEU to serve merely as a second preamble to the Treaty. The travaux préparatoires of the Constitutional Convention show that careful consideration was given to which formulations and values should be included in Article 2 TEU, and which should be placed in the Preamble.¹⁶ In particular, the President of the Convention, Valéry Giscard d'Estaing, emphasised that Article 2 TEU should contain only legally well-defined values – not vague or purely emotional programmatic statements.¹⁷

In conclusion, despite the many textual, systematic, and historical arguments that can be interpreted in both directions, one can state, perhaps unsurprisingly, that Article 2 TEU constitutes a legal norm and therefore possesses legal normativity.¹⁸ Compliance with the values it sets out is a mandatory requirement for accession to the EU, which supports the view that their continued observance during membership is not merely a matter of political expectation or mutual interest but should be regarded as a fundamental legal obligation for all member states.

■ 2.2. *The Conferral Constraint: Why EU Values Cannot Bypass the Scope of Union Law*

The key doctrinal question concerns the extent of Article 2 TEU's substantive binding effect. It is undisputed that the Union institutions themselves are bound by the values set out in Article 2 TEU.¹⁹ The scope of Article 2 in relation to the member states, by contrast, raises significant doctrinal and competence-related concerns.²⁰

16 See only European Convention, 2003; see also: Hilf and Schorkopf, 2025, Art. 2 paras. 8–10.

17 See European Convention, 2003; for more detail see: Spieker, 2023, p. 45; see also: Tridimas, 2006, p. 15; Calliess, 2022, Art. 2 para. 6.

18 See, among many: von Bogdandy, 2019, p. 522; Rötting, 2009, pp. 93 and 231; Scheppele, Kochenov and Grabowska-Moroz, 2020, p. 67; Streinz, 2018, p. 10.

19 On the binding nature of Article 2 TEU vis-à-vis the EU institutions, see, among many: Spieker, 2023, p. 87; Hilf and Schorkopf, 2025, Art. 2 para. 18; Terhechte, 2023, Art. 2 paras. 6.

20 See only Huber, 2022, p. 293; Nettesheim, 2019, p. 91; Nettesheim, 2021, p. 223; Nettesheim, 2022, pp. 529, 534; Riedl, 2024, p. 173; Schorkopf, 2020, pp. 482 ff; Hillgruber and Strickrodt, 2022.

In its *Repubblika* judgment of 2021, the CJEU introduced the principle of non-regression,²¹ which prohibits member states from adopting measures that weaken the protection of the rule of law as enshrined in Article 2 TEU and further specified by Article 19(1), second subparagraph, TEU.²² This principle implies that member states are expected to uphold the standard of respect for these values. The CJEU reasoned that, under Article 49 TEU, adherence to the values of Article 2 TEU is a precondition for joining the EU and that this obligation continues throughout membership.²³ The CJEU made it clear that a member state may not amend its legal framework in a way that undermines the protection of judicial independence.²⁴

Despite developing the principle of non-regression, the CJEU has so far not abandoned the requirement that Article 19(1), second subparagraph, TEU links the application of Article 2 TEU to the scope of Union law. From a doctrinal perspective, the non-regression principle, based solely on Article 49 TEU, cannot justify applying the values of Article 2 TEU to member states independently of the scope of EU law. This is because the EU is bound by the principle of conferral and by the member states' integration mandate. As such, the Union's measures and obligations may neither bypass the substantive scope of Union law nor override its inherent limits, for example those defined by the limited applicability of the Charter of Fundamental Rights.²⁵ The Charter of Fundamental Rights' restricted scope of application is primarily set out in Article 51(1), first sentence, CFR, which binds the institutions, bodies, offices, and agencies of the Union, as well as the member states *only when they are implementing Union law*. In addition, Article 6(1), second

21 See only from the settled case law of the Court of Justice: *Repubblika v Il-Prim Ministru* (Judgment of 20 April 2021, Case C-896/19, EU:C:2021:311); *Asociația "Forumul Judecătorilor din România" and Others* (Judgment of 18 May 2021, Joined Cases C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19, EU:C:2021:393); *Commission v Poland* (Judgment of 15 July 2021, Case C-791/19 R, EU:C:2021:596); *Euro Box Promotion and Others* (Judgment of 21 December 2021, Joined Cases C-357/19, C-379/19, C-547/19, C-811/19 and C-840/19, EU:C:2021:1034); *Commission v Poland* (Judgment of 5 June 2023, Case C-204/21, EU:C:2023:442) para. 74. For a critical view on the principle of non-regression, see: Scholtes, 2023.

22 *Repubblika v Il-Prim Ministru* (Judgment of 20 April 2021, Case C-896/19, EU:C:2021:311) paras. 56, 63 and 73.

23 *Repubblika v Il-Prim Ministru* (Judgment of 20 April 2021, Case C-896/19, EU:C:2021:311) para. 61; see also: the early approach in *Wightman and Others v Secretary of State for Exiting the European Union* (Judgment of 10 December 2018, Case C-621/18, EU:C:2018:999) para. 63.

24 *Repubblika v Il-Prim Ministru* (Judgment of 20 April 2021, Case C-896/19, EU:C:2021:311) para. 63; see also: *A. B. and Others (Appointment of Judges to the Supreme Court – Remedy)* (Judgment of 2 March 2021, Case C-824/18, EU:C:2021:153); *Openbaar Ministerie (Independence of the issuing judicial authority)* (Judgment of 17 December 2020, Joined Cases C-354/20 PPU and C-412/20 PPU, EU:C:2020:1033) para. 40; *A. K. and Others (Independence of the Disciplinary Chamber of the Supreme Court)* (Judgment of 19 November 2019, Joined Cases C-585/18, C-624/18 and C-625/18, EU:C:2019:982).

25 See also on this issue: Kaiser, 2023.

sentence, TEU and Article 51(2) CFR make it clear that the Charter of Fundamental Rights neither extends the Union's competences nor creates any new powers.²⁶

From this perspective, the infringement proceedings initiated by the Commission on 19th December 2022 against Hungary are problematic. The case concerns legislation that restricts the depiction of homosexuality and transgender identities in media and educational materials aimed at minors. In addition to alleging violations of secondary law (Article 9(1)(c)(ii) of Directive 2010/13/EU on audiovisual media services, Article 3(2) of Directive 2000/31/EC on electronic commerce, and Articles 16 and 19 of Directive 2006/123/EC on services in the internal market), the fundamental freedoms (Article 56 TFEU), and fundamental rights (Articles 1, 7, 11, and 21 CFR), the Commission also argues – under its second plea – that there has been an autonomous breach of Article 2 TEU.²⁷ If the Commission's claim were to be understood as suggesting that Article 2 TEU can be invoked independently of any violation of specific provisions of primary or secondary Union law, particularly without reference to the Charter of Fundamental Rights, this would effectively circumvent the limitations set out in Article 51(1), first sentence, CFR, Article 6(1), second sentence, TEU, and Article 51(2) CFR. It is therefore understandable that, during the oral hearing in Case C-769/22 on 19th November 2024, the Commission took a markedly more cautious position, almost contradicting its written submission, by emphasising that Article 2 TEU could not be applied in isolation from the rest of Union law. Accordingly, it argued that the second plea could not be upheld independently of the first, which invokes specific provisions of primary and secondary law.²⁸

Even under the CJEU's broad interpretation of Article 51(1), first sentence, CFR, the Charter of Fundamental Rights is only applicable where there is a concrete substantive link to Union law.²⁹ Since the *ASJP* judgment, the CJEU has held that an abstract potential for any involvement with Union law is sufficient to trigger

26 BVerfGE 152, 152 (para. 43) – *Right to be Forgotten I*; Schorkopf, 2020, p. 481; Huber and Paulus, 2015, p. 296; Bogdandy and Spieker, 2019, p. 421.

27 Pending proceedings of 19 December 2022, Case C-769/22 (Commission v Hungary (Act LXXIX of 2021)), plea 2.

28 In the hearing for C-769/22, the Commission took a notably more defensive stance – almost in contradiction to its statement of claim – emphasising that Article 2 TEU cannot be applied independently of other Union law provisions and that plea 2 cannot be treated as arising directly from plea 1 (i.e. the complaint regarding specific primary and secondary law provisions).

29 See: *Åkerberg Fransson*, judgment of 26 February 2013, Case C-617/10, EU:C:2013:105, para. 19; *Hernández*, judgment of 10 July 2014, Case C-198/13, EU:C:2014:2055, para. 34; *Paoletti*, judgment of 6 October 2016, Case C-218/15, EU:C:2016:748, para. 13; critically Britz, 2015, p. 277; Huber, 2015, p. 305; Wollenschläger, 2014, p. 577.

Article 2 TEU in conjunction with Article 19(1), second subparagraph, TEU.³⁰ However, as long as the CJEU's case law on Article 19(1), second subparagraph, TEU remains focused on ensuring the effective enforcement of Union law, does not subjectivise this provision, and does not extend the operationalisation of the rights of the Charter of Fundamental Rights beyond the specific content of Article 47 CFR, the limitations of Article 51(1), first sentence, CFR can still be respected. In contrast, any attempt to apply Article 2 TEU as an autonomous legal norm, or worse to turn it into a source of individual rights, such as for human dignity or minority protection, would be methodologically inappropriate. Such matters are to be assessed exclusively under the Charter of Fundamental Rights.

The CJEU's value-based jurisprudence does not raise competence concerns, so long as Article 2 TEU is used solely as an interpretive aid to clarify specific obligations under Union law, without establishing a value-based reservation that applies independently of the scope of EU law. Therefore, there is no circumvention of the principle of conferral if the CJEU relies on Article 2 TEU to interpret clearly defined Union obligations. This is illustrated by the *LM* judgment.³¹ In *LM*, the CJEU held that the obligation to assess judicial cooperation under the principle of mutual recognition, specifically in the context of the European Arrest Warrant³², does not derive from any 'legal effect of Article 2 TEU going beyond the standard provisions of primary law.'³³ Rather, the obligation is grounded in established secondary legislation, in particular Article 1(3) of the Framework Decision on the European Arrest Warrant (FD EAW). Article 2 TEU merely supports the interpretation of these specific obligations, without creating a general value-based exception.³⁴ Accordingly, not every violation of Article 2 TEU automatically leads to a suspension of cooperation or a breakdown in mutual trust.³⁵ Mutual trust

30 See also: Klatt, 2019, p. 1117; Schorkopf, 2019, p. 3421; See the restrictive case law of the Court of Justice: *Siragusa*, judgment of 6 March 2014, Case C-206/13, EU:C:2014:126, paras. 25–6, 31–2; *Hernández*, judgment of 10 July 2014, Case C-198/13, EU:C:2014:2055, para. 37. However, the line of case law has not since been entirely clear and tends towards applying the Charter: *Berlioz Investment Fund*, judgment of 16 May 2017, Case C-682/15, EU:C:2017:373, paras. 33; in more detail *Tjebbes*, judgment of 12 March 2019, Case C-221/17, EU:C:2019:189.

31 See: *LM* (C-216/18 PPU), judgment of 25 July 2018, EU:C:2018:586; see also in detail: Hainthaler, 2024, p. 74; Wendel, 2019, p. 111.

32 See on the *Aranyosi* test *Aranyosi and Căldăraru* (Joined Cases C-404/15 and C-659/15 PPU), judgment of 5 April 2016, EU:C:2016:198, para. 89; and already on mutual recognition in the asylum system *N.S. and Others* (Joined Cases C-411/10 and C-493/10), judgment of 21 December 2011, EU:C:2011:865.

33 Hainthaler, 2024, p. 63.

34 The judgment in *LM* illustrates the CJEU's institutional restraint when operationalising Article 2 TEU values. The Court involves national courts in the assessment of judicial independence. See also: Wendel, 2019, p. 119.

35 See also: *Minister for Justice and Equality (Deficiencies in the judicial system)* (C-216/18 PPU), judgment of 25 July 2018, EU:C:2018:586, paras. 60 ff; see also Wendel, 2019, p. 112.

merely underpins the recognition regime, whereas the suspension of cooperation must be based on specific provisions of secondary law.³⁶

■ 2.3. *Interim Conclusion: A Constrained Mandate*

Article 2 TEU is a legal norm and therefore binding on the member states, but only within the scope of Union law. It generally serves as an interpretive aid for clearly defined obligations under Union law, particularly in conjunction with Article 19(1), second subparagraph, TEU, as established since the *ASJP* judgment. Article 2 TEU cannot generate autonomous legal obligations independently of specific provisions of Union law. Otherwise, it would undermine the Union's competence structure as defined by the integration framework and the specific, normatively defined scope of application, such as Article 51(1), first sentence, CFR. As such, the CJEU's value-based jurisprudence does not raise concerns of ultra vires action provided that Article 2 TEU is used exclusively to interpret existing Union obligations. Doctrinally, Article 2 TEU does not establish an independent value-based reservation that overrides the principle of conferral or operates beyond the defined limits of Union competences.

3. The Procedural Hurdle: The Challenge of Judicial Enforcement

As outlined above, the CJEU has so far operationalised Article 2 TEU only by way of Article 19(1), second subparagraph, TEU. This has allowed the CJEU, albeit through a broad interpretation of that provision, and subject to the condition that the *Republika* approach does not evolve into a full-fledged *ordre public communautaire* reservation,³⁷ to establish a point of legal link between value enforcement and the scope of Union law. This limited substantive reach is mirrored by a correspondingly restricted justiciability: under the structure of the EU Treaties, Article 2 TEU cannot be enforced judicially by the CJEU in infringement proceedings unless it operates within the material scope of Union law.

■ 3.1. *The Primacy of Politics: Why Article 7 TEU is the Exclusive Path to Sanctions*

At first glance, the CJEU's general responsibility³⁸ to ensure the observance of the law in the interpretation and application of the Treaties under Article 19(1) TEU

36 See especially: Hainthaler, 2024, p. 78. The judgment of the CJEU in *OG (Parquet de Lübeck) (C-508/18)*, judgment of 27 May 2019, EU:C:2019:456.

37 On the possibility of such a development, see only: Hainthaler, 2024, p. 82.

38 In the same direction, among many, see: Spieker, 2023, p. 47; von Bogdandy and Spieker, 2020, p. 319; Hillion, 2016, p. 66; Weber, 2017, p. 748; Giegerich, 2019, p. 96. Contra, among many, see: Nettesheim, 2022, p. 534; Riedl, 2024, p. 173; Martenczuk, 2018, p. 45; Levits, 2018, p. 262; Terhechte, 2023, Art. 2 para. 11.

might suggest that it has a broad judicial competence to review violations of Union values.³⁹ However, this authority is explicitly limited by Article 269 TFEU in conjunction with Article 7 TEU when it comes to the sanctioning of value violations.⁴⁰ Article 269(1) TFEU restricts the CJEU's jurisdiction in Article 7 TEU proceedings to purely procedural matters.⁴¹ As a result, the substantive definition and enforcement of the values enshrined in Article 2 TEU, when linked to sanctions under Article 7 TEU, are, as clearly stated in Article 269 TFEU, excluded from the CJEU's jurisdiction and instead left to the political discretion of the member states.⁴²

However, this does not yet resolve the question of whether, outside or alongside the procedure under Article 7 TEU, an additional judicial review of the values in Article 2 TEU by the CJEU is possible, whether in the context of preliminary rulings or infringement proceedings, or whether Article 7 TEU constitutes an exhaustive special mechanism for addressing breaches of the Union's fundamental values.⁴³ Whether the Treaties allow for the enforcement of Article 2 TEU values exclusively through the potentially exhaustive procedure of Article 7 TEU, or also through infringement proceedings before the CJEU, is ultimately a matter of interpretation.

The wording of Article 7 TEU alone does not conclusively establish that it serves an exclusive function, as it lacks terms such as 'only' or 'exclusively.' However, the structure of the Treaties strongly suggests that Article 7 TEU constitutes a special and exhaustive mechanism.⁴⁴ A systematic analysis of the Treaties shows that the drafters have already operationalised Article 2 TEU in various

39 In this direction also Lenaerts, 2017, p. 639.

40 See also: Martenczuk, 2018, p. 45; Levits, 2018, p. 262; Riedl, 2024, p. 173.

41 See: *Hungary v Parliament* (judgment of 3 June 2021, Case C-650/18, EU:C:2021:426) para. 29; Schmahl, 2000, p. 827; Ruffert, 2022, Art. 269 para. 1.

42 See also: Schorkopf, 2019, p. 3422; Ruffert, 2022, Art. 269 para. 3. Not convincing from a doctrinal perspective is AG Bobek, Opinion of 3 December 2020, *Hungary v European Parliament* (Case C-650/18, EU:C:2020:985) paras. 43ff, who seeks to reinterpret Art. 269 TFEU – contrary to its clear wording – from a jurisdiction-limiting into a jurisdiction-expanding provision. Correctly, however, on rule-of-law grounds, the CJEU's jurisdictional restriction to purely procedural issues should apply only to the determination decisions under Art. 7 paras. 1–2 TEU, but not to the suspension decision under Art. 7 para. 3 TEU; see especially: Hainthaler, 2024, p. 241.

43 For an in-depth discussion of this issue, see: AG Bobek, Opinion of 3 December 2020, *Hungary v European Parliament* (Case C-650/18, EU:C:2020:985) para. 43; see also: Ruffert, 2022, Art. 7 para. 36; von Bogdandy, 2019, p. 532, 535; Germelmann, 2021, p. 193; Schorkopf, 2000, p. 106; Pechstein, 2018, Art. 7 para. 22; Schmidt and Bogdanowicz, 2018, p. 1061; Lavelle, 2019, p. 45; on the *lex specialis* principle generally see: *Commission v Ireland and Others* (judgment of 2 December 2009, Case C-89/08 P, EU:C:2009:742) para. 14; *Heininger* (judgment of 13 December 2001, Case C-481/99, EU:C:2001:684) para. 37; Martens, 2013, p. 428.

44 In this regard, see also: Giegerich, 2015, p. 535; Nettessheim, 2024, p. 293; Riedl, 2024, p. 174; Martenczuk, 2018, p. 45; Levits, 2018, p. 262; Hillgruber and Strickrodt, 2022; Schorkopf, 2020, p. 482; contra Hainthaler, 2024, p. 293; Hummer, 2015, p. 90; Schmahl, 2015, p. 854; Spieker, 2023, p. 62; Skouris, 2018, p. 50.

places by referring to it as a legal condition in specific provisions and linking it to concrete legal consequences. The values in Article 2 TEU are first mentioned at the beginning of the Treaties and are then addressed in Articles 3, 7, 8, 13, 21, 32, 42, and 49 TEU. These specific provisions embed the values of Article 2 TEU into defined legal contexts and attach enforceable consequences to them, subject to particular requirements. Article 49 TEU is especially illustrative: even in the accession process, the decision on membership – and, implicitly, the assessment of value compliance – rests primarily with the member states, each of which must independently ratify the accession agreement.⁴⁵ This political decision-making power of the member states continues after accession through Article 7 TEU.

Article 7 TEU provides a special procedure for responding to serious breaches of the Union's fundamental values by member states. By contrast, the idea that Article 2 TEU should allow the CJEU to independently derive legal consequences and obligations from that provision requires significantly stronger justification than what the CJEU's case law has so far provided.

In any case, as will be shown below, a systematic and teleological interpretation suggests that the specific purpose of Article 7 TEU, to provide for a graduated and differentiated protection of the values in Article 2 TEU through both preventive and sanctioning measures, can only be achieved if Article 7 is understood as an exhaustive special provision. In addressing the question of whether the conditionality mechanism can apply alongside Article 7 TEU, the CJEU itself has commented on this issue:

that the EU legislature cannot establish, without infringing Article 7 TEU, a procedure parallel to that laid down by that provision, having, in essence, the same subject matter, pursuing the same objective and allowing the adoption of identical measures, while providing for the involvement of different institutions or for different material and procedural conditions from those laid down by that provision. However, it is permissible for the EU legislature, where it has a legal basis for doing so, to establish, in an act of secondary legislation, other procedures relating to the values contained in Article 2 TEU, which include the rule of law, provided that those procedures are

⁴⁵ Provisions of the Accession Treaty that form part of primary law are not subject to the legality review of the Court of Justice. The Court cannot review one provision of primary law against another, as there is no hierarchy within primary law. See: LAISA (joined cases 31 and 35/86, judgment of 28 April 1988, EU:C:1988:211) para. 14; similarly Ohler, 2025, Art. 49 para. 59; Niedobitek, 2004, p. 375; contra Cremer, 2022, Art. 49 para. 12; Pechstein, 2018, Art. 49 para. 11.

different, in terms of both their aim and their subject matter, from the procedure laid down in Article 7 TEU.⁴⁶

Applied to the question of whether judicial enforcement of the values enshrined in Article 2 TEU is permissible, the decisive point is that the CJEU's value-based jurisprudence must differ from the Article 7 TEU procedure both in purpose and in subject matter.

To begin with, the subject matter of the Article 7 TEU mechanism and the CJEU's value jurisprudence must be examined. Both approaches rely on Article 2 TEU as their legal basis. However, the CJEU in its value-operationalising case law also refers to Article 19(1), second subparagraph, TEU, which could suggest that they rest on distinct normative foundations. Moreover, the Article 7 procedure and infringement proceedings before the CJEU differ in both the legal criteria and the legal consequences they entail. Substantively, Article 7(2) and (3) TEU require serious and systemic breaches of the values in Article 2 TEU, whereas judicial proceedings before the CJEU could address even isolated violations. As for legal consequences, a CJEU judgment finding a breach of Article 2 TEU leads,⁴⁷ apart from the obligation to comply with the ruling, only to financial penalties in the form of lump sums or daily fines under Article 260(2) TFEU. In contrast, Article 7(3), first sentence, TEU allows for the suspension of specific membership rights, including a member state's voting rights in the Council.⁴⁸ Precisely because Article 7 procedure is politically challenging, due to the unanimity requirement in the European Council under Article 7(2) TEU, the CJEU's value-operationalising case law, now supported by secondary law tools such as the conditionality mechanism, has enabled the development of a more differentiated system for protecting the Union's fundamental values. Therefore, clear distinctions can be made between the issues addressed by the Article 7 TEU procedure and those covered by the CJEU's value jurisprudence.

As the CJEU has rightly observed,⁴⁹ not only the subject matter but also the purpose and objective of the two procedures must differ. Otherwise judges could continuously introduce new, less demanding, and subsidiary mechanisms in pursuit of the same aim, effectively undermining the principle of conferral, especially in the context of judicial law-making. According to the CJEU's reasoning

46 Court of Justice, *Hungary v Parliament and Council* (Case C-156/21, judgment of 16 February 2022, EU:C:2022:97) paras. 167–168 and *Poland v Parliament and Council* (Case C-157/21, judgment of 16 February 2022, EU:C:2022:98) paras. 206–207, emphasis in the original.

47 See also: Ruffert, 2022, Art. 7 para. 37; para. 37; Schorkopf, 2000, p. 106; Schmidt and Bogdanowicz, 2018, p. 1061; Schorkopf, 2025, Art. 7 para. 31; Lavelle, 2019, p. 45.

48 See further: Schorkopf, 2025, Art. 7 paras. 43; Skouris, 2018, p. 50; Schmidt and Bogdanowicz, 2018, p. 1072; Kassner, 2003, p. 137.

49 Court of Justice, *Hungary v Parliament and Council* (Case C-156/21, judgment of 16 February 2022, EU:C:2022:97) para. 168; *Poland v Parliament and Council* (Case C-157/21, judgment of 16 February 2022, EU:C:2022:98) para. 207.

however, the value-operationalising approach developed since *ASJP* specifically aims to safeguard one of the Union's core values: the rule of law. Yet this is precisely the same objective pursued by Article 7 TEU, which establishes a detailed procedure with clearly defined institutional roles and sanctions for breaches of the EU's fundamental values. As recently as 2014, the Commission itself acknowledged that the EU Treaties did not provide sufficient enforcement instruments for the values of Article 2 TEU outside of the Article 7 procedure.⁵⁰ The Council Legal Service had reached the same conclusion back in 2014:

Respect of the rule of law by the Member States cannot be, under the Treaties, the subject matter of an action by the institutions of the Union irrespective of the existence of a specific material competence to frame this action, with the sole exception of the procedure described at Article 7 TEU. Only this legal basis provides for a Union competence to supervise the application of the rule of law, as a value of the Union, in a context that is not related to a specific material competence or that exceeds its scope.⁵¹

This is doctrinally compelling, since the CJEU's purely judicial development of the law effectively bypasses the high threshold requirements of the Article 7 TEU procedure. This is particularly problematic, since it would enable the CJEU to largely determine both the conditions and the consequences of the very broadly worded Article 2 TEU on its own. The exclusion of the CJEU from the Article 7 procedure, as expressly provided for in Article 269 TFEU, reflects the original intent of the Treaty drafters: that the enforcement of the values in Article 2 TEU should rest solely with the other member states, as political equals, through a process grounded in political legitimacy.⁵² The fact that this was the unanimous view of all Union institutions up until 2014 only reinforces the historical intent behind the Treaties. Article 7 TEU reflects the member-driven structure of the European Union in matters of value enforcement.⁵³ The provision demonstrates that the 'masters of the Treaties' deliberately entrusted the definition and enforcement of Article 2 TEU values to the deep democratic legitimacy of the member states represented in the European Council, thus relying on the intergovernmental dimension within the EU's institutional culture. Within the EU's constitutional architecture, the two-stage sanction mechanism, the consultation of member states, the high voting thresholds, the central role of the Council and the European Council, and

50 European Commission, 2014, pp. 8–9.

51 Council of the European Union, Opinion of the Legal Service of the Council, 10296/14 LIMITE, 27 May 2014, para. 17.

52 See also: Nettesheim, 2019, p. 91; Nettesheim, 2022, p. 543.

53 Nettesheim, 2019, p. 91; for background on the development of Article 7 TEU see: Sadurski, 2010, p. 385.

the limitation of the CJEU's role to procedural review under Article 7 TEU all serve a single purpose: the protection of member state competences.⁵⁴ Accordingly, the values enshrined in Article 2 TEU can override the principle of conferral and grant new powers to Union institutions only within the narrow framework of Article 7 TEU.⁵⁵ It is no surprise that the Council (Article 7(1) TEU: four-fifths majority) and, above all, the European Council (Article 7(2) TEU: unanimity; Article 7(3) and (4) TEU: qualified majority) play a particularly prominent role in safeguarding the member states. The European Council, which provides the Union with the necessary impetus for its development and sets its general political directions and priorities, is ultimately responsible for defending the values enshrined in Article 2 TEU through the Article 7 procedure. Only the European Council has the authority to determine that a member state has violated these values. As the representative body of the member states, it concentrates their full constitutional legitimacy. It is therefore, in principle, the appropriate forum for the collective enforcement of shared values, especially values such as the rule of law, which, as the CJEU rightly notes, form part of the constitutional identity of the member states.⁵⁶

In addition to the political procedure under Article 7 TEU, the conditionality mechanism⁵⁷ offers another way to sanction breaches of the Union's fundamental values. In line with the logic of the European Union as a supranational organisation still primarily focused on the internal market, the conditionality regime allows for the protection of the Union budget against violations of Article 2 TEU, based directly on the legal basis provided in Article 322(1)(a) TFEU.

An infringement procedure based directly on Article 2 TEU, outside the scope of Union law, would not only bypass the mechanisms laid down in Article 7 TEU, including clearly defined procedural steps, designated institutional actors, and a graduated system of sanctions. More than that, such a procedure would create a structurally inconsistent grey area between the conditionality mechanism and the Article 7 TEU procedure. The specific legal frameworks for both mechanisms – the conditionality regime, which is tied to the protection of the EU budget, and the Article 7 procedure, which is a political process centred on the role of the member states – are grounded in primary and secondary Union law. These

54 See: Council of the European Union, Opinion of the Legal Service, 13593/18, 25 October 2018, para. 13.

55 Moreover, as already mentioned, Art. 2 TEU does not serve to confer additional competences upon the EU institutions, see: BVerfGE 123, 267 (397) – *Lissabon*.

56 Court of Justice, *Associação Sindical dos Juízes Portugueses* (Case C-64/16, judgment of 27 February 2018, EU:C:2018:117) para. 35, referring in this sense to Court of Justice, *Unibet* (Case C-432/05, judgment of 13 March 2007, EU:C:2007:163) para. 37; Court of Justice, *DEB* (Case C-279/09, judgment of 22 December 2010, EU:C:2010:811) paras. 29–33; Court of Justice, *Rosneft* (Case C-72/15, judgment of 28 March 2017, EU:C:2017:236) para. 73; Court of Justice, *Hungary v Parliament and Council* (Case C-156/21, judgment of 16 February 2022, EU:C:2022:97) paras. 231ff; and Court of Justice, *Poland v Parliament and Council* (Case C-157/21, judgment of 16 February 2022, EU:C:2022:98) para. 263.

57 European Parliament and the Council of the European Union, 2020.

frameworks risk being circumvented through unchecked judicial law-making by the CJEU.

■ 3.2. *The Legitimacy Deficit: When Judicial Activism Undermines the Rule of Law*

Beyond the legal questions already raised, there is also a fundamental issue of legitimacy: how far may judicial development of the law based on Article 2 TEU go before the CJEU begins to assume a quasi-legislative role, introducing structural changes to the Union without adequate democratic legitimacy, bypassing both the member states and the Union legislator?⁵⁸ The operationalisation of constitutional values within a legal order is, in principle, a task for the legislature. Courts, especially constitutional courts, are meant to play a complementary, gap-filling role. Thus, even apart from concerns about circumventing specific procedures and legal competences, it must be recognised that the CJEU is not institutionally suited to lead the European Union into a new phase of constitutionalism on the basis of the broadly worded and highly indeterminate Article 2 TEU.⁵⁹ At the heart of the principle of separation of powers, or, in the EU context, the principle of institutional balance,⁶⁰ is the idea that tasks should be carried out by the institution best equipped for them.⁶¹ It is therefore primarily the responsibility of the Union legislator to create instruments for safeguarding the EU's values, where necessary. If the protection of the rule of law under Article 7 TEU is rightly seen as inadequate, it is up to the Commission, Parliament, and Council to initiate and adopt new legislation, as they have done, for example, through the conditionality mechanism. By contrast, any structural reform of the European

58 On this issue see also: Möllers and Schneider, 2018, p. 147; Blauburger and Kelemen, 2017, pp. 325–326 and 331.

59 Accurately observed by Nettesheim, 2024, p. 269: 'Its legitimacy and political capital are insufficient to create a meta-constitution for the constitutions of the EU Member States. The Court's 'value constitutionalism' amounts to an eclectic 'Frankenstein constitutionalism' that has no place within the current treaty architecture. The democratic quality of the overall system suffers. Highly political conflicts cannot simply be resolved by juridification.'

60 See from the case law of the Court of Justice only *Roquette Frères* (Case C-138/79, judgment of 29 October 1980, EU:C:1980:249); *Commission v Council* (Case C-302/87, judgment of 27 September 1988, EU:C:1988:461); *Parliament v Council (Chernobyl)* (Case C-70/88, judgment of 22 May 1990, EU:C:1990:217); *Commission v Council (Titanium Dioxide)* (Case C-300/89, judgment of 11 June 1991, EU:C:1991:244); and from the literature among many Jacqué, 2004, p. 383; Craig, 2021, p. 46; Yuratich, 2017, p. 99.

61 For the German Federal Constitutional Court's case law on the principle of separation of powers, see: BVerfGE 49, 89 para. 73 – Kalkar, and in particular BVerfGE 68, 1 para. 144 – *Atomwaffenstationierung*: 'The organisational and functional distinction and separation of powers, normatively enshrined there as a principle, primarily serve the distribution of political power and responsibility, as well as the control of those holding power; it also aims to ensure that state decisions are made as correctly as possible – that is, by the bodies that are best suited for this purpose based on their organisation, composition, function, and procedures (...).'

Union can only be legitimately undertaken by the member states themselves, as the ‘masters of the Treaties.’ They decide politically on the Union’s values, whether in the accession process, under Article 7 TEU, or through treaty amendments.⁶²

The conditionality mechanism clearly demonstrates that new procedures for defending the Union’s values must, as a matter of principle, be based on new legal foundations rather than leaving such developments to the CJEU through Article 2 TEU and thereby assigning the CJEU a quasi-legislative role that the actual legislature fails to fulfil. In this context, former Commission President Barroso rightly observed as early as 2012 that ‘We need a better developed set of instruments, not just the alternative between the ‘soft power’ of political persuasion and the ‘nuclear option’ of Article 7 TEU.’⁶³ The Commission recognised that an additional enforcement mechanism required a proper legal basis, and that such a sensitive area could not be left to the discretion of the CJEU. This is why the regulation establishing the conditionality mechanism was introduced on the basis of Article 322(1)(a) TFEU.⁶⁴

Ultimately, the CJEU’s case law aimed at defending the rule of law in Poland, Hungary, and Romania leads to a paradoxical outcome. In seeking to counteract democratic backsliding, the CJEU risks overstepping its judicial mandate, thereby undermining its own legitimacy and that of the European Union. The core rule-of-law paradox lies in the fact that this approach may endanger the rule of law *within* the Union itself.⁶⁵ By disregarding the vertical balance of power between the Union and its member states, and by weakening the horizontal institutional balance within the EU, the CJEU’s legitimacy, as well as that of the Union, is diminished.⁶⁶ This is especially problematic because the direct and overriding effect of Union law rests precisely on the premise of conferred powers. The expansion of the CJEU’s authority through value-based jurisprudence is not matched by a corresponding increase in democratic legitimacy.

■ 3.3. *Interim Conclusion: A Judicial Dead End*

The judicial enforcement of the values enshrined in Article 2 TEU is likewise limited to the scope of EU law. Article 7 TEU constitutes an exclusive special

62 See also among many: Schorkopf, 2020, p. 482; Nettesheim, 2024, p. 269.

63 See: European Commission, 2014.

64 Council of the European Union, Opinion of the Legal Service, 13593/18, 25 October 2018, para. 2.

65 See also: Haltern, 2017, paras. 756 etc.; 2021, p. 213: ‘Constitutionally speaking, the erosion of competence boundaries undermines the legitimacy of the entire constitutional structure of the European Union [...]. Both the Union’s formal legitimacy (as the internal rationale for primacy and direct effect implodes) and its substantive legitimacy (as the expansion of competences must go hand in hand with an increase in democratic legitimacy) are thereby impaired.’

66 See explicitly: *Van Gend en Loos v Nederlandse Administratie der Belastingen* (Case C-26/62, judgment of 5 February 1963, EU:C:1963:1) 1 (25); *Flaminio Costa v ENEL* (Case C-6/64, judgment of 15 July 1964, EU:C:1964:66) 1259 (1269).

procedure for serious breaches of these values, which is largely shielded from judicial review by Article 269 TFEU. An infringement procedure based solely on Article 2 TEU would circumvent the established allocation of roles and competences, effectively hollowing out Article 7 TEU, and pushing the CJEU into a quasi-legislative role without any legitimate basis. In order to preserve both the institutional balance and the principle of conferred powers, judicial enforcement of Article 2 TEU independently of the scope of Union law remains excluded, unless as with the conditionality mechanism, a specific legal framework is established by the legislator.

4. Conclusion: Structural Limits of the ECJ's Current Approach and Prospects for a Coherent Path Forward

Ultimately, the Treaties' structure makes clear that only Article 7 TEU permits repressive enforcement of the Union's values against Member States, independently of the material scope of Union law. Article 2 TEU itself does not extend its applicability beyond that scope. So far, the CJEU has relied on Article 19(1), second subparagraph TEU to establish a connection to Union law. However, it is doctrinally questionable to consider the mere abstract potential of a body acting as a Union court in a functional sense sufficient to trigger the material scope of Union law. At the same time, it is unlikely that the CJEU will reverse this line of case law. Nevertheless, the application of this jurisprudence on judicial independence should be avoided in contexts beyond the clear dismantling of the rule of law. It would be far from convincing to extend the use of purely abstract points of reference to establish a link to Union law in relation to other national institutions. Doing so would, in theory, allow the CJEU to subject the entire administrative and governmental structure of the Member States to a form of European constitutional oversight. Yet under the functioning of Union law, it is precisely the national authorities and institutions that are responsible for implementing and enforcing Union law, thereby ensuring its effectiveness. With respect to the judiciary, the CJEU has already developed detailed requirements regarding the appointment, term of office, and dismissal of judges. On the basis of Articles 10 and 12 TEU, similarly detailed requirements could be imposed on national parliaments concerning the election and exercise of parliamentary mandates. Likewise, the CJEU could establish a system of constitutional oversight for national administrations, given that Articles 197, 291, and 298 TFEU require the Union's institutions, bodies, and

agencies to rely on an open, efficient, and independent European administration, something that necessarily involves the Member States.⁶⁷

Without violating the principle of conferral, the CJEU cannot, by judicially developing the law under Article 2 TEU, create a generally applicable set of obligations that would allow it to exercise constitutional oversight over areas that fall within the original competences of the Member States or over constitutionally grounded national decisions within the framework of infringement proceedings. For a provision of Union law to have effect within the constitutional orders of the Member States, it must be based on a clear legal foundation, namely one that defines or at least clearly specifies both the conditions for its application and its legal consequences. This requirement, rooted in the constitutional identity of the Union, has long been insisted upon by the constitutional and supreme courts of the Member States, dating back to the Maastricht Treaty,⁶⁸ and it once again comes to the fore in the context of operationalising the values enshrined in Article 2 TEU.

A comparison with the Conditionality Mechanism introduced by the EU legislator further illustrates that the repressive enforcement of the Union's values requires a specific legal basis in the Treaties. It is no coincidence that the Conditionality Mechanism is grounded in the dedicated Conditionality Regulation (Regulation (EU, Euratom) 2020/2092), which is based on Article 322(1)(a) TFEU. In this regard, the Union's legislature has taken responsibility by establishing a mechanism for the enforcement of values that is sufficiently distinct from Article 7 TEU, particularly due to its link to the internal market.

Conversely, another repressive instrument for protecting the Union's values, the so-called 'New EU Framework to strengthen the Rule of Law,' also referred to as the pre-Article 7 procedure, explicitly operates,⁶⁹ according to the Commission, without relying on a specific legal basis. It can arguably be based in general on Article 292, fourth sentence, TFEU.⁷⁰ However, in terms of legal consequences, it only authorises the Commission to issue recommendations, and not to impose binding sanctions.

Within this graduated system – comprising primary law procedures, secondary law instruments, and purely recommendatory mechanisms for safeguarding values – the ECJ's value-based jurisprudence under infringement proceedings

67 See also: Nettesheim, 2022, p. 542: 'In this way, the CJEU is developing comprehensive judicial requirements for the member state system of court establishment, the appointment, tenure, and dismissal of judges, as well as the position of courts in the state function system.'

68 For a similar example, see particularly: Højesteret, judgment of 6 April 1998, I 361/1997, UfR 1998, 800, – *Carlsen v. Rasmussen*. In this case, the Højesteret clarified that Art. 20 para. 1 of the Danish Constitutional Act, which regulates the delegation of state powers to international organizations, contains a requirement for clarity: the powers delegated must be clearly defined. It would be unconstitutional if the organization itself decides the extent of its own jurisdiction (competence-competence).

69 European Commission, 2024.

70 Instructive on this: Hainthaler, 2024, p. 291.

introduces a structurally inconsistent tool. It overextends the effectiveness of value enforcement (by combining application beyond the Union's legal scope with the harsh consequence of financial sanctions under Article 260 TFEU), while disregarding the limited scope of Union law.

Even the cross-sectoral enforcement instruments long established in other areas of Union law, namely the fundamental freedoms aimed at achieving the Union's internal market objectives, offset their broad scope by relying on clearly defined legal criteria (such as a cross-border element, a personal or material nexus, a specifically protected good or type of conduct, defined exemptions, and justification grounds). Following the same logic, Article 51(1) sentence 1 CFR introduces a limited scope of application as a corrective to the horizontal effect of the fundamental freedoms, tying the Charter of Fundamental Rights' applicability to the 'implementation of Union law.'⁷¹

Even outside the system of repressive enforcement of values, the differentiated logic of the EU Treaties becomes evident. Where legal norms apply across the board and independently of specific areas of application, other mechanisms are used to safeguard the principle of conferral: clear legal criteria and scope-based exceptions for the fundamental freedoms, the limited scope of application of the Charter of Fundamental Rights, and the strict procedural requirements and central role of the European Council in the Article 7 TEU procedure. Abandoning all these safeguards and shifting the repressive enforcement of values largely into the hands of the CJEU – channelling it through infringement proceedings (Articles 258 and 259 TFEU refer, not coincidentally, to a 'failure to fulfil an obligation under the Treaties') – would only be conceivable through a formal Treaty revision, which is the exclusive prerogative of the Member States, not under the current constitutional framework of the EU.

It follows that any judicial enforcement of the values set out in Article 2 TEU must meet four cumulative conditions.

It requires a concrete link to the *material scope* of Union law. Article 2 TEU cannot serve as a standalone source of Union competence. It becomes operational only when another provision of Union law, such as Article 19 TEU, Article 291 TFEU, or sector-specific secondary legislation, already applies. The scope of Article 2 TEU is thus necessarily derivative.

Even where the material scope of Union law is established, the enforcement of values must rely on a *normative basis* that imposes a specific legal obligation. It is not sufficient that a provision merely refers to the values of the Union; it must concretise them. The relevant Treaty or legislative norm must define the legal standard to be enforced. Abstract or programmatic references, such as those in Articles 10(2), 12 TEU or Article 298 TFEU, cannot serve as a sufficient foundation for infringement proceedings.

71 Critically: Spieker, 2024.

The legal obligation must be interpreted *within its own normative limits*. Article 2 TEU may serve to guide the interpretation of a norm, but not to expand its substantive content. Infringement proceedings require a clearly defined legal obligation under the Treaties. Using Article 2 TEU to transform limited obligations into far-reaching constitutional mandates would violate the principle of legal certainty and exceed the Court's interpretive authority.

The *substantive meaning* of the values in Article 2 TEU must be derived from the shared constitutional traditions of the Member States. This interpretive approach ensures democratic legitimacy and doctrinal coherence. Article 2 TEU can only produce concrete normative content through comparative constitutional reasoning, analogous to the development of general principles under Article 6(3) TEU. The values must reflect constitutional common ground, not judicial innovation.

This fourfold structure is not merely a theoretical constraint; it follows from the very logic of the Union's constitutional order. Repressive value enforcement, particularly when linked to Article 260 TFEU financial sanctions, must remain legally predictable, politically accountable, and normatively limited. Without a formal Treaty revision, which only the Member States can initiate, any further expansion of value enforcement through judicial channels would lack structural legitimacy.

The following table summarises the necessary preconditions for a coherent and legally sound application of Article 2 TEU in infringement proceedings:

Table 1. Preconditions for a Coherent Application of Article 2 TEU in Infringement Proceedings

Precondition	Doctrinal Function	Legal Justification
Material Scope of Union Law	Article 2 TEU can only be operationalised where the situation falls within the scope of Union law, as defined by a separate substantive legal norm.	Prevents unwarranted expansion of Union competences; upholds the principle of conferral under Article 5(2) TEU.
Normative Anchor in Primary or Secondary Law	Value enforcement must rely on a Treaty provision or legislative act that contains a concrete and specific legal obligation.	Avoids reliance on declaratory or programmatic provisions; ensures legal certainty and normative specificity.
Prohibition of Normative Overreach	Article 2 TEU may inform the interpretation of a specific obligation but cannot extend its substantive content beyond what is defined in Union law.	Maintains the interpretive limits of judicial reasoning; protects the integrity of the Treaties' legal framework.
Substantive Elaboration via Shared Constitutional Traditions	The concrete meaning of the values in Article 2 TEU must be developed through comparative constitutional analysis grounded in the common traditions of the Member States.	Ensures democratic legitimacy; aligns with the methodology for deriving general principles under Article 6(3) TEU.

Source: Author's own elaboration.

This framework not only respects the structural logic of the Treaties but also offers a coherent path forward: one that preserves the legitimacy of value enforcement without transforming the ECJ into a constitutional court of general jurisdiction over national institutions.

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