

**European Law Blog**

# **Citizenship, Values, and the Rule of Law: The Aftermath of the Commission v Malta Judgment and Article 2 TEU**

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The Court's judgment in [Commission v Malta](#) on the Maltese citizenship-by-investment (CBI) scheme constitutes a worrying deployment of Article 2 TEU as an all-purpose corrective that ignores textual limits of [Article 20\(1\) TFEU](#), interpreted through the prism of [Declaration No 2](#), competence boundaries and institutional balance within the EU. unlimited. By underlying that the EU "is founded on representative democracy, which gives concrete expression to democracy as a value, which is, under Article 2 TEU, one of the values on which the European Union is founded", that "the exercise by the Member States of their power to lay down the conditions for granting their nationality has consequences for the functioning of the European Union as a common legal order" (para. 89 of the judgment) and that "Union citizenship is based on the common values contained in Article 2 TEU and on the mutual trust between the Member States as regards the fact that none of them is to exercise that power in a way that is manifestly incompatible with the very nature of Union citizenship" (para. 95 of the judgment), the Court formulated a value-based approach that justified interference with national citizenship policies. Although the judgment has already been extensively analyzed in the academic discourse (see indicatively [here](#), [here](#) and [here](#)), this blog specifically examines the invocation of Article 2 TEU by the Court and its (potential) broader implications.

### **Article 2 TEU Against the Letter of the TEU (and Declaration No 2)**

The starting point of any discussion of EU constraints on nationality attribution is deceptively simple: according to Article 20(1) TFEU, Union citizenship "shall be additional to and not replace national citizenship," and Declaration No 2 on nationality states that nationality "shall be settled solely by reference to the national law of the Member States." These provisions were not drafted in a vacuum. The "additional" and "not replace" formulas were inserted to underline EU citizenship's derivative character and to reassure skeptical Member States that the Union would not Europeanize nationality by the back door.

Read in this light, the Treaties draw a clear line: (attribution of) nationality, even including highly questionable forms of "passport for sale", remains a national competence. Hence, the Court's recourse to Article 2 TEU in *Commission v Malta* cuts across that settlement by prescribing concrete limitations on this national competence. More specifically, Malta's CBI scheme was condemned as contrary to EU values, yet the judgment does not convincingly identify which value is breached, or explain how such a breach follows from the text, structure or drafting history of the citizenship provisions. Interestingly, "democracy" is briefly mentioned in paragraph 89 of the judgment, without a thorough analysis on (1) how the protection of that value necessitates the restriction of the attribution of citizenship against the letter of the Declaration No 2, even though the latter does not constitute a legally binding document, or (2) why the fact that the CBI scheme in question "has consequences for the functioning of the European Union as a common legal order" that justify EU intervention on that matter. In this regard, Article 2 TEU seems to be interpreted as a free-standing legal yardstick capable of expanding its normative reach to an area the Treaties themselves left to the Member States. In this sense, although the invocation of Article 2 TEU does not constitute in itself the decisive

argument of the judgment (the final ruling instead is based primarily on Article 20 TFEU and the duty of sincere cooperation under Article 4(3) TEU), it appears to pave the way for such an expansive interpretation with far-reaching effects. That interpretation heavily relies on an inflated reading of the formula “values common to the Member States”. However, it is at least as plausible to understand those values as shared constitutional aspirations that structure political and legal discourse rather than as a directly justiciable code authorizing the Court to override express competence allocations whenever national law is normatively unattractive.

### **From “Systemic Deficiencies” to One Disliked Policy**

The *Commission v Malta* judgment also illustrates how quickly the limitations on the EU’s competence set out in the Treaties can evaporate through the invocation of Article 2 TEU. However, the aim should not be to use Article 2 TEU to constitutionalize every values-related issue but to police the outer edge of democratic backsliding, since, when it comes to non-systemic violations of EU values, secondary legislation appears more adequate to address such issues. Whatever else one thinks about CBI, it is difficult to describe Malta’s scheme in those terms (compared, for example, with [the situation in Hungary or Poland](#)), since it neither transforms the Maltese constitutional order, nor does it politicize the judiciary or even rendering free elections meaningless. Naturally, it is a controversial policy choice in a sensitive field but not a symptom of authoritarian consolidation.

Hence, reading the *Commission v Malta* judgment as a violation of Article 2 TEU, which appears to be what the Court arguably implies or at least uses as a supporting argument, would, however, presuppose abandoning the systemic-violations threshold that has so far upheld the respect for national autonomy within the European project. Once that threshold falls away, Article 2 TEU risks becoming exactly what critics fear: a [generalized “trump card”](#) against national decisions that the Court (or the Commission) finds politically or morally distasteful, regardless of whether they amount to a structural breakdown of EU values.

### **Values, Competences and Selectivity**

Defenders of the Malta judgment argue that granting nationality without a “genuine link” undermines solidarity, democracy and equality, and thus conflicts with the Union’s values (see, [here](#) and [here](#)). That line of argument has two structural problems.

Firstly, it collapses the distinction between *EU constitutional values* and *competences*. Many nationality policies of the Member States arguably sit uneasily with democracy or equality: think of highly restrictive naturalization rules for long-term residents, diaspora-favouring citizenship regimes, or the blanket exclusion of certain minorities from meaningful access to citizenship. Yet, the Treaties clearly leave those choices to the Member States. If the mere fact that a policy can be framed as being in tension with democracy or equality values suffices to bring it within the orbit of Article 2 TEU, there is no principled stopping point. Almost any

nationality rule could become an EU values issue, notwithstanding Article 20 TFEU and Declaration No 2, as far as the Court of Justice considers it to be “manifestly incompatible with the very nature of Union citizenship” (see para. 95).

Secondly, the choice of target appears to be selective. On the reasoning now deployed by the Court, one could equally argue that (a) systematically refusing naturalization to third-country nationals with a strong factual bond to the Member State, or (b) denying national parliamentary voting rights for national elections to mobile EU citizens in their State of residence, violates the values of democracy and equality enshrined in Article 2 TEU. Yet, in the latter case, for example, Article 22 TFEU strongly suggests that Member States retain control over national parliamentary elections, and, in neither case, it has been proposed to reinterpret the Treaties in the name of Article 2 TEU. What distinguishes the Maltese CBI scheme, then, is less a qualitative difference in its relationship to EU values than its political unpopularity. However, that cannot constitute a sound basis on which to extend the reach of Article 2 TEU.

### **Article 2 TEU as an Vehicle to Override the Allocation of Competencies**

*Commission v Malta* also needs to be read within a wider doctrinal trend. In recent years, Article 2 TEU is progressively interpreted forming the “constitutional core” of EU law that ranks above all other Treaty provisions (see [here](#) and [here](#)). On this view, the constitutional “core” must guide a “principled” and even “transformative” interpretation of EU law: sectoral Treaty rules that sit uncomfortably with values are to be aligned or “transformed”, provided only that the resulting reading is not explicitly *contra legem*. *En passant*, it is the author’s opinion that Article 2 TEU values indeed constitute the normative core of EU constitutionalism, and thus their protection should be prioritized as guiding principles for the application of EU law, without though being able to expand the Union’s competencies in areas reserved for the Member States, directly overriding the constitutional principle of conferral.

In this sense, Article 2 TEU cannot be effectively deployed to displace the very clear rule that Member States decided on nationality. Hence, it is difficult to see how that can be squared with any meaningful notion of legality. More specifically, given that Article 20 TFEU and Declaration No 2 both point to the Member States’ absolute competency over nationality, then Article 2 TEU is (mis)used to complementarily justify a different allocation of power because the underlying national policy is thought objectionable. Consequently, the label “interpretation” starts to look like a fig leaf. What is essentially happening is constitutional amendment by judicial fiat. We should not forget that legality without meaningful constraints on what counts as a permissible reading is an empty shell. When values become a warrant to bypass allocated competencies, legality is hollowed out from within.

### **Constitutional Law Without Politics – again**

There is a deeper pathology at work here, which [Martijn van den Brink captures](#) by reviving Martin Shapiro's diagnosis of "constitutional law without politics". The intellectual climate in which *Commission v Malta* is possible, is one in which the Treaties are read as a kind of sacred text and the Court appears as the "disembodied voice of right reason," merely working out the "correct implications" of open-ended clauses.

In that climate, the fact that CBI is politically controversial and raises serious distributive and democratic questions becomes a reason for judicial intervention, is not a reason to insist that such choices need to be worked through in political, democratically legitimated, fora. On the contrary, the more contested the policy, the stronger the temptation to recast disagreement as a matter of fundamental values and to relocate it to Luxembourg.

In other words, the problem is not that courts have no role in protecting EU values. In cases of systemic democratic erosion, attacks on judicial independence, or sham elections, it may be both legitimate and necessary for the Court of Justice to give Article 2 TEU hard legal teeth. But extending that logic to a single, however unattractive, nationality policy that lies outside the scope of EU competencies is a qualitatively different move. It blurs the line between defending the basic conditions of constitutional democracy and supervising ordinary, and reversible, policy choices.

From a rule of law perspective, this conflation is dangerous. It undermines the clarity of Treaty-based competence boundaries, erodes the predictability of value-based review, and feeds the perception that "EU values" are a flexible instrument for integration through adjudication rather than a shared constitutional minimum.

### **Towards a More Principled Use of Article 2 TEU**

What would a more principled approach to the *Commission v Malta* judgment – and to Article 2 TEU – look like?

Firstly, it would take the Treaties at their word. The combination of Article 20 TFEU and Declaration No 2 should be read as a genuine constraint, not as an obstacle to be worked around through intra-Treaty hierarchy. If the Union is to acquire substantive control over nationality law, that should occur through political means (legislation where competences exist, Treaty change where they do not), not through rereading and expanding the application of Article 2 TEU.

Secondly, it would recenter the systemic-defect threshold. EU values should be operationalized in hard law only where there is an entrenched, structural breakdown of core values, such as the kind of pattern we see in long-running rule of law crises in eastern Europe, rather than whenever a single policy offends widely shared intuitions about fairness or solidarity. That is not formalism for its own sake; it is the minimum needed to keep value-based adjudication from collapsing into judicialized politics.

Thirdly, it would embrace institutional humility. In domains like nationality, which are saturated with questions of identity and sovereignty, courts should be cautious about substituting their own judgments for those of legislatures and electorates. That is especially true in the EU, where the Union's [democratic legitimacy](#) still remains fragile.

From this perspective, *Commission v Malta* is a missed opportunity. The Court could have acknowledged the profound normative concerns raised by CBI schemes, signalled the political urgency of addressing them, and nonetheless accepted that, based on the current Treaties, the Court's hands are largely tied. Although not strictly central to its reasoning, the Court opted to stretch Article 2 TEU, coupled with the principles of solidarity and mutual trust, to cover ground the Treaties deliberately left to the Member States. The result is a judgment with a weak doctrinal foundation, as well as a precedent for a style of "value formalism" in which the invocation of EU values simultaneously expands judicial power and hollows out the Treaties' own constitutional constraints. In the long run, that approach risks undermining both the rule of law and the very legitimacy of the values Article 2 TEU is meant to uphold.

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