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The EU Citizenship as an Element of European Identity

Citizenship, Identity and Values – Reflections on *Commission/Malta*

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SUMMARY: 1. Introduction. – 2. Member States' competences and primacy of EU law. – 3. *Commission/Malta* as an "exercise of competences" case. – 4. Origins of Solidarity in *Commission/Malta*. – 5. Structure of Art. 2 TEU and how to apply it? – 6. Conclusion.

1. *Introduction*

It is always uncomfortable for a sitting judge, even more for a reporting judge, to publicly ruminate about a decided case. A prudent reader will have to assume that my thoughts presented in this text are personal and academic and dwell beyond what was considered in deliberations that remain confidential and limited by the four corners of the Commission's plea. After all, this text is not primarily focused on the case itself but on its possible broader consequences for interpretation of EU law.

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On its face, *Commission/Malta*[1] looks like a case about EU citizenship and it certainly is. The single plea raised by the European Commission concerned a violation of EU Citizenship provisions under Art. 20 TFEU and of a duty of loyal cooperation under Art. 4(3) TEU. The Commission insisted that by introducing an "investment citizenship scheme" where Maltese and, automatically and as advertised, EU citizenship could have been acquired against significant financial remuneration, the Republic of Malta failed to fulfill its obligations under EU law. The Grand Chamber of the CJEU decided for the Commission saying that «by establishing and operating an institutionalised citizenship investment scheme […] which establishes a transactional naturalisation procedure in exchange for predetermined payments or investments and thus amounts to the commercialisation of the grant of the nationality of a Member State and, by extension, that of Union citizenship, the Republic of Malta has failed to fulfill its obligations under Article 20 TFEU and Article 4(3) TEU».

Facts of the case are relatively simple. The Republic of Malta introduced a scheme under which acquisition of national citizenship was made available subject to payment of 600.000 to 750.000 Euro to the government, purchase of property of minimum value of 700.000 Euro and loose requirements of legal residence that, in effect, allowed the applicant to show up on the territory of Malta not more than twice; on occasion of collection of biometric data and on occasion of giving an oath.

While the judgment speaks for itself, the question that I want to discuss in this paper goes beyond its legal and factual background. Namely, knowing that acquisition of national citizenship is a retained competence of the Member States, and knowing that exercise of that competence is limited by EU law, the question is how the line is drawn between the "good" and "bad" acquisition of national citizenship and, more broadly, between a good and a bad exercise of national competence. While this is seemingly a moral question, I will try to separate law and morality[2] and look for the answer within framework

[1] Court of Justice, Judgment of 29 April 2025, Case C-181/23, *Commission/Malta*.
[2] Arguably, Art. 2 TEU values, as well as the entire constitutional edifice of the EU, comport moral judgment in themselves, which makes separation of law and morality

of EU constitutional law, notably, through a lens of EU identity and values enshrined in Art. 2 TEU. I will propose a reading of Art. 2 that goes beyond the question of its justiciability and suggest that the judgment in *Commission/Malta* was, at least implicitly, informed by EU values, notably, but not exclusively, the value of solidarity.

I will also suggest that the current Art. 2 debate and litigation, as well as the debate about national constitutional identity clause of the TEU is just a variation of the old struggle for immunization of national legal orders from primacy and direct effect of EU law, the struggle that historically manifested in different and well-known guises starting from the German *Solange* saga, Italian *Frontini* reservation, *ultra vires* theory, and national identity litigation.

2. *Member States' competences and primacy of EU law*

According to Art. 5(1) TEU «[t]he limits of Union competences are governed by the principle of conferral. The use of Union competences is governed by the principles of subsidiarity and proportionality». Conversely, Member States retain the competences that have not been conferred to the EU. When the CJEU examines the *exercise* of Member States' competence which has not been conferred to the EU, its reasoning of follows the analytical syntax "exercise of competence – restriction of the exercise – justification of the restriction", whereas a restriction may be justified by a general principle of EU law, a *raison d'être* of the EU,[3] a fundamental right,[4] or identity of the EU.[5]

illusory.

[3] Court of Justice, 18 December 2014, Opinion 2/13, *Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms*, para. 172.

[4] Court of Justice, Judgment of 1 April 2008, Case C-267/06, *Tadao Maruko*, para. 59: «Admittedly, civil status and the benefits flowing therefrom are matters wh59: all within the competence of the Member States and Community law does not detract from that competence. However, it must be recalled that in the exercise of that competence the Member States must comply with Community law and, in particular, with the provisions relating to the principle of non-discrimination (see, by analogy, Case C-372/04 Watts [2006] ECR I-4325, paragraph 92, and Case C-444/05 Stamatelaki [2007] ECR I-3185, paragraph 23)».

[5] Court of Justice, Judgment of 16 February 2022, Case C-156/21, *Hungary/European Parliament and Council*, para. 127: «The values contained in Article 2 TEU have been identified and are shared by the Member States. They define the very identity of the

Ultimately, Art. 2 values prevail also over claims based on values of national constitutional identity.[6]

Disputes between the EU and the Member States over competences can also be understood as disputes about primacy of EU law. Namely, EU law can take precedence over national law in two ways. First, if the EU has competence to regulate a field and, second, if a Member State, when exercising its retained competence, encroaches upon the law of the EU.

Over the decades the Member States' attempts to immunize their legal systems against primacy of EU law has taken different guises and reached the most abstract level in which primacy of EU law was being asserted on the ground of values. In brief, value-based primacy asserts a normative claim according to which an Art. 2 value of the EU, as defined by the CJEU, prevails over asserted national constitutional identity[7] or, indeed, over an asserted national value not consecrated by Art. 2.[8] This is, at the same time, the ultimate battlefield for primacy of EU law.

European Union as a common legal order. Thus, the European Union must be able to defend those values, within the limits of its powers as laid down by the Treaties».

[6] Court of Justice, Judgment of 21 April 2026, Case C-769/22, *Commission/Hungary* (Values of the Union), para. 559: «According to the case-law of the Court, although the Union is required to respect the national identities of the Member States, in accordance with Article 4(2) TEU, with the result that those States enjoy a certain margin of assessment in implementing the values referred to in Article 2 TEU and the principles of EU law giving concrete expression to those values, it in no way follows from this that the obligations resulting from Article 2 TEU may vary from one Member State to another […]».

[7] Court of Justice, Judgment of 18 December 2025, Case C-448/23, *Commission/Poland*, para. 180: «Even though, as is apparent from Article 4(2) TEU, the European Union respects the national identities of the Member States, inherent in their fundamental structures, political and constitutional, such that those States enjoy a certain degree of discretion in implementing the principles of the rule of law, it in no way follows that that obligation as to the result to be achieved may vary from one Member State to another. Whilst they have separate national identities, inherent in their fundamental structures, political and constitutional, which the European Union respects, the Member States adhere to a concept of 'the rule of law' which they share, as a value common to their own constitutional traditions, and which they have undertaken to respect at all times (judgments of 16 February 2022, Hungary v Parliament and Council, C-156/21, EU:C:2022:97, paragraphs 233 and 234, and of 5 June 2023, Commission v Poland (Independence and private life of judges), C-204/21, EU:C:2023:442, paragraph 73)».

[8] *Commission/Hungary*, cit., para. 559.

Earlier attempts of such immunization involved justifications based on arguments of a higher level of national protection of fundamental rights and the CJEU reacted by constructing the concept of fundamental rights as a part of common constitutional traditions of the Member States to override the objection.[9] Later on, the adoption of the Charter of Fundamental Rights of the EU resolved the problem by providing for an explicit legal basis in EU primary law. Subsequently, the Member States contestation of primacy of EU law was elevated to arguments of national constitutional identity, however, with limited success.[10]

The concept of constitutional identity[11] has been first mentioned in Art. F of the Treaty of Maastricht and later made part of Art. 4(2) of the TEU (Lisbon) and the case law of the CJEU on the matter is not in short supply. In functional sense, together with proportionality and subsidiarity clause, the provision serves as an assurance to the Member States against disproportionate encroachments of EU law into their withheld competences. Today it is clear that the Member States cannot successfully rely on national constitutional identity in defiance of Art. 2 TEU values.

3. Commission/Malta *as an "exercise of competences" case*

Most of the instances of Member State defiance of primacy of EU law have one thing in common. They attempt to draw the line of defense against, as some may see it, overreach of EU legal order upon national law. In *Commission/Malta* the hitherto uncontested exercise of national competences in field of granting national citizenship faced the boundary of solidarity as an Art. 2 TEU value. It is in this sense that

[9] See M. GRAZIADEI, R. DE CARIA, "*The Constitutional Traditions Common to the Member States" in the Case-Law of the European Court of Justice: Judicial Dialogue at its Finest*, in *RTDP*, Vol. 67, No. 4, 2017, pp. 949-971.

[10] See e.g. S. RODIN, *National Identity and Market Freedoms after the Treaty of Lisbon*, in *CYELP*, Vol. 7, 2011, pp. 11-41.

[11] Identity is commonly defined as something that defines an object as being unique due to its own characteristics and at the same time different from everything else. The CJEU has also developed the concept of EU identity according to which the legal order of the EU has since long time been considered autonomous and distinct from both, legal order of international law and legal orders of its Member States.

Commission/Malta is to be seen not exclusively and, possibly, not primarily through the lens of citizenship but through the lens of values.

Looking at para. 80 of the judgment one can see that the competence of Member States in respect of national citizenship is not contested and, in the Court's own words, «is to be settled solely by reference to the national law of the Member State concerned». However, as the Court continued in para. 81, it is the well-established law that even in areas of Member States' exclusive competence, those powers must be exercised «having due regard to EU law».

This limitation rests on several assumptions the basic one being the distinction between *allocation* of competences and their *exercise*. The doctrine is akin to the "dormant commerce clause" under the US Constitution according to which State regulation, to be constitutional, must not create undue burden[12] to interstate commerce. As the objectives of the EU go far beyond regulation of free trade (commerce), the undue burden test applies in respect of the entire body of EU law. There is no rule of Member State law, «any legislative, administrative or judicial practice»,[13] no national identity guarantee, that would be allowed to run against law of the EU as interpreted by the CJEU, including provisions regulating EU citizenship which, in the Court's words also contribute to process of integration which is *raison d'être* of the EU.[14]

4. *Origins of Solidarity in* Commission/Malta

[12] Interestingly, the expression undue burden englobes the analytical syntax "right-restriction-justification". The burden is imposed on a right and it can be due if justified.

[13] Court of Justice, Judgment of 9 March 1978, 106/77, *Amministrazione delle Finanze dello Stato/Simmenthal SpA*, para. 22.

[14] Court of Justice, Opinion 2/13, cit., para. 172: «The pursuit of the EU's objectives, as set out in Article 3 TEU, is entrusted to a series of fundamental provisions, such as those providing for the free movement of goods, services, capital and persons, citizenship of the Union, the area of freedom, security and justice, and competition policy. Those provisions, which are part of the framework of a system that is specific to the EU, are structured in such a way as to contribute – each within its specific field and with its own particular characteristics – to the implementation of the process of integration that is the raison d'être of the EU itself».

Art. 2 TEU was not pleaded in *Commission/Malta*, and the case was not decided on its grounds. However, in paras 96 to 99 the Court invoked the concept of solidarity, the same concept that appears in the second sentence of Art. 2.

There are more ways than one to understand what the concept of solidarity means.

On its face, as it follows from the text of para. 96 of the judgment, solidarity refers to the «special relationship of solidarity and good faith between that State and its nationals and the reciprocity of rights and duties». This is the internal concept of solidarity and the basis for the statement that the Court made in para. 97 that such solidarity «forms the basis of the rights and obligations reserved to Union citizens by the Treaties». In other words, the internal solidarity between a Member State and its nationals triggers the external concept of solidarity in respect of EU citizens, all that regardless of lack of competence of the EU and broad discretion of the Member States in area of national citizenship (para. 98). Once the link between internal and external solidarity is established, the CJEU connected solidarity with mutual trust and Art. 4(3) which provides for the principle of sincere cooperation. The Court went to say in para. 99 that: «[…] a Member State manifestly disregards the requirement for such a special relationship of solidarity and good faith, characterised by the reciprocity of rights and duties between the Member State and its nationals, and thus breaks the mutual trust on which Union citizenship is based, in breach of Article 20 TFEU and the principle of sincere cooperation enshrined in Article 4(3) TEU, when it establishes and implements a naturalisation scheme based on a transactional procedure […]» such as the facts of the case indicate.

This analysis establishes the competence as one belonging to the Member State, restricts its exercise and justifies it by value of solidarity and principle of mutual trust. Whereas the legal basis of mutual trust obviously has its legal basis in Art. 4(3) TEU, just as Commission pleaded, the origins of solidarity are less clear. While it appears clear from the judgment that it refers to the relationship between a Member State and its citizens and, by virtue of Art. 4(3) to other Member States and, by extension to the EU, in my understanding it is based in the second sentence of Art. 2 TEU and applied implicitly to the case.

Noteworthy, that silent application of Art. 2 is signaled by the citation of Art. 2 in para. 3 of the judgment (legal context) and explicitly in para. 93 where the Court said that: «Union citizenship is thus one of the principal concrete expressions of the solidarity which forms the very basis of the process of integration referred to in paragraph 91 of the present judgment, and which is an integral part of the identity of the European Union as a specific legal system, accepted by the Member States on a basis of reciprocity».

In other words, it can be inferred that the concept of solidarity, which dates to the Schuman declaration[15] makes part of the social contract that constitutes the EU legal order and as such justifies restrictions of exercise of national competence, including in the field of national citizenship. That social contract defines the EU as a liberal legal order in classical sense where everyone, a Member State and an individual have a right to determine for themselves what it means to live a good life as long he does not harm the others.[16] This is the origin of the analytical syntax "competence – restriction of exercise of competence – justification of the restriction" where a restriction is justified by prevention of harm to others or, in terms of US law, undue burden.

In this light it can be concluded that the principle of solidarity justifies restrictions on exercise of national competence whenever such exercise inflicts harm to others, in the concrete situation to other EU citizens by diluting the substance of their EU citizenship rights and to the other Member States by breach of mutual trust, all this because of the transactional nature of the investment citizenship scheme.

This brings me to my proposition how to understand the two-sentence structure of Art. 2 TEU and how to apply it in legal analysis.[17]

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[15] R. SCHUMAN, *Schuman Declaration*, Ministry of Foreign Affairs, Paris, 9 May 1950, para. 3: «Europe will not be made all at once, or according to a single plan. It will be built through concrete achievements which first create a de facto solidarity».

[16] J. MILL, *On Liberty (1859)*, Kitchener, 2001, p. 13: «the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others».

[17] It is my personal reading of Art. 2 that has not been tested in practice.

5. *Structure of Art. 2 TEU and how to apply it?*

Art. 2 TEU features two sentences and reads: «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».

In a 2024 interview (Berkeley Law's CJEU Series), president of the CJEU, Koen Lenaerts noted: «When you count all these values, you come to the number of 12. And I always told my students in Leuven, these are the 12 stars of the European flag».[18] He explained that the EU flag's 12 stars symbolize perfection/completeness (unlike the U.S. flag's state-by-state stars) and represent the shared values Member States must uphold to belong to the EU's common legal order.

While the twelve-star metaphor sits reasonably well, I would like to propose a different reading of Art. 2 by reference to Aristotle's distinction of substance and accidents (Aristotle, Categories) which can be also found in writings of St. Augustine (*The Trinity*).[19]

According to Aristotle, substance (*ουσία*) – is the primary category of being. It refers to what exists in itself (or "in its own right") and serves as the underlying subject or bearer of properties. Substances are independent entities that do not depend on anything else for their existence in the way properties do.

Accidents (*συμβεβηκός*) – These are properties, qualities, or attributes that inhere in or are present in a substance. They exist only by depending on a substance; they cannot exist independently. Accidents modify or qualify a substance but do not change what kind of thing the

[18] UC BERKELEY LAW'S, *Episode #2: Interview with President Koen Lenaerts, Borderlines Podcast, European Union Court of Justice Series*, 1 November 2024, visited on 1 April 2026, www.law.berkeley.edu/podcast-episode/european-union-court-of-justice-series-interview-with-president-koen-lenaerts/.

[19] SAINT AUGUSTINE, *The Trinity*, 2nd Edition (Works of Saint Augustine: A Translation for the 21st Century), Kindle edition, 2011, p. 5231.

substance fundamentally is. In another interpretation, «[b]eings that are present-in others are accidental, while those that are not present-in others are non-accidental».[20]

St. Augustine, talking of God, asserts that He, being the substance, has no accidents. God is not good, God is goodness. Saying that God is good would mean reducing Him to an accident of being good and implicitly accepting the possibility of not being so.

How does this apply to analysis of Art. 2 TEU? Are Art. 2 TEU values of substantive or accidental nature and what does the answer imply for interpretation of EU law? Let us take the example of democracy, a value stated in the first sentence. Obviously, and as a matter of fact, there are accidents of French democracy, German democracy, Greek democracy, Hungarian democracy, and so on. These are all accidents of a substantive concept of democracy. The question is the following: If Art. 2 has any normative value at all, which I think is the case, how is it then possible to tell which accident of democracy (or any other EU value) is valid and which is not by standards of Art. 2?

In my suggested reading, instead of understanding the twelve concepts mentioned in Art. 2 TEU as co-equal values, it is possible to look at the first and the second sentence separately. In that way accidents of values from the first sentence of Art. 2 TEU could be considered valuable, only insofar they comply with (are contained in, or, technically said, fall within scope) substantive concepts mentioned in the second sentence, namely, pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men. Non-pluralist democracy is still an accident of democracy, but it does not qualify as being valuable. German idea of *Unrechtstaat* introduced by Gustav Radbruch describes exactly a non-valuable historical accident, an intolerant, discriminatory and non-pluralist legal regime, opposite to the valuable concept of the rule of law.

According to the same reading, only valuable accidents of concepts mentioned in the first sentence of Art. 2 would have normative character within the legal order of EU law and their value, or absence

[20] P. STUDTMANN, *Aristotle's Categories*, in E. N. ZALTA, U. NODELMAN (eds.), *The Stanford Encyclopedia of Philosophy*, Stanford, 2024, www.plato.stanford.edu/entries/aristotle-categories/#Sub visited on 11 April 2026.

of it, would be determined by the substance of concepts mentioned in the second sentence. Certainly, this requires some basic consensus about substance of Art. 2 second sentence which is, at minimum, possible to define in negative terms, namely, as absence of authoritarianism, intolerance, injustice, selfishness, and discrimination. And a belief in that substance provides for a necessary consensus that makes existence of a society possible.

6. *Conclusion*

The CJEU never applied the structure of analysis of Art. 2 TEU explained above, and *Commission/Malta* was not decided in that way. The case was decided on grounds of solidarity as an EU value closely related to mutual trust that imposes limits to exercise of Member States' competences.

Nevertheless, concepts of mutual trust and solidarity employed across the judgment can be understood as accidents of the substantive concept of solidarity contained in the second sentence of Art. 2 TEU. Namely, understood, at minimum, as absence of selfishness the concept of solidarity does not operate exclusively between a Member State and its citizens but also among European citizens at large and, in the light of mutual trust, among the Member States.

Understood in this way Art. 2 solidarity applies to the concept of national grants of citizenship and informs us that EU law restrictions of exercise of Member State competences can be justified by the second sentence of Art. 2 TEU whenever the result of such exercise contradicts one of the values consecrated therein. Therefore, when a Member State exercises its competence to grant citizenship by naturalization or by special recognition based on, hypothetically speaking, sport achievements would apparently not be incompatible with Art. 2, second sentence, and commodification of citizenship is, because it is selfish, inflicts harm to others and, therefore, does not fall within the scope of the EU value of solidarity consecrated by the second sentence of Art. 2 TEU.

Broader implications of this approach for exercise of Member State competences in any area are also imaginable. Analytical syntax "exercise of Member State competence – restriction of exercise –

justification of the restriction" can be applicable in any area, beyond national citizenship. In essence, any exercise of Member State competence may be tested in the light of the values consecrated by Art. 2 TEU.

Such an interpretative approach affirms an understanding of values that leaves the Member States regulatory discretion in respect of "valuable" exercise of national competences and defines the "harm for the others" as a red line.

ABSTRACT (ITA)

A prima vista, la causa C-181/23, *Commissione/Malta*, sembra riguardare la cittadinanza dell'Unione, e in effetti è così. L'unico motivo sollevato dalla Commissione europea concerneva la violazione delle disposizioni in materia di cittadinanza dell'Unione. La Commissione sosteneva che, introducendo un «programma di cittadinanza per investitori», attraverso il quale era possibile acquisire, in cambio di un'ingente remunerazione finanziaria, la cittadinanza maltese e, automaticamente, come pubblicizzato, quella dell'Unione, la Repubblica di Malta fosse venuta meno agli obblighi ad essa incombenti in forza del diritto dell'Unione europea. L'articolo propone una lettura dell'articolo 2 TUE che supera la questione della sua giustiziabilità e suggerisce che la sentenza Commissione europea contro Repubblica di Malta, sia stata, almeno implicitamente, ispirata ai valori dell'Unione, in particolare, ma non esclusivamente, al valore della solidarietà. L'articolo sostiene che, sebbene i valori menzionati nella prima frase dell'articolo 2 TUE abbiano carattere normativo nell'ordinamento giuridico dell'Unione, il loro valore – o la sua assenza – è determinato dal contenuto sostanziale dei concetti richiamati nella seconda frase dello stesso articolo. Ciò richiede un consenso di fondo sul contenuto della seconda frase dell'articolo 2, che può essere definito, quanto meno in termini negativi, come assenza di autoritarismo, intolleranza, ingiustizia, egoismo e discriminazione.

ABSTRACT (ENG)

On its face, Case C-181/23, *Commission/Malta* looks like a case about EU citizenship which it is. The single plea raised by the European Commission concerned a violation of EU Citizenship provisions. The Commission insisted that by introducing an "investment citizenship scheme" where Maltese and, automatically and as advertised, EU citizenship, could have been acquired against significant financial remuneration, The Republic of Malta failed to fulfill its obligations under European Union Law. The article proposes a reading of Art. 2 of the Treaty on European Union that goes beyond the question of its justiciability and suggests that the judgment in the case C-181/23,

Commission/Malta was, at least implicitly, informed by EU values, notably, but not exclusively, the value of solidarity. It argues that whilst valuable accidents of concepts mentioned in the first sentence of Art. 2 have normative character within the legal order of EU law, their value, or absence of it, is determined by the substance of concepts mentioned in the second sentence of Art. 2. This requires some basic consensus about substance of Art. 2 second sentence which is, at minimum, possible to define in negative terms, namely, as absence of authoritarianism, intolerance, injustice, selfishness, and discrimination.