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The Impact of Multiple Crises on the Evolution of EU Law

Abstract

Against the backdrop of the multiple crises that the EU has faced over the last two decades, this keynote speech, delivered by President Lenaerts to celebrate the 20th anniversary of Hungary's accession to the EU, examines three areas of EU law in the light of the common values enshrined in Article 2 of the Treaty on European Union. First, it assesses the impact of the financial crisis, not only on the legal framework of Economic and Monetary Union but also on primary EU law more broadly. Second, it analyses how the case law relating to the COVID-19 pandemic has helped clarify the limits that may be imposed on free movement in the context of an exceptional public health crisis. Finally, it explores the rule of law crisis, considering its broader implications for understanding the scope and significance of the values enshrined in Article 2 TEU. This threefold examination supports the contention that, while these crises have raised new and complex legal questions – requiring the Court of Justice of the EU to resolve them expeditiously – the Court, in interpreting EU law, must remain respectful of the limits imposed on its jurisdiction by the Treaties and of the foundational values on which the EU is founded.

Keywords: Court of Justice of the EU, evolution of EU law, financial crisis in the EU, EMU, rule of law crisis, right to free movement during the COVID-19 pandemic, Article 2 TEU, EU values

I Introduction

It is a pleasure to be here at ELTE Law School in Budapest and I am honoured to celebrate the 20th anniversary of Hungary's accession to the European Union (EU) with you today. I would like to congratulate the organisers of this conference for having brought together

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a broad array of distinguished experts and I look forward to the further fruitful discussions on the always-relevant subject of the impact of multiple crises on the evolution of EU law.

The theme of this conference is of key importance when looking back on the EU since the 2004 enlargement. One of the EU's founding fathers, Jean Monnet, noted in his memoirs that: 'Europe would be built through crises, and […] would be the sum of their solutions.'[1] This statement was very prescient and indeed, over the course of the last few decades, the EU has reckoned with numerous challenges, three of which being: the financial crisis, the COVID-19 crisis and the rule of law crisis. These crises all had different sources and impacts on the lives of Europeans. Every crisis has also had a profound effect on the evolution of EU law. Its substantive and procedural provisions had to be interpreted and applied in an unprecedented context. However, as the saying goes: 'In the midst of every crisis, lies great opportunity'. An opportunity to return to the basics and to remind ourselves of our common foundations and values, as listed in Article 2 of the Treaty on the European Union (TEU), namely human dignity, freedom, democracy, equality, the rule of law and respect for human rights. In my address, I would like to examine, in particular, three areas of EU law.

First, I shall explore the financial crisis, and the effect that it had on the understanding of Economic and Monetary Union law, but also on EU primary law more broadly.

Second, I shall examine how the case-law arising from the COVID-19 pandemic has helped clarify the acceptable limits to free movement of persons in such exceptional circumstances, notably by interpreting the public health derogation set out in the Citizenship Directive.[2]

Third and finally, I shall take a look at the rule of law crisis. Here, I shall not only focus on how the respect for the rule of law may be pursued through the procedures before the Court of Justice of the European Union (Court or Court of Justice), but also on how that crisis contributed to a better understanding of the scope and effect of the Article 2 TEU values, of which the rule of law forms part.

This examination will show that while these crises raised new and challenging questions of law in respect to both EU primary and secondary law provisions, as well as compelled the Court to resolve them rather expediently, the Court remained, in interpreting those provisions, mindful of the limits to its jurisdiction as enshrined in the Treaties and of the foundational values which underpin the EU legal order.

[1] Jean Monnet, *Memoirs* (tr. by Richard Mayne, Third Millenium 1978, London) 417.

[2] Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC [2004] OJ L158/77 and corrigendum [2004] OJ L229/35.

II The Financial Crisis

The 2008–2009 financial crisis struck the EU heavily, requiring a Treaty revision in order to allow for the establishment of a financial and economic safeguard in the form of the European Stability Mechanism (ESM). The simplified Treaty revision procedure introduced by the Lisbon Treaty allows the European Council, deciding unanimously, to amend in whole or in part 'Part Three of the FEU Treaty', which concerns 'Union policies and internal actions'. To date, it has only been applied once, to pave the way for the establishment of the ESM by the Member States whose currency is the euro in 2012. The European Council inserted a new third paragraph in Article 136 TFEU, enabling the Member States whose currency is the euro to – and I quote – 'establish a stability mechanism to be activated if indispensable to safeguard the stability of the euro area as a whole'. This same provision provides that such financial assistance must be subject to strict conditionality.

1 The EMU Provisions of the Treaties

The *Pringle* judgment arose from a challenge to this Treaty revision. Thomas Pringle, a Member of the Irish Parliament, alleged that this was an unlawful amendment of the Treaties. The Irish Supreme Court notably had doubts as to whether that new Treaty provision resulted from a correct application of the simplified revision procedure, and thus referred to the Court questions on this matter.

The Court explained that it had to ascertain in particular whether the Treaty amendment at issue concerned solely 'Part Three of the FEU Treaty'. The mere fact that the amendment at issue formally concerned Part III of the TFEU was not sufficient. The Court also verified that it did not entail any alteration of Part I of that Treaty by encroaching on the EU's competences in the areas of monetary policy[3] or the coordination of the economic policies of the Member States,[4] and that it did not increase the Union's competences.

The Court found that the amendment at issue fulfilled all those conditions. A stability mechanism such as the ESM would not encroach upon the EU's exclusive competence on monetary policy. Its objective consists of ensuring the stability of the euro area as a whole, and thus not merely ensuring price stability.[5] Of course, the stability of that area as a whole may have a positive impact on the stability of the euro as a currency.[6] That impact is indirect, however, and an economic measure cannot be qualified as 'monetary' on the sole ground that it influences the stability of the euro or prices in the euro area indirectly. The envisaged stability mechanism should in fact be regarded as a measure of economic policy as

[3] Article 3(1)(c) TFEU.

[4] See in particular Article 5(1) TFEU.

[5] See Article 127(1) and 282(2) TFEU.

[6] Judgment of the Court (Full Court), 27 November 2012, Case C-370/12 *Thomas Pringle v Government of Ireland and Others,* EU:C:2012:756, para 56.

it aims to complete the EU regulatory framework for the strengthened economic governance of the EU. However, it was not found to undermine the EU's competence to coordinate the economic policies of the Member States as it differs in nature and scope from a mere 'coordination'.[7] Moreover, the Court ruled out Article 122(2) TFEU as a potential legal basis for establishing the ESM. That provision concerns ***ad hoc*** financial assistance to a Member State and is therefore not adapted to the establishment of a permanent mechanism aiming to safeguard the stability of the euro area as a whole.[8] Lastly, the Court explained that the amendment did not confer any new competences on the EU, as it created no new legal basis for the EU to undertake action that was not possible prior to its entry into force.[9] The Court emphasised that the Member States could only make use of the possibility offered by the new provision if they complied with the rules and principles governing the EU's economic and monetary policy. Thus, the 'strict conditionality' for granting financial assistance under the new mechanism aimed to ensure that it operates 'in a way that will comply with [EU] law,' including measures coordinating the Member States' economic policies.[10]

Having established that the European Council Decision amending the TFEU was validly adopted pursuant to the simplified amendment procedure, the Court then proceeded to carry out a more specific analysis, examining whether the Member States' adherence to the ESM Treaty would comply with the rules and principles governing the EU's economic and monetary policy.

The Court found, for analogous reasons to those explained in its reply to the first question, that the activities of the ESM as envisaged in that treaty do not encroach upon the EU's exclusive monetary policy[11] and that they do not run counter to the provisions governing the EU's coordination of economic policies of the Member States either.[12]

The judgment was particularly awaited for the interpretation of Article 123(1) TFEU and the famous 'no bail-out' clause in Article 125(1) TFEU. The obstacle of the first provision was easily overcome, as the prohibitions it contains, in particular to grant credit to public bodies of the Member States or of the EU, are addressed exclusively to the ECB and the Member States' central banks. The grant of financial assistance by one Member State or by a group of Member States to another Member State is therefore not covered by that prohibition.[13]

As to the 'no bail-out clause', it provides that neither the EU nor the Member States can be 'liable for […] the commitments' of another Member State or 'assume [those commitments]'. That does not mean that the Union or a Member State may not generally grant any form of

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7 Ibid, para 64.

8 Ibid, para 65. The Court also referred to Article 143(2) TFEU. Although that provision enables the Union, subject to certain conditions, to grant mutual assistance to a Member State, it covers only Member States whose currency is *not* the euro (referred to as Member States 'with a derogation' in that provision) (Ibid, para 66).

9 Ibid, paras 74–76.

10 Ibid, para 69.

11 Judgment in *Pringle*, paras 96 and 97.

12 Ibid, paras 110 and 111.

13 Judgment in *Pringle*, para 125.

financial assistance to a Member State. Article 125(1) TFEU must be interpreted in the light of its objective to ensure that the Member States follow a sound budgetary policy. Economic and monetary policy rests on the principle that the logic of the market applies to the Member States when they enter into debt. Indeed, maintaining or reinforcing budgetary discipline allows them to borrow at lower rates. To avoid undermining that incentive, financial support must be limited to situations where it is indispensable to safeguard the financial stability of the euro area as a whole and must be subject to strict conditionality.[14]

Those conditions were found to be fulfilled in the case of the ESM. Notably, ESM's financial support is reserved to situations where an ESM member's difficulties in obtaining financing on the market threaten the stability of the euro area as a whole and is subject to strict conditionality tailored to the financial instrument chosen.[15] Those features preserve the incentive for the Member States to conduct sound budgetary policies.

Finally, it is worth mentioning that the *Pringle* ruling also brought about important clarifications on the possibility for the EU institutions to participate in mechanisms established outside the framework of the Union, such as the ESM. Indeed, the ESM Treaty allocates various tasks to the Commission and the ECB. These institutions, in liaison with one another, notably assess requests for stability support and their urgency, negotiate a Memorandum of Understanding detailing the conditionality attached to the financial assistance granted and monitor compliance with the said conditionality. The Court found that their tasks fall within a non-exclusive area of competence, namely economic policy, and that they do not entail any power to make decisions on their own. Any activities pursued by those institutions within the ESM Treaty commit solely the ESM as such.[16]

The Court also noted that these tasks do not alter the essential character of the powers conferred on those institutions by the Treaties. The Commission, in line with its role as specified in Article 17(1) TEU, by exercising these tasks, promotes the general interest of the Union, namely the financial stability of the euro area as a whole and the ECB, by virtue of its duties within the ESM Treaty and in line with its mandate as envisaged in Article 282(2) TFEU, supports the general economic policies in the Union. Their participation in the operation of the ESM Treaty was thus found to be compliant with EU primary law.[17]

The judgment in *Pringle* has a long legacy in many other cases brought in the wake of the financial crisis. For example, the dividing line clarified in that judgment between the EU's monetary and economic policies was central to the reasoning in the famous *Gauweiler* case, in which doubts arose as to whether the ECB had disregarded its mandate when developing its outright monetary transactions (OMT) programme.[18] In particular,

[14] Ibid, para 136.
[15] Ibid, para 142.
[16] Ibid, paras 160 and 161.
[17] Ibid, paras 162 to 165.
[18] Judgment of the Court (Grand Chamber) of 16 June 2015, Case C-62/14 *Peter Gauweiler and Others v Deutscher Bundestag*, EU:C:2015:400.

the Court reasoned by analogy when it held that the mere fact that that programme could contribute indirectly to the stability of the euro area did not mean that it relates to economic policy rather than monetary policy.[19] Both the objectives of a measure and the instruments that it uses are relevant to decide whether it belongs to monetary or economic policy. Since the purchases in secondary sovereign bond markets envisaged in the context of the OMT programme could be implemented only in so far as necessary for the maintenance of price stability, they could be regarded as a measure of monetary policy. That was not called into question by the fact that comparable purchases relate to economic policy when carried out by the ESM, because the latter's objective is to stabilise the euro area as a whole.[20] The Court also confirmed that the OMT programme was compatible with the prohibition of monetary financing of Member States in the euro area. To reach that conclusion, the Court applied, by analogy, its reasoning on Article 125 TFEU in *Pringle* to Article 123 TFEU. Article 123 TFEU prohibits all financial assistance from the ESCB to a Member State, but does not preclude, generally, the possibility of the ESCB purchasing from the creditors of such a State, bonds previously issued by that State.[21] The Court confirmed that approach in *Weiss*, in which the ECB's public sector asset purchase programme (PSPP) was at issue.[22]

2 Clarifications to Other EU Primary Law Provisions

Cases arising from the financial crisis, apart from delineating the boundaries of the EMU provisions set out in the relevant Treaty articles, also clarified other 'constitutional' matters relating to the Court's jurisdiction and the EU institutions' obligations under EU primary law.

Firstly, in *Pringle*, the Court confirmed that it had jurisdiction to rule on the case. Various Member State Governments, as well as the Council and the Commission, argued that the jurisdiction of the Court was limited, if not excluded, by the fact that the questions related to the validity of a European Council decision, which amended EU primary law. Under Article 267 TFEU, the Court has no power to assess the validity of the Treaties.

However, the Court pointed out that the European Council is now an EU institution listed in Article 13(1) TEU. Its decisions can therefore in principle be subject to judicial review, on condition of course that the challenged measure really is to be attributed to the European Council and not to the representatives of the Member States.[23] Moreover, in a Union based on the rule of law, compliance with all procedural and substantive conditions for a simplified revision procedure should be subject to judicial review by

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[19] Ibid, paras 51–52.

[20] Ibid, paras 63–64.

[21] Ibid, paras 94–95.

[22] Judgment of the Court (Grand Chamber) of 11 December 2018, Case C-493/17 *Heinrich Weiss and Others*, EU:C:2018:1000, especially paras 50, 51, 61, 63 and 103.

[23] Judgment in *Pringle*, para 44. See also Order of the Court (First Chamber) of 16 June 2021, Case C-685/20 P *Eleanor Sharpston v Council of the European Union and Representatives of the Governments of the Member* States, EU:C:2021:485, para 51.

the Court. The Court therefore asserted its jurisdiction and recalled in that respect that according to the first subparagraph of Article 19(1) TEU, it is its constitutional role to ensure that the law is observed in the interpretation and application of the Treaties.

Secondly, an important clarification was brought by the cases following *Pringle*, namely cases involving actions for annulment of 'ESM measures' such as Memoranda of Understanding and actions seeking to obtain damages from the Union based on the involvement of the ECB or the Commission in the adoption of such measures. In *Ledra Advertising v Commission and ECB*,[24] *Mallis and Others v Commission and ECB*,[25] and in *Council v K. Chrysostomides & Co. and Others*,[26] the Court recalled its position from the *Pringle* ruling and confirmed that 'the activities pursued by those institutions within the ESM Treaty commit the ESM alone', which 'fall[s] outside the EU legal order'. It follows that such acts, and also more generally Eurogroup measures, cannot form the subject matter of an action for annulment before the EU Courts.[27] However, the involvement of the Commission and the ECB in the activities of the ESM does not exonerate these institutions from their duty to act in conformity with EU law. That applies in particular to the Commission, which acts as the 'Guardian of the Treaties'. This means for example that the EU might incur non-contractual liability if the Commission fails to identify a violation of EU law in the conditionality reflected in a Memorandum of Understanding that it has negotiated with the beneficiary Member State.[28]

Thirdly, the *Ledra Advertising* judgment confirms that even when the EU institutions act outside of the framework of the Treaties, such as when the Commission concludes Memoranda of Understanding with Member States in the ESM context, they are bound to respect the Charter of Fundamental Rights of the EU (Charter) and to ensure that those memoranda are consistent with the fundamental rights guaranteed by the Charter.[29] Unlike for Member States, Article 51(1) of the Charter does not contain any limit as to its applicability to the actions of the institutions.[30] The financial crisis thus also helped clarify the constitutional boundaries of the Charter, and that institutions remain bound to respect it even when not directly implementing EU law.

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[24] Judgment of the Court (Grand Chamber) of 20 September 2016, Joined Cases C-8/15 P to C10/15 P *Ledra Advertising Ltd and Others v European Commission and European Central Bank (ECB)*, EU:C:2016:701, para 45.

[25] Judgment of the Court (Grand Chamber) of 20 September 2016, Joined Cases C-105/15 P to C109/15 P *Konstantinos Mallis and Others v European Commission and European Central Bank (ECB)*, EU:C:2016:702, paras 53 and 54.

[26] Judgment of the Court (Grand Chamber) of 16 December 2020, Case C-597/18 P *Council v K. Chrysostomides & Co. and Others*, EU:C:2020:1028, para 131.

[27] See, to that effect, judgment of 20 September 2016, *Mallis and Others v Commission and ECB* (n 25) para 61.

[28] See, to that effect, judgment of 16 December 2020, *Council v K. Chrysostomides & Co. and Others* (n 26) para 96.

[29] See, to that effect, judgment of 20 September 2016, *Ledra Advertising and Others v Commission and ECB* (n 24) para 67.

[30] See, to that effect, Opinion of Advocate General Wahl in Joined Cases *Ledra Advertising and Others v Commission and ECB* (n 24) point 85.

III The COVID-19 Crisis

The COVID-19 public health crisis is a recent memory to us all, and its effects are still felt strongly everywhere today. The uncertainty and exceptional nature of this crisis led many Member States to take similarly exceptional measures to counter the spread of the coronavirus. Challenges to these measures have recently come before the Court questioning, in particular, the compatibility of these measures with fundamental aspects of EU law, such as free movement of people and the Citizenship Directive.[31]

Nordic Info[32] was a case arising out of the rules imposed in Belgium during the health crisis linked to the COVID-19 pandemic. In the spring of 2020, the Belgian Government prohibited non-essential travel having as its point of departure or arrival Belgium, on the one hand, and the countries of the EU, the Schengen Area and the UK, on the other, provided that those countries were designated as 'red zones' in the light of their epidemiological situation. That prohibition was based on a three-tiered country classification system, comprising green, orange and red countries. Green meant low risk and no travel restrictions, orange meant moderate risk and a travel warning, and red meant high risk and a travel ban for non-essential travel. Moreover, any traveller coming from a country classified as a red zone was required, in Belgium, to undergo screening tests and observe quarantine. Sweden was first briefly classified as red in the summer of 2020, then as orange.

Nordic Info, the applicant in this case, is a travel agency who cancelled all of its scheduled trips between Belgium and Sweden for the summer 2020 period as a reaction to those classifications. It subsequently filed a civil action before the Brussels Court of First Instance and sought damages. Nordic Info argued, *inter alia*, that the Belgian measures restricted the right to free movement guaranteed by the Citizenship Directive and that there was no legal basis for such a derogation. The Brussels Court of First Instance essentially asked the Court whether the ban on leaving Belgium, the compulsory screening tests and quarantine measures complied with the freedom of movement.

In this case, the Court was called upon to interpret Articles 27 and 29(1) of the Citizenship Directive, which allow for the adoption of measures restricting free movement on public health grounds. It was the first time that the Court had to interpret those provisions in the context of a global health emergency such as the spread of the COVID-19 disease. The Court followed a six-step analysis in interpreting those provisions of the Citizenship Directive, which I shall summarise as follows.

First, the Court found that the emergency measures had been enacted with non-economic aims and sought to stop the spread of the COVID-19 disease, which had been classified as a pandemic by the WHO.[33]

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[31] Directive 2004/38/EC (n 2).

[32] Judgment of the Court (Grand Chamber) of 5 December 2023, Case C-128/22 *Nordic Info BV v Belgische Staat*, EU:C:2023:951.

[33] Judgment of 5 December 2023, *Nordic Info* (n 32) paras 50 to 54.

Second, the Court explained that measures restricting the freedom of movement on public health grounds may cover both components of that freedom, namely the right of entry and the right of exit. It observed that limiting both components may be necessary in order to curb the spread of the disease. Moreover, measures restricting freedom of movement which a Member State may adopt on public health grounds under the Citizenship Directive not only cover measures that impose a partial or total ban on entering or leaving the national territory but all measures that adversely affect free movement by rendering it less attractive, such as an obligation for travellers entering that territory to undergo screening tests and to observe quarantine.[34]

Third, whilst the Citizenship Directive applies to measures limiting the right of exit to all Union citizens, including nationals, the same does not hold true in respect of the right of entry. When nationals exercise their right of entry into their own Member State, the Directive does not apply.[35]

Fourth, the Court observed that, unlike measures limiting free movement on public policy or public security grounds, which must be adopted in the form of an act of individual application, measures grounded in public health concerns may be of general application.[36]

Fifth, the Court went on to examine whether the Citizenship Directive contains conditions and safeguards that are to be attached to measures restricting free movement on public health grounds. The relevant provisions of the Directive Articles 30 to 32, contain terms and expressions calling to mind measures of individual application. Logically, the question that arose was whether those conditions and safeguards also applied to measures of general application. The Court replied in the affirmative, since those provisions give effect to the principle of legal certainty, the principle of good administration and the principle of effective judicial protection, all of which are general principles of EU law that apply to all measures restricting free movement, regardless of the form in which they are adopted. In concrete terms, this meant that the measures of general application that restrict free movement on public health grounds must be brought to the attention of the public by means of an official publication and by means of sufficient official media coverage. In addition, those measures must be open to challenge in judicial and, where appropriate, administrative redress procedures, either directly or incidentally.[37]

Sixth and last, the Court observed that measures restricting free movement on public health grounds must comply with the principle of proportionality. That compliance implies that national authorities must carry out an analysis of the appropriateness, necessity and proportionality *(stricto sensu)* of the measures at issue.[38]

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[34] Ibid, paras 57 to 59.

[35] Ibid, para 60.

[36] Judgment of the Court (Grand Chamber) of 5 December 2023, *Nordic Info* (n 32) paras 62 to 64.

[37] Ibid, paras 65 to 76.

[38] Ibid, paras 76 and 77.

Whilst it was for the referring court to examine whether the measures at issue complied with the principle of proportionality, the Court sought, nonetheless, to provide it with useful guidance based on the documents relating to the main proceedings.

In particular, the Court noted that the appropriateness of a given measure must be assessed in relation to the scientific data commonly accepted at the time of the facts in the main proceedings, the trend in cases of infection and mortality and the degree of uncertainty that might prevail in that regard.[39] The Court also drew the attention of the referring court to the fact that similar measures were adopted by the other Member States in a joint effort to curb the spread of the disease.

In regards to necessity and assessing whether less restrictive yet equally effective measures exist, the Court noted the large margin of discretion enjoyed by the Member States in the field of public health, given the precautionary principle.[40] In assessing whether in the case concerned less restrictive responses to the spread of COVID-19 would have been sufficient, account had to be taken of the overall epidemiological situation in Belgium at the time, as well as the extent to which the Belgian health services were overstretched, and ultimately, the need for these measures for the overall protection of the population.[41]

Finally, in regards to proportionality *stricto sensu*, the Court emphasised the balancing that must be struck between the public health objective pursued against the free movement rights of Union citizens and their families, the respect of their private and family rights guaranteed under Article 7 of the Charter, as well as the freedom to conduct business of legal persons, in this case *Nordic Info*, under Article 16 of the Charter.[42] The importance of the objective pursued must be proportionate to the seriousness of the interference with these rights.

In regards to a ban on leaving the Belgian territory, the Court observed that the contested measures did not prevent all exits from that territory but was limited to non-essential travel, such as leisure travel and tourist trips. Moreover, that ban was lifted as soon as the Member State of destination was no longer classified as a red zone. Regarding the compulsory screening measures, the Court noted that, because of the rapidity of the tests and the limited interference with the Charter rights at issue, those measures contributed to fulfilling the aim of containing and curbing the spread of the COVID-19 virus.[43] As to measures imposing a compulsory quarantine for travellers coming from a Member State classified as a red zone, the Court observed that those measures appeared, subject to verification, to comply with the principle of proportionality, read in the light of the precautionary principle, for two main reasons. First, there was a significant probability

[39] Ibid, para 82.
[40] Ibid, para 90.
[41] See to that effect, ibid, para 91.
[42] Ibid, paras 92 and 93.
[43] Ibid, paras 95 and 96.

that such a traveller would be infected by the virus, thereby passing it on to other persons. Second, screening tests were not entirely reliable at that time.[44]

The *Nordic Info* ruling provides two interesting clarifications to the derogations contained in Articles 27 and 29(1) of the Citizenship Directive, applied to the extraordinary circumstances of the COVID-19 pandemic. First, the scope of those derogations itself was confirmed, covering both measures of entry and exit, as well as restrictive measures of general application. This wide scope reflects the particular nature of the public health derogation. If a Member State has scientific evidence of an epidemic or a pandemic, it is likely that comprehensive restrictive measures will have to be imposed on the general public to protect the health of the population. A more restrictive reading of the scope of Articles 27 and 29(1), and the types of measures justified under the public health derogation, could render attempts to 'curb the spread or risk of the spread of a disease' ineffective, thereby jeopardising the objective of that derogation.

Second, and relatedly, Member States have a wider discretion in the public health context, which will affect any analysis of the proportionality of restrictive measures arising from a health crisis as extraordinary as COVID-19. This wider margin is related to the scientific uncertainty that persisted throughout the COVID-19 crisis and justified the imposition of protective measures. It was often precisely because of incomplete information that restrictive measures were enacted, in view of the potential risks.

However, in the final analysis, the restrictive measures taken must still be balanced against the free movement rights at issue, but also against potential interferences with other Charter rights. Indeed, various rights guaranteed under the Charter may be affected by these measures and the courts will therefore have to balance the objective of the measures against numerous potential interferences with fundamental rights.

All of this has a bearing on any future challenges to restrictions on free movement law brought about by the COVID-19 pandemic or any future pandemic or epidemic.

IV The Rule of Law Crisis

As you all know, respect for the rule of law is inherent in the EU legal order. More generally, it serves to create and to safeguard the bonds of solidarity and mutual trust between the Union's Member States. Respect for this value, along with the other values enshrined in Article 2 TEU, is thus essential in order to ensure that the pillars of the EU legal order stand strong.

The *sui generis* constitutional structure of the EU enables it to uphold the values on which it is founded and to attain the objectives set out in the Treaties. This requires the EU institutions and the Member States to respect the vertical and horizontal allocation of powers as established by the authors of the Treaties. For the Court of Justice, this means that

[44] Ibid, para 97.

it is bound to uphold that structure via Treaty interpretation without modifying it, as such modification would disturb the checks and balances on which the EU is founded. Thus, the Court of Justice, whilst being fully committed to upholding the rule of law within the EU and tasked by the first subparagraph of Article 19(1) TEU to do so, it must, in carrying out its mission, respect the limits set to its own jurisdiction.

Article 19(1) TEU entrusts the responsibility for ensuring judicial review in the EU legal order not only to the Court of Justice but also to national courts and tribunals. Indeed, the second subparagraph of that provision states that 'Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law'. The Court first operationalised this subparagraph of Article 19(1) TEU in the *Portuguese Judges* judgment, which involved a Union's challenge to measures reducing the salary of Portuguese judges, arguing that they violated the principle of judicial independence. In its judgment, the Court explicitly linked that Article 19(1) TEU to the values of the EU espoused in Article 2 TEU, specifically the rule of law. It found Article 19(1) TEU to be a 'concrete expression' of the rule of law.[45]

The rule of law crisis resulted in many cases before the Court, which have confirmed the status of the Article 2 TEU values, most importantly the rule of law, as protected under Article 19(1) TEU and as part of the right to effective judicial protection under Article 47 of the Charter.[46] I wish to highlight two aspects of these cases. First, the procedural avenues by which the rule of law may be upheld before the Court of Justice. Second, the way in which the rule of law crisis allowed the Court to clarify the status of Article 2 TEU values.

1 Procedural Avenues by which to Protect the Rule of Law

Regarding the procedural avenues for invoking Article 19(1) TEU and Article 47 of the Charter before the Court of Justice, a distinction must be drawn between infringement actions and preliminary references.

In the context of infringement actions, the application of Article 19(1) TEU only requires that the independence of the courts of the defendant Member State, which may be called upon to rule on questions relating to EU law, is adversely affected by the national measure(s) or practice(s) challenged by the Commission or another Member State. If that is the case, the Court of Justice will find that Article 19(1) TEU applies and proceed to examine the merits of the action.[47] Given that infringement actions seek to determine whether the defendant

[45] Judgment of the Court (Grand Chamber) of 27 February 2018, Case C-64/16 *Associação Sindical dos Juízes Portugueses v Tribunal de Contas*, EU:C:2018:117, para 32.

[46] See eg, ibid, paras 35 and 41.

[47] Judgment of the Court (Grand Chamber) of 24 June 2019, Case C-619/18 *European Commission v Republic of Poland (Independence of the Supreme Court)*, EU:C:2019:531, paras 55–59; and judgment of the Court (Grand Chamber) of 5 November 2019, Case C-192/18 *European Commission v Republic of Poland (Independence of ordinary courts)*, EU:C:2019:924, paras 104-107.

Member State infringes EU law in general and in an objective manner, there is no need for a relevant dispute before the national courts.[48]

The situation is different with regard to preliminary references. Indeed, Article 19(1) TEU cannot change the function of the Court of Justice in the context of this procedure, which 'is […] to help the referring court to resolve the specific dispute pending before that court'.[49] Hence, the need to safeguard the EU judicial architecture cannot go as far as transforming the preliminary reference mechanism into a form of infringement action.

As the Court of Justice observed in *Miasto Łowicz*, access to the preliminary reference procedure is made conditional upon the existence of a connecting factor between the interpretation of Article 19(1) TEU (and Article 47 of the Charter) sought by the referring court and the dispute before it.[50]

It is rather straightforward to establish the connecting factor between Article 19(1) TEU and the dispute in the main proceedings in cases where the judges whose independence is being threatened are parties to those proceedings. In order to ensure compliance with the rule of law, those judges must have access to effective remedies before an independent court of law. Since Article 19(1) TEU produces direct effect, applicants may rely on that Treaty provision in order to have a court set aside conflicting national measures.

As the Court of Justice has pointed out, that connecting factor may be of a substantive or a procedural nature. For example, in the *Portuguese Judges* case, it was substantive since the referring court had to decide whether it should annul administrative decisions reducing the salaries of members of the Tribunal de Contas (Court of Auditors) on the ground that the national legislation providing for such reduction was incompatible with Article 19(1) TEU.[51]

In certain cases, that connecting factor is procedural. Indeed, the Court has declared admissible preliminary references that relate to procedural questions of national law concerning judicial independence raised *in limine litis*, before the referring court can, as required, rule on the substance of the case, for example the question of whether the panel of judges who delivered the judgment under appeal was formed properly.[52]

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[48] Judgment of the Court (Grand Chamber) of 26 March 2020, Joined Cases C-558/18 and C563/18 *Miasto Łowicz v Prokurator Generalny zastępowany przez Prokuraturę Krajową, formerly Prokuratura Okręgowa v Płocku v Skarb Państwa – Wojewoda Łódzki and Others*, EU:C:2020:234, para 47.

[49] Ibid. See also judgment of the Court (Grand Chamber) of 20 April 2021, Case C-896/19 *Repubblika v Il-Prim Ministru*, EU:C:2021:311, para 48.

[50] Judgment of 26 March 2020, *Miasto Łowicz v Prokurator Generalny* (n 48) para 48.

[51] Judgments of 27 February 2018, *Associação Sindical dos Juízes Portugueses* (n 45) para 12 and judgment of the Court (Second Chamber) of 7 February 2019, Case C-49/18 *Carlos Escribano Vindel v Ministerio de Justicia*, EU:C:2019:106.

[52] See, for example, judgment of the Court (Grand Chamber) of 6 October 2021, Case C-487/19 *W.Ż.* (Chamber of Extraordinary Control and Public Affairs of the Supreme Court – Appointment), EU:C:2021:798, para 94; Judgment of the Court (Grand Chamber) 16 November 2021, Joined Cases C-748/19 to C-754/19 *Prokuratura Rejonowa v Mińsku Mazowieckim and Others*, EU:C:2021:931, para 49; and judgment of 29 March 2022, Case C-132/20 *BN and Others v Getin Noble Bank S.A.*, EU:C:2022:235, para 67.

By contrast, in *Miasto Łowicz,*[53] any connecting factor was missing, since an answer to the questions referred by the national courts was not objectively needed for the resolution of the disputes in the main proceedings. Those questions, which were of a general nature, sought to determine whether the legislative reforms affecting the disciplinary proceedings applicable to judges called into question the principle of judicial independence within the meaning of Article 19(1) TEU. Those questions arose in disputes that related, firstly, to the payment of expenses incurred by a Polish town in the performance of certain tasks entrusted to it in respect of government administration and, secondly, to criminal proceedings brought against certain persons as a result of their involvement in kidnappings, in which an exceptional reduction in the sentence was anticipated. Although the references adequately stated the reasons which prompted the questions on the interpretation of Article 19(1) TEU,[54] they did not establish a connecting factor between the requested interpretation and its objective need for a resolution of the disputes in question.[55]

In a judgment *G. and others*[56] rendered at the start of this year, in Joined Cases C-181/21 and C-269/21, the Court held two further Polish references to be inadmissible.

The first reference was from a court sitting in a three-judge panel. During the course of proceedings, one of those judges expressed doubts as to the status of the panel as a 'court' in of the view of how another judge had been appointed in light of the recent judicial reforms in Poland. The doubting judge, acting alone, thus referred questions relating, *inter alia,* to Article 19(1) TEU and Article 47 of the Charter and whether the panel could be considered an independent and impartial tribunal established by law. The Court held that, although every court is obliged to verify whether it constitutes an independent or impartial tribunal,[57] the judge who referred the questions was not able to act alone in a way that could take into account the Court's interpretation of those provisions, for example, where appropriate, to recuse another judge.[58] The questions referred therefore did not meet an objective need linked to a decision which that judge might take. They were consequentially hypothetical, and thus inadmissible.

The second reference was from a court in single judge formation, questioning whether a definitive order, adopted by a panel of three judges, where one of the judges had been appointed under the procedure introduced as a result of the Polish judicial reforms was in conformity with EU law. The Court also held this reference to be inadmissible, noting that national law did not grant the referring court jurisdiction to apply its interpretation of EU law to the definitive order.[59] It also noted that the questions referred related to a part of the

[53] Judgment of 26 March 2020, *Miasto Łowicz v Prokurator Generalny* (n 48).

[54] Ibid, para 41 and 42.

[55] Ibid, paras 52 and 53.

[56] Judgment of the Court (Grand Chamber) of 9 January 2024, Joined Cases C-181/21 and C269/21 *G. and Others v M.S. and X.* (Appointment of judges to the ordinary courts in Poland), EU:C:2024:1.

[57] Judgment of 9 January 2024, *G. and Others* (Appointment of judges to the ordinary courts in Poland) (n 56) para 68.

[58] Ibid, para 69.

[59] Ibid, para 76.

procedure that was definitively closed, as the order was no longer subject to appeal. The questions thus related to a general assessment, disconnected from the requirements of the dispute.[60]

A third procedural avenue, actions for annulment, has allowed the Court to add important clarifications related to the scope and effects of the Article 2 TEU values, to which I now turn.

2 The Status of the Article 2 TEU Values

Cases arising from the rule of law crisis have allowed the Court to rule on fundamental questions as to the status of the said values. First, what is the legal 'value of values' in the EU legal order? Stated differently, are they 'merely a statement of policy guidelines or intentions' that lack any binding legal effects? Is the enforceability of values a political question? The Court of Justice replied in the negative to those questions in the so-called *Conditionality* judgments, ruling that the values laid down in Article 2 TEU are imbued within the entire body of EU law. These judgments concerned a challenge to the validity of a Regulation which imposed rule of law conditionality for the protection of the EU budget.[61] Hungary and Poland brought actions for annulment, alleging, *inter alia,* that 'the rule of law' does not lend itself to a precise definition and the abstract nature of that concept confirmed that the Article 2 TEU values are political, not legal in nature.[62] In that regard, the Court held – and I quote – that 'Article 2 TEU is not merely a statement of policy guidelines or intentions, but contains values which […] are an integral part of the very identity of the European Union as a common legal order, values which are given concrete expression in principles containing legally binding obligations for the Member States'.[63]

The Court of Justice has consistently held that respect for the Article 2 TEU values lies at the core of EU membership. On the one hand, a candidate State for EU membership must align its own constitution and national identity with those values as a *conditio sine qua non* for accession. Acquiring the status of 'Member State' is, therefore, a 'constitutional moment' for the State concerned since at that very moment, the legal order of the new Member State is deemed by the 'Masters of the Treaties' to uphold the values on which the EU is founded.

On the other hand, after accession, the Member State in question commits itself to respecting those values for as long as it remains a member of the EU. That ongoing commitment means that there is 'no turning back the clock' when it comes to respecting the

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[60] Ibid, paras 77 and 78.

[61] Judgment of the Court (Full Court) of 16 February 2022, Case C-156/21 *Hungary v European Parliament and Council of the European Union*, EU:C:2022:97; and Case C-157/21 *Republic of Poland v European Parliament and Council of the European Union*, EU:C:2022:98.

[62] Judgments of 16 February 2022, *Hungary v Parliament and Council* (n 61) para 222.

[63] Judgments of 16 February 2022, *Hungary v Parliament and Council* (n 61) para 232, and *Poland v Parliament and Council* (n 61) para 264.

values contained in Article 2 TEU. Accession is the starting point in value protection and not the finish line. A Member State can always improve its own level of value protection. However, EU law precludes such a Member State from falling into democratic backsliding. 'Compliance with those values', the Court of Justice has held, 'cannot be reduced to an obligation which a candidate State must meet in order to accede to the [EU] and which it may disregard after its accession'.[64] The Member States must respect those values 'at all times'.[65]

This means that claims based on national identity may not call into question the values on which the EU is founded. In the recent *Commission v Poland* case Poland had argued that upholding the Commission's complaints would be *ultra vires* and 'amount, for the Court, to exceeding its own powers and those of the European Union'.[66] By not leaving Poland the last say in the organisation and jurisdiction of its own judiciary, the Court would not be respecting the national and constitutional identity of the Polish State pursuant to Article 4(2) TEU.[67]

The judgment in *Commission v Poland* explicitly states that the values enshrined in Article 2 TEU cannot be derogated from in the name of national identity. The respect for these values, such as the rule of law, is a requirement for EU accession and must be maintained throughout EU membership. There is thus no basis for arguing that the requirements deriving from Article 2 TEU may adversely affect the national identity of a Member State under Article 4(2) TEU. That provision must be read taking into account the provisions of the same rank, namely Article 2 and the second subparagraph of Article 19(1) TEU.[68]

While Article 4(2) TEU gives a certain degree of discretion to Member States in implementing principles of the rule of law, this discretion does not extend to the result to be achieved. The values which Member States sign up to on accession, particularly the rule of law and what that value entails, must be respected at all times and cannot be undermined by reference to a Member State's particular constitutional model.[69]

V Concluding Remarks

To conclude, this brief and necessarily selective examination of the Court's case law confirms that the EU legal order has indeed evolved in times of crisis. The understanding of core provisions of EU law, such as the Treaty articles on the EMU and Articles 2 and 19(1) TEU, has been deepened and refined through judgments arising from such exceptional

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64 Judgments of 16 February 2022, *Hungary v Parliament and Council* (n 61) para 126, and *Poland v Parliament and Council* (n 61) para 144.

65 Judgments of 16 February 2022, *Hungary v Parliament and Council* (n 61) para 234, and *Poland v Parliament and Council* (n 61) para 266.

66 Judgment of 5 June 2023, Case C-204/21 *European Commission v Republic of Poland (Independence and private life of judges)*, EU:C:2023:442, paras 60 and 61.

67 See to that effect, ibid, para 61.

68 Ibid, para 72.

69 See, to that effect, ibid, para 74.

circumstances. Procedural issues addressed in these cases, such as whether the Court has jurisdiction over certain EMU issues or whether the referred rule of law questions are admissible, have also been clarified.

The Court has also made clear that even in times of crisis, the EU institutions and Member States alike must continue to comply with EU law. Furthermore, the EU institutions must respect the Charter even when they are not implementing EU law and may incur non-contractual liability. Additionally, the preliminary reference procedure cannot be transformed into an infringement action through allegations concerning rule of law violations. Finally and fundamentally, even in the face of crisis, Member States may not regress on underpinning principles, such as the Article 2 TEU values, that they sign up to upon accession to the EU.

Preserving these values is, however, not entirely an end in itself. One should never forget that the principal aim pursued by the EU is, as stated in Article 3(1) TEU, the promotion of peace. The European Union, which was created in the aftermath of Second World War is, and remains fundamentally, a peace project. It has been a guarantee for peace and stability in the region in the last 70 years. The current worrying international context in which all Europeans live and the experience of living through the past crises should reinforce our awareness of the inestimable value of this achievement. These crises have however forged new links in the chain that unites all of us within the EU legal order. I am sure that this chain will hold just as strong through any further crises that may come our way.