



The Enforcement of the Principle of Democracy Against Member States Under Article 10 of the Treaty on European Union

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ARTICLES

ABSTRACT

Over recent years, adherence to democratic principles has declined in several EU Member States. But are Member States bound by EU democratic standards, and if so, how can we define them? While the European Commission has started launching infringement actions against Member States based on the principle of democracy anchored in Articles 10 and 2 TEU, some scholars doubt that the principle of democracy under Article 10 and 2 TEU can be transformed into clear and concrete obligations for the Member States. This paper aims to respond to these doubts by specifying the concrete legal obligations imposed upon the Member States by Articles 10 and 2 TEU. The paper argues that Article 10 TEU places two concrete obligations upon Member States. Under Article 10(2)(2) TEU, they must ensure that their government is democratically accountable. Under Article 10(1) TEU, they must ensure effective representation in the European Parliament as well as the European Council. On this basis, the paper argues that several elements of national democracy are essential to effectively fulfil these obligations. National parliaments, national elections, national political parties, citizen rights, free and pluralistic media as well as national courts are amongst those national institutions and structures which are so-called institutional double agents, essential for Member State and European democracy at the same time, and, consequently, protected by Article 10 TEU.

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KEYWORDS:

democracy; Article 2 TEU; Article 10 TEU; democratic double actors; value enforcement

TO CITE THIS ARTICLE:

Miriam Schuler, 'The Enforcement of the Principle of Democracy Against Member States Under Article 10 of the Treaty on European Union' (2026) 22(2) Utrecht Law Review 80–104. DOI: <https://doi.org/10.36633/ulr.1289>

Per Article 2 of the Treaty on European Union (TEU),¹ the Member States of the European Union (EU) share a common set of values such as adherence to the rule of law, democracy and human rights. Over the past years, however, respect for the rule of law and democracy has declined in several Member States.² Whereas the institutions have spent considerable effort addressing rule of law concerns, only in recent years has the Commission started to enforce the principle of democracy in cases against Poland and Hungary,³ basing the alleged violation of the principle of democracy on Articles 10 and 2 TEU.⁴

Just as the Court of Justice of the European Union (the Court/CJEU) held in *Portuguese Judges* that the principle of judicial independence in Article 19 TEU gives concrete expression to the rule of law,⁵ the Commission builds upon the Court's case law which links the principle of representative democracy anchored in Article 10(1) TEU to the value of democracy laid down in Article 2 TEU.⁶ It is, however, notable that the European Commission has based its infringement action on the whole of Articles 10 and 2 TEU to demonstrate that the Polish Law on Russian Influence 'unduly interferes with the democratic process'.⁷ While previous cases before the Court focused on questions surrounding elections to the European Parliament, the Commission's infringement action against Poland, which was launched in the context of upcoming domestic parliamentary elections, broadens the possible scope of Article 10 TEU to domestic elections,⁸ and hence to potentially purely internal situations.

While the idea that Article 10 TEU may impose democratic minimum standards on the Member States is certainly not new,⁹ a catalogue of EU-law derived standards for Member State democracy is rarely provided. Ceurremans and David take a citizen-centred approach, arguing that under Article 10(3) TEU Member States are obliged to guarantee the ability of citizens:

¹ Consolidated Version of the Treaty on European Union [2008] OJ C115/13 (TEU).

² See for example Anna Gora and Pieter de Wilde, 'The Essence of Democratic Backsliding in the European Union: Deliberation and Rule of Law' (2022) 29 J.E.P.P. 321, 344; Beáta Bakó, 'Hungary's Latest Experiences with Article 2 TEU: The Need for "Informed" EU Sanctions' in Armin von Bogdandy and others (eds), *Defending Checks and Balances in EU Member States* (Springer 2021) 43; Richard Bellamy and Sandra Kröger, 'Countering Democratic Backsliding by EU Member States: Constitutional Pluralism and "Value" Differentiated Integration' (2021) 27 Swiss Political Science Review 619; Matej Avbelj, 'Pluralism and Systemic Defiance in the EU' in András Jakab and Dimitry Kochenov (eds), *The Enforcement of EU Law and Values: Ensuring Member States' Compliance* (OUP 2017) 44.

³ While the European Commission had invoked a violation of 'the democratic values of the Union; the principle of democracy and the electoral rights of EU citizens' in its letter of formal notice, it dropped democracy-related claims when it referred Hungary to the Court of Justice. According to AG Kokott's opinion in the case, these provisions thus 'do not form part of the subject matter of the proceedings', cf Opinion of AG Kokott in Case C-829/24, *European Commission v Hungary*, EU:C:2026:90, para 43.

⁴ European Commission, 'Rule of Law: Commission Launches Infringement Procedure against Poland for Violating EU Law with the New Law Establishing a Special Committee' (Press release, 8 June 2023) <https://ec.europa.eu/commission/presscorner/detail/en/ip_23_3134> accessed 4 September 2026.

⁵ Case C-64/16, *Associação Sindical dos Juizes Portugueses (ASJP)*, EU:C:2018:117, para 32.

⁶ Case C-502/19, *Junqueiras Vies*, EU:C:2019:1115, para 63; Case C-418/18, *Puppinck and Others v Commission*, EU:C:2019:1113, para 64; Case C-629/21, *Puigdemont*, EU:C:2022:413, para 250; Case C-808/21, *Commission v Czech Republic*, EU:C:2024:962, para 114; Case C-814/21, *Commission v Poland*, EU:C:2024:963, para 112; Case C-181/23, *Commission v Malta*, EU:C:2025:283, para 89.

⁷ European Commission, 'Rule of Law: Commission Launches Infringement Procedure against Poland for Violating EU Law with the New Law Establishing a Special Committee' (n 4).

⁸ See for example Miriam Schuler, 'Taking Democracy Seriously: The Commission's Infringement Action against Poland for Violating EU Law with the New Law in Poland on the State Committee for the Examination of Russian Influence' (*European Law Blog*, 16 June 2023) <<https://europeanlawblog.eu/taking-democracy-seriously-the-commissions-infringement-action-against-poland-for-violating-eu-law-with-the-new-law-in-poland-on-the-state-committee-for-the-examination-of-russian-influence/>> accessed 16 June 2023; Nora Visser, 'Enforcing Democracy: How the European Commission is Testing out the Legal Waters' (*Verfassungsblog*, 13 June 2023) <<https://verfassungsblog.de/enforcing-democracy/>> accessed 4 August 2023. Outside of the context of the Commission's infringement action similar arguments have also been made by Thomas Verellen, 'Hungary's Lesson for Europe: Democracy is Part of Europe's Constitutional Identity. It Should be Justiciable' (*Verfassungsblog*, 8 April 2022) <<https://verfassungsblog.de/hungarys-lesson-for-europe/>> accessed 1 August 2023; John Cotter, 'To Everything There Is a Season: Instrumentalising Article 10 TEU to Exclude Undemocratic Member State Representatives from the European Council and the Council' (2022) 47 ELR 69; Armin von Bogdandy and Luke Dimitrios Spieker, 'Transformative Constitutionalism in Luxembourg: How the Court Can Support Democratic Transitions' [2022] MPIL Research Paper No. 2022-14.

⁹ Cotter, 'To Everything There Is a Season' (n 8); John Cotter, 'Democracy Manifest? Ensuring the EU Legislature's Democratic Legitimacy in the Face of National-Level Autocratisation' (2025) 2025 10 European Papers 489, 515; Verellen (n 8); David Krappitz and Niels Kirst, 'An Infringement of Democracy in the EU Legal Order' (*EU Law Live*, 29 May 2020) <<https://eulawlive.com/libproxy.kcl.ac.uk/op-ed-an-infringement-of-democracy-in-the-eu-legal-order-by-david-krappitz-and-niels-kirst/>> accessed 1 August 2023; Bogdandy and Spieker (n 8).

to engage in a flurry of activities, spanning from participation in EU elections as a candidate or through the right to vote to having access to accurate and true information on the Union's activities, the right to voice dissatisfaction about government policies and its stance on the EU, enjoying academic freedom, to being represented by a democratically accountable government in the Council.¹⁰

However, they fail to identify specific domestic institutions or structures that are essential for democracy and are protected as a matter of EU law. Similarly, Bouzora acknowledges that 'the existence of a parliamentary democracy, checks and balances, and a robust electoral system'¹¹ form the core content of the value of democracy, but does not add any further flesh to the bone of Member States' EU-law derived democratic obligations. Several scholars even doubt that the principle of democracy under Articles 10 and 2 TEU can be operationalised in the same way as the rule of law, given that '[t]here is much less in EU law, [European Convention on Human Rights] law, and common traditions of the Member States to draw on than in the context of judicial independence' so that 'it would require a lot of imagination to derive from these provisions clear standards and concrete obligations for the Member States'.¹²

Taking up this challenge, the present paper proceeds on the assumption that a somewhat greater degree of imagination may indeed be warranted in order to explore how democratic obligations might nevertheless be derived from these provisions – an exercise that begins by reconsidering the implications of the *Portuguese Judges* case for the operationalisation of the Union's foundational values. To recall, the Court held in *Portuguese Judges* that Member State courts are essential to ensure compliance with the obligation flowing from Article 19(1) subparagraph 2 TEU. They function as institutional double actors, fulfilling both a domestic and EU function to uphold the rule of law. While scholars have replicated the *Portuguese Judges* logic to demonstrate that EU and Member State democracy interlock,¹³ scholarly literature to date falls short when it comes to identifying domestic institutions or structures that are essential for democracy. As such, the groundbreaking potential of the *Portuguese Judges* case for translating the Union's foundational values into concrete institutional obligations has to date been overlooked. Just as *Portuguese Judges* has established that Member State courts are essential to protect both the domestic and the European rule of law,¹⁴ and just as the Court's judgment on party membership has established that national political parties are essential for both national political life and the democratic life of the Union,¹⁵ one must look for further institutional double actors in the field of democracy. In other words, one must identify which constitutional structures of the Member State are essential to effectively fulfil the obligations arising under Article 10 TEU.

To do so, this paper builds upon the Court's two recent judgments¹⁶ on membership of a political party and the ability to stand for election as well as on existing literature¹⁷ to carve out clear Member State obligations under Article 10 TEU. Under Article 10(2) subparagraph 2 TEU, Member States must ensure that their government is democratically accountable. Under Article 10(1) and 10(2) subparagraph 1 TEU, they must ensure effective representation so that the European Parliament reflects faithfully and completely the free expression of choices made

¹⁰ Timothée Ceurremans and Elisabeth David, 'Countering Democratic Backsliding in (Future) EU Member States: Article 10(3) TEU Unlocked' (2024) 30 ELJ 515, 525.

¹¹ Yasmine Bouzora, 'The Value of Democracy in EU Law and Its Enforcement: A Legal Analysis' (2023) 8 European Papers 809, 850.

¹² Monica Claes, 'Safeguarding the European Union's Values Beyond the Rule of Law' in Anna Södersten and Edwin Hercok (eds), *The Rule of Law in the EU: Crisis and Solutions* (SIEPS 2023) 69; see also Vissers (n 8); equally expressing doubts about the role of Article 10 in enforcing democracy is Bouzora (n 11) 825–829.

¹³ See for example Cotter, 'To Everything There Is a Season' (n 8); Ceurremans and David (n 10); Verellen (n 8); Bogdandy and Spieker (n 8) 15; Krappitz and Kirst (n 9).

¹⁴ Case C-64/16, *ASJP* (n 5) paras 32–43.

¹⁵ Case C-808/21, *Commission v Czech Republic* (n 6) paras 121–22; Case C-814/21, *Commission v Poland* (n 6) paras 119–20.

¹⁶ Case C-808/21, *Commission v Czech Republic* (n 6); Case C-814/21, *Commission v Poland* (n 6).

¹⁷ See for example Cotter, 'To Everything There Is a Season' (n 8); Cotter, 'Democracy Manifest?' (n 9); Bouzora (n 11); Verellen (n 8); Krappitz and Kirst (n 9); Bogdandy and Spieker (n 8); Miriam Schuler, 'Paving the Way for an Enforcement of Democracy under Article 10 TEU? The Court's Judgments in Cases C-808/21 *Commission v Czechia* and C-814/21 *Commission v Poland*' (*European Law Blog*, 20 November 2024) <<https://www.europeanlawblog.eu/pub/fsc541k/release/2>> accessed 22 November 2024.

by EU citizens. Member State representatives in the European Council and Council must also reflect choices made by the people of a Member State through the very same logic. These two obligations become justiciable through Article 10(3) TEU which enshrines an enforceable right to participate in the democratic life of the Union which itself must meet the requirements of Article 10(1) and 10(2) TEU.

On this basis, this paper proceeds to further flesh out the obligations of Member States under Article 10 TEU. While the Court has already held recently that membership in national political parties is essential to effectively exercise the right to vote in European Parliament elections,¹⁸ the paper builds on this logic and explores what other Member State structures and institutions are essential to guarantee more broadly a representative and accountable democratic system as required by Article 10 TEU. This paper will demonstrate that the guarantee of free and fair elections, political rights of citizens, national political parties, free and independent media and press as well as the existence of a democratic and pluralistic national parliament are amongst those national institutions and structures which are so-called institutional double actors, essential for Member States and European democracy at the same time, and, consequently, protected by Article 10 TEU. It thus provides an account of those democratic minimum standards that the Member States must respect as a matter of EU law.

Lastly, the paper will explore when these obligations apply to the Member States. Seen as the Union's democratic life pre-supposes democratic life in the Member States,¹⁹ and considering that the Union's and the Member States' political spheres cannot be properly separated,²⁰ this paper will argue that Member States are bound by an obligation to adhere to democratic principles at all times, and even outside the specific context of elections to the European Parliament. However, a violation of Articles 10 and 2 TEU can only be found in serious and systemic cases.

All in all, this paper argues that Article 10 TEU imposes enforceable democratic obligations on Member States, which can be operationalised through a methodology inspired by the Court's judgment in *Portuguese Judges*. The paper specifically contributes to already existing literature in the field²¹ by developing a theory of institutional double actors to identify national institutions essential to the functioning of EU democracy. Applying this theory of institutional double actors, the paper carves out a catalogue of EU-law derived minimum requirements for national democracy. The paper will make these claims in four steps. Section 1 demonstrates that Article 10 TEU entails justiciable obligations of representation and accountability. Section 2 develops the institutional double actor framework. Section 3 applies this framework to identify core democratic structures protected under EU law. Section 4 and 5 examine the scope of these obligations and argue that they apply beyond EU electoral contexts, subject to a threshold of serious and systemic breach.

1. MEMBER STATE OBLIGATIONS UNDER ARTICLE 10 TEU: ACCOUNTABILITY AND REPRESENTATION

Before this paper can make its core claim that minimum democratic standards can be defined and substantiated under Article 10 TEU, it first needs to demonstrate that Article 10 TEU does in fact impose justiciable obligations upon the Member States.²² The *Portuguese Judges* case, in which the Court first enforced standards of judicial independence as an element of the

¹⁸ Case C-808/21, *Commission v Czech Republic* (n 6) paras 121–22; Case C-814/21, *Commission v Poland* (n 6) paras 119–20 (emphasis added).

¹⁹ von Bogdandy and Spieker (n 8) 19.

²⁰ Stephen Coutts, 'Union Citizenship as a Status of Political Integration: ECJ Case C-808/21, *Commission v Czech Republic* and Case C-814/21, *Commission v Poland*' [2026] *EuConst* 1, 12.

²¹ For democracy specifically see for example Cotter, 'To Everything There Is a Season' (n 8); Cotter, 'Democracy Manifest?' (n 9); Verellen (n 8); Bouzora (n 11); Krappitz and Kirst (n 9); Andreas Haratsch, 'Democracy – A Value Common to the Member States of the European Union' in Armin Hatje and Luboš Tichý (eds), *Liability of Member States for the Violation of Fundamental Values of the European Union* (Nomos 2018); Thomas Giegerich, *The Human Right to Democracy in Multilevel Systems at a Time of Democratic Backsliding: Global, Regional and European Union Perspectives* (Springer 2025).

²² This section develops arguments from Miriam Schuler, 'National Party Bans Under EU Law' (2026) 27 *German Law Journal* 556, 566–570.

rule of law against the Member States, relied on Article 19(1) subparagraph 2 TEU.²³ Article 19(1) subparagraph 2 TEU expressly addresses the Member States and imposes upon them the obligation to ‘provide remedies sufficient to ensure effective legal protection in the fields covered by Union law’. By contrast, Article 10 TEU is lacking in two regards: it neither addresses the Member States directly nor does it contain expressly worded obligations imposed upon them. Indeed, scholars recognise that there are two possible readings of Article 10 TEU: one is merely descriptive, and one is operative.²⁴ Upon further inspection, however, the Court’s recent judgments on membership of a political party and the ability to stand for election have paved the way towards operationalising Article 10 TEU.²⁵ More precisely, the Court has held the following:

*[U]nder Article 10(1) TEU, the functioning of the European Union is to be founded on representative democracy, which gives concrete expression to democracy as a value. Democracy is, under Article 2 TEU, one of the values on which the European Union is founded ... Article 10(2) and (3) TEU confers on EU citizens the right to be directly represented in the European Parliament and to participate in the democratic life of the European Union.*²⁶

While the Court has previously only linked the principle of representative democracy under Article 10(1) TEU to the value of democracy in Article 2 TEU,²⁷ the Court has now connected the principle of representative democracy in Article 10(1) TEU with the system of representation in Article 10(2) TEU and the citizens’ right to democratic participation enshrined in Article 10(3) TEU. As already argued elsewhere, citizens enjoy a right to participate in the Union’s democratic life, and that democratic life must comply with the requirements set out in Article 10(1) and (2) TEU.²⁸ The CJEU thus reads the individual right to democratic participation enshrined in Article 10(3) TEU through the lens of Article 10(1) and (2) TEU, thus transforming them into legally binding obligations.²⁹

For anyone wondering whether the principle of democracy enshrined in Article 10 TEU is justiciable, the Court has thus provided a clear answer: not only has the Court emphasised that the right contained in Article 10(3) – a right that many scholars consider to fulfil the conditions for direct effect³⁰ – becomes a right to participate in a democratic system which complies with the requirements and descriptions of Article 10(1) and (2) TEU. Rather, the Court has also expressly confirmed that ‘Article 4(2) TEU must be read in the light of provisions of the same rank, in particular Articles 2 and 10 TEU, and cannot exempt Member States from the obligation to comply with the requirements arising from those provisions’.³¹ From this, it becomes clear that Articles 10 and 2 TEU do indeed impose obligations upon the Member States.

This is important because, although the Court’s judgments tied the right of mobile EU citizens to join national political parties to Article 22 of the Treaty on the Functioning of the European Union (TFEU),³² it also rendered an interpretation of Article 10 TEU. While Article 22 TEU is limited, both by only applying to mobile EU citizens and by only capturing municipal and European elections, the scope of Article 10 TEU is wider: Article 10(3) TEU does not only apply to every citizen but also comprises the whole of the democratic life of the Union. This democratic life ‘takes place in two arenas: the Parliament and the two

²³ Case C-64/16, *ASJP* (n 5).

²⁴ Cotter, ‘To Everything There Is a Season’ (n 8) 71.

²⁵ Schuler, ‘Paving the Way for an Enforcement of Democracy under Article 10 TEU?’ (n 17).

²⁶ Case C-808/21, *Commission v Czech Republic* (n 6) paras 114–21; Case C-814/21, *Commission v Poland* (n 6) paras 112–19 (emphasis added).

²⁷ Case C-502/19, *Junqueras Vies* (n 6) para 63; Case C-418/18, *Puppinck and Others v Commission* (n 6) para 64; Case C-629/21, *Puigdemont* (n 6) para 250; Case C-808/21, *Commission v Czech Republic* (n 6) para 114; Case C-814/21, *Commission v Poland* (n 6) para 112; Case C-181/23, *Commission v Malta* (n 6) para 89.

²⁸ Schuler, ‘National Party Bans Under EU Law’ (n 22) 568.

²⁹ Schuler, ‘Paving the Way for an Enforcement of Democracy under Article 10 TEU?’ (n 17); Schuler, ‘National Party Bans Under EU Law’ (n 22) 568.

³⁰ Verellen (n 8); Bogdandy and Spieker (n 8) 19; Giegerich (n 21) 144.

³¹ Case C-808/21, *Commission v Czech Republic* (n 6) para 158; Case C-814/21, *Commission v Poland* (n 6) para 155.

³² Consolidated Version of the Treaty on the Functioning of the European Union [2012] OJ C326/47 (TFEU).

Councils'.³³ Because the Council represents the Member States, and because the Member State representatives must themselves be democratically accountable to either national parliaments or to the citizens of a Member State, Article 10 TEU thus extends to national democracy and national political life.

While the Court has emphasised that 'the organisation of *national* political life ... is part of national identity, within the meaning of Article 4(2) TEU',³⁴ the Court has also underlined that 'Article 4(2) TEU must be read in the light of provisions of the same rank, in particular Articles 2 and 10 TEU, and cannot exempt Member States from the obligation to comply with the requirements arising from those provisions'.³⁵ Conversely then, national political life is included in the Member States' democratic obligations under Articles 10 and 2 TEU and the fact that it falls within a Member State's national identity does not exempt them from organising their national political life, and their national democracy, in compliance with Articles 10 and 2 TEU.

Because the democratic life in the Union takes place in two arenas, Article 10(3) TEU, read in conjunction with Article 10(2) TEU, thus 'regulates both levels of the Union, the European and the Member State level'.³⁶ Article 10 TEU thus contains an obligation imposed upon the Member States to be democratic. This overarching obligation to democracy rests upon two pillars: the accountability of the democratic system (section 1.1). and the representativeness of the democratic system (section 1.2).

1.1. THE RIGHT TO AN ACCOUNTABLE DEMOCRATIC SYSTEM

According to Article 10(2) subparagraph 2 TEU, 'Member States are represented in the European Council by their Heads of State or Government and in the Council by their governments, themselves democratically accountable either to their national Parliaments, or to their citizens'. While some have gone as far as claiming that Member States not guaranteeing democratic accountability are not 'entitled to representation in the European Council or the Council',³⁷ most scholars do not go as far. However, there seems to be agreement that Article 10(2) subparagraph 2 TEU imposes an obligation on Member States to secure 'a democratically accountable government in order to guarantee democratic legitimacy'.³⁸ Under the Union's 'dual structure of democratic legitimation' anchored in Article 10 TEU,³⁹ input legitimacy is derived directly from elections to the European Parliament by the European citizens⁴⁰ and indirectly through the representation of the peoples of the Member States in the European Council and Council.⁴¹ It is thus the Member State representatives who must themselves be democratically legitimised and accountable at national level in order to supply the European Council and Council with democratic legitimacy.⁴² This requires 'an uninterrupted chain of democratic legitimacy between the people, exercising their democratic rights in an election, via their national Parliament through to the national government; in presidential systems, the legitimacy is directly provided by the people to the president'.⁴³ In other words, the people of a Member State can

³³ Verellen (n 8).

³⁴ Case C-808/21, *Commission v Czech Republic* (n 6) para 154; Case C-814/21, *Commission v Poland* (n 6) para 153 (emphasis added).

³⁵ Case C-808/21, *Commission v Czech Republic* (n 6) para 154; Case C-814/21, *Commission v Poland* (n 6) para 153.

³⁶ Giegerich (n 21) 144.

³⁷ Cotter, 'To Everything There Is a Season' (n 8) 71.

³⁸ Krappitz and Kirst (n 9); in this sense see also Verellen (n 8); Schuler, 'Paving the Way for an Enforcement of Democracy under Article 10 TEU?' (n 17); Bogdandy and Spieker (n 8) 19; doubtful about the role of Article 10 TEU in enforcing democracy against the Member States Bouzora (n 11) 825–829.

³⁹ Armin von Bogdandy, 'The European Lesson for International Democracy: The Significance of Articles 9 to 12 EU Treaty for International Organizations' (2012) 23 EJIL 315, 322; Armin von Bogdandy, 'European Democracy: A Reconstruction through Dismantling Misconceptions' [2022] MPIL Research Paper No. 2022-02 3.

⁴⁰ cf TEU (n 1) art 14.

⁴¹ von Bogdandy, 'The European Lesson for International Democracy' (n 39) 325; Schuler, 'National Party Bans Under EU Law' (n 22) 570.

⁴² See for example German Federal Constitutional Court *Maastricht* 12.10.1993 BVerfGE 89, 155, 187. See also Schuler, 'National Party Bans Under EU Law' (n 22) 570; Haratsch (n 21) 75.

⁴³ Krappitz and Kirst (n 9).

only perform their role as a democratic actor if they are able to exercise ‘equal and effective popular control’ over their government represented in the European Council and Council.⁴⁴

In its most basic sense democratic accountability ‘means being answerable for one’s actions to some authority and having to suffer sanctions for those actions’.⁴⁵ It thus describes a relationship between an actor – here the government representatives in the European Council and Council – and a forum – here national parliaments or the people. In this relationship ‘the actor has an obligation to explain and to justify his or her conduct, the forum can pose questions and pass judgement, and the actor may face consequences’.⁴⁶ This necessitates ‘equal and effective popular control’ over the government.⁴⁷

But are the Member States’ democratic obligations exhausted in guaranteeing some sort of accountability of their representatives in the Council and the European Council? Ceurremans and Davids criticise that Article 10(2) TEU is not able to capture Member State democracy ‘in all its aspects’.⁴⁸ For example, they doubt that Article 10(2) TEU could ‘remedy any problems that may fall outside this particular aspect of democratic society: such as attacks on minority groups or the undermining of the plurality of the media’.⁴⁹ Other scholars, however, argue that Article 10(2) TEU can be used more broadly to oblige Member States to comply with essential democratic standards.⁵⁰ It is important at this juncture to consider the other element of democratic governance set out in Article 10(1) and (2) TEU: the principle of representative democracy.

1.2. THE RIGHT TO A REPRESENTATIVE DEMOCRATIC SYSTEM

Although the democratic life of the Union takes place in two arenas – the European Parliament and the Council⁵¹ – the Court has so far expressly acknowledged only the right of citizens for direct representation in the European Parliament.⁵² If, however, the citizen right to participate in the democratic life of the Union under Article 10(3) TEU comprises the right to be represented in the institutions listed in Article 10(2) TEU, then it is not too far-fetched to argue that there exists a corresponding right of EU citizens to participate through representation in the European Council and the Council.

While Article 10(2) subparagraph 1 TEU provides that citizens are directly represented in the European Parliament, Article 10(2) subparagraph 2 TEU also specifies that the Member States are ‘represented’ in the European Council and the Council. The Council is, together with the European Parliament, ‘the main EU legislative body, ensuring that the principle of representative democracy, enshrined in Article 10 TEU, is respected in the European Union’.⁵³ To give full effect to the principle of representative democracy anchored in Article 10(1) TEU, the Council’s decisions must be ‘sufficiently representative of both the Member States and the population of the European Union’.⁵⁴ As such, both the Parliament and the Council are institutions fulfilling a representative function.⁵⁵

⁴⁴ Antoinette Scherz, ‘How Should the EU Respond to Democratic Backsliding? A Normative Assessment of Expulsion and Suspension of Voting Rights from the Perspective of Multilateral Democracy’ (2026) 33 J.E.P.P. 688, 699.

⁴⁵ Katrin Auel, ‘Democratic Accountability and National Parliaments: Redefining the Impact of Parliamentary Scrutiny in EU Affairs’ (2007) 13 ELJ 487, 495.

⁴⁶ *ibid.*

⁴⁷ Scherz (n 44) 699.

⁴⁸ Ceurremans and David (n 10) 522.

⁴⁹ *ibid.*

⁵⁰ Verellen (n 8); Krappitz and Kirst (n 9); Bogdandy and Spieker (n 8) 19; Giegerich (n 21) 144; Schuler, ‘Paving the Way for an Enforcement of Democracy under Article 10 TEU?’ (n 17); Giegerich (n 21) 144.

⁵¹ *cf* TEU (n 1) art 10(2).

⁵² Case C-808/21, *Commission v Czech Republic* (n 6) para 115; Case C-814/21, *Commission v Poland* (n 6) para 113.

⁵³ Opinion of AG Ćapeta in Case C-438/24, *Erakond Eestimaa Rohelised*, EU:C:2025:895, para 18.

⁵⁴ Case C-157/21, *Commission v Poland*, EU:C:2022:98, para 309.

⁵⁵ *cf* Joined Cases C-541/20 to C-555/20, *Lithuania and Others v European Parliament and Council*, EU:C:2024:818, para 905.

The Court has held that the principle of representative democracy requires that ‘the composition of the Parliament reflects faithfully and completely the free expression of choices made by the citizens of the European Union’.⁵⁶ It has also stressed the role of the European Parliament as an ‘intermediary’ between the people and the exercise of public power.⁵⁷ A recent opinion by AG Ćapeta adds on to this by explaining that effective representation is guaranteed by ‘the correlation between election results and the actual will of the voters’.⁵⁸ Democratic representation therefore emphasises ‘the need for institutions to channel the popular will’⁵⁹ and demands that institutional composition reflect the free choices made by citizens.

But what does representation mean in relation to the Council? Although Article 10(2) subparagraph 2 TEU formally refers to Member States rather than to their citizens, it is evident that what is required is the representation of the nationals of those Member States. After all, the provision requires that Member State representatives in the European Council and the Council be democratically accountable either to their national parliaments or to their citizens.⁶⁰ As a multilateral democracy, the EU is ‘a voluntary association between several democratic peoples’.⁶¹ This however also means that the normative status attributed to government representatives in the Council ‘is completely contingent upon the representation of their people’.⁶²

Most scholars have thus concluded that Article 10(2) subparagraph 2 TEU presupposes an ‘uninterrupted chain of democratic legitimacy between the people’⁶³ of a Member State and the European Council and the Council, thereby necessitating that citizens are represented in these institutions.⁶⁴ However, returning to the question posed above, representation is not exhausted in accountability. Rather, ‘[e]lections “make” representation but do not “make” the representatives’.⁶⁵ As Urbinati explains, ‘[a]t a minimum they make responsible and limited government, but not representative government’.⁶⁶ They are but one pillar of representative democracy which essentially has two elements: ‘the decisional dimension (will); and the deliberative dimension (voice)’.⁶⁷ Representative democracy thus provides for a link ‘between the informal deliberation citizens activate within civil society through their direct political and multifarious forms of presence and the formal deliberation of representatives within state institutions’.⁶⁸ Those two elements of representative democracy – the deliberative and the decisional dimension – are emphasised by the Court for example when it stresses that political parties fulfil an essential function in representative democracy, not just by fielding candidates in elections (decisional element) but also by enabling citizens to act collectively (deliberative element).⁶⁹ Representation, conceived as political representation, thus means being responsive.⁷⁰ It means that ‘[c]itizens’ right to an equal share in determining the political will (one person/one vote) must go hand-in-hand with meaningful opportunities to form and

⁵⁶ Case C-629/21, *Puigdemont* (n 6) paras 250–52; Case C-502/19, *Junqueras Vies* (n 6) para 83.

⁵⁷ Case 138/79, *Roquette Frères v Council*, EU:C:1980:249, para 33.

⁵⁸ Opinion of AG Ćapeta in Case C-438/24, *Erakond Eestimaa Rohelised* (n 53) para 37.

⁵⁹ Tom Gerald Daly and Brian Christopher Jones, ‘Parties versus Democracy: Addressing Today’s Political Party Threats to Democratic Rule’ (2020) 18 I.J.C.L. 509, 512.

⁶⁰ See also Schuler, ‘National Party Bans Under EU Law’ (n 22) 568.

⁶¹ Scherz (n 44) 698.

⁶² *ibid* 699.

⁶³ Krappitz and Kirst (n 9).

⁶⁴ Arguing that in order to be represented in the Council Member State representatives need to be democratically accountable see also John Cotter, ‘The Last Chance Saloon’ (*Verfassungsblog*, 19 May 2020) <<https://doi.org/10.17176/20200519-133724-0>> accessed 31 March 2026; Cotter, ‘To Everything There Is a Season’ (n 8).

⁶⁵ Nadia Urbinati, *Representative Democracy: Principles and Genealogy* (University of Chicago Press 2006) 224.

⁶⁶ *ibid*.

⁶⁷ Simona Piattoni, ‘Representation as Delegation: A Basis for EU Democracy?’ (2013) 20 J.E.P.P. 224, 229.

⁶⁸ Urbinati (n 65) 226.

⁶⁹ Case C-808/21, *Commission v Czech Republic* (n 6) paras 119–22; Case C-814/21, *Commission v Poland* (n 6) paras 117–20.

⁷⁰ Piattoni (n 67) 227.

manifest their ideas and give them public voice'.⁷¹ Necessitating common deliberation between represented and representative, 'political representation is primarily a public, institutionalized arrangement involving many people and groups, and operating in the complex ways of large-scale social arrangements'.⁷²

When applied to the European Council and the Council, the principle of representative democracy hence does not exhaust itself in an 'uninterrupted chain of democratic legitimacy between the people'⁷³ of a Member State and their representative. Rather, the requirement that the Member States are *represented* in the Council means that there must be an institutional arrangement, at Member State level, ensuring the deliberation between the represented (the citizens of a Member State) and the representative, ensuring that the Member State representative faithfully and fully reflects the free expression of popular choice at national level. Just as European citizens enjoy a right under Article 10(2) subparagraph 1 and Article 10(3) TEU to direct representation in the European Parliament,⁷⁴ citizens of the Member States likewise have a right to effective and adequate representation in the European Council and the Council.⁷⁵

1.3. REPRESENTATION AND ACCOUNTABILITY AS JUSTICIABLE MEMBER STATE OBLIGATIONS

The citizen right to participate in the democratic life of the Union thus implies the right to a representative and accountable democratic system. This right is enforceable not only against the Union, but equally against the Member States.⁷⁶ Articles 10 and 2 TEU make clear that the obligation to guarantee a representative and accountable democratic system is one shared by the Union and the Member States.⁷⁷

While the right to be effectively represented directly only envisages Union institutions, it is the Member States determining the representativeness of these institutions. This is because the elections to the European Parliament are organised by the Member States, so that the Member State's democratic systems and practices determine whether these elections are carried out in a democratic manner, guaranteeing effective representation of Union citizens.⁷⁸ Similarly, the representativeness and accountability of Member State representatives in the European Council and Council depends on the Member State's democratic system. Much of the citizen right to participate in the democratic life of the Union is thus realised by and in the Member States. In other words, the citizen right to democratic participation enshrined in Article 10(3) TEU 'necessarily pre-supposes the existence of a democracy'⁷⁹ at the Member State level. There can be no EU democracy without Member State democracy; there is no democratic life of the Union without democratic life in the Member States.⁸⁰ As such, Article 10(3) TEU entails a right to an accountable and representative democratic system in the Member States. The obligation to guarantee a representative and accountable democratic system is thus a Member State obligation.

⁷¹ Urbinati (n 65) 226.

⁷² Hanna Fenichel Pitkin, 'Political Representation' *The Concept of Representation* (1st edn, University of California Press 1967) 221.

⁷³ Krappitz and Kirst (n 9).

⁷⁴ cf Case C-808/21, *Commission v Czech Republic* (n 6) para 115; Case C-814/21, *Commission v Poland* (n 6) para 113.

⁷⁵ In this sense see already Schuler, 'National Party Bans Under EU Law' (n 22) 569.

⁷⁶ Giegerich (n 21) 144.

⁷⁷ Miriam Schuler and Darren Harvey, 'A New Approach to Constitutional Crisis Prevention?: Article 2 TEU as an Obligation to Take Preventive Action' (2026) 17 EJRR 56; Elise Muir, Piet Van Nuffel and Geert De Baere, 'The EU as a Guardian of the Rule of Law within Its Member States' (2023) 29 CJEL 1, 19.

⁷⁸ cf Opinion of AG Ćapeta in Case C-438/24, *Erakond Eestimaa Rohelised* (n 53) para 20; Case C-650/13, *Delvigne*, EU:C:2015:648, paras 31–32; Koen Lenaerts and José A Gutiérrez-Fons, 'Epilogue on EU Citizenship: Hopes and Fears' in Dimitry Kochenov (ed), *EU Citizenship and Federalism: The Role of Rights* (CUP 2017) 779; Sébastien Platon, 'The Right to Participate in the European Elections and the Vertical Division of Competences in the European Union' (2018) 3 European Papers 1245, 1259; von Bogdandy and Spieker (n 8) 18; Schuler, 'National Party Bans Under EU Law' (n 22) 561–564.

⁷⁹ Giegerich (n 21) 143.

⁸⁰ von Bogdandy and Spieker (n 8) 19; Schuler and Harvey (n 77) 64.

This is also confirmed by the Court's *Repubblika*⁸¹ case law which requires the Member States to prevent any regression in the protection of the principle of democracy.⁸² The principle of democracy is, inter alia, protected by Article 10(1) and (2) TEU, guaranteeing effective representation and accountability. For the principle of democracy to be effectively protected, the *Repubblika* judgment establishes that Member States must not reduce the level of protection afforded by their national law, preventing any regression. Read in light of the *Repubblika* case law and the duty of sincere cooperation laid down in Article 4(3) TEU, the Member States must thus prevent any regression of democracy protection in the Union by refraining from adopting rules that would undermine the representativeness or accountability of the EU's institutions.

But what specifically is required of a Member State's democratic system to be considered to fulfil the criteria of accountability and representativeness under Article 10 TEU? While many believe that Article 10 TEU can be used to articulate minimum democratic requirements applicable to the Member States,⁸³ few have provided a catalogue of those core elements of democracy that the Member States must guarantee as a matter of Article 10 TEU.⁸⁴ However, as observed by Verellen, 'this should not be an impossible task'.⁸⁵ To this end, the paper turns to the methodology developed by the Court in *Portuguese Judges* and explores its potential beyond the rule of law context.

2. FROM ABSTRACT OBLIGATIONS TO CONCRETE STRUCTURAL STANDARDS: A THEORY OF INSTITUTIONAL DOUBLE ACTORS

The Court's judgment in *Portuguese Judges* offers more than a doctrinal development in the field of judicial independence; it provides a methodology not just for operationalising but also for substantiating the values enshrined in Article 2 TEU. This section builds on the *Portuguese Judges* case to develop a general theory of institutional double actors and essential infrastructures capable of concretising democratic obligations under Article 10 TEU.

The *Portuguese Judges* case pertained to austerity measures adopted by Portugal, inter alia the decision to cut the salaries of judges.⁸⁶ Represented by the Trade Union of Portuguese Judges, some of the affected judges filed a complaint alleging that the measures infringe the principle of judicial independence, enshrined in Article 19(1) subparagraph 2 TEU and in Article 47 of the Charter of Fundamental Rights of the European Union (Charter/CFR).⁸⁷ The Portuguese Supreme Administrative Court referred the matter to the CJEU.⁸⁸ Although the CJEU did not find a violation of the principle of judicial independence in this case,⁸⁹ the judgment has paved the way for the EU's enforcement of Article 2 TEU values against the Member States. This is because the Court could have simply responded by saying that 'the organisation of justice in the Member States falls within the competence of the Member States'.⁹⁰ However, it emphasised that, under Article 19(1) subparagraph 2 TEU, Member States are under an obligation to 'provide remedies sufficient to ensure effective legal protection in the fields covered by Union law' and that this obligation is only fulfilled, if Member State

81 Case C-896/19, *Repubblika*, EU:C:2021:311, paras 63–64.

82 Although the non-regression principle was initially established for the rule of law only, it applies to all values enshrined in TEU (n 1) art 2. cf Case C-769/22, *Commission v Hungary*, EU:C:2026:326, para 524; Opinion of AG Čapeta in Case C-769/22, *Commission v Hungary* EU:C:2025:408, para 183; Mathieu Leloup et al "Non Regression: Opening the Door to Solving 'the Copenhagen Dilemma'? All Eyes on Case C-896/19 *Repubblika* v Il-Prim Ministru" (2021) RECONNECT Working Paper No 15, 16; Julian Scholtes, "Constitutionalising the End of History? Pitfalls of a Non-Regression Principle for Article 2 TEU" (2023) *European Constitutional Law Review* 1, 59; Lucia Serena Rossi, "Concretised", "Flanked", or "Standalone"? Some Reflections on the Application of Article 2 TEU" (2025) 10 *European Papers* 1, 6.

83 Verellen (n 8); Bogdandy and Spieker (n 8) 19; Cotter, 'Democracy Manifest?' (n 9) 493; Cotter, 'To Everything There Is a Season' (n 8) 81; Ceurremans and David (n 10) specifically on the role of Article 10(3).

84 Focusing on citizen rights specifically rather than on constitutional and institutional pre-conditions of democracy are Ceurremans and David (n 10).

85 Verellen (n 8).

86 Case C-64/16, *ASJP* (n 5) paras 6–12.

87 Charter of Fundamental Rights of the European Union [2012] OJ C326/391; *ibid* para 13.

88 Case C-64/16, *ASJP* (n 5) para 18.

89 *ibid* para 52.

90 Case C-896/19, *Repubblika* (n 81) para 48.

courts are independent.⁹¹ Even more crucially, and although Article 19(1) subparagraph 2 TEU is limited to demanding that the Member States provide remedies ‘in the fields of Union law’, the Court decided that EU standards of judicial independence apply to all Member State courts potentially applying EU law.⁹²

To conclude that national courts are bound by EU-law derived standards of judicial independence under Article 19 TEU, the Court relied heavily on the function that national courts fulfil in the EU legal system.⁹³ This special position of national courts is explicitly recognised by the Treaties in Article 267 TFEU, which makes Member State courts essential to the proper working of the preliminary reference procedure.⁹⁴ By virtue of this position, Member State courts cooperate with the CJEU and share with it the responsibility to ensure judicial review within the EU legal order.⁹⁵ They do so by ‘ensuring that in the interpretation and application of the Treaties the law is observed’.⁹⁶ In other words, it is up to Member State courts to give direct effect to EU law, to set aside any national provisions that conflict with EU law and to send references to the CJEU if any questions as to the interpretation of the Treaties arise. As such, they are the key arbitrator between national law and EU law.

Of course, this idea is also anchored more broadly in Article 2 TEU, which designates that the Union and the Member States share common values, such as the rule of law.⁹⁷ But the *Portuguese Judges* case makes a much more specific claim than that. Rather than limiting itself to the statement that the Union and the Member States share certain values, the Court has supplied us with a four-step process (see also [Figure 1](#)) to further substantiate obligations under Article 2 TEU. First, the Court has clarified that the value of the rule of law under Article 2 TEU is given concrete expression in Article 19 TEU.⁹⁸ Second, the Court has held that under Article 19(1) subparagraph 2 TEU the Member States are obliged to ‘provide remedies sufficient to ensure effective judicial protection for individual parties in the fields covered by EU law’.⁹⁹ Third, the Court has specified that Article 267 TFEU recognises the role Member State courts play in fulfilling the obligation under Article 19(1) subparagraph 2 TEU, and as such in protecting the European and national rule of law.¹⁰⁰ Fourth, the Court has found that in order to carry out this function effectively, it is essential for Member State courts to be independent, as confirmed by Article 47(2) of the Charter.¹⁰¹

Value	Member State obligation	double actor	Essential infrastructure
Article 2 TEU: Value of the rule of law	Article 19(1) subpara.2 TEU: Member State obligation to provide effective legal protection in the fields covered by Union law	Article 19(1) subpara.2 TEU; Article 267 TFEU: Member State courts fulfil a function to ensure the rule of law	Article 47(2) CFR: The independence of courts and tribunals is essential for them to effectively provide judicial protection

Figure 1 Portuguese Judges
 – From Abstract Values to Essential Infrastructures.

In other words, the Court makes clear that there are national institutions and actors where the Union’s and the Member State’s legal orders interlock, and which are essential not only for national purposes but also fulfil a function on Union level, here the protection of the rule of law in the form of the uniform application of Union law. Where such structures exist, and

⁹¹ Case C-64/16, *ASJP* (n 5) paras 34–44.

⁹² *ibid* para 39.

⁹³ Shu-Perng Hwang, ‘Judikativer Werteschutz in Der Europäischen Union: Eine Verfassungsvergleichende Perspektive’ (2024) 59 *EuR* 240, 257.

⁹⁴ Case C-64/16, *ASJP* (n 5) para 43.

⁹⁵ *ibid* para 32.

⁹⁶ *ibid* para 33.

⁹⁷ *ibid* para 30.

⁹⁸ *ibid* para 32.

⁹⁹ *ibid* para 34.

¹⁰⁰ *ibid* paras 32 and 43.

¹⁰¹ CFR (n 87); *ibid* paras 37–43.

where they are ‘double actors’ fulfilling national functions and Union obligations at the same time, they are governed not only by national law, but equally subject to EU law protection. This EU law protection extends to those elements that are inherent in the role EU law assigns to these actors and hence essential for them to effectively fulfil their EU function.¹⁰² In four simple analytical steps the Court thus concretised a value under Article 2 TEU into a specific obligation for which specific Member State actors and structures are essential. Because these Member State actors and structures are essential to effectively fulfil the Member States’ EU-law derived obligations, they thus become protected by EU law themselves.

Against this background, one must thus ask

if there now exist ... other institutional structures in relation to which the interlocking of EU and national systems of governance is so strong, that the relevant national organs ought to comply with the values enshrined in Article 2 TEU, in similar ways as Articles 2 and 19 TEU interact in the ‘EU shared judicial space’?¹⁰³

While scholars have pointed towards Article 10 TEU to demonstrate that EU and Member State democracy interlock,¹⁰⁴ scholars have to date not identified specific domestic institutions or structures that are as essential for democracy as Member State courts are for the rule of law. I thus propose to push the institutional double actor theory laid down in *Portuguese Judges* further, identifying national actors that act as a double actor of EU law and national law and fulfil a purpose essential for the Union’s democratic functioning.¹⁰⁵ Member State courts were deemed such a double actor because they are vital for the Member States to fulfil their obligation to provide effective legal protection in the fields of Union law under Article 19(1) subparagraph 2 TEU. Mirroring the reasoning of *Portuguese Judges*, it can be argued that Article 10 TEU ‘entrusts the responsibility for ensuring democratic representation and accountability in the EU legal order not only to EU institutions identified in that article but also to the relevant national organs’.¹⁰⁶ By analogy with the *Portuguese Judges* case, we thus need to ask ourselves which Member State institutions and structures are entrusted with the responsibility to ensure representation and accountability and to what extent EU law protects these institutions need to effectively fulfil this purpose.

In its recent judgments on party membership and the ability to stand for election, the Court has indeed alluded to the fact that this might be a viable method to further substantiate Member State’s democratic obligations:

Political parties, one of whose functions is to field candidates in elections ... *fulfil an essential function in the system of representative democracy*, on which the functioning of the European Union is founded, in accordance with Article 10(1) TEU. It follows that *membership of a political party contributes significantly to the effective exercise of the right to stand for election*, as conferred by Article 22 TFEU.¹⁰⁷

While the Court’s judgments are technically limited to the role that national political parties play in elections to the European Parliament, it is the Court’s reasoning to interpret Member State obligations under Article 22 TFEU which is striking. Just as in *Portuguese Judges*, the Court uses the logic of institutional double actors to further concretise Treaty obligations: It departs from the premise that the value of democracy is given concrete expression in the principle of representative democracy under Article 10(1) TEU. Article 22(2) TFEU distils this into a Member State obligation to guarantee the right to vote and stand as a candidate in European Parliament elections to mobile EU citizens, under the same conditions as nationals of that state. Because in a system of representative democracy national political parties

¹⁰² cf Case C-64/16, *ASJP* (n 5) paras 40–43, emphasising that judicial independence is inherent in and essential to Courts providing effective judicial protection.

¹⁰³ Muir, Van Nuffel and De Baere (n 77) 19.

¹⁰⁴ See for example Cotter, ‘To Everything There Is a Season’ (n 8); Ceurremans and David (n 10); Verellen (n 8); von Bogdandy and Spieker (n 8) 15; Krappitz and Kirst (n 9).

¹⁰⁵ Making a similar argument on the basis of the CJEU’s judgment in *Rimšėvičs* (Joined Cases C-202/18 and C-238/18 EU:C:2019:139), see Cotter, ‘Democracy Manifest?’ (n 9) 501–505.

¹⁰⁶ Muir, Van Nuffel and De Baere (n 77) 19.

¹⁰⁷ Case C-808/21, *Commission v Czech Republic* (n 6) paras 121–22; Case C-814/21, *Commission v Poland* (n 6) paras 119–20 (emphasis added).

make an essential contribution to the citizen's ability to effectively exercise their right to stand in elections, the Member States must guarantee access to national political parties for mobile EU citizens to fulfil their obligation under Article 22 TFEU. Just as in *Portuguese Judges*, the Court has thus identified a national structure that is essential to the fulfilment of Member State obligations enshrined in Article 22 TFEU which gives concrete expression to the principle of representative democracy anchored in Article 10(1) TEU and the value of democracy laid down in Article 2 TEU.

Although the Court judgments in Cases C-808/21 and C-814/21 were limited to the right of mobile EU citizens in elections to the European Parliament under Article 22 TFEU, the judgments are 'significant for the importance of democracy more generally to the functioning of the Union, especially representative democracy, including national elections and national democratic processes and the conditions for their realisation'.¹⁰⁸ This is because, although eventually relying on Article 22 TFEU, the Court rendered an interpretation of Article 10 TEU and to do so used the same methodology to contextualise and substantiate the Member State's democratic obligations as it did to contextualise the Member State's obligations under the rule of law: the logic of institutional or also functional double actors and essential infrastructures.

As we have seen above, the scope of Member State obligations under Article 10 TEU is potentially much wider than the scope of Article 22 TFEU. Rather than limiting itself to the context of European Parliament elections, Article 10 TEU captures 'both levels of the Union, the European and the Member State level'.¹⁰⁹ Applying the logic of functional double actors that we can find both in *Portuguese Judges* and in the Court's judgments on party membership, we must thus ask: who are the double actors of EU and Member State democracy and what structures are essential for them to effectively fulfil their obligations under Article 10 TEU?

3. NATIONAL INSTITUTIONS ESSENTIAL FOR ENSURING REPRESENTATION AND ACCOUNTABILITY ON THE EU LEVEL

While authors often focus on the Member State governments represented in the Council,¹¹⁰ Article 10 TEU brings into focus several elements of national democracy. This is because Article 10(2) subparagraph 2 TEU does not only mention a Member States' governments' representatives in the Council and European Council,¹¹¹ but also emphasises that governments' relationship with two other national actors. On the one hand, Article 10(2) subparagraph 2 TEU brings into the limelight the citizens of a Member State, which are represented by their Member State representative in the Council. On the other hand, Article 10(2) subparagraph 2 TEU also explicitly mentions national parliaments, which, as Article 12 TEU confirms, have a role to play in the Union's democratic life.

As such, Article 10(2) subparagraph 2 TEU clearly defines two double actors of EU and of Member State democracy: the citizens of a Member State as well as national parliaments. Now the next question is how EU law needs to protect these double actors for them to effectively fulfil their role in national and in EU democracy, ensuring that EU institutions remain representative and accountable, ultimately ensuring the democratic legitimacy of these institutions. This next section will argue that for national citizens to effectively fulfil their role in EU and national democracy, they must be guaranteed the right to free and fair national elections at regular intervals, enjoy political rights and have access to intermediary institutions such as a pluralist system of national political parties as well as a free press and media pluralism (section 3.1). National parliaments, on the other hand, must be representative, transparent, pluralistic and organised in a democratic manner (section 3.2). Lastly, independent and impartial Member State courts must ensure that democratic rights and processes are protected (section 3.3).

¹⁰⁸ Coutts (n 20) 17.

¹⁰⁹ Giegerich (n 21) 144.

¹¹⁰ Cotter, 'To Everything There Is a Season' (n 8); Cotter, 'The Last Chance Saloon' (n 64).

¹¹¹ The European Council consists, amongst others, of the Heads of State or Government of the Member States, TEU (n 1) art 15(2), whereas the Council is formed by a representative of each Member State at ministerial level, TEU (n 1) art 16(2).

As is well known, the Court has held in its seminal judgment in *Commission v Malta* that, even when Member States exercise their remaining competences to ‘lay down the conditions for granting their nationality’, they are making decisions that have consequences for the functioning of the EU as a supranational democracy.¹¹² The Court has thus not only confirmed the close interaction between national and EU democracy, but has also put the spotlight on maybe the most important double actor of national and EU democracies: the citizen of a Member State.¹¹³

As Article 10(2) TEU makes clear, the citizens of a Member State fulfil a double function. Firstly, EU citizenship, and with it the right to vote in elections to the European Parliament, is derived from the citizenship of a Member State.¹¹⁴ The citizen of a Member State hence has a role in legitimising the European Parliament and is directly represented in it.¹¹⁵ Secondly, the citizens of a Member State must be represented by their government in the European Council and Council. The citizen of a Member State thus also has a role in legitimising the European Council and Council and is represented in these institutions.¹¹⁶ At the core of both strands providing the EU with democratic legitimacy is thus one single person: ‘the citizen of the Union and simultaneously of one or several Member States’.¹¹⁷

The citizen of a Member State hence does not only exist in the national democratic sphere, but also fulfils a function expressly recognised in Article 10(2) TEU: to provide the EU with democratic legitimacy. Applying the logic from the *Portuguese Judges* and the party membership judgments presented above, the question thus is: what structures are essential for the national citizen to effectively fulfil its function in providing the Parliament and the Council with sufficient democratic legitimacy, specifically to ensure the representativeness and the accountability of these institutions?

3.1.1. Free and fair national elections

The representativeness of the European Parliament is, inter alia, guaranteed by the holding of regular, free and secret elections, governed by universal suffrage.¹¹⁸ As such, the right to vote in elections to the European Parliament is explicitly guaranteed in Article 39(2) CFR, which Union citizens can invoke against the Member State they are a national of;¹¹⁹ and in Article 22 TFEU specifically for mobile EU citizens which they can invoke against the Member State they reside in.¹²⁰

By analogy, one can then also demand that the representativeness of the members of the Council is guaranteed by free and secret, universal national elections. However, the right for the citizens to vote in national elections is not expressly protected in either the Charter or in other Treaty provisions. Upon a first glance, one could thus conclude that national elections are simply outside the scope of EU law and hence not protected by EU law. On further inspection, however, this does not seem convincing.

Applying the four-step-test derived from the *Portuguese Judges* case, it is true that the requirement of judicial independence can be anchored in Article 47(2) of the Charter¹²¹ and that the importance of political parties finds expression in both Article 12 of the Charter and Article 10(4) TEU.¹²² However, it is important to emphasise that the protection of the independence of

¹¹² Case C-181/23, *Commission v Malta* (n 6) para 89.

¹¹³ Miriam Schuler, ‘Why the EU Should Care about National Elections’ (*European Law Blog*, 16 October 2023) <<https://europeanlawblog.eu/why-the-eu-should-care-about-national-elections/>> accessed 9 October 2024.

¹¹⁴ TEU (n 1) art 9.

¹¹⁵ TEU (n 1) art 10(2). See also supra section 1.

¹¹⁶ TEU (n 1) art 10(2). See also supra section 1.

¹¹⁷ Armin von Bogdandy and others, ‘Reverse Solange: Protecting the Essence of Fundamental Rights against EU Member States’ (2012) 49 CMLR 489, 495.

¹¹⁸ cf TEU (n 1) art 14(3).

¹¹⁹ cf Case C-650/13, *Delvigne* (n 78).

¹²⁰ cf Case C-808/21, *Commission v Czech Republic* (n 6); Case C-814/21, *Commission v Poland* (n 6).

¹²¹ Case C-64/16, *ASJP* (n 5) paras 35 and 41.

¹²² Case C-808/21, *Commission v Czech Republic* (n 6) para 120; Case C-814/21, *Commission v Poland* (n 6) para 118.

Member State courts or of EU citizens' access to national political parties does in the end not result from the Charter Article itself. Rather, the Charter is but one means to interpret the EU law obligation that the CJEU is applying in these cases.¹²³ The fact that national elections are neither directly mentioned in Article 10 TEU, nor anywhere else in the Treaties or the Charter, is thus not a sufficient reason to conclude that national elections fall outside the scope of EU law. Rather, what must be taken into account is the wording and the objective¹²⁴ of Article 10 TEU.

When interpreting the wording of Article 10(2) subparagraph 2 TEU we have already seen that there is a requirement of representativeness and accountability of Member State representatives in the Council and European Council. We have also seen that the principle of representative democracy is interpreted as requiring that 'the composition of the Parliament reflects faithfully and completely the free expression of choices made by the citizens of the European Union'¹²⁵ and that '[e]lections for the European Parliament serve the function of electing people who will faithfully represent the will of the electorate when carrying out their functions as MEPs and making decisions with regard to EU policies'.¹²⁶ If it follows from the principle of representative democracy that the members of a representative body must be legitimated in free, fair, secret and universal elections, then *mutatis mutandis* it flows from the wording of Article 10(2) subparagraph 2 that there is an EU law requirement for national elections. After all, Article 10(2) subparagraph 2 explicitly states that the Member States are 'represented' in the Council, implementing the principle of democracy in Article 10(1) TEU. It further concretises that there needs to be a chain of democratic accountability between the Member State representatives and either national parliaments or national citizens. If representation requires elections, and if the chain of democratic accountability needs to exist between the citizens of a Member State and the Member State representative in the Council and European Council, it then arguably follows from an interpretation of the wording of Article 10(2) subparagraph 2 TEU that EU law necessitates regular, free, fair, secret and universal elections.

This is further emphasised by the logic of 'essential' and 'inherent' structures or conditions we can find in both the *Portuguese Judges* case and the party membership cases. In *Portuguese Judges*, the Court reasons that the guarantee of independence 'is inherent in the task of adjudication'¹²⁷ and in its judgments on party membership the Court concluded that 'political parties ... fulfil an essential function in the system of representative democracy', contributing 'significantly to the effective exercise of the right to stand for election'.¹²⁸ Applying this to the task of the citizens of a Member State to provide democratic legitimacy for their Member State representative in the Council, and their right to participate in the democratic life of the Union through effective representation in the Council, one can conclude that national elections are inherent to this task and essential for the citizen to fulfil their function in EU democracy.

That the requirement for national elections is not expressly anchored in Article 10 TEU but rather follows from an interpretation of the wording of Article 10(2) subparagraph 2 TEU, namely an interpretation of the terms 'represented' and 'democratically accountable', is not problematic as the interpretation of abstract terms is an ordinary activity for courts.¹²⁹

The same conclusion is confirmed by reading the Member State obligations of ensuring representation and accountability under Article 10 TEU in light of Article 6(3) TEU and Article 3 of Protocol 1 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) 1952.¹³⁰ According to Article 6(3) TEU, 'fundamental rights, as guaranteed by

¹²³ cf Case C-808/21, *Commission v Czech Republic* (n 6) para 91; Case C-814/21, *Commission v Poland* (n 6) para 90.

¹²⁴ cf Case C-808/21, *Commission v Czech Republic* (n 6) para 91; Case C-814/21, *Commission v Poland* (n 6) para 90.

¹²⁵ Case C-629/21, *Puigdemont* (n 6) paras 250–52; Case C-502/19, *Junqueras Vies* (n 6) para 83.

¹²⁶ Opinion of AG Ćapeta in Case C-438/24, *Erakond Eestimaa Rohelised* (n 53) para 39.

¹²⁷ Case C-64/16, *ASJP* (n 5) para 42.

¹²⁸ Case C-808/21, *Commission v Czech Republic* (n 6) paras 121–22; Case C-814/21, *Commission v Poland* (n 6) paras 119–20.

¹²⁹ cf Opinion of AG Ćapeta in Case C-769/22, *Commission v Hungary* (n 82) paras 203–206.

¹³⁰ Krappitz and Kirst (n 9); Giegerich (n 21) 151; Pál Sonnevend, 'How to Make Article 10 TEU Operational? The Right to Influence the Exercise of State Power and Cardinal Laws in Hungary' in Michal Bobek and others (eds), *Transition 2.0 – Re-establishing Constitutional Democracy in EU Member States* (Nomos 2023) 563, 575.

the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law'. In Article 3 Protocol 1 ECHR the contracting parties 'undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature'. When determining what is essential for EU citizens to be effectively represented in the Council, and to effectively fulfil their role as a double actor of EU and national democracy, one must take into account the guarantees of Article 3 Protocol 1 ECHR. Accordingly, Article 10 TEU read in conjunction with Article 6(3) TEU and Article 3 Protocol 1 ECHR requires the Member States to hold free and fair national elections.

This requirement for free and fair elections at Member State level is also reflected in the accession criteria which the European Commission has concretised in its Agenda 2000, necessitating that the applicant countries 'have set up democratic institutions and independent judicial and constitutional authorities, which permit different state authorities to function normally, *have held free and fair elections*, permitting the alternation of different political parties in power and, in general, recognise the role of the opposition'.¹³¹ Because Article 49 makes the respect of Article 2 TEU values a condition for EU membership, the accession criteria can help interpret the meaning of Article 2 TEU values such as democracy.¹³² Compliance with the values of Article 2 TEU, in turn, 'cannot be reduced to an obligation which a candidate State must meet in order to accede to the European Union and which it may disregard after its accession'.¹³³ If, however, free and fair national elections are an obligation the Member States must comply with before accession, then it becomes transformed into an EU law obligation which they must equally respect as long as they are a member of the EU.

At a minimum, then, Article 10(2) subparagraph 2 TEU obliges the Member States to ensure representation and accountability through holding regular elections at national level. This is further reaffirmed by reading Article 10(2) subparagraph 2 TEU in conjunction with Article 6(3) TEU and Article 3 Protocol 1 ECHR as well as by Articles 2 and 49 TEU.

3.1.2. Citizen rights

However, elections are rendered meaningless¹³⁴ if a Member State has dismantled the very core components of liberal democracy such as the civil and political rights intrinsic to a democratic process.¹³⁵ As a result, for citizens to effectively fulfil their double role in both EU and national democracy, it is not sufficient to enjoy the active and passive right to vote. Rather, for citizens to effectively provide democratic legitimacy through representation and accountability as required by Article 10 TEU, citizens equally need to enjoy the right to information and access to documents, the freedom of expression, the freedom of association, enjoy a right to education and academic freedom as well as freedom of thought, conscience and religion.¹³⁶ These rights are essential for the citizen to fulfil their role as a double actor under Article 10 TEU, and are thus protected by that provision.

The CJEU has equally recognised that political rights are essential cornerstones of democracy. For instance, the CJEU has held that freedom of expression as enshrined in Article 11 CFR is 'an essential foundation of a pluralist, democratic society' and reflects 'the values on which the Union, in accordance with Article 2 TEU, is based'.¹³⁷ As one of the 'basic conditions for progress in a democratic society', and as an anchor for 'pluralism, tolerance and broadmindedness', freedom of expression 'protects not only "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also those that offend, shock

¹³¹ European Commission, 'Agenda 2000—For a Stronger and Wider Union' 15.07.1997 COM(97) 2000 final Vol 1, 43 (emphasis added).

¹³² Bouzoraq (n 11) 818.

¹³³ Case C-769/22, *Commission v Hungary* (n 82) para 523; Case C-156/21, *Hungary v Parliament and Council*, EU:C:2022:97, para 126; Case C-157/21, *Poland v Parliament and Council* (n 54) para 144.

¹³⁴ John Morijn, 'Separate Charter Invocation as a New Enforcement Method: The Lex NGO Case' (2022) 59 CMLR 1137, 1157.

¹³⁵ Bellamy and Kröger (n 2) 622.

¹³⁶ Ceurremans and David (n 10) 525.

¹³⁷ Case C-163/10, *Patriciello*, EU:C:2011:543, para 31; Case C-203/15, *Tele2 Sverige*, EU:C:2016:970, para 93.

or disturb'.¹³⁸ Further, the CJEU and Commission both confirmed that 'the right to freedom of association constitutes one of the essential bases of a democratic and pluralist society, inasmuch as it allows citizens to act collectively in fields of mutual interest and in doing so to contribute to the proper functioning of public life'.¹³⁹

As such, citizens as individuals and civil society as a collective 'carry out a key role as 'public watchdog' and constitute one of the essential bases of a democratic society'.¹⁴⁰ While the importance of political rights is recognised in Articles 10–14 CFR and also reflected in the CJEU's case law, the guarantee of these rights is also an essential element for citizens to effectively fulfil their role as double actors of EU and national democracy: without the protection of the essential political rights of citizens, there can neither be proper representation nor proper democratic accountability within the meaning of Article 10(1) and (2) TEU. As such, Article 10 TEU places an obligation upon the Member States to effectively guarantee and protect the political rights of their citizens.

3.1.3. Intermediary actors and institutions

While Article 10(4) TEU explicitly only acknowledges that political parties at European level¹⁴¹ contribute to forming European political awareness and to expressing the will of citizens of the Union, a broader point can be inferred from the inclusion of Article 10(4) TEU in the Union's democratic provisions: Some structures play an essential part in enabling citizens to form an opinion, and in acting collectively. These structures thus must be guaranteed and protected specifically. One could call those structures intermediary actors or institutions, which mediate between the citizens and the state and enable the citizens to exercise their political rights. As we already know from the Court's case law, national political parties are such an intermediary institution which is essential for the system of representative democracy.¹⁴² Without the right to join political parties, and without a pluralistic system of political parties, citizens would not be able to effectively exercise their political rights (section 3.1.3.1). At the same time, free and pluralistic media and press also have such an intermediary function, as they are key 'to fostering public discourse and civic participation, as a broad range of reliable sources of information and quality journalism empowers citizens to make informed choices, including about the state of their democracies' (section 3.1.3.2).¹⁴³ Because these intermediary institutions are of such an essential importance to democracy, Article 10 TEU does not merely oblige the Member States to not interfere with citizens' rights to join political parties and to access information from the press, but places them under a positive obligation to guarantee a pluralist system of political parties as well as media pluralism and a free press.¹⁴⁴

3.1.3.1. National political parties

As seen above, the freedom of association allows citizens to act 'collectively in fields of mutual interest and in doing so to contribute to the proper functioning of public life'.¹⁴⁵ As such, citizens must enjoy the right to found and become a member of national political parties which, in the system of representative democracy under Article 10(1) TEU, play a fundamental role 'in expressing the will of EU citizens' and hence fulfil an essential function.¹⁴⁶

¹³⁸ Case C-769/22, *Commission v Hungary* (n 82) para 460.

¹³⁹ Case C-78/18, *Commission v Hungary*, EU:C:2020:476, para 112; European Commission, 'Recommendation on promoting the engagement and effective participation of citizens and civil society organisations in public policy-making processes' C(2023)8672 final, Recital 2.

¹⁴⁰ Miriam Schuler, 'Regime Defence Disguised as a Defence of Sovereignty: The Hungarian Defence of National Sovereignty Bill as a Violation of European Values' (*European Law Blog*, 5 February 2024) <<https://europeanlawblog.eu/2024/02/05/regime-defence-disguised-as-a-defence-of-sovereignty-the-hungarian-defence-of-national-sovereignty-bill-as-a-violation-of-european-values/>> accessed 26 March 2024.

¹⁴¹ European political parties are regulated by Regulation 2025/2445. They normally consist of several national political parties, cf Regulation 2025/2445, art 3(1)(b).

¹⁴² Case C-808/21, *Commission v Czech Republic* (n 6) paras 121–22; Case C-814/21, *Commission v Poland* (n 6) paras 119–20.

¹⁴³ cf Recital 8, Regulation (EU) 2024/1083 of the European Parliament and of the Council of 11 April 2024 establishing a common framework for media services in the internal market and amending Directive 2010/13/EU (European Media Freedom Act) [2024] OJ L2024/1083.

¹⁴⁴ On positive obligations under TEU, art 2, see Opinion of AG Čapeta in Case C-769/22, *Commission v Hungary* (n 82) paras 184–85; Schuler and Harvey (n 77).

¹⁴⁵ Case C-78/18, *Commission v Hungary* (n 139) para. 112.

¹⁴⁶ Case C-808/21, *Commission v Czech Republic* (n 6) paras 120–21; Case C-814/21, *Commission v Poland* (n 6) paras 118–19.

The Court has of course recognised this essential function of national political parties only within the context of elections to the European Parliament.¹⁴⁷ However, as section 2 of this paper has argued, there exists not only a right for the EU citizen to be directly represented in the European Parliament. Rather, there equally exists a right for national citizens to be indirectly represented by their Member State representative in the Council, and to hold that representative democratically accountable. If national political parties play an essential role in the system of direct representation established by elections to the European Parliament, it is however equally reasonable to conclude that they play an essential role in the system of indirect representation established by Article 10(2) subparagraph 2 TEU.¹⁴⁸

After all, national political parties play an essential role in enabling the national citizen to be effectively represented by their Member State representative in the European Council and Council, and to hold that representative accountable. Not only do they play an essential role in national elections, hence helping national citizens to voice, channel and represent their opinions on their Member State's relationship with the EU. Rather, national political parties also play an important role for fielding candidates who will represent national citizens at national level, and consequently also at EU level in the European Council and Council.¹⁴⁹

Just as their role is essential for guaranteeing effective representation of citizens, their role is equally vital in ensuring democratic accountability. By providing 'important venues for popular discussion of political issues and the formation of public opinion, as well as structures through which the politically engaged citizenry can communicate effectively with their elected representatives',¹⁵⁰ 'national political parties control their governments' actions in the Council and European Council, serving as an important check on and venue for discussion on European policies and legislation.'¹⁵¹

As such, national political parties are an essential intermediary to ensure representation and accountability under Article 10 TEU and thus contribute significantly to national citizens fulfilling their role as double actors of EU and national democracy. Article 10 TEU, read in conjunction with Article 12 CFR, thus obliges the Member States to guarantee that their citizens have access to a pluralistic party system.¹⁵²

3.1.3.2. Media pluralism and a free press

For citizens to effectively fulfil their role as double actors of national and EU democracy as assigned by Article 10 TEU, namely to be able to hold institutions accountable, 'mechanisms for steady and reliable information' about the actions of decision-makers are vital.¹⁵³ Citizens get such information not just from information requests directed at national and European institutions. Rather, information, and consequently democratic deliberation, are highly dependent on the existence of media and free press that report on European politics. As such, the CJEU has highlighted the importance of media freedom 'in a democratic and pluralistic society'.¹⁵⁴ Especially a free press plays a fundamental role as 'public watchdog', imparting 'information and ideas on all matters of public interest', thus constituting an essential pillar of a democratic society governed by the rule of law.¹⁵⁵

The importance of media freedom and media pluralism is not just recognised in the Court's case law, but also anchored in Article 11 of the Charter and in the European Media Freedom

¹⁴⁷ Case C-808/21, *Commission v Czech Republic* (n 6) paras 121–22; Case C-814/21, *Commission v Poland* (n 6) paras 119–20.

¹⁴⁸ Schuler, 'National Party Bans Under EU Law' (n 22) 571.

¹⁴⁹ *ibid.*

¹⁵⁰ Richard S Katz, 'Democracy and the Legal Regulation of Political Parties' in Ingrid Van Biezen and Hans-Martien Ten Napel (eds), *Regulating Political Parties: European Democracies in Comparative Perspective* (Leiden UP 2014) 18–19.

¹⁵¹ Schuler, 'National Party Bans Under EU Law' (n 22) 571; see also Armin Hatje, 'Parteiverbote Und Europarecht' (2005) 120 DVBl 261, 261.

¹⁵² For a more detailed analysis see Schuler, 'National Party Bans Under EU Law' (n 22) 570–571.

¹⁵³ Auel (n 45) 496.

¹⁵⁴ Case C-719/18, *Vivendi SA Autorità per le Garanzie nelle Comunicazioni*, EU:C:2020:627, para 57; Recital 2 European Media Freedom Act (n 143).

¹⁵⁵ Case C-633/22, *Real Madrid Club de Fútbol*, EU:C:2024:843, paras 49–50 and 55; Recital 2 European Media Freedom Act (n 143).

Act which recognises in its Article 3 that Member States are under an obligation to ‘respect the right of recipients of media services to have access to a plurality of editorially independent media content and ensure that framework conditions are in place in line with this Regulation to safeguard that right, to the benefit of free and democratic discourse’.¹⁵⁶

Interpreting Article 10 TEU in its context and considering the essential function that media freedom and pluralism fulfil in enabling citizens to effectively fulfil their role as a double actor of EU and national democracy, free press and media pluralism is thus an essential element of Member State democracy that is protected by Article 10 TEU.

3.2. REPRESENTATIVE AND PLURALISTIC NATIONAL PARLIAMENTS

As seen above, the citizens of a Member State are not the only double actor of national and EU democracy recognised by Article 10 TEU. Rather, a system of representative democracy rests upon ‘the fundamental democratic principle that the peoples should take part in the exercise of power through the intermediary of a representative assembly’¹⁵⁷ which plays a part in the legislative process, thereby fulfilling the function of a guarantor of institutional balance.¹⁵⁸ Whereas the CJEU has made the aforementioned statements only in relation to the European Parliament, Article 10(2) subparagraph 2 as well as Article 12 TEU also recognise the role of national parliaments as double actors of EU and national democracy.

Pursuant to Article 12 TEU, national parliaments actively contribute to the good functioning of the Union and do so mainly within the framework of the Early Warning Mechanism set up by Protocol No 2.¹⁵⁹ This Mechanism enables national parliaments to conduct a subsidiarity review of EU legislation.¹⁶⁰ Although it remains controversial whether national parliaments should ‘enjoy requisite powers to tame “competence creep”’¹⁶¹ and although the results of the Early Warning Mechanism have been described as ‘disappointing’ in practice,¹⁶² Article 12 TEU shows that national parliaments are an essential actor to guarantee democratic accountability. This is because under the Early Warning Mechanism, national parliaments, as a collective, can place the European Commission under an obligation to justify and explain their conduct.¹⁶³ Thus, national parliaments are watchdogs of EU subsidiarity,¹⁶⁴ holding the European Commission accountable and observing the separation of competences between the Union and the Member States.

More important than the role formally recognised in Article 12 TEU is however the wider legitimisation function national parliaments have for EU politics.¹⁶⁵ They are scrutinisers of their government’s EU policies,¹⁶⁶ as well as communicators¹⁶⁷ and deliberators of EU politics, ensuring transparency for and representation of citizens in EU policies.¹⁶⁸

National parliaments play such an important role because ‘public spheres remain mostly organised at the national level ... which leaves national parliaments as the main focus points for public deliberation and, indeed, the main sources of political legitimacy’.¹⁶⁹ As such, national

¹⁵⁶ European Media Freedom Act (n 143).

¹⁵⁷ Case 138/79, *Roquette Frères v Council* (n 57) para 33.

¹⁵⁸ *ibid.*

¹⁵⁹ Oskar Josef Gstrein and Darren Harvey, ‘The Role of National Parliaments in the European Union’ (2014) 17 *ZEUS* 335, 337.

¹⁶⁰ TEU (n 1) art 12(b) and art 5(3).

¹⁶¹ Jacob Öberg, ‘National Parliaments and Political Control of EU Competences: A Sufficient Safeguard of Federalism?’ (2018) 24 *European Public Law* 697.

¹⁶² Gstrein and Harvey (n 159) 339.

¹⁶³ Protocol (No 2) on the Application of the Principles of Subsidiarity and Proportionality [2008] OJ C115/206, art 7(3).

¹⁶⁴ Lucy Kinski, ‘What Role for National Parliaments in EU Governance? A View by Members of Parliament’ (2021) 43 *J.Europ.Integration* 717, 720.

¹⁶⁵ *ibid.*; Giegerich (n 21) 146.

¹⁶⁶ Auel (n 45) 488; Kinski (n 164) 720.

¹⁶⁷ Kinski (n 164) 720.

¹⁶⁸ Auel (n 45) 488.

¹⁶⁹ Lucy Kinski and Ben Crum, ‘Transnational Representation in EU National Parliaments: Concept, Case Study, Research Agenda’ (2020) 68 *Pol.Stud.* 370, 373.

parliaments ‘contribute to making European policy making more democratic’.¹⁷⁰ They ‘provide a major space for public debate and are thus the ideal forums for the deliberation of important European issues and their domestic implications’.¹⁷¹ In deliberating on European issues and their domestic implications, national parliaments articulate the demands of their citizens and lobby for their voters’ preferences on EU policies to be reflected.¹⁷² They can mobilize their citizens’ support or objections to such policies and release or build tensions with the EU,¹⁷³ that can then be reflected in national or European elections.

Further, national parliaments equally hold their governments accountable for their EU policies, for example ‘by inducing them to explain European issues and decisions, to clarify European negotiation situations and to justify their negotiation position and behaviour’.¹⁷⁴ Moreover, by openly deliberating ‘important European issues and their domestic implications’, national parliaments ‘effectively contribute to making policy processes more transparent and, thus, more accessible for their national public’,¹⁷⁵ thus creating the necessary conditions for citizens to hold their governments and EU bodies accountable.

National parliaments thus perform a vital function in the EU’s democratic system. Just as courts can only protect the EU rule of law if they adhere to standards of independence derived from EU law, national parliaments can only contribute to EU democracy if they adhere to certain basic democracy standards, requiring not only that parliaments are ‘representative and accessible, but also transparent, accountable, and effective for their performance and integrity’.¹⁷⁶ These requirements are underlined by Resolutions of the European Parliament which emphasise that to achieve trust in a democracy ‘transparent, science-based and democratic decisions, as well as dialogue with and the involvement of the opposition, civil society and stakeholders, are fundamental’.¹⁷⁷ This especially includes ‘the sufficient possibility for parliamentary debates’.¹⁷⁸ Because these elements are essential for national parliaments to fulfil their function as a double actor of EU and national democracy as recognised by Articles 10 and 12 TEU, the aforementioned provisions thus protect national parliaments as a matter of EU law.

3.3. INDEPENDENT AND IMPARTIAL MEMBER STATE COURTS

Although the *Portuguese Judges* case has already recognised the protection of judicial independence as the essence of the rule of law and protected by Article 19 TEU,¹⁷⁹ the existence of and access to national courts is equally important for the value of democracy and the achievement of democratic accountability within the meaning of Article 10(2) subparagraph 2 TEU. After all, effective accountability can only be achieved when there are ‘judicial institutions possessing enough independence and integrity to uphold [democratic] processes and rights against pressures to bias them to favour the incumbents’.¹⁸⁰ In the words of the Court, the requirement that Member State courts be independent and impartial is ‘of cardinal importance as a guarantee that all the rights which individuals derive from EU law will be protected and that the values common to the Member States set out in Article 2 TEU ... will be safeguarded’.¹⁸¹

¹⁷⁰ Auel (n 45) 498.

¹⁷¹ *ibid.*

¹⁷² Kinski (n 164) 720.

¹⁷³ Tapio Raunio, ‘The Gatekeepers of European Integration? The Functions of National Parliaments in the EU Political System’ (2011) 33 *J.Europ.Integration* 303, 307.

¹⁷⁴ Auel (n 45) 498.

¹⁷⁵ *ibid.*

¹⁷⁶ Katerina Kalaitzaki, “‘The Role of National Parliaments and European Parliament as Guardians of European Values: The Case of Democracy and the Rule of Law in Cyprus’” (2025) 31 *J.L.S.* 476, 482.

¹⁷⁷ European Parliament, ‘European Parliament resolution of 13 November 2020 on the impact of COVID-19 measures on democracy, the rule of law and fundamental rights (2020/2790(RSP))’ (2020) P9_TA(2020)0307, Recital I.

¹⁷⁸ European Parliament, ‘European Parliament resolution of 1 June 2023 on the breaches of the Rule of Law and fundamental rights in Hungary and frozen EU funds (2023/2691(RSP))’ (2023) P9_TA(2023)0216, para 2.

¹⁷⁹ Case C-64/16, *ASJP* (n 5) para 36.

¹⁸⁰ Bellamy and Kröger (n 2) 622.

¹⁸¹ Case C-448/23, *Commission v Poland (Contrôle ultra vires de la jurisprudence de la Cour – Primauté du droit de l’Union)*, EU:C:2025:975, para 108.

Having identified the core institutional components of democratic governance protected under Article 10 TEU, the next question concerns the scope of these obligations. In particular, it must be clarified when and under what conditions the Member States are required to comply with these standards. As we have seen above, Article 10(3) TEU enshrines a citizen right to participate in the democratic life of the Union; a right that extends to that democratic life to be organised as set out in Article 10(1) and (2) TEU. Because Article 10(2) TEU makes clear that the democratic life of the Union takes place at both European and Member State level, the right to participate in the democratic life of the Union under Article 10(3) TEU thus also sets minimum democratic standards applicable to the Member States.¹⁸² As the previous section has shown, this comprises that the Member States must guarantee basic structures of democratic life such as political rights, free and fair elections, access to political parties and free and pluralistic media as well as impartial and independent courts. What yet remains to be seen is when these Member State obligations become applicable.¹⁸³

4.1. AN IMPACT AT UNION LEVEL

Following an extremely narrow conception of what the Union citizens' democratic rights are, and what the Union's democratic life comprises, one could demand that for a national measure to come within the scope of Article 10 TEU, there must be a 'sufficiently direct causal relationship' between a breach of democratic requirements and its 'impact on citizens' rights to democratic participation at Union level'.¹⁸⁴ Under such a narrow conception advocated for by Ceurremans and David, 'not every national situation of democratic backsliding has a bearing on the right of EU citizens to participate in the 'Union's democratic life'.¹⁸⁵

Such a restrictive scope of Member State obligations under Article 10 TEU would however be inconsistent with the interpretation of Article 10(3) TEU for which this article advocates. If Article 10(3) TEU is to be understood as entitling 'every citizen of the Union to a democratic system in the Member State of their own nationality',¹⁸⁶ then the existence of such a democratic system in the Member States matters regardless of its direct and causal impact upon Union level democracy. The Member States have 'have freely and voluntarily committed themselves'¹⁸⁷ to respect democratic principles and have chosen the system of a constitutional democracy¹⁸⁸ which is based upon the *Grundnorm* of human dignity.¹⁸⁹ The democratic rights enshrined in Article 10(3) TEU thus do not only matter if and when a direct and causal impact upon Union democracy can be found. Rather, it is grounded upon the belief in the intrinsic worth of each and every human being, which is inalienable.¹⁹⁰ This means that each and every human being has the right to live in a sphere of individual freedom, and it follows from this that each and every human being has a right to justification of all those actions which affect them.¹⁹¹ In this light, Article 10(3) TEU applies at all times.

Moreover, the requirement of a 'sufficiently direct causal relationship' between a breach of democratic requirements and its 'impact on citizens' rights to democratic participation at Union

¹⁸² Giegerich (n 21) 144.

¹⁸³ This section on scope of application builds upon Schuler, 'National Party Bans Under EU Law' (n 22) 572–574.

¹⁸⁴ Ceurremans and David (n 10) 526–527.

¹⁸⁵ *ibid* 527.

¹⁸⁶ Giegerich (n 21) 148.

¹⁸⁷ Case C-621/18, *Wightman and Others*, EU:C:2018:999, para 63; Case C-896/19, *Republika* (n 81) para 61; Case C-769/22, *Commission v Hungary* (n 82) para 521.

¹⁸⁸ Opinion of AG Ćapeta in Case C-769/22 (n 82) para 215.

¹⁸⁹ Opinion of AG Pitruzzella in Case C-715/20, *X (Lack of reasons for termination)* EU:C:2023:281, para 76; *ibid* para 271.

¹⁹⁰ European Law Institute, 'Charter of Fundamental Constitutional Principles of a European Democracy' (2024) 69 https://europeanlawinstitute.eu/fileadmin/user_upload/p_eli/Publications/ELI_Charter_of_Fundamental_Constitutional_Principles_of_a_European_Democracy.pdf accessed 5 September 2026.

¹⁹¹ Rainer Forst, 'Die Würde des Menschen und das Recht auf Rechtfertigung' (2005) 53 *Deutsche Zeitschrift für Philosophie* 589, 590.

level¹⁹² is grounded upon a very narrow understanding of what the democratic life of the Union entails. Rather than acknowledging that European and Member State democracy interlock and often cannot be strictly separated into two clearly distinguishable spheres, Ceurremans and Davids seem to conceive of Member State and Union democracy as two different spheres which only exceptionally impact each other. But not only is it extremely difficult to determine when exactly a Member State becomes so undemocratic that it impacts Union level democracy,¹⁹³ also any requirement of a 'direct and causal' impact on Union-level democracy appears difficult to reconcile with the *Portuguese Judges* case. In this case the Court expressly recognised that the mere potential for courts to fall within the scope of Union law was considered sufficient for Article 19(1) subparagraph 2 TEU to apply.

4.2. THE INSEPARABILITY OF THE UNION'S AND THE MEMBER STATES' DEMOCRATIC LIFE

The *Portuguese Judges* case has effectively placed all Member State courts under an obligation to comply with EU law at all times.¹⁹⁴ This is because the *Portuguese Judges* case links the EU law protection of national courts 'to the extent' that these courts fulfil their assigned function under EU law and rule on questions concerning 'the application or interpretation of EU law'.¹⁹⁵ The protection is thus functional;¹⁹⁶ it seeks to guarantee that a double actor of EU and national law can effectively fulfil its role. Key to this role is, however, that this actor exists in the national sphere and the EU sphere at the same time; and that these spheres cannot be neatly distinguished or separated from each other.

Indeed, Pech and Platon observe that even if the Member States sought 'to limit the independence of judges only when they rule on questions which do not concern the application or interpretation of EU law', it would be 'a hard task to pinpoint exactly which areas of national law are unaffected by EU law'.¹⁹⁷ This is because 'it is often impossible to identify, at the beginning of a procedure, whether or not a provision or principle of EU law may turn out to be applicable in the course of a given procedure'.¹⁹⁸ A national court is thus obliged to comply with EU standards of independence because potentially at any point in time, someone could invoke EU law before it, and it could be called upon to fulfil its EU law function. We thus simply cannot draw a meaningful distinction between 'judicial independence within the scope of EU law' and 'judicial independence in purely national cases'.¹⁹⁹ Rather, a national court can at any point in time be potentially transformed into an EU law actor. It is because of this potential to exercise EU law functions at any point in time why 'a minimum of guarantees of judicial independence must be ensured, as a matter of principle, for all courts and as regards all their activities'.²⁰⁰

The same applies for democratic double actors under Article 10 TEU.²⁰¹ While the Court has recognised in recent judgments that electoral rights can be divided into separate spheres and consequently that mobile EU citizens have no right to participate in the national elections of a Member State of which they are not a citizen,²⁰² national political life and the democratic life of the Union cannot be neatly separated into two different spheres.²⁰³ As Coutts explains:

¹⁹² Ceurremans and David (n 10) 526–527.

¹⁹³ Cotter, 'Democracy Manifest?' (n 9) 492.

¹⁹⁴ Sébastien Platon and Laurent Pech, 'Judicial Independence under Threat: The Court of Justice to the Rescue in the ASJP Case' (2018) 55 CMLR 1827, 1840–1841; Matteo Bonelli and Monica Claes, 'Judicial Serendipity: How Portuguese Judges Came to the Rescue of the Polish Judiciary: ECJ 27 February 2018, Case C-64/16, Associação Sindical Dos Juizes Portugueses.' (2018) 14 European Constitutional Law Review 622, 623.

¹⁹⁵ Case C-64/16, *ASJP* (n 5) para 40.

¹⁹⁶ Bonelli and Claes (n 194) 631.

¹⁹⁷ Platon and Pech (n 194) 1841.

¹⁹⁸ Opinion of AG Bobek in Joined Cases C-748/19 to C-754/19, *Prokuratura Rejonowa w Mińsku Mazowieckim*, EU:C:2021:403, para 137.

¹⁹⁹ *ibid* para 136.

²⁰⁰ *ibid*.

²⁰¹ Schuler, 'National Party Bans Under EU Law' (n 22) 573.

²⁰² Case C-808/21, *Commission v Czech Republic* (n 6) para 155; Case C-814/21, *Commission v Poland* (n 6) para 154.

²⁰³ Coutts (n 20) 12.

[P]olitical issues and ideologies map across different electoral contexts. While there are local, European and national elections, there are not necessarily separate local, European and national politics. Or if there are, they are not at all clearly demarcated but are fluid, run into each other and form part of a wider whole.²⁰⁴

The argument is thus not that we cannot differentiate between a mobile EU citizen and a national citizen, but rather that we cannot differentiate between national citizens contributing to national political life and national citizens contributing to the democratic life of the Union. Just as a national court can be transformed into an EU law court at any moment, a national citizen can be transformed into an EU citizen at potentially any moment. As explained by Coutts, citizens often exist in one political sphere where European and national dimensions are merged into one.²⁰⁵ It is thus not just the obligation under Article 19(1) subparagraph 2 TEU which is ‘area-based, not case-dependent’;²⁰⁶ the same applies to the obligation under Article 10 TEU. Because it is area-based and applies to the whole democratic life of the Union, and because this life and the issues covered by it are themselves wide-ranging, it is in practice impossible to draw a clear distinction between national citizens acting exclusively within the national political sphere and national citizens contributing to the democratic life of the Union.²⁰⁷ To protect that potential – of issues and citizens becoming Europeanised – and because national political life forms part of the democratic life of the Union under Article 10 TEU, the Member States are thus under an obligation to comply with EU law derived democracy standards at all times.

This also follows from the specific role Article 10(2) TEU assigns to the European citizens in the EU democratic order: As we have seen above, both strands of democratic legitimacy under Article 10(2) TEU ‘eventually lead to the individual, ie the citizen of the Union and simultaneously of one or several Member States’.²⁰⁸ It is impossible to distinguish whether that individual contributes to national political life or to European political life. Rather, under Article 10(2) TEU even a citizen’s contribution to national political life is a matter of EU democracy. This because the Court has held in *Wightman* that the decision of a Member State to withdraw from the EU must be based on a ‘democratic process’.²⁰⁹ If withdrawal – as the ultimate exercise of popular sovereignty of a Member State – requires a democratic process, conversely then, continued membership of the Union equally requires a democratic process that continues to support this membership and vests the EU with democratic legitimacy.²¹⁰ From the perspective of the Union’s dual structure of legitimation, there thus exists no such thing as a purely internal situation.

A look into Treaty history supports this. According to Article F(1) of the Treaty of Maastricht,²¹¹ ‘[t]he Union shall respect the national identities of its Member States, whose systems of government are founded on the principles of democracy’. Areas of national identity are such that are inherent in the Member States fundamental structures, political and constitutional, inclusive of regional and local self-government.²¹² And yet, although these areas are neither governed by EU competences nor directly touched upon by other Treaty obligations, Article F(1) of the Treaty of Maastricht makes clear that the principle of democracy governs even these most fundamental constitutional and political structures in the Member States. This supports the conclusion that Member State democracy is never outside the scope of EU law.

The democratic life of the Union is thus inseparably connected to the democratic life in the Member States.²¹³ Not only are the actors of national political life the same actors that are also awarded a role in the EU Treaties. Rather, the Union and the Member States share one

²⁰⁴ *ibid.*

²⁰⁵ *ibid.*

²⁰⁶ Opinion of AG Bobek in Joined Cases C-748/19 to C-754/19, *Prokuratura Rejonowa w Mińsku Mazowieckim* (n 198) para 135.

²⁰⁷ See also Schuler, ‘National Party Bans Under EU Law’ (n 22) 577.

²⁰⁸ Von Bogdandy and others (n 117) 495.

²⁰⁹ Case C-621/18, *Wightman* (n 187) para 67.

²¹⁰ Schuler, ‘National Party Bans Under EU Law’ (n 22) 577.

²¹¹ Treaty on European Union (Treaty of Maastricht) [1992] OJ C191/1.

²¹² cf TEU (n 1) art 4(2).

²¹³ von Bogdandy and Spieker (n 8) 19.

political sphere and one democratic space. Given the inseparability of both democratic actors and spaces, Article 10 TEU governs not only situations at the EU level but also at Member State level²¹⁴ and applies to the Member States at all times.²¹⁵

5. THRESHOLD OF ACTIVATION: SYSTEMIC AND SERIOUS DEFICIENCIES

The unlimited scope of Article 10 TEU does, however, need to be distinguished from its threshold of activation. While the previous section has argued that Article 10 TEU applies at all times, this does not automatically mean that every individual breach of the democratic standards enumerated above gives rise to a violation of the principle of democracy under Article 10 TEU.

The Court has recently clarified that ‘only manifest and particularly serious breaches’ can constitute a breach of Article 2 TEU.²¹⁶ However, the Court has also underlined that the infringement of a provision giving concrete expression to Article 2 TEU does not automatically give rise to a violation of that provision.²¹⁷ In other words, a violation of the standards under Article 10 TEU, which give concrete expression to the value of democracy anchored in Article 2 TEU,²¹⁸ does not necessarily indicate an infringement of Article 2 TEU.

On this basis, one could thus also conclude that Article 10 TEU has a different threshold than Article 2 TEU. After all, if Article 10 TEU applies – as argued above – at all times, one could also conclude that it must capture all situations. Such an approach, however, would disregard what is already inherent in the proposed method of substantiating Member State obligations under Article 10 TEU: only democracies’ essential actors and infrastructures are protected.

Intrinsically connected with such a focus on the elements ‘inherent’ to democracy is that Article 10 TEU is only engaged when the Member States are systemically and structurally violating democratic standards.²¹⁹ This is also more broadly reflected in the nature of Article 10 TEU, which is inherently structural.²²⁰ Whereas other Treaty provisions contain more detailed descriptions of individual political rights, Article 10 TEU sets out only the most fundamental elements of the Union’s democratic framework.²²¹ Its purpose is to secure ‘the EU’s democratic legitimacy through a system of dual legitimization.’²²² Accordingly, Article 10 TEU conceptualises democracy from a systemic and structural perspective.²²³ It entitles ‘every citizen of the Union to a democratic system in the Member State of their own nationality’.²²⁴ As such, the democratic standards applicable to the Member States under Article 10 TEU are only engaged in particularly serious and systemic situations.²²⁵

6. CONCLUSION

Scholarly literature has long demonstrated that under Article 10 TEU EU democracy and Member State democracy interlock. This paper has started with this premise and has demonstrated that Article 10 TEU does indeed contain concrete and enforceable Member State obligations, namely, to guarantee the effective representation in and democratic accountability of EU institutions.

²¹⁴ *ibid*; Giegerich (n 21) 144.

²¹⁵ Ceurremans and David (n 10) 525; Sonnevend (n 130) 580; Schuler, ‘National Party Bans Under EU Law’ (n 22) 574.

²¹⁶ Case C-769/22, *Commission v Hungary* (n 82) para 551.

²¹⁷ *ibid* para 547.

²¹⁸ Case C-502/19, *Junqueras Vies* (n 6) para 63; Case C-418/18, *Puppinck and Others v Commission* (n 6) para 64; Case C-629/21, *Puigdemont* (n 6) para 250; Case C-808/21, *Commission v Czech Republic* (n 6) para 114; Case C-814/21, *Commission v Poland* (n 6) para 112; Case C-181/23, *Commission v Malta* (n 6) para 89.

²¹⁹ Schuler, ‘National Party Bans Under EU Law’ (n 22) 574–575.

²²⁰ *ibid* 575.

²²¹ *ibid*.

²²² *ibid*.

²²³ *ibid*.

²²⁴ Giegerich (n 21) 148 (emphasis added).

²²⁵ Ceurremans and David (n 10) 527; Schuler, ‘National Party Bans Under EU Law’ (n 22) 575.

However, the paper has demonstrated that the EU institutions are not the only place where EU and Member State democracy are linked. Rather, the EU and the Member States share democratic actors: on the one hand, Article 10(2) TEU directly assigns a role to the citizens of a Member State in EU democracy. On the other hand, Articles 10(2) and 12 TEU recognise the contribution of national parliaments to EU democracy. These two democratic actors are thus double actors of EU and Member State democracy. They fulfil functions both at the Member State and at the Union level and hence exist in both spheres at the same time.

In order for these double actors to fulfil their democratic function assigned by the Treaties, EU law must guarantee that these double actors have access to the essential democratic infrastructure that enables them to effectively fulfil their democratic role. On this basis, the paper has argued that core components of Member State democracy – including free and fair elections, political parties, independent media and pluralistic parliaments – are not merely matters of domestic constitutional law, but form part of the constitutional infrastructure of the Union itself.

Yet, EU and Member State democracy do not only share the same democratic actors. Rather, EU and Member State democracy also share the same democratic space: the European and national political sphere are so inherently intertwined, that there is no ‘democracy within the scope of EU law’ and ‘democracy outside of the scope of EU law’. It follows from this that the double actors of EU and Member State democracy must be protected at all times.

Ultimately, the paper advances a broader claim: just as the Court has recognised that there can be no effective Union based on the rule of law without independent national courts, there can be no functioning democratic Union without robust democratic institutions in the Member States. If taken seriously, Article 10 TEU therefore has the potential to become a central pillar in the Union’s constitutional architecture – one that anchors democracy not only as a value, but as a set of enforceable structural commitments shared between the Union and its Member States.

FUNDING INFORMATION

Arts and Humanities Research Council.

London Arts and Humanities Partnership Research Studentship.

COMPETING INTERESTS

The author has no competing interests to declare.

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TO CITE THIS ARTICLE:

Miriam Schuler, ‘The Enforcement of the Principle of Democracy Against Member States Under Article 10 of the Treaty on European Union’ (2026) 22(2) *Utrecht Law Review* 80–104. DOI: <https://doi.org/10.36633/ulr.1289>

Published: 29 October 2026

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