

AMNESTY AND EU LAW. RULE OF LAW, EFFET UTILE AND REASONABLE SACRIFICES ACCORDING TO THE COURT OF JUSTICE

[Commentary on the Judgments of the Court of Justice (Grand Chamber) of 16 July 2026, Cases C-523/24, *Sociedad Civil Catalana (SCC)*; and C-666/24, *Associació Catalana de Víctimes d'Organitzacions Terroristes (ACVOT)*]

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SUMMARY: The judgments of the Court of Justice on the Spanish Organic Law on Amnesty (LOA) find, in essence, no incompatibility with EU law. This outcome is reached through several mechanisms: the objections raised in the Venice Commission's opinion are disregarded; a novel doctrine is developed requiring systemic problems for an infringement of Article 19 TEU to be found; the *effet utile* doctrine is used to limit the literal scope of EU legislation; and the arguments of the LOA and of the Spanish Constitutional Court are adopted as the Court's own.

Clearly, in a matter such as this, political assessments cannot be entirely removed from judicial decision-making. In this case, the Luxembourg Court's choice is clear, and it is legitimate to ask whether it might lead to differences in treatment depending on the political positions at stake.

KEY-WORDS: Amnesty. Rule of law. Effect utile. Article 2 TEU. Article 19 TEU.

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I. Introduction

Of the many interesting issues that could be discussed in relation to the SCC and ACVOT judgments of the Luxembourg Court, I will address two here: on the one hand, the relationship between the Organic Law on Amnesty (LOA)¹ and the values of Article 2 TEU; on the other, the compatibility of this Law with the Directive on combating terrorism². According to the Luxembourg Court, there is nothing in the LOA that contradicts either Article 2 TEU or the aforementioned Directive. I believe, however, that there are elements that might qualify or, at least, cast some doubt on this clean relationship

¹ Organic Law 1/2024 of 10 June on amnesty for the institutional, political and social normalisation of Catalonia, *BOE*, 11-VI-2024.

² Directive (EU) 2017/541 of the European Parliament and of the Council of 15 March 2017 on combating terrorism and replacing Council Framework Decision 2002/475/JHA and amending Council Decision 2005/671/JHA, *OJ*, L 88 of 31-III-2017.

between the provisions of the Amnesty Law and EU law³. On the one hand, as regards the Directive on terrorist offences, the way in which the Court applies the effet utile doctrine to the case is of interest, and in particular the link it establishes between certain political objectives and the possibility of excluding the criminal prosecution of terrorist offences that may be committed in pursuit of those political objectives. On the other hand, as regards the effectiveness of the values of Article 2 TEU, it is inevitable to relate the amnesty judgments to the judgment in *Commission v. Hungary* delivered a few months earlier⁴. In that decision, the Court of Justice, for the first time, applied Article 2 TEU directly in order to declare the legislation of a Member State contrary to EU law⁵. In the judgments of 16 July, however, it does not examine the compatibility between the values of Article 2 TEU and the LOA, even though Article 2 TEU had been invoked in the questions referred for a preliminary ruling by the Court of Auditors (Tribunal de Cuentas). The end result, as we shall see, is a pair of decisions in which the Court accepts certain “reasonable sacrifices”. Article 19 TEU, as regards the protection of the right to a fair trial, will only come into play in the presence of “systemic problems”, and certain offences that must be prosecuted under EU law will be disregarded where certain circumstances arise that do not jeopardise the effet utile of the provision. The Court, usually so inclined to extend the effectiveness of EU law, here accepts a certain retreat in the face of national rules. We shall examine this in Sections III and IV.

Before turning to that, however, we will pause on another issue that might seem minor: in the judgments under discussion, the account of the facts begins with the legal actions brought. In one case, with the claim filed by SCC before the Court of Auditors⁶, and in the other, with the Public Prosecutor’s statement of charges concerning a number of persons accused of various offences⁷. The facts preceding those judicial proceedings do not appear -if they appear at all- until later; this contrasts with the approach taken by the Luxembourg Court in other decisions, in which the presentation of the relevant facts goes back to events prior to the commencement of the judicial proceedings⁸. Of course, there are also cases in which the Court begins its account of the facts with the judicial action that gave rise to the reference for a preliminary ruling; but whether it is done one way or the other is not -I believe- irrelevant.

In this case, the issue was to determine whether the LOA was compatible with EU law, and amnesty laws can only be judged in the context in which they arise. Without that context, it is not merely that they cannot be properly assessed; they may not even be properly understood. In fact, I believe that for those who lack the context that the Luxembourg Court withholds from us, the very description of the case may prove unintelligible. I can picture some commentator, a few years from now, having to search

³ As is well known, the SCC judgment held that the requirement that courts rule on applications for the application of the LOA and lift existing interim measures even where a ruling of the Court of Justice is pending is indeed contrary to EU law, which affects Articles 8(3), 10 and 13(3) of the LOA. The ACVOT judgment states that the application of the amnesty to terrorist offences is compatible with EU law provided that the courts are able to determine which terrorist offences are excluded from the LOA. This paper will not deal with these nuances, which, in the view of the Luxembourg Court, do not affect the substantial compatibility of the Amnesty Law with EU law.

⁴ CJEU judgment of 21 April 2026, *Commission v. Hungary*, C-769/22, ECLI:EU:C:2026:326.

⁵ See K. Lenaerts and J.A. Gutiérrez-Fons, “En la Unión Europea, valores primero”, *Revista Española de Derecho Europeo*, 2026, No. 98, pp. 27-44, p. 39.

⁶ See paragraph 26 of the judgment.

⁷ See paragraph 21 of the judgment.

⁸ See, for example, CJEU judgment of 5 June 2018, *Coman*, C-673/16 (paragraph 9), CJEU judgment of 17 April 2018, *Egenberger*, C-414/16 (paragraph 24), CJEU judgment of 21 January 2016, *Euras and Others*, C-74/14 (paragraphs 5 et seq.) or CJEU judgment of 21 December 2011, *N.S.*, C-411/10 and C-493/10 (paragraphs 34 et seq.).

through one link after another in order to understand what the Court of Justice is referring to when it describes the facts of the SCC and ACVOT judgments.

Of course, no narrative is innocent. Not only the selection of the facts recounted but also the order in which they are presented is relevant. In the decisions discussed here, the focus is on certain judicial proceedings in which the Organic Law on Amnesty appears as a procedural incident; but no account is given either of the origin of those actions before the Court of Auditors and the Audiencia Nacional or of the way in which the LOA came about. I believe it would have been appropriate to include these elements in the account of the facts, and that is why, in the next section, I will set out the events in what is perhaps a revolutionary manner: chronological order.

II. Facts and narrative

1. *The procés*

The starting point of the case is 2011, which is precisely when the temporal scope of the amnesty begins and which corresponds to the first significant actions of the Generalitat aimed at achieving the secession of Catalonia (the so-called *procés*). The *procés* reached its climax in 2017⁹, when several Catalan public administrations, led by the Government of the Generalitat, decided to stop acting as Spanish constitutional authorities in order to organise the secession of Catalonia and turn the territory into an independent Republic. There is no need to enter into the debate as to whether those involved in that project (the so-called *procés*) really intended to carry it through or were using it as a means of pressure to achieve other objectives; but what is beyond doubt is the abundance of declarations and resolutions, formally adopted by the competent bodies of the various regional and local administrations, which expressly referred to the existence of a process that was to culminate in the secession of Catalonia, a process in which the so-called “disconnection laws” of September 2017¹⁰ and the self-determination referendum of 1 October 2017¹¹ played a central role. These actions entailed allocating public resources to unlawful ends, which could give rise to accounting liability and, depending on the circumstances, to the commission of a criminal offence.

Even before 1 October 2017, the courts took action in relation to the events that were taking place in Catalonia. The obstruction of a judicial committee in a Generalitat building on 20 September 2017 led to the opening of judicial proceedings against the leaders of the organisations that had called on citizens to protect the institutions of the Generalitat from the investigations under way¹²; subsequently, those investigations were extended to other political leaders, who were tried by the Supreme Court on various charges and, ultimately, convicted by judgment of 14 October 2019 of the offences of sedition, misappropriation of public funds and disobedience¹³. The civil liability that

⁹ See paragraph 28 of the SCC judgment.

¹⁰ Catalan Law 19/2017 of 6 September on the self-determination referendum (*DOGC*, 6-IX-2017, Annex A) and Catalan Law 20/2017 of 8 September on the legal and foundational transition of the Republic (*DOGC*, 8-IX-2017, Annex A).

¹¹ For further detail on these events, I refer to R. Arenas García, *Orden europea de detención y entrega y defensa del orden constitucional de los estados miembros de la UE: el caso del procés*, Valencia, Tirant lo Blanch, 2025, pp. 35-47, esp. pp. 39-44.

¹² *Ibidem*, p. 52.

¹³ Supreme Court Judgment (Criminal Chamber) 459/2019 of 14 October 2019, ECLI:ES:TS:2019:2997. Some of the defendants were convicted of sedition and misappropriation of public funds, others only of sedition, and three solely of disobedience. The former (those convicted of sedition and misappropriation,

might arise from the misappropriation of public funds, however, was not determined by the Supreme Court but was referred to the Court of Auditors, which could, moreover, deal with the accounting liability of senior officials who had not been criminally charged but who might have participated in the irregular expenditure incurred during the *procés*. SCC decided to use this avenue to seek the liability that might arise from having allocated public funds to purposes other than those justifying the expenditure. Herein lies the origin of the case decided by the SCC judgment.

In the run-up to the referendum of 1 October 2017, groups known as Committees for the Defence of the Referendum (CDR) had been formed, whose purpose was to enable the referendum to be held despite any judicial or police obstacles that might arise. After the referendum, these committees became Committees for the Defence of the Republic, with the aim of turning into reality the independent Catalan Republic that had been attempted in 2017. In September 2019, several members of those CDRs were arrested and charged with preparing explosives that they might use to achieve the independence of Catalonia through violence. These arrests are the origin of the case that culminated in the ACVOT judgment.

2. The amnesty

Following the failure of the secession attempt and the conviction of several leaders of the secessionist movement, the political parties that had led the *procés* sought an alliance with the PSOE, nationalist parties and other forces on the left of the political spectrum in order to mitigate the effects of the legal response to the secession attempt. Both the pardon granted to those sentenced to imprisonment (by means of several Royal Decrees of 22 June 2021 published in the *BOE* of 23 June 2021) and the amendment of the Criminal Code to abolish the offence of sedition and redefine the offence of misappropriation of public funds¹⁴ fall within this strategy. The next step, however, was to obtain an amnesty for the events that took place during the *procés*. After the 2023 elections, the investiture agreement that brought Pedro Sánchez to the Presidency of the Government included the adoption of an Amnesty Law, which would benefit, among others, several leaders of the parties that had voted in favour of that investiture¹⁵. The registration in the Congress of Deputies of the bill for the Organic Law on Amnesty preceded Pedro Sánchez's investiture by three days¹⁶.

The passage of the law caused a deep division in Spanish society, as shown by the fact that it was ultimately adopted by the Congress of Deputies but with the opposition of the Senate, which rejected the text sent by the Lower House¹⁷. Obviously, this division does

or of sedition alone) received prison sentences; the latter (convicted solely of disobedience), fines and disqualification from public office.

¹⁴ Organic Law 14/2022 of 22 December, *BOE*, 23-XII-2022.

¹⁵ Oriol Junqueras, president of ERC, and Carles Puigdemont, leader -though not president at the time- of Junts, for example.

¹⁶ See the *BOCG*, Congreso de los Diputados, XV Legislature, Series B, 32-1, of 24 November 2023, which contains the letter of 13 November 2023 addressed to the Bureau of the Congress by the Spokesperson of the Socialist Parliamentary Group, https://www.congreso.es/public_oficiales/L15/CONG/BOCG/B/BOCG-15-B-32-1.PDF submitting the bill. The vote investing Pedro Sánchez as President of the Government took place on 16 November, see Royal Decree 828/2023 of 16 November appointing Pedro Sánchez as President of the Government (*BOE*, 17-XI-2023).

¹⁷ See the Senate's veto in the *BOCG*, Congreso de los Diputados, XV Legislature, Series B, 32-12, of 21 May 2024, https://www.congreso.es/public_oficiales/L15/CONG/BOCG/B/BOCG-15-B-32-12.PDF. This veto was overridden in the Congress by 177 votes to 172, see the *Diario de Sesiones del Congreso de los Diputados*, XV Legislature, No. 45, concerning the plenary session of 30 May 2024.

not affect the formal validity of the Organic Law, but it may be relevant in determining whether it is the result of a broad consensus capable of legitimising an exceptional measure such as an amnesty. The Senate, moreover, requested an opinion on the bill from the Venice Commission, which adopted it at its session of 15 and 16 March 2024¹⁸. The report included certain observations on the contradictions between the text and the parliamentary procedure of the bill, on the one hand, and the requirements of the rule of law, on the other.

Once the LOA had been adopted, it was necessary to determine how it would apply to the cases that had been tried or were under investigation, as well as its compatibility with both the Spanish Constitution and EU law. Several actions of unconstitutionality having been brought against the LOA, the Constitutional Court ruled in its judgment of 26 June 2025¹⁹, which, as we shall see, is relevant to the decisions of the Luxembourg Court under discussion. The judgment holds that the LOA is, in general terms, compatible with the Constitution, although it annuls some of its provisions. Further decisions of the Constitutional Court are, however, still pending on questions of unconstitutionality and appeals brought in relation to the LOA.

Since the incompatibility of the LOA with EU law had also been raised, several references for a preliminary ruling have been made concerning it. The first two rulings of the Luxembourg Court dealing with this Law are those discussed here. As is well known, they uphold the essential compatibility of the LOA with EU law, merely declaring that the requirement that courts decide on applications for the application of the LOA even where a reference for a preliminary ruling is pending before the Luxembourg Court does not comply with what EU law requires²⁰. Here, however, we will not address that issue, confining ourselves, as announced, to examining the potential relevance of the values enshrined in Article 2 TEU and the relationship between the LOA and the Directive on terrorism.

III. Article 2 TEU: from Hungary to Spain

The judgment in *Commission v. Hungary* of last April²¹ is a “constituent” judgment, probably on a par with *Van Gend en Loos*²² (direct effect) and *Costa/ENEL*²³ (primacy). Article 2 TEU, which sets out the values on which the Union is founded, became a yardstick for determining the compatibility of national legislation with EU law. Before the judgment in *Commission v. Hungary*, the Luxembourg Court had never used Article 2 TEU on its own to declare national legislation contrary to Union law. It was then reasonably doubted whether the provision could be applied autonomously²⁴, beyond the procedures laid down in Article 7 TEU. The April 2026 decision puts an end to this debate

¹⁸ Opinion on the Rule of Law requirements of amnesties with particular reference to the Parliamentary Bill “On the Organic Law on Amnesty for the Institutional, Political and Social Normalisation of Catalonia”, CDL-AD(2024)003.

¹⁹ Constitutional Court Judgment (Plenary) 137/2025 of 26 June. The judgment was accompanied by four dissenting opinions in favour of declaring the LOA unconstitutional.

²⁰ See paragraphs 134 to 142 of the SCC judgment.

²¹ See *supra* n. 4.

²² CJEU judgment of 5 February 1963, 26/62, ECLI:EU:C:1963:1.

²³ CJEU judgment of 15 July 1964, 6/64, ECLI:EU:C:1964:66.

²⁴ On the evolution of the role of Article 2 TEU in the case-law of the Luxembourg Court, see L.D. Spieker, “A European Society of Constitutional Interpreters. The Societal Forces Behind *Commission v. Hungary*”, *Verfassungsblog*, 3 July 2026, <https://verfassungsblog.de/a-european-society-of-constitutional-interpreters/>.

and confirms that the Luxembourg Court may use the values of Article 2 to declare national legislation contrary to EU law.

One consequence of the above is that the Court of Justice may see its power of review over national legal systems expanded beyond the areas in which there is EU legislation. The values of Article 2 TEU extend to all State action, even action falling within the exclusive competence of the States, so that, where those values are infringed, the fact that there is no applicable EU legislation, beyond Article 2 TEU itself, might not be relevant. In other words: from now on the Luxembourg Court would become a combination of Supreme Court and Constitutional Court not only of the EU but also of its Member States. This new position of the Luxembourg Court has not failed to attract criticism²⁵ as well as caveats²⁶. In this regard, it is important to distinguish between paragraph 549 of the judgment in *Commission v. Hungary*, where the Court recalls that the Member States may not exercise “its powers in a way that would go against those values, which define the very identity of the Union as a common legal order, accepted by the Member States on a reciprocal basis”, and paragraph 547, which states that “it does not follow from the legally binding nature of Article 2 TEU that any infringement of a provision of EU law which, directly or indirectly, gives concrete expression to those values necessarily means that there has been infringement of that article”. The first paragraph, by referring to the competences of the States, would support an application of Article 2 TEU beyond the Union’s own competences. The second, by referring to infringements of Union law, would favour an interpretation whereby Article 2 TEU could give rise to an autonomous infringement of EU law, but only in those cases in which there is another infringement of EU law. That is to say, it could not operate directly in cases where there was no infringement of other provisions of EU law. Should this latter interpretation be confirmed, the scope of the judgment in *Commission v. Hungary* would be narrower than some have inferred. Even so, the direct effect of Article 2 TEU, even with these limits, would be significant (an autonomous infringement of EU law based on this provision) and could serve as a bridge to a broader scope (on the basis of the reference to the competence of the Member States in paragraph 549 of the judgment).

In any event, moreover, the Luxembourg Court limits the direct application of Article 2 to cases in which the breaches of the values of Article 2 are “manifest and particularly serious”²⁷. From here, however, we may ask, on the one hand, whether this direct application of Article 2 TEU is possible in a matter falling within the competence of the States (in view of what is stated in paragraph 549 of the judgment); and, on the other hand, whether this consideration of Article 2 TEU can operate outside the framework of infringement proceedings, since paragraph 551 of the judgment in *Commission v. Hungary* expressly refers to that type of procedure.

It will be interesting to see how the Court responds to these doubts, and the judgments it has delivered in relation to the LOA, together with those that may be delivered in the future, could provide an opportunity to do so. The first two, those discussed here, must however be regarded as a missed opportunity. This is partly due to the way in which the questions referred for a preliminary ruling were formulated.

²⁵ See, for example, M. Polzin, “Die neue Wertekudikatur: Art. 2 EUV und die Selbstermächtigung des EuGH”, *DÖV Blog*, 7 May 2026, <https://blog.kohlhammer.de/doev/die-neue-wertekudikatur-art-2-euv-und-die-selbstermachtigung-des-eugh>.

²⁶ See Th. Giegerich, “Art. 2 EUV im Vertragsverletzungsverfahren: EuGH-Urteil zum ungarischen Anti-LGBTI-Gesetz macht EU zur wehrhaften Demokratie”, *Jean Monnet Saar*, 1 June 2026, <https://jean-monnet-saar.eu/?p=323015>.

²⁷ See paragraph 551 of the judgment in *Commission v. Hungary*.

The initial question that should be asked is whether the LOA complies with the requirements of the rule of law. The question is pertinent, because the aforementioned opinion of the Venice Commission on the bill for the Organic Law²⁸ points, at various junctures, to friction between the law and those requirements. Thus, it questions the use of the urgent procedure for the passage of the Law²⁹. It also casts doubt on whether the LOA genuinely pursues reconciliation -which could legitimise it-, given the absence of an in-depth debate, of broad agreement and of mechanisms giving victims a voice³⁰. It raises doubts about the temporal limits of the amnesty³¹ and notes that there are elements that could lead it to be regarded as a self-amnesty³². In other words, the possibility that the LOA does not correspond to what would be appropriate for a legitimate amnesty law is not mere speculation, but is backed by the Venice Commission.

On this basis, it could be argued that the breach of the requirements of the rule of law entailed a corresponding infringement of Article 2 TEU, in which case it would be necessary to determine whether the Commission v. Hungary doctrine can be transposed to a case such as the one at hand; to that end, it would first be necessary to decide whether some additional infringement of EU law is required or whether Article 2 TEU could extend to the exercise of the States' own competences. Second, it would be necessary to examine whether the doctrine established in the context of infringement proceedings can be extended to rulings on references for a preliminary ruling.

The Luxembourg Court, however, does not address these issues. As I have said, the possibility of this separate application of Article 2 TEU had not been raised in the questions referred either; but, in addition, there are certain elements in the judgments under discussion that seem to point to little inclination on the part of the Court to follow this line of reasoning.

First, the Opinion of the Venice Commission does not appear in the text of the judgments under discussion. The reason is clear: the Luxembourg Court refrains from critically examining the compatibility of the amnesty with the requirements of the rule of law, although it appears to assume that such compatibility exists. In the ACVOT judgment (paragraph 66), it cites the Opinion of the Advocate General³³, which does analyse how international standards on amnesty apply to the LOA, concluding that the LOA conforms to them³⁴, including as regards the exclusion of self-amnesties, since, according to the Advocate General, the case at hand does not fall into that category, an issue that had indeed been raised at the hearing³⁵.

Second, the little that is said in the judgments about the legitimacy of the LOA repeats the arguments of the Law itself. Thus, the SCC judgment states that an amnesty requires political decisions proper to the Member States³⁶ and adds that the object and scope of the law are "limited to the resolution of the political conflict surrounding the Catalan

²⁸ See *supra* n. 18.

²⁹ See paragraphs 79 and 127 of the Opinion.

³⁰ See paragraph 127 of the Opinion.

³¹ See paragraph 124 of the Opinion.

³² See paragraphs 74 and 97 of the Opinion.

³³ Opinion of Advocate General Dean Spielmann of 13 November 2025, ECLI:EU:C:2025:891.

³⁴ See points 75 to 84 of the Opinion. The Advocate General does cite the opinion of the Venice Commission both in this case (n. 75, among others) and in the case concerning the questions referred by the Court of Auditors (Opinion of Advocate General Dean Spielmann of 13 November 2025, ECLI:EU:C:2025:889, n. 72, among others), but without addressing the objections raised in that Opinion concerning the passage of the law, the absence of genuine reconciliation and the possibility that it constitutes a self-amnesty.

³⁵ See points 91 to 95 of the Opinion. Here the Opinion cites paragraph 74 of the Venice Commission's opinion, but does not mention paragraph 97, which points to indications that the LOA was intended to favour specific individuals.

³⁶ See paragraph 121.

independence process”³⁷, repeating what was said by the Constitutional Court, namely that the LOA “seeks to reduce the institutional and political tensions created by the pursuit of Catalan independence and to facilitate a scenario for reconciliation”³⁸. This is done without taking into account the contrary indications in the Opinion of the Venice Commission and the contrary views of other courts such as, for example, the Supreme Court. In relation to the latter, it should be noted that the Luxembourg Court is under no obligation to base its decisions on the findings of national courts; accordingly, relying on the opinion of the Constitutional Court is legitimate, but it is neither mandatory nor does it relieve the Court of the need to provide its own reasoning, nor does it preclude consideration of the views of other courts, which are in no worse a position than the Constitutional Court to interpret and apply EU law and international law³⁹.

Third, when the Luxembourg Court has had no choice but to test the LOA against the requirements of the rule of law, it has opted for an interpretation favourable to the Amnesty Law. This can be seen especially in the Court of Justice’s analysis, in the SCC judgment, of how Article 19 TEU bears on the requirement, laid down in the second paragraph of Article 10 and in Article 13(3) of the LOA, to adopt a decision extinguishing liability within two months, without being able to assess exculpatory submissions and evidence, and without hearing the parties. According to the way the question was referred, these requirements could conflict with Article 19 TEU and Article 47 of the Charter of Fundamental Rights (right of access to a court and to effective judicial protection). The judgment does not address the application of Article 47 of the Charter, presumably because it was not established that EU funds were affected, and rules out that of Article 19 TEU on the ground that this provision is only infringed where the existing problems are systemic in nature. In the specific case, it considers that the exceptional nature of amnesty laws rules out a systemic risk. In other words, since the amnesty law is by definition exceptional, certain limitations on the application of the principles of effective judicial protection and fair trial would not suffice to trigger the limits laid down in Article 19 TEU⁴⁰. The doctrine appears to be new, and this has been highlighted⁴¹; although it had been anticipated in the Opinion of the Advocate General⁴², who likewise does not base his proposal on previous case-law.

In the light of the foregoing, both the Opinion of the Advocate General and the judgment view the LOA with what we might call “sympathy”⁴³. The formulation of the questions referred -prior to the judgment in *Commission v. Hungary*- made it easier for the Luxembourg Court not to address the general conflict between the LOA and the

³⁷ See paragraph 123.

³⁸ See paragraph 122.

³⁹ Order of the Supreme Court (Criminal Chamber) of 1 July 2024, ECLI:ES:TS:2024:8322A, which sets out some of the criticisms made by the Venice Commission of the bill.

⁴⁰ See paragraph 115 of the SCC judgment.

⁴¹ See N. González Campaña, “The Luxembourg Judges and the Boiling Frog: The Spanish Amnesty Law under Scrutiny (C-523/24 & C-666/24)”, *EU Law Live*, 13 August 2026, <https://eulawlive.com/op-ed-the-luxembourg-judges-and-the-boiling-frog-the-spanish-amnesty-law-under-scrutiny-c-523-24-c-666-24/>; M.A. Simonelli, “El TJUE descarta que la Ley Orgánica de Amnistía vulnere el Derecho de la Unión y establece un umbral sistémico para el artículo 19, apartado 1, párrafo segundo, TUE”, *Fundación Manuel Giménez Abad*, 23 July 2026, <https://www.fundacionmgimenezabad.es/el-tjue-descarta-que-la-ley-organica-de-amnistia-vulnere-el-derecho-de-la-union-y-establece-un->

⁴² See point 121 of the Opinion (*supra* n. 34).

⁴³ Even more so the judgments than the Opinion of the Advocate General. The latter, for example, recommended holding that there was indeed a conflict between Article 19 TEU and, on the one hand, the impossibility of taking evidence on the origin of the funds in question and, on the other, the exclusion of the hearing of the parties concerned (see point 164 of the Opinion in the SCC case, which sets out the Advocate General’s proposals).

requirements of the rule of law; but, as can be seen especially in the Opinion of the Advocate General, this conflict had been raised at the hearing, at least as regards the possibility of regarding the LOA as a self-amnesty. The judgment not only fails to address it, but explicitly lowers the level of scrutiny in relation to Article 19 TEU (fair trial and effective judicial protection) and adopts as its own the political assessment of the LOA's objective set out in the Law itself and endorsed by the Constitutional Court, without considering the objections raised by other Spanish courts on the basis of the Opinion of the Venice Commission.

At this point, it should come as no surprise either that the Court adopts a strict interpretation of what amounts to an effect on the financial interests of the EU. It is true that the argument based on a reduction in GNI as a consequence of secession is strained; but I do not think the same can be said of maintaining that the fight against corruption, even in cases where the EU budget is not directly affected, is a requirement of the rule of law. This was established by the Luxembourg Court in its Euro Box Promotion judgment⁴⁴. Admittedly, that case had certain particular features, but the connection between the fight against corruption (whether or not it affects the financial interests of the EU) and Article 2 TEU is clear⁴⁵.

In short, the decisions under discussion could have been a good complement to the April judgment in *Commission v. Hungary*; but neither the formulation of the questions referred nor the disposition of the Court itself has helped to shape the novel direct application of Article 2 TEU, which could have been put to excellent use in a case such as this one, in which national legislation had been the subject of prior (and critical) analysis by the Venice Commission. The Court of Justice, however, “was not up for it”, as is shown, moreover, quite clearly, by the answer given to the questions referred concerning the conflict between the LOA and the Directive on combating terrorism⁴⁶, which we shall address in the next section.

IV. Terrorism, amnesty and effet utile

The LOA prevents the punishment of conduct that should be penalised under the wording of Directive 2017/541. Only some of the cases covered by the Directive are excluded from the amnesty; specifically, those in which serious human rights violations have been intentionally caused. That is to say, conduct that falls within the scope of the Directive but has not caused serious human rights violations will indeed benefit from the amnesty. Even cases in which serious human rights violations have been caused will also be covered by the amnesty if they were not caused intentionally. Indeed, the aforementioned opinion of the Venice Commission⁴⁷ notes that the European Commission had already highlighted the difficulty of reconciling the wording of the Directive with the LOA⁴⁸. That the LOA excludes punishment for cases classified as terrorism by the Directive is

⁴⁴ CJEU judgment of 21 December 2021, C-357/19, C-379/19, C-547/19, C-811/19 and C-840/19, ECLI:EU:C:2021:1034. See paragraph 192 of the judgment, which holds that effective punishment is required of fraud offences affecting the financial interests of the Union “and of corruption in general”.

⁴⁵ See R. Arenas García, *op. cit.*, p. 82 and the references cited therein. Currently, Directive (EU) 2026/1021 of the European Parliament and of the Council of 29 April 2026 on combating corruption (OJ L of 11 May 2026) already provides for the prosecution of corruption, without being limited to cases in which the financial interests of the EU are affected (Article 1).

⁴⁶ See *supra* n. 2.

⁴⁷ See *supra* n. 18.

⁴⁸ See n. 52 of the opinion.

undisputed, as is acknowledged both by the Opinion of the Advocate General⁴⁹ and by the ACVOT judgment⁵⁰. The way to maintain, nonetheless, that the LOA does not conflict with the Directive is to argue that this exclusion does not compromise the *effet utile* of the Directive. The Court's reasoning here is that, given the objective of the amnesty (to reduce the institutional and political tensions generated by the Catalan independence process and to facilitate a scenario of reconciliation), the *effet utile* of the Directive is not compromised by the fact that certain offences that could be classified as terrorism are no longer prosecuted⁵¹.

This use of the *effet utile* doctrine is surprising. The argument has been used to extend or broaden the effectiveness of EU provisions vis-à-vis domestic rules or interpretations, not to limit what is already contained in the wording of the European provision⁵². The fact that neither the Opinion nor the judgment relies on previous decisions for this novel use of the *effet utile* doctrine does not make it any easier to trace the roots of this case-law.

The Luxembourg Court therefore accepts a limitation on the application of the wording of the Directive. The *effet utile* of that provision is not, according to the Court, an obstacle to this, but, of course, nor can it serve as a justification; and, in order to find such a justification, the judgment relies on the silence of the Directive regarding amnesty laws in order to argue, from there, that the legitimate purposes of an amnesty law fall within State competence and that, as long as this does not compromise the *effet utile* of the Directive, there is no conflict with EU law.

This line of reasoning forces the Court to adopt as its own the arguments of the Law concerning the LOA's objective of reconciliation and its effectiveness in resolving the political conflict in Catalonia⁵³. If the amnesty is not legitimate, it could not be a sufficient basis for limiting the effectiveness of the Directive (even if, to follow the line of argument of the judgment, this limitation does not compromise its *effet utile*). Either any amnesty measure adopted by any State is accepted without assessing whether or not it is appropriate, on the understanding that this is not for the Luxembourg Court to decide, or an effort must be made to establish whether the "partial and temporary deactivation of the Directive" (in the terms used in the Opinion) is justified. The Luxembourg Court, albeit timidly, opts for this second path, but, as we have seen, sidesteps all the arguments that could call into question whether the LOA genuinely seeks reconciliation, whether it reflects a broad agreement in which the views of the victims are present, or whether it is not a self-amnesty. By addressing these issues, the Court inevitably becomes a political actor, since, as is well known, positions on these questions are far from unanimous, and there are elements, as we have seen, supporting the opposite of what the Luxembourg Court takes for granted.

⁴⁹ See *supra* n. 34. In point 88 of the Opinion, the Advocate General describes the effect of the LOA as a "partial and temporary deactivation of its effects".

⁵⁰ See paragraph 64 of the ACVOT judgment.

⁵¹ See paragraph 75 of the judgment, although the argument is developed in the preceding paragraphs (paragraphs 63 to 74).

⁵² It is not possible to elaborate on this idea here; but it can be seen, for example, in J. Blockx, "*Effet Utile* Reasoning by the Court of Justice of the European Union is Mostly Indirect: Evidence and Consequences", *European Journal of Legal Studies*, 2022, vol. 14, No. 1, pp. 141-171, pp. 149-151, where it is pointed out that the *effet utile* doctrine is aimed at increasing the effectiveness of Community control ("the Court's interpretation of the effect of the directive was aimed at *giving greater* effectiveness (or *effet utile*) to Community control" (p. 150). Or, put differently, at avoiding a lower effectiveness of the obligations contained in the Directive ("aimed at *avoiding lower* effectiveness) or at achieving a more effective interpretation of primary law ("the Court used the specter of an ineffective European law to argue for a more effective interpretation of the EEC Treaty rules" (*ibidem*, p. 151).

⁵³ See in particular paragraphs 68 and 75 of the judgment.

This -I must be clear- strikes me as worrying, because it may lead to discrimination based on ideology which, in the hands of the Luxembourg Court, is not reassuring. We shall examine this below.

The inevitable starting point is that, as could not be otherwise, the idea that the LOA reflects a particular political choice is present in the judgments under discussion. This is the case, for example, in paragraph 121 of the SCC judgment, which recalls that the application of an amnesty law requires political choices, or in the following paragraph, which takes up the argument of the Spanish Constitutional Court that the LOA seeks to reduce institutional and political tensions; an idea that also appears in paragraph 75 of the ACVOT judgment. This political choice is, moreover, related to certain claims, also political, which gave rise to the situation to which the LOA refers. The Luxembourg Court is also clear on this point, and it is an idea that recurs throughout the judgments under discussion. Thus, in paragraph 100 of the SCC judgment, the Court links the unlawful acts to the pursuit of political activities “seeking to culminate in the independence of part of the national territory of a Member State”. It is striking that even when the judgment sets out to describe the questions referred (paragraph 91), it introduces the concept of “political activities”, which was not used by the Court of Auditors when formulating those questions⁵⁴. In other words, the assessment against EU law is carried out without losing sight of the fact that we are dealing with acts framed within a particular political aim (the independence of Catalonia). This idea appears repeatedly in the two judgments under discussion⁵⁵ and has significant effects when the Court examines whether the LOA fails to respect the principles of equal treatment and non-discrimination enshrined in Articles 20 and 21 of the Charter of Fundamental Rights (paragraphs 84 et seq. of the ACVOT judgment). These principles could be affected insofar as offences committed with a particular aim are being exempted from criminal punishment, to the exclusion of others. Here the Court’s answer is significant and is worth quoting. Paragraph 86 of the ACVOT judgment reads that “in the context of an amnesty such as the LOA, which has the specific aim of promoting political reconciliation in the sole context of a particular political movement, the offences committed in that context and those committed in other contexts cannot be regarded as comparable situations”. That is to say, giving special treatment to offences committed within the framework of the political movement whose aim is to achieve the independence of Catalonia may be justified, and the fact that offences committed for other political purposes are indeed punished does not amount to unequal treatment. The Luxembourg Court therefore does not close the door to the possibility that the hypothetical answer it might give in other amnesty cases could differ from the one it gives here.

It is true that it could be argued that the Luxembourg Court leaves the assessment of the political reasons for the amnesty to the State that enacts it; but, as we have seen, this is not the case, since it does, albeit cursorily, analyse the legitimacy of the measure. If this analysis is combined with the statement in paragraph 86 of the ACVOT judgment, there is at least the appearance of the Court taking a political side. We are talking about terrorism, about a “deactivation” (in the Advocate General’s words) of the Directive governing the prosecution of these offences, and about a justification for that deactivation in which the political motivation of the alleged offenders does not seem to be irrelevant. The risk that the Luxembourg Court itself may shield discrimination on the argument that

⁵⁴ See the operative part of Order 1/2024 of the Court of Auditors of 29 July 2024 (https://www.tcu.es/export/sites/portal/repositorio2/AUTO/2024/Auto-Cuestion-Prejudicial-TJUE_2024.pdf).

⁵⁵ See, for example, paragraphs 2, 84 and 122 of the SCC judgment and 71, 73 and 81 of the ACVOT judgment.

there are indeed differences between one political motivation and another is there and, as I said earlier, it is not reassuring. If those in government make a habit of amnestying offences committed by their supporters and new cases reach the Court of Justice, we shall see what answer is given. The door has been left open.

V. Conclusion

The core of the Luxembourg Court's judgments on the LOA is political. It could not be otherwise when what lies behind it is a political agreement to shield from prosecution - criminal as well as administrative and accounting- those who also offended for political reasons. The Luxembourg Court circles around the issue but, in the end, has to rule on the legitimacy of the LOA, and its answer is affirmative, even though, as we have seen, there are grounds for denying that it meets what the guarantee of the rule of law requires. And here the Opinion of the Venice Commission is key. Had the Court chosen to rely on that Opinion, it would not have been impossible for it to conclude that an amnesty for terrorist offences is not possible. Not because, from the perspective of the Opinion, such offences cannot be amnestied, but because the LOA as a whole would not meet the requirements of consensus, inclusion of reparation measures and appropriate procedure, among others. As regards misappropriation of public funds, if we are dealing with a law that infringes the rule of law and, therefore, Article 2 TEU, this would be the moment to examine the scope of what began in *Commission v. Hungary*; but, at the very least, the Court could have refrained from inventing the requirement of a systemic problem for the application of Article 19 TEU, which would also have entailed certain limits on the application of the LOA in relation to misappropriation. Finally, it could have been an opportunity to establish that the fight against corruption is a requirement deriving from Article 2 TEU and, following the line of the *Euro Box Promotion* judgment, to hold that a rule that exempts from criminal liability those who have diverted public money to purposes other than those provided for by law is contrary to EU law.

Obviously, the Court has taken a different path: it adopts as its own the arguments of the promoters of the LOA, ignores the Opinion of the Venice Commission, uses *effet utile* not to broaden but to limit the literal application of a provision of EU law, adds the requirement of a systemic problem so as not to find an infringement of Article 19 TEU, and holds that the political aim of achieving the independence of Catalonia cannot be compared with other hypothetical political aims.

The question that remains is: why?