GENERAL DEVELOPMENT

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Op-Ed: “Three Questions to rule (on) them All: the full Court Hearing in the Case Commission v. Hungary on the Justiciability of EU Values against Member States (C-769/22)”

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On 19 November 2024 the most extensive formation of the Court of Justice, the Full Court, heard the parties in the case Commission v. Hungary (C-769/22) – a landmark case on EU values. This infringement action targets the so-called ‘anti-LGBTQ+ law’ passed by Orban’s government in 2021. The case and its hearing have been exceptional in many ways, not only for the formation of the Court and the large public audience attending, but also for the long list of Member States – sixteen– that intervened in support of the Commission. Such an unprecedented setting left Hungary isolated in the Grande Salle of the Court, as previously seen in the Council. Moreover, the Commission decided to mobilise EU values at the core of their claim in a unique way.

The Three-Level Claim of the Commission and the Hungarian Response

The infringement action originates from a Hungarian law ‘adopting stricter measures against persons convicted of paedophilia and (…) for the protection of children’ adopted in 2021. In particular, this law targets content that allegedly ‘promotes or portrays’ ‘divergence from self-identity corresponding to sex at birth, sex change or homosexuality’ addressed to minors. The argument of the Commission is that such a law discriminates against people on the basis of sexual orientation and gender identity. Moreover, the Hungarian measures

create direct discrimination against LGBTQ+ people not only by causing alienation, but also by resulting in a systemic and deliberate attack to the functioning of the internal market, the EU legal order, and the European society.

The Commission built a three-level claim. On the first level, the guardian of the Treaties denounces a violation of several instruments of secondary law, including: the Audiovisual Media Services Directive, the e-Commerce Directive, the Services Directive and the GDPR. On the second level, such infringements also result in violations of certain articles of the Charter of Fundamental Rights: 1 (human dignity), 7 (respect for private and family life), 8 (protection of personal data), 11 (freedom of expression and information), 21 (non-discrimination). On a third level, altogether these measures infringe Article 2 TEU: the values of the EU.

During the hearing, the Hungarian government defended its own measures, by affirming that the Commission misunderstood its legislation, and that the measures do not intend to prohibit all content. However, the sensitivity of minors should be considered, and their education should fall in the domain of parental responsibility, rather than schools or public media.

The debate held during the hearing, which mostly tested the position of the Commission, and the statements of the Member States offer fertile ground for fundamental considerations, which will be expanded elsewhere. Among them, one subject played the most prominent role: whether and how Article 2 TEU can be invoked in an infringement action. In the following passage, it is useful to address three questions that can convey the most relevant matters and offer an overview of a few decisive issues.

Did the Commission and the Member States Succeed in Showing the Gravity of the Violation as being Worth Invoking EU Values in Article 2 TEU?

The claim based on Article 2 TEU has been justified by the Commission and most of the intervening states by the gravity of the violations, i.e., in the words of the Commission: their ability to affect the very fabric of society.

This unprecedented fashion of evoking EU values, as much as the strong position shown by so many Member States sounded like an emergency call for the Court: to respond to such a large threat, they request the mobilisation of EU values as a barrier safeguarding the EU society. However, to justify the mobilisation of values, it is necessary to demonstrate the gravity of the situation. The relevance of this point has been expressed by a question coming from Judge Ziemele on the basis of arguments presented by Belgium: 'Is the Commission acting in the context of self-defending democracy? Is it really that at stake?'

The Commission and most of the Member States justified the mobilisation of values by adopting two parameters: the seriousness and the systemic (or structural) nature of the purported violations, assessed in a holistic approach. The first invites the Court to consider the substance of each breach of primary and secondary law and identify its seriousness when the infringement goes beyond the sum of individual violations of fundamental rights. The second parameter is activated when the vitiated measures are part of a widespread and coordinated policy.

Luxembourg and Finland stressed that the infringements must be cumulative, not isolated. The Netherlands and Belgium invoked the deliberate character of the violation. The latter State, through a thought-provoking pleading by Liesbet Van den Broek, interestingly proposed adopting Articles 17 and 18 of the European Convention on Human Rights on abuse of rights as an interpretative tool. Malta mentioned, as a condition, the threat to the proper functioning of the Union and its procedures. The terminology of an 'emergency call' for the Court has been widely shared.

Nevertheless, the Commission had a few difficult moments in its question time, when explaining the consequences of making such a serious claim. First of all, the Commission nuanced the free-standing nature of the claim based on Article 2. When asked whether the Commission would pursue legal action under article 260 TFEU if Hungary withdrew the legislation, the representatives strongly replied that they would terminate their action if Hungary eliminated all sources of discrimination. However, by doing so, they made the violation appear more circumstantial compared to the first phase of the pleading. Indeed, Advocate General Ćapeta followed up, asking how a

prospective separate breach of Article 2 TEU found by the Court would affect the regime of mutual trust, e.g. in the domain of judicial cooperation. In fact, if the magnitude of the violation is that radical, it would affect LGBTQ+ people beyond the domains of the policy contested, leaving them exposed even after a possible withdrawal of the legislation. The Commission replied that each field follows different criteria to determine a violation (e.g. those enshrined in *LM* case law for the European Arrest Warrant, C-216/18 PPU). On this point, Belgium validly overrode the Commission, by affirming that, for example, such a recognised breach should definitely have an (indirect) impact when assessing the status of the national legal order, according to the *LM* criteria. Ultimately, the Commission adopted a prudent view by affirming that the claim based on Article 2 TEU is separate, but not autonomous and with limited systemic consequence.

What is, then, the Added Value of Invoking EU Values?

While the Commission 'played it safe' about the separate-not-autonomous nature of the claim, the Member States offered a wide range of nuances about the 'free-standing' character of Article 2 violations.

Belgium argued in favour of Article 2 TEU as a 'fondement unique' of an infringement action, as a last-solace resource for a self-defending democracy. Malta proposed that Article 2 TEU can represent a self-standing ground of review only under specific conditions. Other Member States, including Ireland, Spain, the Netherlands, and Finland, adopted a position which is closer to the Commission's. The European Parliament also advanced a more in-depth consideration. On the one hand, it rejected the possibility of invoking Article 2 TEU independently. On the other, it argued that invoking EU values only makes sense if it has a further role, compared to the Charter. And this is why a qualitative assessment is needed, more than a quantitative one.

On this same line, the Parliament and some Member States advanced an important argument linking the binding nature of EU values to the Copenhagen criteria and Article 49 TEU: a European State is called upon to respect the values listed in Article 2 TEU at the moment of its accession to the EU. Its membership, however, does not terminate its obligation to respect them, according to the principle of non-

regression. By ratifying the Treaty of Lisbon, all Member States have committed themselves to the respect of the Treaties, including Article 2 TEU, and the Charter.

This first systemic argument should be seen as the basis for expanding on the true systemic effect that an ascertained violation of Article 2 TEU would trigger. Asked about the practical implications of such an event, the Commission indeed developed its arguments. First, the judgment would have a declaratory value in attesting that the violations go beyond individual provisions of primary and secondary law. Second, that ruling would have a direct impact on the sanctions imposed on the condemned Member States in the procedure under Article 260(2) TFEU. In that framework, the gravity of the violation represents an aggravating factor for the determination of penalties. Third, the symbolic value would be of great importance to the community affected by this measure, acknowledging that the EU stands to protect them with the strongest position.

To those elements, Belgium, from the point of view of a Member State, argued that such a violation would be an element that the Council would have to weigh when considering the pursuit of the political procedure under Article 7 TEU.

What is the Scope of Article 2 TEU? A Tricky Navigation through Articles 2, 7 TEU, 258 TFEU: EU Competences and Beyond

The issue of the systemic impact of a declared breach of EU values necessarily implies questioning what the scope of Article 2 is, and in what framework such a violation could be claimed.

On a first level, the question is whether it is possible to find a violation of Article 2 outside the scope of EU law. As observed by several judges and parties in connection with Article 49 TEU, the principle of non-regression binds the Member States' legal systems as a whole. Certainly, as noted by the Commission, this should not overstep onto the competences of national constitutional organs, in other words: Article 4(2) TEU.

Such considerations find some arguments in their favour and a few complications. First, on this point, the Commission has been prudent. When asked about this, the representatives reiterated that a connection

with EU policies is needed. They justified this position with the limited scope of the infringement procedure: a violation should be found within the scope of EU law. However, within the crisis of the framework of the rule of law, the Court found violations of Article 19 TEU even in the field of judicial organisation (*ASJP*, C-64/16).

Moreover, Malta advanced important arguments in this regard. Interrogated by the Court, they elaborated a test to trigger Article 2 TEU: a violation should occur within the exclusive or exercised shared competence of the EU or, even outside these competences, when the 'institutional functioning of the Union and its procedures' are affected, connecting the values not only with Article 19 TEU, but also to Article 10 TEU (which refers to democracy) and to Article 13 TEU (according to which 'the Union shall have an institutional framework which shall aim to promote its values').

On a second level, a few questions focused on the eventual overlap between the political procedure of Article 7 TEU and the infringement procedure. Similar to the reasoning in the Conditionality Regulation judgment, the Commission, supported by the Parliament and many Member States, rightfully replied that the two procedures are of different natures and they can coexist.

The Rest will be History

Advocate General Ćapeta announced the publication of her Opinion on 5 June 2025. Based on her valuable contributions to recent 'constitutional' cases, this assessment will further shape the outcome of the case. One year ago, the Opinion in *KS and KD* (point 155, C-29/22 P) affirmed that 'a violation of fundamental rights cannot be a political choice in the EU'. Will she extend the same to values?

The Commission pleaded this case in days characterised by tension inside and outside the EU, with important elections and changes ahead. Therefore, it is legitimate to wonder how the political context and its repercussions on EU values will change in the next year and how the upcoming judgment will impact them.

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