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Case C-769/22: A further step in the protection of the fundamental rights within the European Union?

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On 19 December 2022, [the Commission brought an infringement action against Hungary regarding the adoption of Law LXXIX of 2021](#) (Anti-LGBTI+ law). The Hungarian legislation raises concern because it outlaws sharing information related to homosexuality or gender change with under-18s. The Commission claimed that Hungary has infringed several Union provisions, among which [Article 2 TEU](#) was expressly included. The explicit mention of the violation of the Article 2 TEU and, thus, the values of the Union is an example of the growing impact and relevance of the European rule of law crisis. Several measures adopted by Hungary and Poland are currently threatening the Union's values on a systematic scale, affecting the Union's very nature. Therefore, the resulting judgement could play a key role regarding the justiciability of Article 2 and the use of the infringement proceedings under [art. 258 TFEU](#) to tackle the violation of such provision.

This blog will firstly discuss the use of the infringement proceeding as a lawful route to claim violations of Article 2 TEU, instead of following the specific procedure under Article 7 TEU, and the relation between these two Articles. After assessing that possibility, both the justiciability and the direct effect of Article 2 will be evaluated. Lastly, the blog will address the definition of the values given by the Court of Justice and its necessary character.

Context and facts of the *European Commission v Hungary*

The Anti-LGBTI+ law was adopted by the Hungarian Parliament on 15th June 2021, and it prohibits minors from accessing content, advertising and media services that promote or portray diverse gender identities or homosexuality. It also prohibits professions related to

sexual culture, sexual life, sexual orientation and sexual development from being aimed at informing about transgender identities or homosexuality. Therefore, the regulation concerned imposes several prohibitions on the access to information about transsexuality and homosexuality. Consequently, this law directly restricts the right of expression, and flagrantly discriminates based on sexual orientation and gender identity violating the rights of these minorities.

According to the Commission, this regulation infringes Article 2 TEU, and Articles 1, 7, 11 and 21 of the [Charter of Fundamental Rights of the European Union](#) (CFR).

Reactions within the European Union

In response, the European Parliament's committee on legal affairs decided to join forces with the Commission towards the defense of the values of the Union last March 21st. It must be highlighted that this strategy is rarely employed by the Parliament in a case where it does not have a direct implication, which clearly suggest that it is a political reaction. Nonetheless, the formal decision to join the case shall be taken by Roberta Metsola, President of the European Parliament (for more info [here](#)). This relevant move, once again, could show the concern of the Parliament regarding the rule of law crisis – a concern that was already expressed in 2018 when the institution proposed to activate Article 7 TEU against Hungary and stated: [“We stand up for the rights of all Europeans, including Hungarian citizens and we defend our European values”](#).

Additionally, Ireland, Portugal, Belgium, the Netherlands, and Luxembourg already joined the case as third parties, and presented their arguments supporting the case against Hungary (see [here](#)). It is worth mentioning that the support shown by such a large number of Member States against a domestic law of another Member State is unprecedented.

All this draws attention the critical importance of this topic and, in particular, the legal and also political expectations and relevance of the outcome of this case.

As of today, the Court has not issued the judgement on the case, nonetheless, the Court will have to take up a position regarding the applicability of Article 2 TEU. Although this provision has been extensively discussed by the CJEU in the case law, it is the first time that the Commission expressly mentions Article 2 TEU as a self-standing ground. This decision represents a further step in how the Union is dealing with the “rule of law crisis” as a consequence of the tendencies manifested by Member States such as Poland and Hungary challenging the concept of rule of law and in particular, the Article 2 TEU.

In this regard, it is noteworthy the CJEU has interpreted and broadened the concept of the rule of law. Firstly, in the case [Les verts](#) the CJEU emphasizes the relevant character of the rule of law since the European Economic Community is based on it. Later, in the case of

[*Associação Sindical dos Juizes Portugueses*](#) (Tribunal de Contas) (hereinafter, ASJP) the Court upholds that:

The European Union is a union based on the rule of law in which individual parties have the right to challenge before the courts the legality of any decision or other national measure relating to the application to them of an EU act.

However, Article 2 TEU is usually seen in relation to the independence of the judiciary or Article 47 CFR. In this case, the perspective is slightly different, placing the values of respect for human dignity, freedom, democracy, equality and respect for human rights at the heart of the debate.

Concerning the specific Hungarian context, it is necessary to consider two threats to the rule of law. On the one hand, the Hungarian government has established a system of legislation targeting its “enemies”, which clearly endangers the value of democracy and rule of law. On the other hand, there are serious deficiencies in the constitutional and electoral system such as lack of transparency, the inadequate involvement of civil society, the absence of sincere consultation, the endangerment of the separation of powers and the weakening of the national system of checks and balances (see [here](#)). Consequently, the European Parliament unsuccessfully initiated sanctioning procedure under Article 7 TEU against Hungary in September 2018 and various infringement proceedings have been initiated by the Commission. For now, Hungary continues to systemically threaten the values of Article 2 TEU.

Infringement procedure against the violation of Article 2 TEU

In the twin cases [C-157/21](#) and [C-156/21](#) brought by Hungary and Poland against the Conditionality regulation the CJEU discusses the use of alternative measures to safeguard Article 2 TEU besides the procedure established under Article 7 TEU. The CJEU upheld that it is permissible to establish acts of secondary legislation and other procedures relating to the values of the Union if their aim and their subject matter is different from the procedure laid down in Article 7 TEU. Thus, an identical procedure will clearly be unlawful.

Having said that, it is necessary to analyze if the infringement procedure meets these conditions. Firstly, the Court explicates that the purpose of the procedure laid down in Article 7 TEU is to penalize serious and persistent breaches of the values contained in Article 2 TEU and eventually to put an end to those breaches. Whereas the purpose of the infringement procedure regulated under Article 258 TFEU is to ensure that Member States comply with EU law in the general interest. Additionally, the latter allows the CJEU to conduct a legal review of the act concerned, while the sanctioning procedure under Article 7 TEU is essentially a “political” procedure. This perspective is shared by Advocate General Evgeni Tanchev. In his [opinion regarding Case C-619/18](#), Tanchev points out the teleological differences between these two procedures. Additionally, the Advocate General

concludes that “these differences reflect the autonomous, indeed complementary, nature of these procedures and that they may apply in parallel” and that the “Article 7 TEU cannot diminish the Court’s authority to rule on the basis of its jurisdiction under Article 258 TFEU”. Moreover, the outcome of the Article 7 TEU procedure can be the suspension of the Member States’ rights, which contrasts with the sanctions under Article 260 TFEU, which are limited to penalty payments. Thus, even the consequences are different.

It is worth mentioning that in the Case C-619/18, the admissibility of the infringement procedure is not even discussed, manifesting the Court’s position in favor of the use of this procedure against violations of Article 2 TEU.

In conclusion, the CJEU having the chance to explicitly ban or limit the use of the infringement action against violations of Article 2 TEU, it decided to not do so. Therefore, given the lack of an explicit ban, the role of the CJEU to ensure the review of the lawfulness of the Union acts and its application by the Member States, and the relevant differences between the two procedures discussed, the infringement procedure under Article 258 TFEU can, in principle, be adequate and applicable to the case concerned.

Justiciability and direct effect of Article 2 TEU

The literature often points to the vague and open character of Article 2 TEU, which directly impacts on its justiciability. Nevertheless, it does not immediately deny its legal nature. For instance, in the ASJP Case and the [Minister for Justice and Equality](#) Case, the CJEU upheld the obligation to apply the Union values by domestic courts in light of the protection of fundamental rights (see [here](#)).

This view was recently demonstrated and clarified by the CJEU in the Case [Hungary v Parliament and Council](#), where the Court recalled that Article 2 is not a statement of policy guidelines or intentions, but on the contrary, these values are an integral part of the identity of the Union which contain legally binding obligations for the Member States.

In the same case, the CJEU attempted to concretize the concept of the rule of law, one of the values mentioned in the Article 2 TEU, as a legal concept nourished by the principles of legality, legal certainty, prohibition of arbitrariness of the executive powers, effective judicial protection, separation of powers, the principles of equality before the law and non-discrimination.

Through this very decisive judgement, the Court confirmed the legal nature of the values of the Union, and it stated that the rule of law is sufficiently defined that, despite a certain degree of discretion, it binds the Member States since it establishes a minimum standard requirement.

Nevertheless, the case law shows that Article 2 TEU is usually applied alongside more specific provisions of EU law, such as Article 19 TEU or Article 47 of the CFR. This combined approach aims to operationalise the values of the Union and, in particular, the rule of law. In addition to that, the literature stresses that through specific provisions of EU law, Article 2 TEU acquires justiciability and legally binding character, and it extends the scope and meaning of such specific provision. According to [von Bogdandy and Spieker](#) this approach increases the legal certainty and still is a powerful tool against tendencies undermining the values of the Union. This phenomenon is called “mutual amplification”. Through mutual amplification of this sort, Article 2 translates into specific legal obligations and thus, becomes justiciable.

In the Anti-LGBTIQ+ law case, the Commission opted to expressly mention the infringement of Article 2 TEU apart from any other provision, but it also includes provisions very much related to the values of the Union. For instance, violations of Articles 1, 7, 8(2), 11 and 21 of the CFR, which refers to human dignity, respect for private and family life, protection of personal data, freedom of expression and information and non-discrimination respectively. As fundamental rights, all of them are intrinsically close to the values of human dignity, freedom, equality, rule of law and respect for human rights under Article 2 TEU. Therefore, despite we are witnessing a further step regarding the activation of Article 2 TEU, it seems that the Commission played safe by mentioning several specific provisions, since the Court has never addressed its applicability as a freestanding provision. In fact, it can be considered that the combined approach, employed so far by the CJEU, implicitly rejects the self-standing application of Article 2 TEU.

The direct applicability of Article 2 TEU seems to go a step beyond which, according to the case law, is unprecedented. Thus, if the CJEU accepts the Commission’s proposal, this would further develop the values of the Union to create concrete obligations directly imposed on Member States. However, it is said that a very concrete definition of the values could potentially uproot the federal balance by the Treaties to the detriment of national autonomy, identity and diversity. Article 2 TEU does not aim to establish an exhaustive and uniform definition of principles, but to observe European minimum standards and to detect “red lines”. For instance, in [L.M.](#) the CJEU stressed that both absolute rights and the essence of other fundamental rights constitute red lines protected by Article 2 TEU. Therefore, the Court should find an adequate balance to respect the Member States’ autonomy while establishing a minimum standard requirement to respect the values of the Union, which entails respect for fundamental rights. This phenomenon has been further developed in relation to the right to an effective judicial protection under Article 19 TEU and 47 CFR, thus it is possible to consider that the CJEU could apply this approach in the context of other fundamental rights under the CFR.

In this regard, efforts are being made to elaborate a concrete definition of the values allowing the direct applicability of Article 2 TEU. Nevertheless, as mentioned in [A New Chapter in the European Rule of Law Saga?](#), the rejection of the self-standing approach could be deemed as a political decision of the CJEU with the purpose of avoiding conflicts of competence within the Union and the weakening of its legitimacy. This statement presents some food for thought. Indeed, if we observed how the literature reacted to the extent of the scope of the Article 19 TEU in the ASPJ case, allowing the justiciability of the article, by considering such judgement as a political and surprising move; I could imagine similar claims due to the further expansion of Article 2 TEU.

Conclusion

All in all, the expected judgement from Luxembourg could represent a big step for the protection of the Union's values and fundamental rights within the Union. The clear statement of the Court in favour of the use of the infringement procedure to tackle these types of violations, the further definition of the values or a clear reasoning about the direct applicability of the Article 2 TEU are desirable and possible outcomes of the judgement. Although the Anti-LGBTI+ law seems to be governed by EU law, the consideration of Article 2 TEU as a standalone provision could simultaneously broaden the material scope of other EU law provisions of primary law or secondary law, which crystallize the EU values, such the CFR. For instance, in future case law, in those cases when the fundamental rights claimed fall outside the implementation of Union law.

The active participation of Member States and Union institutions in this case evidences the existence of a general desire for a mechanism to finally tackle the crisis. The status of the Union as a guarantor of the rule of law is in the hands of the CJEU.