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# From Dialogue to Discord

## Some Reflections on Advocate General Ćapeta's Arguments Regarding Art. 2 TEU

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*"For the for foregoing reasons, I am of the view that the Court should find that [...], Hungary has infringed Article 2 TEU.' 'This negation of values enshrined in Article 2 TEU is the impalpable 'something more', which prompted the Commission to introduce the sixth plea."*

With these strong words, Advocate General Ćapeta concluded the first part of her Opinion regarding a violation of Article 2 TEU, which lies at the heart of the pending case before the CJEU – a case that bears, quite appropriately, the name "Valeurs de l'Union". Although this assessment may have been expected – especially since AG Ćapeta is known as an Advocate General who interprets European law in a particularly progressive and dynamic manner – her words are likely to cause a stir. Even though this is not the final judgment, it is unprecedented for Article 2 TEU to be declared justiciable and found to have been infringed.

The upcoming judgment of the CJEU in case C-769/22 will be a landmark ruling for several reasons. First, it concerns the question of whether Article 2 TEU can serve – in the words of AG Ćapeta – as a self-standing ground for an infringement action (para. 32). This aspect touches upon the widely discussed issue of justiciability in European scholarship. Second, the case is about developing standards for identifying values of Article 2 TEU. Both involve fundamental questions, as Article 2 TEU deals with nothing less than the foundational principles of the European Union itself.

This centrality of Article 2 TEU – which was already present during the oral hearing in November – is also reflected in Ćapeta's approach. Notably, her Opinion opens with the examination of Article 2 TEU, while the Commission deliberately listed Article 2 TEU as the final plea in law – precisely to emphasize that Hungary's violation of Article 2 TEU constitutes the crowning element of the case. The Commission repeatedly emphasized that the internal market provisions triggered the scope of the Charter, and that these systematic and serious infringements then contained a "something more" which led to a violation of Article 2 TEU. This is not a matter of legal hairsplitting. It matters how arguments are constructed and in what order they are presented.

After offering a substantive overview of Ćapeta's Opinion regarding Article 2 TEU, this contribution will focus on two notable features of her reasoning: First, the use of the term "good society", which introduces a concerning ethical dimension. Second, the criterion Ćapeta introduced for establishing a violation of Article 2 TEU – namely, the "negation of values", which is insufficient and merely shifts the problem of developing concrete standards rather than solving it.

### A Closer Look on Ćapeta's Argument on Article 2 TEU

Because Ćapeta relies, inter alia, on significant Charter violations for finding an infringement of Article 2 TEU, she starts her analysis by examining fundamental rights (paras 45 ff.). She finds violations of Article 21, Article 11, Article 7, and Article 1.

In addition, she particularly advocates for the Court's first-ever recognition of a violation of Article 2 TEU as a *self-standing ground* (paras. 142). Ćapeta rightly limits herself to the relevant question here – namely, whether Article 2 TEU can be applied as a *self-standing* ground for action *within* the scope of Union law – and leaves the broader debate over its *autonomous* application for a future case (para. 144).

Her Opinion on Art. 2 TEU is divided into two parts: First, she examines the much-debated question of the justiciability of Article 2 TEU (paras. 150 ff.). Specifically, this concerns whether Article 2 TEU can

function as a *self-standing* ground to assess legality within infringement proceedings – rather than merely serve, as often in the past, to interpret or further define legal provisions. The subsequent question is *under what circumstances* Article 2 TEU may be infringed, with a focus on the development of applicable criteria (paras. 235). While the Member States unanimously supported the general justiciability of Article 2 TEU during the oral hearing – differing only as to whether Article 2 TEU can be applied on its own or concretized by other provisions – their submissions displayed a remarkable diversity of approaches regarding which criteria should be used to establish a violation of Article 2 TEU. In this respect, the Member States found themselves "united in diversity".

In her discussion of justiciability, Ćapeta begins with a textbook-like explanation of Article 2 TEU's function as the constitutional identity of the Union's legal order. Moreover, she points out that Article 2 TEU is a legally binding provision, whose observance – according to Article 49 TEU – is a prerequisite for accession to the Union. Furthermore, in Repubblika, the CJEU established the principle of non-regression, according to which Member States – precisely because of their decision *by choice* to join a society and a Union based on Article 2 TEU – are obliged to maintain at least the level of protection of these values as existed at the time of accession (paras. 181 ff.). Ćapeta correctly argues that this principle of non-regression is not limited to the value of the rule of law but rather constitutes a value-based prohibition of regression, which applies equally to the values at issue here, such as human rights and equality (para. 183). After addressing arguments often misleadingly abbreviated in the literature – such as the claim that Article 7 TEU precludes justiciability (para. 196) – Ćapeta also finds, convincingly, that Article 2 TEU is justiciable and can therefore serve as a *self-standing* ground (para. 233).

Ćapeta then poses the central question, which lies at the heart of the case: Which standards and criteria indicate a violation of Article 2 TEU? She sharpens this issue by asking how it is to be assessed whether a Member State has crossed the "red lines" (para. 234). Precisely because Article 2 TEU allows for constitutional pluralism, the boundaries of what has been agreed upon must be clear to the Member States. Ćapeta approaches this question abstractly first (para. 237): while rejecting criteria such as the number or severity of violations, she considers that the key criterion for finding a breach of Article 2 TEU is a "negation of values". The number of infringements may, but does not necessarily have to, indicate a violation of Article 2 TEU (para. 248). She argues that violations of, for example, Union fundamental rights can still reflect constitutional dialogue, where values and their interpretation are negotiated. In her view, only a "negation of values" — not interpretative differences, even if they entail legal breaches — constitutes a violation of Article 2 TEU (para. 253).

Ćapeta ultimately concludes that, in the case at hand, there is no longer any legitimate constitutional dialogue, but rather a degree of discord so severe that it amounts to a "negation of values" (para. 255). The denial of equality for LGBTI persons, which forms the basis of all the breaches, is not something over which legitimate debate within constitutional dialogue can persist; instead, it amounts to a violation of Article 2 TEU – specifically with respect to human rights, human dignity, and equality (para. 273).

## The Ethical Dimension in a "good society"

What stands out is Ćapeta's reference to the idea of a "good society" (paras. 157, 177), whose vision is expressed in Art. 2 TEU, and which she invokes in the context of the Union's constitutional identity. Obviously, this assessment contains an ethical dimension, which inevitably raises the question of what "good" actually means. The reason we find such an approach in Ćapeta's Opinion lies in the specific nature of the case: this one does not focus on the rule of law – a value supported by extensive case law. Rather, the case concerns LGBTQI rights and the stigmatization of a minority, a context which (1) involves values that have not previously been central in the Court's jurisprudence, and (2) touches a domain in which the Hungarian government itself has justified its actions as promoting the "good life".

The narrative then also explains Ćapeta's adoption of the term "good society". By describing society as "good" – in reference to the European Society set out in Article 2 (2) TEU – she deliberately engages with this theme and offers a counter-narrative to the model promoted by the Hungarian government.

This ethical dimension is problematic for at least two reasons: Firstly, the use of the term "good" plays into the hands of those who consider Article 2 TEU to be non-justiciable due to its vagueness and abstractness, and who accuse the CJEU of using its case law to enforce a "European way of life" and of abusing Article 2 TEU as a homogeneity clause. The justiciability and legal force of the values in Article 2 TEU have long been controversial, not least because the term "values" could be understood as implying a primarily moral or ethical content. Even though the CJEU's judgment on the rule of law conditionality has now confirmed at the highest level that Article 2 TEU is legally binding, the use of the word "good" risks reigniting old controversies.

Secondly, the assessment of what is "good" is inherently selective and unpredictable. While a case-by-case approach to Article 2 TEU helps avoid overly specific standards and maintains its character as a result-oriented norm, the reference to the term "good" further increases this selectivity.

## Constitutional Dialogue versus Negation of Values

Equally striking are the distinct terms "negation of values" and "constitutional dialogue", which Ćapeta employs in developing criteria for Article 2 TEU violations and distinguishes from one another.

She rightly observes that values are negotiated within a constitutional dialogue (para. 203) and that Article 2 TEU allows for different interpretations. This is also reflected in the case law of the CJEU, which considers Article 2 TEU as imposing only obligations of result. Although the Court has, in the exercise of its jurisdiction, necessarily given Article 2 TEU more substance this pluralism is also evident, for example, in the principle of non-regression, which does not establish concrete requirements for the Member States but, with its particular temporal reference point and reliance on each national legal order, has a pluralism-preserving effect.

Nonetheless, her choice of criteria is problematic: For her, the "negation of values" is the only relevant criterion, distinct from legitimate constitutional dialogue – a dialogue that may involve legal breaches, but, in the absence of negation, does not amount to a violation of Article 2 TEU. While the latter point is convincing, Ćapeta's approach merely shifts the problem: the term "negation" is somehow interchangeable with "violation" and does not provide any further requirements or a set of criteria that would indicate such negation. According to Ćapeta, a considerable number of violations may indicate a negation of values, but do not necessarily do so. Likewise, serious violations are not, in and of themselves, sufficient indicators (para. 241).

## The case for "systemic deficits"

The question is: Are we expecting too much? Certainly, the Court is under a great deal of pressure. Admittedly, this question represents both a significant, but also a minimal step forward. The underlying necessity stems from the principles of legal clarity and certainty: when a law is enacted, a standard is required to determine whether and when it has been infringed. This is a legitimate expectation that the Member States are entitled to have.

But this expectation may be better met with other criteria. Particularly, the conceptual notion of "systemic deficit" may offer an effective framework for identifying a "negation of values", and thus a violation of Article 2 TEU. What makes this concept appealing is its multi-layered nature, allowing for examination across various dimensions. While Ćapeta rightly notes that multiple infringements alone do not necessarily establish a breach of Article 2 TEU, the concept of systemic deficit provides various elements – such as the number and intent of violations, as well as a temporal and qualitative dimension that may be determined by reference to the essence of the values – to ensure legal certainty. Generally, no single criterion is sufficient to establish a violation of Article 2 TEU;

rather, such a finding should be based on a holistic assessment and contextualization.

The notion of a systemic deficit can be understood as a mesh of interrelated elements: the more intense and intentional the infringements, and the more the violated legal norms can be seen as expressions of the essence of the values, the more likely it is that there is a negation of values. Under such circumstances, the space for legitimate constitutional dialogue – formed through the Union's foundational and continued consensus in Art. 2 TEU, which itself is the product of deliberate choice – shifts into discord. This act of choice is also reflected in the accession of each new Member State under Article 49 TEU, which justifies not only the conditions required for the functioning of the Union's legal order, but also the establishment of the principle of non-regression (para. 177). Ćapeta effectively recalls this choice and the Member States' voluntary decision to join the Union (para. 155).

In any case, the suspense remains as to which arguments the CJEU will draw upon for its decision in full court.

## ABOUT THE AUTHOR

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