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A Case for Judicial Caution? Advocate General Kokott's Assessment of Hungary's Law on Sovereignty from a Democratic Standpoint

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After operationalising the value of the Rule of Law (RoL), the EU is turning to democracy, through both legislative and judicial developments (see also here). Case C-829/24, relating to an infringement procedure against Hungary for adopting the Law on the Protection of National Sovereignty, must be considered in this context. As Advocate General (AG) Kokott highlights in her Opinion of 12 February 2026, this Case revolves around '*the fundamental and very topical question of how and to what extent a democratic society may legitimately protect itself against the actions of foreign actors exerting inappropriate or manipulative influence, such as disinformation, including by means of financial support, on domestic democratic decision-making processes, including national elections*' (para. 2).

She emphasises that this objective, which MS are entitled to pursue as a '*sovereign right*' (para. 100), is also promoted by EU institutions and iteratively refers to examples in this regard (see e.g. para. 116 and footnotes). As part of the question of the role and legitimacy of the Court of Justice (ECJ) to deal with democratic backsliding in Hungary, this Case raises the following dilemma: How can the ECJ control the validity of a national (illiberal) Law grounded on the very same objectives recognised as legitimate by EU institutions?

We argue that AG Kokotts' Opinion offers a cautious yet convincing assessment of the Law from a democratic standpoint. Although involving challenges of considerable importance to democracy — as evidenced by the numerous interventions in support of the Commission (from 15 MS and the European Parliament) — the infringement procedure isn't framed around the value of democracy. The Opinion therefore shows that the Case may not be the ideal vehicle for deepening the operationalisation of this value, but offers a valuable opportunity to develop the concept of the 'chilling effect' in the ECJ's case law.

Background of the case

The Hungarian Defence of National Sovereignty Bill was passed at breakneck speed: it entered into force on 22 December 2023, only one month after it was submitted by a MP from the ruling Fidész party. It establishes the Sovereignty Protection Office (SPO) to investigate any activity that may influence democratic processes and the will of voters, with a view to protecting national sovereignty. The broad and indeterminate scope of the term 'activity', enshrined in Article 3 of the Law, is crucial to the Case, as we shall see (see already paras. 4 and 58-59). For it raised numerous challenges to democracy at large (see e.g. the Venice Commission's Opinion) and democracy in the EU (see here and here), the Law called for a strong and fast reaction.

The European Commission's stance was more nuanced. On the one hand, and despite being criticised for its slowliness in conducting the preliminary stages of the infringement procedure, it brought the Case before the ECJ in December 2024 and successfully submitted it to the expedited procedure (Order of the President of the Court of 12 February 2025).

On the other hand, the Commission failed to grasp the democratic challenges raised by the Hungarian Law. In general, its lack of firmness has been criticised as a permissive response to Hungary's democratic backsliding, as illustrated by its handling of the RoL conditionality mechanism with its decision to lift the suspension of funds being challenged by the European Parliament (C-225/24). AG Ćapeta's Opinion considers the Commission lacked transparency, stressing an explanation was owed '*not only to Hungary, but to the EU citizenry at large'* (para. 68).

In the present case, it didn't ask for interim measures as requested by civil society and the European Parliament. Meanwhile, Fidész continued on the road to eroding liberal democracy: SPO began its activities, spreading a harmful climate in Hungarian's democratic space and the Hungarian Constitutional Court confirmed the law's constitutionality. A member of Hungary's ruling Fidész party also submitted, on 13 May 2025, a new bill, 'Transparency of Public Life'. A joint letter from 326 civil society organisations suggest it '*would provide the government with the final tools to effectively and completely silence the remaining independent voices in Hungary*' (see also here). The joint letter further underlines that the SPO is crucial to the new bill, asking for interim measures to suspend its activities before irreparable harm occurs (in this case, '*the effective paralysis of civil society organisations, independent media and dissenting voices'*).

On top of that, the Commission didn't frame the Case around democracy. After having established concerns for the EU values of Article 2 TEU and democracy, including Articles 10 and 14(3) TEU and Article 22 TFEU, in its letter of formal notice, it refrained from taking action under these provisions in the final infringement brought before the Court. Instead, the Commission invokes multiple violations of EU Law, including the Services Directive and the Charter.

With all this background in mind, one can wonder if the ECJ's ruling will still be able to tackle the democratic concerns raised by the Hungarian Law and SPO's activities. In her Opinion delivered on 12 February 2026, AG Kokott gives some answers in this regard.

The perfect case for concretising the value of democracy?

Since *ASJP* of 2018, the ECJ counters RoL backsliding in Poland and Hungary by relying on a value-principle-obligation logic, systematised in the *Conditionality judgments* of 2022 (C-156/21 and C-157/21). It operates as follows: the values of Article 2 TEU are given concrete expression in principles that imply obligations for the MS. This logic applies to Article 19 TEU for the RoL, and has been extended to the principle of representative democracy enshrined in Article 10 TEU (*Junqueras*, 2019).

Three seminal rulings — Commission v Czech Republic and Commission v Poland in 2024 and Commission v Malta in 2025 — demonstrated the ECJ's willingness to stand as a guardian of democracy at national level through 'concretisation' (see e.g. here). These cases however apply to European elections and the effectiveness of EU Citizens' political rights. Voices have emerged calling for a move beyond this approach and for the

operationalisation of Article 2 TEU to enable more direct control over national democracy (see Spieker). They rely on the idea that although Article 10 TEU refers to democracy at Union level, EU's democracy cannot function if MS' democratic system fails.

If it was to follow this road, the ECJ would need a case. The so-called 'Lex Tusk' adopted by Poland in April-May 2023 represented a good opportunity, for it could have led to the stigmatisation and elimination of political opponents. In June 2023, the Commission opened an infringement procedure considering it unduly interfered with the democratic process, and invoking, among others, the violation of Articles 2 and 10 TEU. However, after October's 2023 parliamentary elections won by the centrist pro-European opposition led by Donald Tusk, the 'Lex-Tusk' lost its effectiveness and attempts were made to repeal it (see the 2024 and 2025 Rule of Law Reports).

The Hungarian Law on the Protection of Sovereignty therefore appeared as a perfect case to underline the intertwined nature of national and European democracy. The Order of the President of the Court, aforementioned, pointed in this direction, by affirming that '*the present case concerns the constitutional relations between the European Union and its Member States in the fundamental and sensitive area of public and democratic life'* (para. 18).

The problem is the following: the Commission refrained from invoking democratic provisions of the Treaties, turning back from its letter of formal notice's concerns. By suppressing them in its reasoned opinion, it has '*definitively dropped its claims that Hungary had infringed the values of the European Union'* (para. 27), states AG Kokott, who accordingly rejects the claim made by the European Parliament and several intervening MS that Hungary nonetheless violated the value of democracy and the right to vote and stand as a candidate (para. 40).

One can argue that in the seminal judgments aforementioned, the infringement of Articles 2 and 10 TEU was not invoked by the Commission, which did not prevent the ECJ from mobilising them as interpretative tools. Such obiter dicta, though not leading in an infringement of the value of democracy and its concretisation norm, surely participates in the operationalisation of Article 2 TEU. In the present case, however, the Commission does not rely on any provision that would present a '*comparable link*' (Kokott, para. 42) with the value of democracy, having dropped its claims on Articles 10 and 14(3) TEU and Article 22 TFEU.

Admittedly, the Commission invokes a violation of freedom of expression enshrined in Article 11 of the Charter, which has repeatedly been linked to Article 2 TEU by the ECJ, as '*as an essential foundation of a pluralist, democratic society reflecting the values on which the Union is based'* (see e.g. *Real Madrid / Le Monde*, para. 49). Nonetheless, the applicability of the Charter is circumscribed and contingent, in this instance, on the infringement of numerous provisions pertaining to freedom of movement (see paras. 177-178). By revolving around these violations of fundamental freedoms and fundamental rights, Case C-829/24 recalls the pending Case C-769/22 *Commission v Hungary*, where the Commission invokes an unprecedented

violation of Article 2 TEU as a standalone provision. Former-judge to the ECJ Rossi suggests that '*In certain cases (…) Article 2 TEU can constitute, within the scope of the Treaties, an autonomous plea* flanked *by other provisions'* (emphasis added). Such an operationalisation of EU values — neither autonomous nor concretised — could have been suggested by AG Kokott to fully capture the democratic dimension in the present Case if the Commission had maintained Article 2 TEU. Instead, she offers an alternative: to counter the '*chilling effect'* of the Hungarian Law (as suggested here).

A welcome use of the concept of 'chilling effect'

Laurent Pech strongly advocates for the use of this concept to protect EU values, as it captures '*measures which aim to pre-emptively dissuade natural and legal persons from exercising their rights by creating a climate of fear or a climate of distrust'* based on their '*vague content, combined effects and/or arbitrary application'*. Developed in the ECHR's case law on freedom of expression, the concept of 'chilling effect' has been used implicitly by the ECJ under alternative names of 'deterrent' or 'dissuasive' effect, in particular with respect to the EU's four freedoms. It is only recently that it was relied upon for fundamental rights enshrined in the Charter (*Transparency of Associations* on freedom of association and *Real Madrid v Le Monde* on freedom of expression).

In AG Kokott's Opinion, 'chilling' and 'deterrent' effect play a role in assessing a restriction to the Services Directive, freedom of association (see in particular para. 197) and freedom of expression (see also here). The concept contributes to AG Kokott's very concrete analysis of the notion of 'requirements' of the law within the meaning of the Services Directives (see paras. 76-81). A combined reading of Articles 7, 8, 11 and 12 of the Law reveals that the SPO's powers of investigation and disclosure imply corresponding obligations to cooperate for the persons and organisations providing or benefiting from services that amount to the numerous activities covered by the Law (Article 3, see e.g. para. 70). Therefore, the duty of cooperation constitutes a requirement even though non-compliance does not immediately trigger legal sanctions, because these mechanisms (also qualified as requirements) make it effectively binding and potentially deterring (see in particular para. 80, '*effet dissuasif'* in French). Under the same logic (para. 180), AG Kokott considers that the duty to cooperate and other consequences of an SPO's investigation amount to a restriction to freedom of expression, since they have a '*chilling effect'* and carry the '*risk of self-censorship*' on journalists, publishers and press organisations (paras. 188-190).

As underlined by Pech, a prominent advantage of this concept is to lighten the burden of proof, the 'mere prospect' of a dissuasive effect, indirectly or potentially, leading to a restriction of the fundamental freedom or fundamental right. If the chilling effect materialises (see here and here), it can in turn reinforce the case. For example, in October 2024, SPO produced two reports on Transparency International Hungary that are taken into account by AG Kokott to concretely demonstrate the negative impact of the Law (see e.g. para. 198).

The concept also has its drawbacks. By relying on the vagueness and risk of arbitrariness of the Law to find limitations to the fundamental rights at stake, AG Kokott restricts the proportionality assessment under Article 52(1) CFR to its first step: the limitation 'must be provided for by law'. Since this criterion is interpreted as making the limitation clear and predictable to avoid the risk of arbitrariness (para. 213), it is only logical that the vagueness of the notion of 'activities' (Article 3) and the large powers of the SPO to investigate on these activities directly prevent any justification of the Law (para. 214). Not pursuing the assessment further produces two rather contradictory effects: it gives the feeling that the Law cannot be justified at all, and that there is no need to try and save it or, *a contrario*, that, if it wasn't for its vagueness, it could have been justified.

Consequently, AG Kokott carries out a thorough assessment of the Law's proportionality concerning the restriction to freedom to provide services (paras 107-126). Had this assessment been conducted from a fundamental rights perspective, it would have addressed more frontally the democratic challenges raised by the Law regarding its objective of protecting internal democratic processes from any illegitimate foreign interference, an objective recognised and shared by the EU institutions.

Conclusion

Case C-829/24 could provide an opportunity to further articulate the intertwined nature of European and national democracy. By taking the lens of freedom of movement and the Charter, AG Kokott's reasoning surely risks obscuring the underlying constitutional issues, as noted by Spieker in his analysis of *Transparency of Associations*.

Yet, as voices emerge to call on cautiousness when dealing with values (see here and here), the ECJ can rely on the concept of chilling effect and steadily assess the impact of the Law on democracy nevertheless. This approach could develop into a coherent and systemic line of case law, as chilling effect may also apply to the Hungarian 'Transparency of Public Life' bill, closely linked to the Law found incompatible with EU law in *Transparency of Associations*, should infringement proceedings be initiated.

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