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EU Values Are Law, after All: Enforcing EU Values through Systemic Infringement Actions by the European Commission and the Member States of the European Union

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Abstract: Although compliance with the founding values is presumed in its law, the Union is now confronted with persistent disregard of these values in two Member States. If it ceases to be a union of Rule-of-Law-abiding democracies, the European Union (EU) is unthinkable. Purely political mechanisms to safeguard the Rule of Law, such as those in Article 7 Treaty of European Union (TEU), do not work. Worse still, their existence has disguised the fact that the violations of the values of Article 2 TEU are also violations of EU law. The legal mechanisms tried thus far, however, do not work either. The fundamental jurisprudence on judicial independence and irremovability under Article 19(1) TEU is a good start, but it has been unable to change the situation on the ground. Despite ten years of EU attempts at reining in Rule of Law violations and even as backsliding Member States have lost cases at the Court of Justice, illiberal regimes inside the EU have become more consolidated: the EU has been losing through winning. More creative work is needed to find ways to enforce the values of Article 2 TEU more effectively. Taking this insight, we propose to turn the EU into a militant democracy, able to defend its basic principles, by using the traditional tools for the enforcement of EU law in a novel manner. We demonstrate how the familiar infringement actions—both under Article 258 and 259 TFEU—can be adapted as instruments for enforcing EU values by bundling a set of specific violations into a single general infringement action to show how a *pattern* of unlawful activity rises to the level of being a *systemic* violation. A systemic violation, because of its general and pervasive nature, in itself threatens basic values

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above and beyond violations of individual provisions of the *acquis*. Certified by the Court of Justice, a systemic violation of EU law should call for systemic compliance that would require the Member State to undo the effects of its attacks on the values of Article 2. The use of Article 260 Treaty on the Functioning of the EU (TFEU) to deduct fines from EU funds due to be received by the troubled Member State would provide additional incentives for systemic compliance. We illustrate this proposed militant democratic structure by explaining and critiquing what the Commission and Court together have done to reign in the governments of Hungary and Poland so far and then showing how they can do better.

I. Introduction: Why and how to enforce EU values

One of the weakest elements in the legal-political edifice of today's European Union (EU) is also the one which was almost entirely taken for granted by its founders: ensuring that the national governments are faithful to the basic principles of democracy, protection of fundamental rights, and the Rule of Law.[1] While this is not the only problem the Union is facing at the moment,[2] it goes to

[1] L Pech and KL Scheppele, 'Illiberalism Within: Rule of Law Backsliding in the EU' (2017) 19 *Cambridge Yearbook of European Legal Studies*, 3; D Kochenov, 'The EU and the Rule of Law—Naïveté or a Grand Design?' in M Adams, E Hirsch Ballin, and A Meuwese (eds), *Constitutionalism and the Rule of Law. Bridging Idealism and Realism* (Cambridge: Cambridge University Press, 2017) 425; A von Bogdandy and M Ioannidis, 'Systemic deficiency in the rule of law: What it is, what has been done, what can be done' (2014) 51 *CML Rev*, 59. A number of scholarly volumes are available, analysing this situation. Eg F Bignami, *EU Law in Populist Times: Crises and Prospects* (Cambridge: Cambridge University Press, 2020); R Janse, *De renaissance van de Rechtsstaat* (Open Universiteit, 2018); A Jakab and D Kochenov (eds), *The Enforcement of EU Law and Values: Ensuring Member States' Compliance* (Oxford: Oxford University Press,, 2017); Th Konstadinides, *The Rule of Law in the European Union—The Internal Dimension* (Oxford: Hart Publishing 2017); C Closa and D Kochenov (eds), *Reinforcing Rule of Law Oversight in the European Union* (Cambridge: Cambridge University Press, 2016); W Schröder (ed.), *Strengthening the Rule of Law in Europe: From a Common Concept to Mechanisms of Implementation* (Oxford: Hart Publishing, 2016); A von Bogdandy and P Sonnevend (eds), *Constitutional Crisis in the European Constitutional Area: Theory, Law and Politics in Hungary and Romania* (Oxford: Hart Publishing, 2015). Cf., for the analyses of the ongoing academic debate, O Mader, 'Enforcement of EU Values as a Political Endeavour: Constitutional Pluralism and Value Homogeneity in Times of Persistent Challenges to the Rule of Law' (2019) 11 *Hague Journal on the Rule of Law*, 133; N Lacey, 'Populism and the Rule of Law' (2019) 15 *Annual Review of Law and Social Science*, 79. M Bonelli, 'From a Community of Law to a Union of Values?' (2017) 13 *European Constitutional Law Review*, 793.

[2] The challenges are varied and overlapping, but none of these puts the very essence of the European projects in question as much as the waning adherence to values: AJ Menéndez, 'The Existential Crisis of the European Union' (2013) 14 *German Law Journal*, 453. Cf eg the contributions in C Closa (ed.), *Secession from a Member State and Withdrawal from the European Union* (Cambridge: Cambridge University Press, 2017); D Chalmers, M Jachtenfuchs, and C Joerges (eds), *The End of Eurocrats' Dream* (Cambridge: Cambridge University Press, 2016); D Kochenov, G de Búrca, and A Williams (eds), *Europe's Justice Deficit?* (Oxford: Hart Publishing, 2015); F Fabbrini, E Hirsch Ballin, and H Somsen (eds), *What Form of Government for the European Union and the Eurozone?* (Oxford: Hart Publishing, 2015); Cf R Smits, 'Crisis Response in Europe's Economic and Monetary Union: Overview of Legal Developments' (2005) 38 *Fordham International Law Journal*, 1135.

the very core of the European project which promised a peaceful, prosperous, and democratic Europe.[3] Given developments over the last decade, we can no longer presume that the EU is a Union of Rule-of-Law-based democracies, as its Treaties presume.[4] The EU's moral appeal as well as the backbone of its legal system collapse when its Member States no longer honour EU values. Moreover, if the Union cannot guarantee compliance with democracy, fundamental rights, and the Rule of Law in a system where mutual trust and mutual recognition must be assumed among the Member States,[5] then the EU will unravel as self-help measures on the part of the compliant Member States become irresistible.[6] A growing practice of self-help, however, would destroy what is most distinctive about the European Union and would signal its demise[7]—just as ignoring the

[3] JHH Weiler, 'Europe in Crisis: On "Political Messianism", "Legitimacy" and the "Rule of Law"' (2013) *Singapore Journal of Legal Studies*, 248; G de Búrca, 'Europe's *raison d'être*' in D Kochenov and F Amtenbrink (eds), *European Union's Shaping of the International Legal Order* (Cambridge: Cambridge University Press, 2013); JHH Weiler, 'The Schuman Declaration as a Manifesto of Political Messianism', in J Dickson and P Eleftheriadis (eds), *Philosophical Foundations of EU Law* (Oxford: Oxford University Press, 2012); P Allott, 'The European Community Is not the True European Community' (1991) 100 *Yale Law Journal*, 2485.

[4] Art. 2 Treaty of European Union (TEU). Cf. LS Rossi, 'La valeur juridique des valeurs: L'article 2 TEU' (2020) *Revue trimestrielle de droit européen*, 3; M Klamert and D Kochenov, 'Article 2' in M Kellerbauer, M Klamert, and J Tomkin (eds), *The EU Treaties and the Charter of Fundamental Rights. A Commentary* (Oxford: Oxford University Press, 2019), 22; LD Spieker, 'Breathing Life into the Union's Common Values: On the Judicial Application of Article 2 TEU in the EU Value Crisis' (2019) 20 *German Law Journal*, 1182; A von Bogdandy and LD Spieker, 'Countering the Judicial Silencing of Critics: Article 2 TEU Values, Reverse *Solange*, and the Responsibilities of National Judges' (2019) 15 *European Constitutional Law Review*, 391; T von Danwitz, 'Values and the Rule of Law: Foundations of the European Union—An Inside Perspective from the ECJ' (2018) 21 *Potchefstroom Electronic Law Journal*, 2; L Pech, 'The Rule of Law as a Constitutional Principle' in Schröder (n 1); R Baratta, 'La communauté des valeurs dans l'ordre juridique de l'Union européenne' (2018) *Revue des affaires européennes*, 81; D Kochenov, 'The *Acquis* and Its Principles: The Enforcement of "Law" versus the Enforcement of "Values" in the European Union', in Jakab and Kochenov (n 1), 8.

[5] As explained in detail, for instance, in Opinon 2/13 of the Court (Full Court) of 18 December 2014, ECLI : EU: C:2014:2454. Cf: B de Witte and Š Imamović, 'Opinion 2/13 on Accession to the ECHR: Defending the EU Legal Order against a Foreign Human Rights Court' (2015) *European Law Review*, 683; E Spaventa, 'A Very Fearful Court? The Protection of Fundamental Rights in the European Union after Opinion 2/13' (2015) 22 *Maastricht Journal of European and Comparative Law*, 35; P Eeckhout, 'Opinion 2/13 on EU accession to the ECHR and judicial dialogue–autonomy or autarky?' (2015) 38 *Fordham International Law Journal*, 955; D Kochenov, 'EU Law without the Rule of Law: Is the Veneration of Autonomy Worth It?' (2015) 34 *Yearbook of European Law*, 74.

[6] Joined cases 90&91/63 *Commission v Luxembourg and Belgium* [1964] ECR 625. W Phelan, *Great Judgments of the Court of Justice: Rethinking the Landmark Decisions of the Foundational Period* (Cambridge: Cambridge University Press, 2019); W Phelan, 'Supremacy, Direct Effect, and Dairy Products in the Early History of European Law' (2014) *IIIS Discussion Paper* No. 455; W Phelan, 'What is *Sui Generis* about the European Union? Costly International Cooperation in a Self-Contained Regime' (2012) 14 *International Studies Review*, 367.

[7] C Rizcallah, *Le principe de confiance mutuelle en droit de l'Union européenne* (Paris: Larcier, 2020); M Wendel, 'Mutual Trust, Essence and Federalism—Between Consolidating and Fragmenting the Area of Freedom, Security and Justice after *LM*' (2019) 15 *European Constitutional Law Review*, 17; C Rizcallah, 'Le principe de confiance mutuelle: une utopie malheureuse?' (2019) 118 *Revue trimestrielle de droits de l'homme*, 297; P Bárd and W van Ballegooij, 'Judicial Independence as a

democracy, fundamental rights, and the Rule of Law altogether would.[8] Paying serious attention to democracy, fundamental rights, and the Rule of Law in the EU is thus essential for the EU's very survival.

The Institutions of the Union that are tasked with the preservation of the values have not been effective so far in guaranteeing European Values because the Institutions have demonstrated a lack of political will.[9] The Court of Justice (ECJ) has been the most notable exception.[10] In a line of truly revolutionary cases, starting with the *Portuguese Judges* decision[11] and building on the forward-looking doctrinal writings of the past quarter of a century,[12] the Court has

Pre-Condition for Mutual Trust? The ECJ in *Minister for Justice and Equality v LM*' (2018) *New Journal of European Criminal Law*, 353; Phelan (n 6); V Mitsilegas, 'The limits of mutual trust in Europe's Area of Freedom, Security and Justice: From automatic inter-State cooperation to the slow emergence of the individual' (2012) 31 *Yearbook of European Law* 319; M Poiares Maduro, 'So Close Yet So Far: The Paradoxes of Mutual Recognition' (2007) 14 *Journal of European Public Policy* 814; K Nikolaïdis, 'Trusting the Poles? Constructing Europe through Mutual Recognition' (2007) 14 *Journal of European Public Policy* 682. Cf. A von Bogdandy, 'Beyond the *Rechtsgemeinschaft*, with Trust—Reframing the Concept of European Rule of Law' (2018) *MPIL Research Paper* (Heidelberg) 2018/02; I Canor, 'My Brother's Keeper? Horizontal *Solange*: "An Ever Closer *Distrust* among the Peoples of Europe"' (2013) 50 *CML Rev*, 383.

[8] Such a failure will not only be a failure of principle of the EU constitutional system internally—it will also mark a departure from its external obligations and the destruction of its international credibility: C Closa, 'Reinforcing of EU Monitoring of the Rule of Law', in Closa and Kochenov (n 1), 15.

[9] See the *Journal of Common Market Studies* special issue edited by D Kochenov, A Magen, and L Pech (eds), 'The Great Rule of Law Debate in the EU' (2016) 54 *Journal of Common Market Studies*, 1043. Cf eg A Schout and M Luining, 'The Missing Dimension in Rule of Law Policy from EU Policies to Multilevel Capacity Building', Clingendael Instituut Report, January 2018, 12.

[10] TT Koncewicz, 'The Supranational Rule of Law as First Principle of the European Public Space—On the Journey in Ever Closer Union among the Peoples of Europe in Flux' (2020) 5 *Palestra* 167; P Van Elsuwege and F Grimmelprez, 'Protecting the Rule of Law in the EU Legal Order: A Constitutional Role for the Court of Justice' (2020) 16 *European Constitutional Law Review*, 8; C Rizcallah and V Davio, 'L'article 19 du Traité sur l'Union européenne: sesame de l'Union de droit' (2020) *Revue trimestrielle des droits del'homme* 122, 156; G Kelepouri, 'Revisiting the Rule of Law in the European Context: The CJEU's Recent Narrative in the Limelight' (2020) *European Politeia*, 71; K Lenaerts, 'New Horizons for the Rule of Law within the EU' (2020) 21 *German Law Journal*, 29; F Brito Bastos, 'An Administrative Crack in the EU's Rule of Law' (2020) 16 *European Constitutional Law Review*, 63; D Kochenov and P Bárd, 'The Last Soldier Standing? Courts versus Politicians and the Rule of Law Crisis in the New Member States of the EU' (2019) 1 *European Yearbook of Constitutional Law*, 243.

[11] Case C-64/16 *Associação Sindical dos Juízes Portugueses v Tribunal de Contas* EU: C:2018:117. L Pech and S Platon, 'Judicial Independence under Threat: The Court of Justice to the Rescue in the *ASJP* Case' (2018) 55 *CML Rev*, 1836; S Adam and P Van Elsuwege, 'L'exigence d'indépendance du juge, paradigm de l'Union européenne comme union de droit' (2018) 9 *Journal de droit européen*, 334; M Bonelli and M Claes, 'Judicial serendipity: how Portuguese judges came to the rescue of the Polish judiciary' (2018) 14 *European Constitutional Law Review*, 622, at 631. Cf. M Krajewski, '*Associação Sindical dos Juízes Portugueses*: The Court of Justice and Athena's Dilemma' (2018) 3 *European Papers*, 395.

[12] The Court's rethinking of the potential of Art. 19(1) was deeply rooted in the literature, especially the remarkable John Usher's work on the predecessor of Art. 19(1) TEU, Art. 164 EEC. Professor John Usher opined that 'The door appears to have been opened to the exercise of new sorts of judicial control in the complex relationship between Community institutions and Member States, going beyond the broad interpretation which the Court had already given under the

strongly protected judicial independence and the irremovability of judges, as crucial elements of the Rule of Law in Europe.[13] In the meantime, however, the backsliding regimes have been consolidating their rule, not just over judiciaries but over virtually all formerly independent institutions necessary for democratic health.[14] Anti-democratic ideologies seeking to destroy the basic values on which the Union is built are now quite entrenched,[15] making 'autocratic legalism' a

Treaties': JA Usher, 'General Course: The Continuing Development of Law and Institutions', in F Emmert, *Collected Courses of the Academy of European Law* (1991) European Community Law. Vol II, Book 1 (The Hague: Martinus Nijhoff Publishers, 1992) esp. Part V 'The European Court of Justice and its Jurisdiction', 122–35; JA Usher, 'How limited is the jurisdiction of European Court of Justice?', in J Dine, S Douglas-Scott, and I Persaud (eds), *Procedure and the European Court* (London: Chancery Law Publishing 1991), 77. See also CN Kakouris, 'La Cour de Justice des Communautés européennes comme cour constitutionnelle: trois observations', in O Due, M Lutter, and J. Schwarze (eds), *Festschrift für Ulrich Everling* (Baden Baden: Nomos, 1995), 629; CN Kakouris, 'La mission de la Cour de Justice des Communautés européennes et l'ethos du juge' (1994) 4 *Revue des affaires européennes* 35, all as cited in L Pech and J Grogan, 'The Meaning and Scope of EU Rule of Law' (2020) *RECONNECT Working Paper* (Leuven) D.7.2., at 20 et seq. Cf, supporting this view, K Lenaerts, 'The Rule of Law and the Coherence of the Judicial System of the European Union' (2007) 44 *CML Rev*, 1625; K Lenaerts, 'The Court of Justice as the Guarantor of the Rule of Law within the European Union', in G De Baere and J Wouters (eds), *The Contribution of International and Supranational Courts to the Rule of Law* (Cheltenham: Edward Elgar, 2015) 242.

[13] L Pech and D Kochenov, *Respect for the Rule of Law in the Case Law of the Court of Justice of the EU*, Stockholm: SIEPS (2020, forthcoming); Koncewicz (n 10), 167; D Adamski, 'The Social Contract of Democratic Backsliding in the "New EU" Countries "(2019) 56 *CML Rev*, 623. The Court has not always applied the same high standard of justicial independence to itself, however. Cf. Case T-550/20 *Order of the Judge Hearing Applications for Interim Measures in Sharpston v Council and Representatives of the Governments of the Member States* EU: T:2020:416, (4 September 2020); Case C-423/20 P(R) *Order of the Vice-President of the Court in Council v Sharpston* EU: C:2020:700, (10 September 2020), para. 29; Case C-424/20 P(R) *Order of the Vice-President of the Court in Council and Representatives of the Governments of the Member States v Sharpston* EU: C:2020:705, (10 September 2020); D Kochenov and G Butler, 'Independence of the Court of Justice of the European Union? Lessons from One Lost Battle for the Integrity of the Institution', (2020) *Jean Monnet Working Paper* (NYU Law School) No 2/2020.

[14] Cf eg Pech and Scheppele (n 1); W Sadurski, *Poland's Constitutional Breakdown* (Oxford: Oxford University Press, 2019); M Smith, 'Staring into the Abyss: A Crisis of the Rule of Law in the EU' (2019) 25 *European Law Journal*, 563; K Kovács and KL Scheppele, 'The Fragility of an Independent Judiciary: Lessons from Hungary and Poland—and the European Union' (2018) 51 *Communist and Post-Communist Studies* 189; TT Koncewicz, 'Understanding the Politics of Resentment: Of the Principles, Institutions, Counter-Strategies, Normative Change, and the Habits of the Heart' (2019) 26 *Indiana Journal of Global Legal Studies* 501; M Bernatt and M Ziółkowski, 'Statutory Anti-Constitutionalism' (2018) 28 *Washington International Law Journal*, 487. See also the literature cited therein.

[15] P Blokker, 'Populist Counter-Constitutionalism, Conservatism, and Legal Fundamentalism' (2019) 15 *European Constitutional Law Review*, 518; Adamski (n 13); A Sajó, 'The Rule of Law as Legal Despotism: Concerned Remarks on the Use of "Rule of Law" in Illiberal Democracies' (2019) 11 *Hague Journal on the Rule of Law*, 371; P Blokker, 'Populist Constitutionalism and Meaningful Popular Engagement' (2018) *The Foundation for Law, Justice and Society Policy Brief* (Centre for Socio-Legal Studies and Wolfson College, University of Oxford); KL Scheppele, 'The Social Lives of Constitutions', in P Blokker and C Thornhill (eds), *Sociological Constitutionalism* (Cambridge: Cambridge University Press, 2017), 35. Cf. J Dawson and S Hanley, 'What's Wrong with East-Central Europe? The Fading Mirage of the "Liberal Consensus"' (2016) 27 *Journal of Democracy*, 21.

strategy for challenging EU law itself.[16] No longer are rule of law issues temporary and isolated deviations from a norm of compliance, which had been presumed. Instead, non-compliance with European values has become a principled *ideological choice* of several governments.[17] This new reality is not a passing phase; it is here to stay.

The ECJ can be applauded for moving to defend Member State judiciaries by reinforcing the fact that they are also EU judiciaries that must be organized in accord with Article 19 of the Treaty on European Union (TEU).[18] Unfortunately, however, Article 19 by itself is insufficient to solve the challenges that persistently deviating Member States present. Central features of the Rule of Law and democracy, both fundamental legal principles of the Union, cannot be reduced simply to the empowerment of the judiciaries.[19] Some have even suggested that disrupting judicial self-government could be more faithful to the Rule of Law.[20] Whatever view one takes on this dispute, defending the Rule of Law requires a broader view of what the principle entails and how it is linked to the defence of democracy and fundamental rights.[21]

Striking a balance between taking the effective action necessary to defend the Rule of Law and respecting the limitations placed on the EU's competences is tricky.[22] The EU's basic values must be enforced in full compliance with the principle of conferral, but at the same time EU institutions must adopt a sufficiently

[16] KL Scheppele, 'Autocratic Legalism' (2018) 85 *University of Chicago Law Review*, 545.
[17] Cf. A Jakab and D Kochenov, 'Introductory Remarks', in Jakab and Kochenov (n 1) 1, speaking of the 'spectrum of non-compliance'.
[18] M Klamert and B Schima, 'Article 19' in Kellerbauer, Klamert, and Tomkin (n 4), 172; Pech and Kochenov, *Respect for the Rule of Law* (n 13) (and the literature cited therein).
[19] On the breadth of the meaning of the Rule of Law in the European legal context see, most importantly, L Pech, 'The Rule of Law as a Constitutional Principle of the European Union' (2009) *Jean Monnet Working Papers* (NYU Law School) No. 4/2009; Janse (n 1); S Douglas-Scott, 'Justice, Injustice and the Rule of Law in the EU', in Kochenov, de Búrca, and Williams (n 2). Cf. L Pech and J Grogan, 'Unity and Diversity in the National Understandings of the Rule of Law in the EU' (2020) *RECONNECT Working Paper* (Leuven) D.7.1; B Grabowska-Moroz, 'Understanding the Best Practices in the Area of the Rule of Law' (2020) *RECONNECT Working Paper* (Leuven) D.8.1. On why the empowerment of judiciaries in the captured Member States is not likely to be the strategy generating change, see, eg D Kochenov, 'On Policing Article 2 TEU Compliance—Reverse *Solange* and Systemic Infringements Analyzed' (2013) *Polish Yearbook of International Law*, 163.
[20] D Kosař, 'Beyond Judicial Councils: Forms, Rationales and Impact of Judicial Self-Governance in Europe' (2018) 19 *German Law Journal*, 1567 (and the literature cited therein). Cf. M Bobek, 'The Fortress of Judicial Independence and the Mental Transitions of the Central European Judiciaries' (2008) 14(1) *European Public Law*.
[21] For key examples of the latter, see, Adamski (n 13), 654; TT Koncewicz (n 14), 501; Baratta (n 4); A Jakab, 'What Can Constitutional Law Do against the Erosion of Democracy and the Rule of Law? On the Interconnectedness of the Protection of Democracy and the Rule of Law' (2020) 6 Constitutional Studies 5.
[22] This consideration lies at the heart of the ECJs interpretation techniques: K Lenaerts and JA Gutierrez-Fons, *Les methods d'interprétation de la Cour de justice de l'Union européenne* (Paris: Larcier, 2020). The complex legal set-up comes with specific challenges for the values: Cf. G Palombella, 'Beyond Legality–before Democracy: Rule of Law Caveats in the EU Two-Level System', in Closa and Kochenov (n 1).

broad view of democracy and the Rule of Law that goes beyond Article 19 TEU and the case law related to it.[23] To do justice to the set of core values in question—democracy, fundamental rights, and the Rule of Law—requires fully acknowledging that these values are not reducible to judicial independence and the irremovability of judges. Neither can they be confined to the self-serving circular approach the Court has used to prevent the Rule of Law from being used to challenge its own rule.[24] Entrenching EU values across the Union also requires more than rhetoric.[25] The A more holistic approach is defended to robustly defend European values.

In this contribution, we explore how the European Institutions and the Member States can move beyond their current narrow strategy for defending judicial independence as required by the *Portuguese Judges* ruling, analysed by Laurent Pech and Dimitry Kochenov in detail elsewhere.[26] While we agree with President Lenaerts[27] that judicial independence is absolutely crucial for maintaining the Union, we believe that it is not sufficient alone to guarantee the enforcement of Article 2 TEU values. We will argue below that suitably strengthened infringement procedures can be used to broaden the protection of European values to all those identified by Article 2 TEU.[28]

We recognize that most commentators have argued that only political mechanisms can be used to enforce the values of Article 2 TEU. But Article 7 TEU is unlikely to be effective when more than one Member State is violating Article 2 TEU.[29]

[23] Klamert and Kochenov (n 4), 22–30; L Pech, 'The Rule of Law as a Constitutional Principle' (n 4). Cf. Pech and Grogan, 'Unity and Diversity' (n 19); T von Danwitz (n 4); R Baratta (n 4). For an interesting reinterpretation of the idea of scope of the law as the starting point of engagement with values, see, CI Nagy, 'The Diagonality Problem of EU Rule of Law and Human Rights: Proposal for an Incorporation *à l'européenne*' (2020) 21 *German Law Journal*, 838.

[24] Kochenov (n 5), 82.

[25] Ibid. The argument is further developed in D Kochenov, 'Rule of Law as a Tool to Claim Supremacy' (2020) *RECONNECT Working Paper* (Leuven) No. 8. Cf J Lindeboom, 'Why EU Law Claims Supremacy' (2018) 38 *OJLS*, 328.

[26] Case C-64/16, *Associação Sindical dos Juízes Portugueses (Portuguese Judges)* [2018] ECLI: EU : C:2018:117. For a detailed analysis of all the rich case law that followed, see Pech and Kochenov (n 13) (and the literature cited therein).

[27] K Lenaerts, 'Our Judicial Independence and the Quest for National, Supranational and Transnational Justice', in G Sevik, M-J Clifton, T Haas, L Lourenço, and K Schwiesow (eds), *The Art of Judicial Reasoning:* Festschrift *in Honour of Carl Baudenbacher* (Berlin: Springer, 2019) 155.

[28] Arts 258, 259, and 260 Treaty on the Functioning of the EU (TFEU), best analysed in the context of the general compliance with the *acquis* by Luca Prete: L Prete, *Infringement Proceedings in EU Law* (The Hague: Kluwer Law International, 2017). Cf M Schmidt and P Bogdanowicz, 'The infringement procedure in the rule of law crisis: How to make effective use of Article 258 TFEU' (2018) 55 *CML Rev*, 1061; P Bárd and A Śledzińska-Simon, *Rule of law infringement procedures. A proposal to extend the EU's rule of law toolbox*, CEPS May 2019 <https://www.ceps.eu/ceps-publications/rule-of-law-infringement-procedures/>; LW Gormley, 'Infringement Proceedings', in Jakab and Kochenov (n 1), 65.

[29] We thus distinguish legal from political enforcement, which operates either via Art. 7 TEU or in an *ad hoc* manner. On the former, see LFM Besselink, 'The Bite, the Bark and the Howl: Article 7 TEU and the Rule of Law Initiatives', in Jakab and Kochenov (n 1); G Wilms, *Protecting Fundamental Values in the European Union through the Rule of Law* (Florence: EUI, 2017); B Bugarič, 'Protecting Democracy inside the EU: On Article 7 TEU and the Hungarian Turn to

In addition to the potential use of a fellow-traveller veto when it comes to finding that values have actually been breached, the route taken when Austria was deemed to be in risk of a breach of basic values at the turn of this century is no longer open. In the Austrian incident, Member States went outside the Treaties altogether to coordinate sanctions; such a move could now be deemed illegal following the amendment of Article 7 TEU precisely to keep the warning stage inside the Treaties.[30] Even with this amendment creating a warning procedure separate from the sanctions procedure, the effective deployment of the present Article 7 TEU is made even less likely because it was drafted without due regard to the essentials of the Community method, as one of us has argued.[31] Treaty change to add new enforcement mechanisms to the mix now that the dilemma has arisen would be absolutely unthinkable given that the very Member States whose behaviour demonstrates the need for the Treaty change would no doubt block it. Because the use of Article 7 TEU sanctions and Treaty change both require unanimity that cannot be expected when more than one state is already violating basic values, a realistic approach to solving the Union's Rule of Law crisis requires using the tools already available. Hence our focus on infringement procedures—and how to adapt them to our present values crisis.

A. Aim and structure of this work

Articles 258–260 of the Treaty on the Functioning of the EU (TFEU) can be turned into tools of militant democracy.[32] Under the Treaties, infringement procedures may be initiated by either the European Commission under Article 258 TFEU or by Member States under Article 259 TFEU to bring errant Member States into line with both EU values and EU law.[33] A Member State that fails to

Authoritarianism', in Closa and Kochenov (n 1). Cf. D Kochenov, 'Article 7', in Kellerbauer, Klamert, and Tomkin (n 4) 88; on the latter, eg GN von Toggenburg, 'La crisi austriaca: delicati equilibrismi sospesi tra molte dimensioni' (2001) *Diritto pubblico comparato ed europeo* 735; K Lachmayer, 'Questioning the Basic Values—Austria and Jörg Haider', in Jakab and Kochenov (n 1), 436. Enforcement in the context of EMU is a cross-over between the two: F. Amtenbrink and R Repasi, 'Compliance and Enforcement in Economic Policy Coordination in EMU', in Jakab and Kochenov (n 1). For general overviews, please see the literature in n 1 above.

[30] W Sadurski, 'Adding Bite to a Bark: The Story of Article 7, EU Enlargement, and Jörg Haider' (2010) *Columbia Journal of European Law*, 385.

[31] D Kochenov, 'Article 7 TEU: A Commentary on a Much Talked-about "Dead" Provision' (2019) 38 *Polish Yearbook of International Law*, 165.

[32] For a broad discussion of the EU as a militant democracy, see U Wagrandl, 'Transnational Militant Democracy' 7 (2018) *Global Constitutionalism*, 143; U Sedelmeier, 'Anchoring Democracy from Above? The European Union and Democratic Backsliding in Hungary and Romania after Accession' (2014) 52 *Journal of Common Market Studies*, 105; J-W Müller, 'The EU as a Militant Democracy, or: Are There Limits to Constitutional Mutations within the Member States' (2014) 165 *Revista de Estudios Políticos*, 141. Cf. Kirshner, *A Theory of Militant Democracy* (New Haven, CT: Yale University Press, 2014).

[33] On this distinction, from a strictly legal perspective, see Kochenov, 'The *Acquis* and Its Principles' (n 4). From a moral-philosophical perspective: G Itzcovich, 'On the Legal Enforcement of Values: The Importance of the Institutional Context', in: Jakab and Kochenov (n 1). For a principled legal-theoretical criticism of the introduction of values into the text of the Treaties, see J Lacroix, 'Does Europe Need Common Values?' (2009) 8 *European Journal of Political Theory* 141.

enforce an ECJ decision finding the Member State in breach of EU law can be sanctioned under Article 260 TFEU. Launching infringement procedures requires political will at the national or supranational level. This political will has so far been missing,[34] but as the situation gets worse, the relevant actors may eventually realize that it is crucial to act. As we will show, the relationship between the scope *ratione materiae* of the *acquis* of the Union and the legal defense of the values of the Union is crucial in this context and we provide an assessment of the evolution of values in the context of the *acquis* in Section II.[35] Section III is dedicated to an analysis of the strengths and weaknesses of the infringement procedures as currently deployed to show that this tool has not so far been summoned effectively to defend EU values: the Commission's victories in value-related infringement cases failed to translate into any change on the ground. Both Polish and Hungarian contexts are considered.

Building on Kim Scheppele's initial proposal to deploy infringement procedures in different and more systemic ways,[36] we argue that a more far-reaching assessment of the national-level developments in a backsliding Member State like Poland or Hungary could lead to the conclusion that the values of the Union are breached, requiring a supranational intervention. The sum of numerous violations that raise questions about the adherence of the Member State to European values more broadly is thus more important and *qualitatively different* than the individual violations that are more customarily alleged in infringements. Either the Commission[37] (Section IV) and/or the Member State(s)[38] (Section V) could launch such an action. We consider different structural options for framing such *systemic infringement procedures*.

As we argue, the systemic nature of infringements that dismantle the democratic constitutional order and truncate the Rule of Law in the Member States are, by virtue of their very nature, within the scope of EU law.[39] The ECJ would

[34] RD Kelemen, 'Europe's Other Democratic Deficit: National Authoritarianism in Europe's Democratic Union' (2017) 52(2) *Government and Opposition* 211; RD Kelemen, 'The European Union's authoritarian equilibrium', (2020) 27(3) *Journal of European Public Policy* 481.

[35] Nagy (n 23); Kochenov (n 4); D Kochenov and L Pech, 'Better Late than Never? On the European Commission's Rule of Law Framework and its First Activation' (2016) 54 *Journal of Common Market Studies*, 1062.

[36] KL Scheppele, 'Enforcing the Basic Principles of EU Law through Systemic Infringement Actions', in Closa and Kochenov (n 1). For criticism, see Kochenov (n 19).

[37] See, for an earlier restatement of this idea, Scheppele (n 36).

[38] See, for an earlier restatement of this idea, D Kochenov, 'Biting Intergovernmentalism: The Case for the Reinvention of Article 259 TFEU to Turn it into a Viable Rule of Law Enforcement Tool' (2015) 7 *Hague Journal on the Rule of Law*, 153.

[39] This can happen focusing on different specific elements in the Treaties, especially fundamental rights; citizenship; human rights. The case law, starting with AG Poiares Maduro's Opinion in Case C-380/05 *Centro Europa 7* [2007] ECR I-349, para. 14 et seq. and continuing on through Case C-135/08 *Janko Rottman v Freistaat Bayern* [2010] ECLI: EU: C:2010:104 and Case 34/09 *Gerardo Ruiz Zambrano v Office national de l'emploi (ONEm)* [2011] ECLI: EU: C:2011:124 is abundant. For a chorus of key academic articulations, see A von Bogdandy et al., 'Reverse *Solange*—Protecting the Essence of Fundamental Rights against EU Member States' (2012) 49 *CML Rev*, 489; D Kochenov, 'A Real European Citizenship; A New Jurisdiction Test; A Novel

therefore have the jurisdiction to guard against this democratic and Rule of Law backsliding in the Member States, thus turning the Union into a nascent militant democracy.[40] The important effort of the ECJ to use Article 19(1) TEU as a trigger of EU jurisdiction on judicial independence is a good start,[41] but protecting judicial independence alone will not reach all Article 2 TEU principles. A systemic infringement action that results in the ECJ finding a systemic breach should trigger the obligation of systemic compliance on the part of the Member State in question, and that might require the rebuilding of the affected constitutional structures in the offending Member State. Only such root-and-branch change would restore full adherence to the values that were breached (Section VI). As the ECJ reaches a wider range of Article 2 TEU principles, we argue, systemic compliance can be supported by an enhanced approach to deploying financial incentives for the Member State(s) found to be in breach of the values to comply with ECJ judgments under Article 260 TFEU (Section VII).

B. Key strategies for enforcing EU values

The project of supranational integration was designed to limit the Member States' ability to engage in serious conflict by removing key political choices from the national level—with regard, most importantly, to the construction of the internal market[42] and non-discrimination on the basis of nationality.[43] The Union accomplished these aims through *de facto* federalization[44] of these areas bolstered by supremacy,[45] pre-emption,[46] and direct effect,[47] in addition to exempting

Chapter in the Development of the Union in Europe' (2011) 18 *Columbia Journal of European Law*, 56; M van den Brink, 'The Origins and the Potential Federalising Effects of the Substance of Rights Test', in D Kochenov (ed.), *EU Citizenship and Federalism: The Role of Rights* (Cambridge, Cambridge University Press, 2017). For critical assessments, see, eg, J Croon Gestefeld, 'Reverse *Solange*—Union Citizenship as a Detour on the Route to Fundamental Rights Protection against National Infringements', in D Kochenov (ed.), *EU Citizenship and Federalism: The Role of Rights* (Cambridge, Cambridge University Press, 2017); Kochenov (n 19); Cf M Dawson, O Lynskey, and E Muir, 'What is the added value of the concept of the "essence" of EU fundamental rights?' (2019) 20 *German Law Journal*, 63; K Lenaerts, 'Limits on limitations: the essence of fundamental rights in the EU', (2019) 20 *German Law Journal*, 2019, 779.

[40] Cf the literature in n 33.

[41] Kochenov and Bárd (n 10); Pech and Kochenov (n 13).

[42] For a grand overview, see C Barnard, *The Substantive Law of the EU: The Four Freedoms* (Oxford: Oxford University Press, 2019). Cf G Davies, 'Social Legitimacy and Purposive Power: The End, the Means and the Consent of the People' in Kochenov, de Búrca, and Williams (n 2); G Peebles, '"A Very Eden of the Innate Rights of Man"? A Marxist Look at the European Union Treaties and Case Law' (1997) 22 *Law and Social Inquiry*, 581, 605.

[43] G Davies, *Nationality Discrimination in the European Internal Market* (The Hague: Kluwer Law International, 2003).

[44] R Schütze, *From Dual to Cooperative Federalism* (Oxford: Oxford University Press, 2009).

[45] J Lindeboom (n 25).

[46] A Arena, 'The Twin Doctrines of Primacy and Pre-emption', in R Schütze and T Tridimas (eds), *Oxford Principles of European Union Law* (Oxford: Oxford University Press, 2018).

[47] B de Witte, 'Direct Effect, Primacy, and the Nature of the Legal Order', in P Craig and G de Búrca (eds), *The Evolution of EU Law* (2nd edn, Oxford: Oxford University Press, 2011); R Schütze, 'Direct Effects and Indirect Effects', in Schütze and Tridimas (n 46).

itself from the general rule of international organizations, that self-help could be used to enforce mutual commitments.[48] A messianic promise of prosperity and peace was aimed at justifying two limitations on the participating states: one democratic and the other economic.[49]

The Union has travelled a long way since the founding moment, acquiring limited human rights protection,[50] an oxymoronic[51] but still a citizenship of its own[52] and a set of entrenched constitutional principles,[53] officially constructed out of those shared values on which the Member States are built.[54] The EU is now widely regarded as a quasi-federal constitutional system,[55] which is not functionally limited by the horizon of economic integration but has now expanded its Treaty competences beyond those founding goals.[56] When it is operating within

[48] Joined cases 90&91/63 *Commission v Luxembourg and Belgium* [1964] ECR 625. Cf eg W Phelan (n 6).

[49] See the literature in n 3 above. Cf. D Kochenov, 'The Citizenship Paradigm' (2013) 15 *Cambridge Yearbook of European Legal Studies*, 197; P Allott, 'European Governance and the Rebranding of Democracy' (2002) 27 *ELRev*, 60.

[50] B de Witte, 'The Past and Future of the European Court of Justice in the Protection of Human Rights', in P Alston (ed.), *The EU and Human Rights* (Oxford: Oxford University Press, 1999); JHH Weiler and NJS Lockhart, '"Taking Rights Seriously" Seriously' (I and II) (1995) 32 *CML Rev*, 579.

[51] D Kochenov, 'The Oxymoron of "Market Citizenship" and the Future of European Integration', in F Amtenbrink, G Davies, D Kochenov, and J Lindeboom (eds), *The Internal Market and the Future of European Integration: Essays in Honour of Laurence W. Gormley* (Cambridge: Cambridge University Press, 2019), 217.

[52] D Kochenov, 'Neo-Mediaeval Permutations of Personhood in Europe', in L Azoulai, E Pataut, and D Barbou des Places (eds), *Ideas of the Person and Personhood in European Union Law* (Oxford: Hart, 2016); P Caro de Sousa, 'Quest for the Holy Grail—Is a Unified Approach to the Market Freedoms and European Citizenship Justified?' (2014) 20 *European Law Journal*, 499. C O'Brien, 'I Trade Therefore I Am: Legal Personhood in the European Union' (2013) 50 *CML Rev*, 1643; D Kochenov (n 39).

[53] See, most importantly, Schütze and Tridimas (n 46). Cf A von Bogdandy and J Bast (eds), *Principles of European Constitutional Law* (1st edn Oxford: Hart, 2006). See also the second edition of this work and the literature in n 4.

[54] A Williams, *The Ethos of Europe* (Cambridge: Cambridge University Press, 2009); A Williams, 'Taking Values Seriously: Towards a Philosophy of EU Law' (2009) 29 *OJLS*, 549. See also the literature in n 1.

[55] Judge Pierre Pescatore famously highlighted the 'caractère fédérale de la constitution européenne', as far back as the beginning of the 1960s. P Pescatore, 'La Cour en tant que juridiction fédérale et constitutionnelle', in *Dix ans de jurisprudence de la Cour des Communautés Européennes* (Cologne: Université de Cologne, 1963), 522. For the key analyses of the EU as a federation: R Schütze (n 44); K Lenaerts, 'Federalism and the Rule of Law: Perspectives from the European Court of Justice' (2010) 33 *Fordham International Law Journal*, 1338; S Oeter, 'Federalism and Democracy', in von Bogdandy and Bast (n 53), 53. A Menon and M Schain (eds), *Comparative Federalism: the European Union and the United States in Comparative Perspective* (Oxford: Oxford University Press, 2006); E Delaney, 'Managing in a Federal System without an "Ultimate Arbiter": *Kompetenz Kompetenz* in the EU and the Ante-bellum United States' (2005) 15 *Regional and Federal Studies*, 225; K Nicolaïdis and R. Howse (eds), *The Federal Vision: Legitimacy and Levels of Governance in the United States and the European Union* (Oxford: Oxford University Press, 2001); D Sidjanski, 'Actualité et dynamique du fédéralisme européen' (1990) 341 *Revue du marche commun*, 655; FW Scharpf, 'The Joint Decision Trap: Lessons from German Federalism and European Integration' (1988) 66 *Public Administration*, 239; M Cappelletti et al. (eds), *Integration through Law: Europe and the American Federal Experience*, vol. 1, bk. 3 (Berlin: Walter de Gruyter, 1986).

[56] J Larik, 'From Speciality to a Constitutional Sense of Purpose: On the Changing Role of the Objectives of the European Union' (2014) 63 *ICLQ*, 935 (and the literature cited therein).

its core competencies, that is, when defending the internal market as such,[57] the Union is unquestionably a success: the law generally works as designed. Once one moves past the core internal market paradigm, however, the competencies of the Union are more contested, especially when the Union sits uneasily with the paradigms of democracy,[58] equality,[59] and (own) adherence to its stated values.[60]

It is not among the objectives of this article to follow the twists and turns of the 'critical turn in the EU legal studies'.[61] Yet, it is indispensable to keep this critical perspective in mind. Indeed, reinforcing the Union's ability to intervene in the ongoing operation of the Member States can legitimately be presented as dangerous in and of itself, given the Union's present limitations.[62] Resistance from the highest courts of the Member States is becoming more frequent, making the ECJ hone unusual tools to address this push-back.[63] While recognizing that overreaching by the EU is potentially a valid concern, we believe that this concern is misplaced when it comes to guaranteeing the shared values of the European enterprise. Unless values are reinforced when they begin to weaken, we encounter the cancer of so-called 'illiberal democracy'[64] or, as Ўладзіслаў Белавусаў has called it, the Belarusianization of the EU.[65]

All elements of the puzzle considered, we are satisfied that the danger of empowering the Union to act in the circumstances of extraordinary violations of Article 2 TEU is not greater than the danger that would result from crumbling constitutionalism in the Member States and its knock-on effects in the EU as a whole.[66] Indeed, Rule of Law backsliding has already been well-orchestrated in several capitals to systemically weaken internal checks on power and to entrench

[57] Caro de Sousa (n 52); C O'Brien (n 52); M Bartl, 'Internal Market Rationality, Private Law and the Direction of the Union: Resuscitating the Market as the Object of the Political' (2015) 21 *European Law Journal*, 572; M Wilkinson, 'The Spectre of Authoritarian Liberalism: Reflections on the Constitutional Crisis of the EU' (2013) 14 *German Law Journal*, 527–60.

[58] JHH Weiler, 'The Schuman Declaration' (n 3); G Davies (n 42); JHH Weiler, 'Epilogue: Living in a Glass House: Europe, Democracy and the Rule of Law', in Closa and Kochenov (n 1). Please also see the literature cited therein.

[59] C O'Brien, *Unity in Adversity* (Oxford: Hart Publishing, 2017); D Kochenov, 'Citizenship without Respect', (2010) Jean Monnet Working Paper (NYU Law School) No. 08/10.

[60] A Williams, 'Taking Values Seriously' (n 54). Cf. Kochenov, de Búrca and Williams (n 2); Williams, *The Ethos of Europe* (n 54).

[61] 'Editorial comments: The Critical Turn in EU Legal Studies' (2015) 52 *CML Rev*, 881.

[62] JHH Weiler, 'Epilogue: Living in a Glass House' (n 58); J Cornides, 'The European Union: Rule of Law or Rule of Judges?' (2013) *European Journal of International LawAnalysis* (blog) <www.ejiltalk.org/the-european-union-rule-of-law-or-rule-of-judges/>. Cf. Kochenov (n 5), 82.

[63] See, for instance, the ECJ's press-release in reply to BVerfG, Judgment of the Second Senate of 5 May 2020 2 BvR 859/15, paras 1–237; J Lindeboom, 'Is the Primacy of EU Law Based on the Equality of the Member States? A Comment on the CJEU's Press Release Following the *PSPP* Judgment' (2020) 21 *German Law Journal*, 1032.

[64] Full text of Viktor Orbán's speech at Băile Tuşnad (Tusnádfürdő) of 26 July 2014 (July 29, 2014—Csaba Tóth) <https://budapestbeacon.com/full-text-of-viktor-orbans-speech-at-baile-tusnad-tusnadfurdo-of-26-july-2014/>.

[65] U Belavusau, 'On age discrimination and beating dead dogs: *Commission v Hungary*' (2013) 50 *CML Rev*, 1145.

[66] Kochenov and Pech (n 35); W Sadurski, *Poland's Constitutional Breakdown* (n 14), 225–7.

the long-term rule of the dominant party.[67] The EU's own claim to democratic legitimacy rests on the robust democratic governments of its Member States, and if one or more of the Member States become autocracies, the legitimacy of the EU is also endangered. Rather than simply observing the deterioration of constitutionalism in some of its Member States to the point where other Member States would have to turn to self-help in order to prevent the consequences from spilling over across their borders, the EU should be able to intervene before that occurs.[68] Besides, an argument has been made that a possibility of such intervention played an important role in the decisions in a number of Member States to join the Union in the first place.[69] Intervention is therefore required if the EU is to be saved.

Numerous proposals as to how to do this best have been made to date,[70] mostly focusing on institutional action by the existing organs and institutions: the Council,[71] the European Commission,[72] the Fundamental Rights Agency of the

[67] Pech and Scheppele (n 1), 10.

[68] For a normative analysis of the context necessitating intervention, see eg A von Bogdandy and M Ioannidis (n 1); C Closa, 'Reinforcing EU Monitoring of the Rule of Law: Normative Arguments, Institutional Proposals and the Procedural Limitations', in Closa and Kochenov (n 1); Jakab and Kochenov (n 1); L Pech and D Kochenov, 'Strengthening the Rule of Law Within the European Union: Diagnoses, Recommendations, and What to Avoid' *RECONNECT Policy Brief* (June 2019); Under Siege *Why Polish courts matter for Europe* (European Stability Initiative, Warsaw-Berlin March 2019); P Bárd and A Śledzińska-Simon, 'On the principle of irremovability of judges beyond age discrimination: Commission v. Poland. Case C-619/18, Commission v. Poland, Judgment of the Court (Grand Chamber) of 24 June 2019, EU: C:2019:531' (2020) 57 CML Rev, 1555; N Neuwahl and C Kovacs, 'Hungary and the EU's Rule of Law protection' (2020) *Journal of European Integration*, 1.

[69] W Sadurski, *Constitutionalism and Enlargement of Europe* (Oxford: Oxford University Press, 2012).

[70] For a brief overview, see C Closa, D Kochenov, and JHH Weiler, 'Reinforcing the Rule of Law Oversight in the European Union' (2014) *RSCAS Working Paper* no. 25 (EUI Florence). For a more in-depth approach, see, eg, the contributions in: *Journal of Common Market Studies* special issue edited by Kochenov, Magen, and Pech (n 9), 1043–59; Closa and Kochenov (n 1); Jakab and Kochenov (n 1). P Bárd, S Carrera, E Guild, and D Kochenov, *An EU mechanism on democracy, the rule of law and fundamental rights. Annex II—Assessing the need and possibilities for the establishment of an EU Scoreboard on democracy, the rule of law and fundamental rights*, European Parliamentary Research Service, April 2016, 47–62; Mader (n 1); Lacey (n 1); Bonelli (n 1).

[71] Press release no. 16936/14, 3362nd Council meeting, General Affairs, Brussels, 16 December 2014, 20–1; Ensuring the respect for the rule of law dialogue and exchange of views. Discussion Paper (13744/15), Brussels 9 November 2015; Summary on the evaluation of the rule of law dialogue among all Member States within the Council (14565/16), Brussels 17 November 2016; Presidency conclusions after the annual rule of law dialogue on the topic 'Media pluralism and the rule of law in the digital age' (13609/17), Brussels 24 October 2017; Presidency conclusions following the annual rule of law dialogue 2018 on the topic 'Trust in public institutions and the rule of law' (14678/18), Brussels, 23 November 2018; Presidency conclusions-Evaluation of the annual rule of law dialogue (14173/19), Brussels, 19 November 2019. E Hirsch Ballin, 'Mutual Trust: The Virtue of Reciprocity Strengthening the Acceptance of the Rule of Law through Peer Review', in Closa and Kochenov (n 1); P Oliver and J Stefanelli, Strengthening the Rule of Law in the EU: The Council's Inaction (2016) 54 *Journal of Common Market Studies*, 1075.

[72] The European Commission first created a Rule of Law Framework for assessing the behaviour of misbehaving Member States. Commission (EC), *A New EU Framework to Strengthen the Rule of Law*, COM (2014) 158 final (11 March 2014). Importantly, it has also triggered the Article 7(1)

EU (FRA),[73] the European Public Prosecutor's Office,[74] and (leaning on an institution of the Council of Europe) the Venice Commission.[75] Solutions have been lodged in institutions yet to be created, such as a 'Copenhagen Commission' tasked with the mission of assessing values compliance.[76] The possibility of cutting European funds to backsliding Member States has been lurking on the agenda for years, with a proposed Regulation pending[77] and a lot of political

TEU procedure against Poland (still pending in Council): *College Orientation Debate on recent developments in Poland and the Rule of Law Framework*, MEMO/16/62, Brussels 13 January 2016, <https://ec.europa.eu/commission/presscorner/detail/en/MEMO_16_62>. It then created a universal Rule of Law Review process to put all Member States through rule of law checks. Commission (EC), Strengthening the Rule of Law within the Union A Blueprint for Action, COM/2019/343 final (17 July 2019). For a critical analysis of the former, see D Kochenov and L Pech, 'Monitoring and Enforcement of the Rule of Law in the European Union: Rhetoric and Reality' (2015) *European Constitutional Law Review*. For a critical analysis of the latter, see, D Kochenov, 'Elephants in the Room' (2019) 11 *Hague Journal on the Rule of Law*, 423; B Grabowska-Moroz and D Kochenov, 'EU Rule of Law: The State of Play Following the Debates Surrounding the 2019 Commission's Communication', G Amato and B Barbisan (eds), Rule of Law vs Majoritarian Democracy (Oxford: Hart Publishing, 2021, forthcoming); for analysis of the European Commission's approach to the rule of law crisis, see Kochenov and Pech (n 35); M Taborowski, 'The Commission takes a step back in the fight for the Rule of Law', *VerfBlog* 3 January 2018, at: <https://verfassungsblog.de/the-commission-takes-a-step-back-in-the-fight-for-the-rule-of-law/>; C Closa, 'The politics of Guarding the Treaties: Commission Scrutiny of Rule of Law Compliance' (2019) 26 *Journal of European Public Policy*, 696–716; M Mycielski and L Pech, 'When Will the EU Commission Act?: An Open Letter', *VerfBlog* 29 April 2020 at: <https://verfassungsblog.de/when-will-the-eu-commission-act/>.

[73] GN Toggenburg and J Grimheden, 'The Rule of Law and the Role of Fundamental Rights: Seven Practical Pointers', in Closa and Kochenov (n 1). L Pech and J Grogan, 'Upholding the rule of law in the EU. What role for FRA?', in R Byrne and H Entzinger (eds), *Human Rights Law and Evidence-Based Policy: The Impact of the EU Fundamental Rights Agency* (London: Routledge, 2019) 219. A recent FRA annual report analysed the rule of law challenges in context of access to justice: European Union Agency for Fundamental Rights, *Fundamental Rights Report 2019* (Luxembourg 2019) 203.

[74] H Cooper, 'EU's Jourová Wants Funds Linked to New Prosecutor's Office' *Politico.EU* 6 August 2017 <https://www.politico.eu/article/eus-jourova-wants-funds-linked-to-new-prosecutors-office/>. For general analysis of challenges regarding the European Public Prosecutor's Office, see: C Díez and E Herlin-Karnell, 'Prosecuting EU Financial Crimes: The European Public Prosecutor's Office in Comparison to the US Federal Regime' (2018) *German Law Journal*, 1191; A Damaskou, 'The European Public Prosecutor's Office. Ground-Breaking New Institution of the EU Legal Order' (2015) 6 *New Journal of European Criminal Law*, 126; W Geelhoed, LH Erkelens, and AWH Meij (eds), *Shifting Perspectives on the European Public Prosecutor's Office* (The Hague: TMC Asser Press, 2018); L Bachmaier Winter (ed.), *The European Public Prosecutor's Office. The Challenges Ahead* (Cham: Springer, 2018).

[75] K Tuori, 'From Copenhagen to Venice', in Closa and Kochenov (n 1); J Nergelius, 'The Role of the Venice Commission in Maintaining the Rule of Law', in von Bogdandy and Sonnevend (n 1). For a general criticism of overreliance on the international bodies on sensitive constitutional matters like this one, see, most importantly, M de Visser, 'A Critical Assessment of the Rule of the Venice Commission in Processes of Domestic Constitutional Reform' (2015) 63(4) *AJCL*, 963.

[76] J-W Müller, 'Should the European Union Protect Democracy and the Rule of Law in Its Member States' (2015) 21 *European Law Journal*, 141; J-W Müller (n 32); J-W Müller, 'Idea of the Copenhagen Commission', in Closa and Kochenov (n 1).

[77] G Halmai, 'The Possibility and Desirability of Rule of Law Conditionality' (2019) 11 *Hague Journal on the Rule of Law*, 117; M Fisicaro, 'Rule of Law Conditionality in EU Funds: The Value of Money in the Crisis of European Values' (2019) 4 *European Papers*, 695; A von Bogdandy and J Łacny, 'Suspension of EU funds for Breaching the Rule of Law—A Dose of Tough Love Needed?'

commotion at the highest level.[78] Reconsidering the system of party-financing at the European level might break the chain of support[79] that the engineers of democratic backsliding receive from their European party family. EU funds should not be used *for the reinforcement* of one-party entrenchment and constitutional decay[80]—a well-known phenomenon from political science.[81] A more aggressive review of backsliding by Member States' courts has been advocated too, using EU citizens' rights and the preliminary reference procedure to bring the ECJ into the picture and thus open up the gates of EU legal pressure.[82] This has partly materialized in Poland (albeit with Article 19 TEU as the trigger when attacks on the domestic judiciary to EU law have occurred).[83] But the Polish

SIEPS European Policy Analysis, June 2020; M Blauberger and V van Hüllen, Conditionality of EU funds: an instrument to enforce EU fundamental values? (2020) *Journal of European Integration*, 1.

[78] RD Kelemen, Europe's Faustian Union, *Foreign Policy* 30 July 2020 <https://foreignpolicy.com/2020/07/30/europes-faustian-union/>; J Morijn, Op-Ed: 'The July 2020 Special European Council, the EU budget(s) and the rule of law: Reading the European Council Conclusions in their legal and policy context' EU Law Live Blog 23 July 2020, <https://eulawlive.com/op-ed-the-july-2020-special-european-council-the-eu-budgets-and-the-rule-of-law-reading-the-european-council-conclusions-in-their-legal-and-policy-context-by-john-morijn/>; D Hegedüs, What EU leaders really decided on rule of law, Politico 21 July 2020 <https://www.politico.eu/article/what-eu-leaders-really-decided-on-rule-of-law-budget-mff/>.

[79] J Morijn, 'Responding to "Populist" Politics at EU Level: Regulation 1141/2014 and beyond' (2019) *International Journal of Constitutional Law*, 617; J Morijn, 'Formation and Funding of European Parliament Political Groups, Political Parties and Political Foundations v. EU-Level Political Rights (Case note T-118/17, *IDDE v European Parliament*)', in A Pahlandsingh and R Grimbergen (eds), *The Charter and the Court of Justice of the European Union: Notable Cases from 2016–2018* (The Hague: Wolf Legal Publishers, 2019) 257; D Kochenov and J Morijn, 'Le rôle de la Charte dans la lutte pour l'État de droit au sein de l'Union européenne', in A Iliopoulou-Penot et L Xenou (eds), *La Charte des droits fondamentaux, source de renouveau constitutionnel européen?* (Bruxelles: Bruylant, 2020).

[80] TG Daly, 'Democratic Decay: Conceptualising an Emerging Research Field' (2019) 11 *Hague Journal on the Rule of Law*, 9.

[81] Kelemen, 'Europe's Other Democratic Deficit' (n 34).

[82] A von Bogdandy et al., 'Reverse *Solange*—Protecting the Essence of Fundamental Rights against EU Member States' (2012) 49 *CML Rev*, 489; von Bogdandy and Spieker (n 4). For analyses, see Croon-Gestefeld (n 39); Kochenov (n 19). See also an upgraded version of this proposal: A von Bogdandy et al., 'A European Response to Domestic Constitutional Crisis: Advancing the Reverse-*Solange* Doctrine', in von Bogdandy and Sonnevend (n 1); A von Bogdandy, C Antpöhler, and M Ioannidis, 'Enforcing European Values', in Jakab and Kochenov (n 1). Cf M Taborowski; *Mechanizmy ochrony praworządności państw członkowskich w prawie Unii Europejskiej. Studium przebudzenia systemu ponadnarodowego* (Warsaw: Wolters Kluwer Polska, 2019).

[83] Pending preliminary references from the Polish Supreme Court: (Case 522/18, *DŚ v Zakład Ubezpieczeń Społecznych Oddział w Jaśle*; Case C-537/18, *YV*; Case C-508/19, *M.F. v J.M.*; Case C-487/19, *W.Ż.*), the Supreme Administrative Court: (Case C-824/18 *A.B., C.D., E.F., G.H., I.J. v Krajowa Rada Sądownictwa*) and Regional Court in Warsaw (Case C-748/19, *Prokuratura Rejonowa w Mińsku Mazowieckim v WB*; Case C-749/19, *Prokuratura Rejonowa Warszawa-Żoliborz w Warszawie v XA and YZ*; Case C-750/19, *Prokuratura Rejonowa Warszawa—Wola w Warszawie v DT*; Case C-751/19, *Prokuratura Rejonowa w Pruszkowie v ZY*; Case C-752/19, *Prokuratura Rejonowa Warszawa—Ursynów w Warszawie v AX*; Case C-753/19, *Prokuratura Rejonowa Warszawa—Wola w Warszawie v BV*; Case C-754/19, *Prokuratura Rejonowa Warszawa—Wola w Warszawie v CU*; Case C-132/20, *Getin Noble Bank*). While somewhat helpful on a number of occasions, the ECJ also found some such references inadmissible: Joined cases C-558/18 and C-563/18 *Miasto Łowicz and Prokurator Generalny*. ECLI: EU: C:2020:234. Cf. M Taborowski, *Mechanizmy ochrony praworządności* (n 82), 315; S Gregorczyk-Abram and M Wawrykiewicz,

Supreme Court—the last bastion of resistance under attack by autocrats—is now essentially silenced too,[84] thus repeating the fate of the late Constitutional Tribunal.[85] The fate of the Polish judiciary reveals the significant limitations of the strategies used thus far to generate a reliable and lasting defence of Article 2 TEU values.[86] And of course no tool works if it is not even tried; no attempts to stop backsliding have been forthcoming from either the Commission or the Council with regard to Hungary for years, even though state capture there is most entrenched across nearly all state institutions. Lastly a potential fine-tuning of the EU's powers through a broad interpretation of the Charter of Fundamental Rights of the EU (CFR)[87] by the ECJ has also been advocated, including by leading politicians—to no avail.[88] The European Parliament has made several significant steps in attempting to play an important role in resolving the crisis,[89] but it lacks sufficient powers to single-handedly trigger change

'*Terra Incognita*. Postępowania indywidualne w obronie sędziów Sądu Najwyższego i Naczelnego Sądu Administracyjnego. Tematyka pytań prejudycjalnych', in Ł Bojarski, K Grajewski, J Kramer, G Ott, and W Żurek (eds), *Konstytucja. Praworządność. Władza Sądownicza. Aktualne problemy trzeciej władzy w Polsce* (Warszawa: Wolters Kluwer Polska, 2019), 523. See also, in general, M Broberg, 'Preliminary References as a Means for Enforcing EU Law' in Jakab and Kochenov (n 1), 107.

[84] M Gersdorf and M Pilich, 'Judges and Representatives of the People: A Polish Perspective' (2020) European Constitutional Law Review (early view); M Krajewski and M Ziółkowski, *'Can an Unlawful Judge be the First President of the Supreme Court?'*, VerfBlog, 2020/5/26, <https://verfassungsblog.de/can-an-unlawful-judge-be-the-first-president-of-the-supreme-court/>.

[85] TT *Koncewicz*, 'Of Institutions, Democracy, Constitutional Self-Defence, and the Rule of Law' (2016) 53 *CML Rev*, 1753; TT Koncewicz, 'The Capture of the Polish Constitutional Tribunal and Beyond: Of Institution(s), Fidelities and the Rule of Law in Flux' (2018) 43 *Review of Central and East European Law*, 116; Cf, in meticulous detail, W Sadurski (n 14). For a general context, see P Castillo-Ortiz, 'The Illiberal Abuse of Constitutional Courts' (2019) 15 *European Constitutional Law Review*, 48.

[86] This vulnerability of local courts in backsliding Member States was obvious from the outset, making the Polish Supreme Court more of an outlier, than the norm: Kochenov (n 19).

[87] Kochenov and Morijn, 'Le rôle de la Charte' (n 79); A Jakab, 'The EU Charter of Fundamental Rights as the Most Promising Way of Enforcing the Rule of Law against EU Member States', in Closa and Kochenov (n 1). The Charter's potential is as far-reaching as it is unused: F Hoffmeiser, 'Enforcing the EU Charter of Fundamental Rights in Member States: How Far Are Rome, Budapest and Bucharest from Brussels?', in von Bogdandy and Sonnevend (n 1); J Morijn, 'Kissing Awake a Sleeping Beauty? The Charter of Fundamental Rights in EU and Member States' Policy Practice' V Kosta, N Skoutaris, and V Tzevelekos (eds), *EU Accession to the ECHR* (Oxford: Hart Publishing, 2014) 123; A Łazowski, 'Decoding a Legal Enigma: The Charter of Fundamental Rights of the European Union and Infringement Proceedings' (2013) 14 *ERA Forum*, 573; See also P Eeckhout, 'The EU Charter of Fundamental Rights and the Federal Question' (2002) 39 *CML Rev*, 945.

[88] V Reding, *The EU and the Rule of Law—What Next?*, 4 September 2013 <https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_13_677>.

[89] European Parliament resolution of 3 July 2013 on the situation of fundamental rights: standards and practices in Hungary (pursuant to the European Parliament resolution of 16 February 2012) (2012/2130(INI)); European Parliament resolution of 25 October 2016 with recommendations to the Commission on the establishment of an EU mechanism on democracy, the rule of law and fundamental rights (2015/2254(INL)); European Parliament resolution of 12 September 2018 on a proposal calling on the Council to determine, pursuant to Article 7(1) of the Treaty on European Union, the existence of a clear risk of a serious breach by Hungary of the values on which the Union is founded (2017/2131(INL)).

(including in the context of Article 7 TEU[90]). Moreover, Parliament's initiatives have generally been met with steep opposition from the Council.[91] Not that other international bodies have been able to play a significant role in dealing with Rule of Law backsliding either. The Council of Europe, with its powerful Court of Human Rights, has failed to turn back autocratic consolidation too.[92]

While joining the choir of those who believe that something significant needs to be done and while fully realizing that limiting the judicially enforceable parts of Article 2 TEU values to judicial independence by way of Article 19 TEU has been insufficient,[93] we have a simple proposal. We propose, instead of composing a new tune, to transpose a well-known one—infringement procedures—into a different key, from enforcing the *acquis sensu stricto* to ensuring respect for the values of the Union—a distinction which will be elaborated in the next part of the article in some more detail.[94] Systemic infringement actions do not require new powers or new tools; they rely entirely on the law in force, which makes them deployable immediately. Besides, they rest on the cooperation between the Commission and the ECJ—a tandem that has been quite effective in the context of breaking new ground on the supranational protection of judicial independence.[95]

C. Our proposal: Systemic infringements in a nutshell

The Commission under Article 258 TFEU or an activist Member State (or group of Member States) under Article 259 TFEU[96] could signal a *systemic breach* of

[90] For a detailed analysis, see, eg Kochenov (n 29), 88; Wilms (n 29).

[91] So much so, that the Parliament was not even invited to make its own case in Council for the conclusion that Hungary is indeed to be formally acknowledged as a country of severe risk of breach of EU values under Article 7(1) TEU. L Pech, D Kochenov, and S Platon, *'The European Parliament Sidelined: On the Council's distorted reading of Article 7(1) TEU'*, VerfBlog, 8 December 2019, at: <https://verfassungsblog.de/the-european-parliament-sidelined>.

[92] Eg European Court of Human Rights (ECtHR) *Baka v Hungary* Application No. 20261/12, 23 June 2016; D Kosař and K Šipulová, 'The Strasbourg Court Meets Abusive Constitutionalism: *Baka v. Hungary* and the Rule of Law' (2018) 10 *Hague Journal on the Rule of Law*, 83.

[93] Having moved the issue of judicial independence and irremovability within the scope of EU law via Article 19 TEU the Court has thereby opened the gates for the effective deployment of Article 47 CFR too: Case C-619/18 R *Commission v Poland* [2018] (order), EU: C:2018:852; joined cases C-585/18, C-624/18, and C-625/18 *A.K. and others v Supreme Court (Independence of the Disciplinary Chamber)*, 19 November 2019, EU: C:2019:982. Cf. L Pech, 'Article 47(2)', in S Peers el al. (eds), *The EU Charter of Fundamental Rights. A Commentary* (Oxford: Hart Publishing, 2021).

[94] Kochenov (n 4). Cf D Kochenov, 'Why the Promotion of the *Acquis* Is Not the Same as the Promotion of Democracy and What Can Be Done in Order to Also Promote Democracy instead of Just Promoting the *Acquis*' (2006) 2 *Hanse Law Review*, 169.

[95] Case C-192/18, *Commission v Poland* [2019], ECLI: EU: C:2019:924; Case C-619/18, *Commission v Poland* [2019] ECLI: EU: C:2019:531; Case 791/19, *Commission v Poland*. Cf. the annotation of C-619/18 in *CML Rev* by Bárd and Śledzinska-Simon, 'On the principle of irremovability of judges beyond age discrimination' (n 68).

[96] In cases when the Commission would decide not to intervene following the initiation of the procedure, thereby turning it into Art. 258 TFEU one: cf, for an analysis, G Butler, 'The Court of Justice as an Inter-State Court' (2017) 36 *Yearbook of European Law*, 179; Kochenov (n 38).

EU values by an offending Member State by *bundling a group of specific alleged violations together* to argue before the ECJ that the infringement of EU law in a Member State is not minor or transient, but systemic and persistent. *Systemic* non-compliance with EU law is a different type of infringement than those typically implicated in the individual *acquis* violations taken one by one, because the *pattern* raises questions about whether the Member State is additionally violating the Rule of Law, fundamental rights, democracy, and other principles under Article 2 TEU and/or violating the principle of sincere cooperation under Article 4(3) TEU. Clearly, a *pattern* of numerous persistent violations (even if each of them, taken separately, would appear relatively minor at first sight) challenges the foundational premise of the EU, which is that its Member States will enforce EU law in general within their borders, not least because the EU institutions must rely on good-faith cooperation of each Member State in order for the EU's presence to be felt in all of the Member States.

The Union should be prepared to deploy Articles 258 and 259 TFEU in the context of on-going state capture, relying directly on Article 2 TEU if necessary, given the depth, breadth, and intensity of well-documented on-going infringements. But unlike the usual infringement procedure in which narrowly focused elements of Member State action are challenged when they are clearly tied to the material scope of the *acquis* and singled out for attention one at a time,[97] a *systemic infringement procedure* would identify a pattern of examples, possibly coming from radically different (sub-)fields of law, pointing to a persistent and coherent state practice of an assault against the values of the Union. Systemic infringement actions should argue that the pattern of activity is incompatible with values of democracy, fundamental rights, and/or the Rule of Law, extending the reach of Article 258 or Article 259 TFEU to the heart of EU values.[98] What makes the breach of EU law worthy of a systemic infringement procedure is not just the number of individual violations but their overall pattern, persistence, and systematicity which together undermine the values of Article 2 TEU. In addition, since European values are constituted out of the shared legal and constitutional traditions of the Member States in the first place, a systemically deviating Member State typically violates its own domestic constitutional principles at the same time and thus threatens the foundation of shared commitments. Even though it is obviously not up to the ECJ to find a domestic constitutional violation, the fact that a Member State systematically violates or ignores its own constitution is an additional fact of relevance in considering whether the Member State is honouring the Rule of Law.

[97] Pål Wennerås has noted that the Commission seems to prefer bringing multiple separate smaller bore actions rather than one larger action putting the pieces of a broader puzzle together. This piecemeal approach has made it more difficult for the Commission to win substantial remedies at the compliance and sanctioning stage. P.Wennerås, 'Making Effective Use of Article 260 TFEU' in Jakab and Kochenov (n 1).

[98] Pech and Kochenov (n 68).

When the very core of constitutionalism in a Member State is undermined, EU values will necessarily be implicated as well. Therefore, when a Member State hides behind the national fence of 'constitutional identity' in order to justify and continue an assault on EU values, this claim needs to be explored for its compatibility with EU law. Sometimes claims of constitutional identity are disagreements about what a particular principle means in practice, and those disagreements can be worked out in dialogues between national and European courts.[99] But sometimes claims of constitutional identity constitute rejections of European values in the name of a conflicting ideology that poses a much more fundamental challenge to European unity as well as the survival of liberal democratic constitutionalism in the Member State in question. When these latter challenges occur, the EU needs a mechanism for checking whether differences over European values are differences in degree or in kind, and that is where systemic infringement procedures can prove their worth. Admirable ECJ case law has emerged over the recent years on the matter of constitutional identity; it is a relatively small step

[99] Cf. K Lenaerts, *The Court of Justice and National Courts: A Dialogue Based on Mutual Trust and Judicial Independence*, Speech of President Lenaerts at the Polish Supreme Court (19 March 2018), at https://www.nsa.gov.pl; GT Davies, 'Interpretative Pluralism within EU Law', in M. Avbelj and G. Davies (eds) *Research Handbook on Legal Pluralism and EU Law* (Cheltenham: Edward Elgar, 2018); M Dawson, 'Constitutional Dialogue between Courts and Legislatures in the European Union' (2013) 19 *European Public Law*, 369; GT Davies 'Legislative control of the European Court of Justice' (2004) 51 *CML Rev*, 1579. The German *Bundesverfassingsgericht* and the Italian *Corte costituzionale* are widely considered the most vocal and authoritative among these. On the most recent radical instalment of dialogue hinting at a threat of its possible breakdown, see Bundesverfassungsgericht [German Federal Constitutional Court], 5 May 2020, *Judgment of the Second Senate of 5 May 2020—2 BvR 859/15 (Ger.)* and Press Release, Court of Justice of the European Union, Press Release No. 58/20 (8 May 2020); D Grimm, 'A Long Time Coming', *Frankfurter Allgemeine Zeitung* (18 May 2020); D Sarmiento, *Requiem for Judicial Dialogue—The German Federal Constitutional Court's Judgment in the Weiss Case and its European Implications*, EU Law Live (9 May 2020). For key general analyses on BVergG see, FC Mayer, 'Multilevel Constitutional Jurisdiction', in von Bogdandy and Bast (n 53), 410–20; C Wohlfahrt, 'The *Lisbon* Case: A Critical Summary' (2009) 10 *German Law Journal*, 1277; A Steinbach, 'The Lisbon Judgment of the German Federal Constitutional Court—New Guidance on the Limits of European Integration?' (2010) 11 *German Law Journal*, 367. Most recently, *Corte costituzionale* has distinguished itself in a much more elegant way than the BVerfG, with the dialogue with the ECJ arising from the Case C-105/14 *Taricco* ECLI: EU: C:2015:555 and Case C-42/17, *M.A.S. and M.B.* ECLI: EU: C:2017:936. Cf. R Mastroianni, 'Supremazia del diritto dell'Unione e "controlimiti" costituzionali: alcune riflessioni a margine del caso Taricco' (2016) *Diritto penale contemporaneo*; C Cupelli, 'Il caso Taricco e il controlimite della riserva di legge in materia penale' (2016) *Giurisprudenza costituzionale*, 419; M Timmerman, 'Balancing Effective Criminal Sanctions with Effective Fundamental Rights Protection in Cases of VAT Fraud: Taricco' (2016) *CML Rev*, 779; R Mastroianni, 'Da Taricco a Bolognesi, passando per la Ceramica Sant'Agostino: il difficile cammino verso una nuova sistemazione del rapporto tra Carte e Corti' (2018) *Osservatorio sulle fonti*, 36; R Mastroianni, 'Alla ricerca di nuovi equilibri nei rapporti tra sistemi concorrenti di tutela dei diritti fondamentali: la sentenza Taricco-bis', in C Amalfitano (ed.), *Primato del diritto dell'Unione europea e controlimiti alla prova della "Saga Taricco"* (2018), 135; F Viganò, '*Melloni* overruled? Considerations on the "Taricco II" judgment of the Court of Justice' (2018) *New Journal of European Criminal Law*, 18; M Bonelli, 'The *Taricco* Saga and the Consolidation of Judicial Dialogue in the European Union' (2018) *Maastricht Journal of European and Comparative Law*, 357; E Lupo, 'La sentenza *M.A.S.* della Corte di giustizia e i suoi effetti: continua la saga *Taricco*' (2018) *Quaderni costituzionali*, 225.

from here to find that wholesale violations of domestic constitutions can under some circumstances also count as a violation of EU law.[100]

When challenges to fundamental values are brought before to the ECJ, Article 2 TEU values must be given *effet utile*, ensuring that the EU lives up to the letter and the spirit of the Treaties. Of course, much about a Member State's national identity is protected by Article 4(2) TEU. But Articles 2 and 4(3) TEU together indicate that the claims a Member State can make under Article 4(2) are limited by the requirement that a Member State demonstrate principled agreement with and full adherence to the values of democracy, Rule of Law and human rights and the other values listed in Article 2 TEU. When the failure to adhere to such values in a spirit of sincere cooperation is demonstrated beyond any reasonable doubt in front of the Court, this should give rise to the finding of a *systemic* breach.

The ECJ has no chance to do this if cases are presented to it in a piecemeal way disguising the extent and systemic nature of the violations involved. By using the common infringement procedure in new ways, the Commission and/or the Member States would be deploying a tried and true instrument in the name of a more ambitious and unfortunately necessary purpose. Combined with accelerated proceedings[101] and use of interim measures,[102] the systemic infringement action could become a highly effective tool to prevent a Member State from

[100] The case of *Coman*, is among the latest illustrations of the ECJ's approach in this context: Case C-673/16 *Relu Adrian Coman and Others v Inspectoratul General pentru Imigrări and Ministerul Afacerilor Interne* [2018] ECLI: EU: C:2018:385. D Kochenov and U Belavusau, 'After the Celebration: Marriage Equality in EU Law post-Coman in Eight Questions and Some Further Thoughts' (2020) 27 *Maastricht Journal of European and Comparative Law*, 549. Cf. Case 208/09, *Ilonka Sayn-Wittgenstein v Landeshauptmann von Wien* [2010] ECLI: EU: C:2010:806; Case 391/09, *Malgožata Runevič-Vardyn and Łukasz Paweł Wardyn v Vilniaus miesto savivaldybės administracija and Others* [2011] ECLI: EU: C:2011:291.

[101] Case C-619/18 *Commission v Poland* [2018], ECLI: EU: C:2018:910; Case C-216/18 *PPU Minister for Justice and Equality v LM* [2018]; ECLI: EU: C:2018:586; Joined cases *A.K. and Others v Sąd Najwyższy* [2018] ECLI: EU: C:2018:977.

[102] The Court embarked on the reinvention of interim measures in *Polish Forest* deploying Art. 279 TFEU to this end for the first time: P Wennerås, 'Saving a forest and the rule of law: *Commission v Poland*. Case C-441/17 R, *Commission v Poland*, Order of the Court (Grand Chamber) of 20 November 2017' (2019) 56 *CML Rev*, 541. Cf Order of the Vice President of the Court of 19 October 2018, *Commission v Poland*, C-619/18; Order of the Grand Chamber of 18 December 2018, *Commission v Poland*, C-619/18. The ECJ interim orders required the Polish authorities to suspend application of relevant provisions of the law on Supreme Court and to ensure that the judges of the Supreme Court concerned by those provisions may continue to perform their duties and were honoured by the Polish state. To compare, the interim relief ordered by the Polish Supreme Court in August 2018 under the national civil procedure code when the Supreme Court decided to refer case to the ECJ were basically ignored by public institutions, including the President of Poland and National Council of Judiciary (cf. case III UZP 4/18, *D.Ś. v Zakład Ubezpieczeń Społecznych* [2018], III). Similar interim relief issued by the Supreme Administrative Court was also ignored by the President of Poland (decision of 27 September 2018, cases no. II GW 27/18 and II GW 28/18). The most recent interim measure related to the Rule of Law was issued by Court of Justice on 8 April 2020 in case C-791/19 R Order of the Court (Grand Chamber) in *Commission v Poland (Disciplinary Chamber of the Supreme Court)* EU: C:2020:277. Cf. L Pech, 'Protecting Polish Judges from Poland's Disciplinary "Star Chamber"' (2020) *CML Rev* (forthcoming).

further constitutional backsliding. Our proposal thus adds to the EU legal scholarship about as well as the practical potential of the infringement procedure, which has been characterized as 'rather doctrinal and anæmic in nature'.[103]

But why go to all of this effort to use an old procedure for new ends? Because a systemic infringement upgrade will allow the Court to play the role of the guardian of the law much more effectively in the current difficult context. An ECJ finding of systemic violation could open up space for the Court to require *systemic compliance* with EU values, something a Member State would find more difficult to evade than compliance with a more narrowly expressed judgment based on a single concrete provision of the *acquis*. Systemic compliance would be more likely to accomplish the goals of the Union in ensuring that Article 2 TEU values are indeed respected.[104] If a Member State nonetheless fails to comply with a systemic infringement judgment, then we propose more incentivizing sanctions to restore European values in the Member State by suspending EU funds as a fine under Article 260 TFEU.

Compliance with the values of Article 2 TEU by both the Member States and the EU institutions alike is not merely a matter of enforcing an impractical ideal. In the face of challenge that demonstrates that mutual trust and respect are no longer warranted, it is difficult to imagine the ECJ turning down a well-documented case of systemic infringement brought by the Commission, a Member State, or a group of Member States. The ECJ has already recognized systemic threats to the Union in its Article 19(1) TEU case law on judicial independence, but this only begins to lay out what needs to be done to ensure that Member States that do not observe basic European values are brought back within the fold through effective and reliable legal procedures and credible sanctions. This being said, it is of course essential to consider systemic infringements in the context of the broader developments in the Member States in question: no legal sanction from Luxembourg or Brussels is capable of ensuring a *de facto* regime change in a back-sliding Member State should EU values enjoy no widespread support there.[105] While the autocrats may indeed have a solid electoral base, all

[103] M Smith, The Evolution of Infringement and Sanction Procedures: Of Pilots, Diversions, Collisions, and Circling, in D Chalmers and A Arnull (eds), *The Oxford Handbook of European Union Law* (Oxford: Oxford University Press, 2015) 350, 353.

[104] Christophe Hillion, Laurent Pech, and two of the present authors have consistently argued that the desiderata contained in Art. 2 TEU are not just vague orienting principles of the Union but common values that Member States have obligations—even legal obligations—to internalize and promote them. Kochenov and Pech (n 35); Pech et al., 'An EU Mechanism on Democracy, the Rule of Law and Fundamental Rights—Annex I (EPRS study)' (2016) PE 579.328, 200 (use of infringement actions based on Art. 2 TEU in conjunction with Arts 4(3) and/or 19(1) TEU is presented as one of the options the Commission should explore in order to better protect the rule of law in the EU). C Hillion, 'Overseeing the Rule of Law in the EU: Legal mandate and means', in Closa and Kochenov (n 1); Scheppele (n 36). See also Closa, Kochenov, and Weiler (n 70).

[105] Adamski (n 13). Cf. Sajó (n 15); M Blauberger and RD Kelemen, 'Can Courts Rescue National Democracy? Judicial Safeguards against Democratic Backsliding in the EU' (2017) 24(3) *Journal of European Public Policy*, 321; P Blokker, 'EU Democratic Oversight and Domestic Deviation from the Rule of Law', in Closa and Kochenov (n 1), 249.

of the evidence demonstrates that neither the Poles nor the Hungarians have definitely said 'no' to European values.[106] This in itself is an argument for coming up with more reliable legal ways of helping those who value democracy, fundamental rights, and the Rule of Law because they are now de facto hostages of the powers that be in the countries in question.

II. The history of values in the context of the *acquis*

The founding fathers of the Union were not as naïve as it might seem today, notwithstanding the fact that dealing with values and fundamental principles going to the core of state functions has traditionally been approached as a national and not a supranational concern. Seeing the problem of backsliding as a purely national matter was not illogical in the context of the founding objectives of prosperity, democracy and peace the Union was supposed to achieve. National membership in the Union as such was supposed to guarantee compliance with common European values through the day-to-day operation of the emerging *droit de l'intégration*.[107]

In fact, at the start of integration project, the more often expressed worry was that the Union posed a more serious threat to the values of the Member States than the Member States' own political problems did. This could be seen in the *Solange* saga, for instance, in which the German Federal Constitutional Court reserved the power to override the Court of Justice if it failed to adequately defend human rights.[108] The Union thus had to reinvent itself under pressure from the Member States to take human rights into account in order to become an organization that would be compatible with the key principles of modern constitutionalism at national level.[109] Characteristically, and of relevance to other values, no Treaty change was required to bring rights enforcement under the aegis of European law,[110] since the core functioning of the Union would have been in danger had the EU insisted on the capacity to override human rights in the name

[106] V Kazai, 'Blaming the People is not a Good Starting Point: A reflection on Prof. Weiler's editorial', *VerfBlog*, 8 August 2020 at: <https://verfassungsblog.de/blaming-the-people-is-not-a-good-starting-point/>.
[107] P Pescatore, *Le droit de l'intégration. Emergence d'un phénomène nouveau dans les relations internationals selon l'expérience des Communautés Européennes* (Leiden: Sijthoff, 1972).
[108] FC Mayer, 'Multilevel Constitutional Jurisdiction' in von Bogdandy and Bast (n 53), 400, 410–20; B Davies, *Resisting the ECJ: Germany's Confrontation with European Law 1949–1979* (Cambridge: Cambridge University Press, 2012).
[109] B de Witte (n 50); Weiler and Lockhart (n 50).
[110] The starting point that should be kept in mind is Case 1/58 *Stork v High Authority* [1959] ECLI: EU: C:1959:4, where the ECJ has absolutely refused to take human rights into account, only to change its position radically and irreversibly soon after, turning human rights into a crucial aspect of EU law. For the most authoritative account, see, Alston (n 50).

of economic integration.[111] Not a single Member State revolted against the idea of the Union taking human rights on board even though such a new competence undoubtedly amounted to a profound reinterpretation of the Treaties,[112] if not a reinvention of the whole system.[113] In the early decades of the Union, then, Union institutions themselves were brought under the basic principles of constitutionalism through the tutelage of its Member States. But now we see an unravelling of the common principles of constitutionalism at Member State level, and so the enforcement mechanisms need to be strengthened in reverse. This is not as novel as it might seem: the Union has been doing precisely this for more than a decade vis-à-vis the candidate countries in the context of the pre-accession exercise. In fact, pre-accession dilemmas, fears, and approaches are directly connected to the codification of the values in the Treaties today.[114]

A. The ad hoc articulation of values in the pre-accession context

If the protection of basic values at European level was at first a matter of the Member States pressing the Union to take constitutional principles on board, the later expansion of EU membership raised the question of whether the instruction should not also proceed from the Union out to the acceding countries. In fact, the Union treated its founding members differently than the way it treated the Member States joining later in this regard: EU enlargement law was in constant evolution.[115] Perusal of the literature of the day demonstrates that the early joiners were only subject to general approval of the others without explicit conditions beyond a promise to embrace the *acquis* in full being attached to membership.[116]

[111] Cf 'Mutual assured destruction' or the 'Cassandra scenario' in inter-court dialogue has been described in detail in the literature: M Kumm, 'Who Is the Final Arbiter of Constitutionality in Europe? Three Conceptions of the Relationship between the German Federal Constitutional Court and the European Court of Justice and the Fate of the European Market Order of Bananas' (1999) 36 *CML Rev*, 360. Numerous challenges to dialogue notwithstanding, Cassandra is nowhere in sight, even following the recent move by the *Bundesverfassungsgericht*: Bundesverfassungsgericht [German Federal Constitutional Court], 5 May 2020, *Judgment of the Second Senate of 5 May 2020–2 BvR 859/15 (Ger.)*. Cf. the literature in nn 63 and 99.

[112] For a famous attempt to explain why ECJ's decisions remained uncontested: JHH Weiler, 'The Dual Character of Supranationalism' (1981) 1 *Yearbook of European Law*, 267.

[113] For an alternative story, see, V Perju, 'On Uses and Misuses of Human Rights in European Constitutionalism', in S Voeneky and GL Neuman (eds), *Human Rights, Democracy, and Legitimacy in a World of Disorder* (Cambridge: Cambridge University Press, 2018).

[114] W Sadurski (n 69); D Kochenov, 'EU Enlargement Law: History and Recent Developments: Treaty—Custom Concubinage?' (2005) 9(6) *European Integration online Papers*, 1.

[115] D Kochenov (n 114). Cf C Hillion (ed.), *EU Enlargement: A Legal Approach* (Oxford: Hart Publishing, 2004); D Kochenov, *EU Enlargement and the Failure of Conditionality: Pre-Accession Conditionality in the Fields of Democracy and the Rule of Law* (The Hague: Kluwer Law International, 2008).

[116] Even this condition, which we now see as basic, was not obvious to some of the applicants and emerged as a result of the initial failure of the UK to join, when an unwritten principle came to be articulated that accession to the EU is not the moment to renegotiate the *acquis*: Kochenov (n 114). Accessions could also happen, as the Greek experience demonstrated, over a frosty assessment of the Commission: L Tsoukalis, *The European Community and the Mediterranean Enlargement*

But after 1989 when a whole bevvy of newly democratizing states knocked on the door to enter, concerns surfaced about whether these new potential Member States might undermine the Union either through failing to adhere to the basic principles of democracy, fundamental rights, and the Rule of Law once admitted, or through entering the Union only to dismantle or undermine it from within.[117] This resulted in the gradual shaping of the EU's customary law on enlargement, which had only ever in practice admitted states that could demonstrate that they were already democratic, adhered to the Rule of Law, and protected human rights long before these requirements made it into the text of the Treaties.[118] Earlier applications from autocratic states, like Franco's Spain or the Kingdom of Morocco, were either politely turned down or left without any consideration, without the need to make the grounds of rejection explicit.[119] These rejections, alongside the academic commentary of the time,[120] were the first practical expressions of the shared values that both the Union and the existing Member States at the time insisted upon as membership criteria, beyond the respect for the rules of the club. In fact, the formulation of the initial invitation to potential Member States preceding the creation of the European Union was addressed to 'free European states',[121] freedom being interpreted in the literature as adherence to democracy, the Rule of Law and human rights coupled with maintaining a capitalist economy.[122]

Three different potential value-problems became acute as the Union grew and they are still with us today. The first, which had already appeared in the literature before the accession of the UK,[123] raised the alarm that a new Member State might undermine the integration project from within. The second flagged concerns that Member States might be unable to implement EU law due to a lack of

(London: Allen & Unwin, 1981). When clearer EU enlargement law gradually came to be articulated, the earlier laissez-faire approaches could still be read between the lines, as new, often unwritten, principles would emerge in abundance, while not all the Member States stuck with them, to the detriment of the coherence and predictability of the enlargement policy: E Basheska and D Kochenov, 'Thanking the Greeks: The Crisis of the Rule of Law in EU Enlargement Regulation' (2015) 39 *Southeastern Europe*, 392; P Van Elsuwege, 'Good Neighbourliness as a Condition for Accession to the European Union: Finding the Balance between Law and Politics', in D Kochenov and E Basheska (eds), *Good Neighbourliness in the European Legal Context* (Boston, MA: Brill Nijhoff, 2015), 215.

[117] Eg P Soldatos and G Vandersanden, 'L'admission dans la CEE—Essai d'interprétation juridique' (1968) *Cahiers de droit européen*, 628; J-P Puissochet, *The Enlargement of the European Communities. A Commentary on the Treaty and the Acts Concerning the Accession of Denmark, Ireland and the United Kingdom* (Leiden: Sijthoff, 1975).

[118] Kochenov (n 114).

[119] Ibid.

[120] Soldatos and Vandersanden (n 117) (writing before any enlargement happened); Puissochet (n 117).

[121] D Kochenov, 'Behind the Copenhagen Façade: The Meaning and Structure of the Copenhagen Political Criterion of Democracy and the Rule of Law' (2004) 8(10) *European Integration online Papers*, 1.

[122] Soldatos and Vandersanden (n 117).

[123] Puissochet (n 117).

state capacity flowing from structurally insufficient resources and/or a dysfunctional administration. The third raised the possibility that a Member State might veer away from democracy and would not abide by the Rule of Law or respect human rights, which in turn would undermine the Union by challenging its basic (then unwritten) principles.

The Union eventually had to deal with all the three in the context of the application and evolution of its pre-accession policy, particularly as the number of states clamouring for entry became more numerous.[124] The core approach chosen to deal with these three potential problems was an *ex ante* one: targeting the likely problems and ensuring their eradication before the accession of new Member States. The insufficiency of this approach is now clear in the context of all problems it aimed to solve because countries do not always remain on their best behaviour. Governments might be admitted with a constructive attitude but might turn against the European project later. Governments might be admitted with sufficient state capacity but lose it due to corruption or autocratic capture of the institutions of accountability. Or governments could backslide to the point where they were no longer democratic, committed to the rule of law, or protective of fundamental rights.

As the mass accession of post-communist states approached, some further guarantee seemed necessary. As a result, *ex post* approaches to keeping the European project together emerged as the EU envisioned expansion. The Treaty of Amsterdam first included what is now Articles 7(2) and (3) TEU, permitting Member States, acting unanimously, to remove an errant Member State's vote in the Council (among other possible sanctions).[125] But after the Haider affair in Austria, when Member States went outside the Treaties to develop an *ad hoc* response,[126] a warning stage was added in the Treaty of Nice in what is now Article 7(1) TEU. The Article 7 mechanisms have been criticized in the literature for having a political, rather than a legal, essence in addition to being hard to use. In fact, despite the challenges that have arisen to basic EU values over the last decade, these obvious *ex post* tools have either not been used or not been used to good effect. The serious erosion of democracy and Rule of Law in at least two Member States now, however, counsels reinforcement of the *ex post* strategy and requires the EU to upgrade the tools in its arsenal to defend Article 2 TEU

[124] K Inglis, 'EU Enlargement: Membership Conditions Applies to Future and Potential Member State', in K Inglis and A Ott (eds), *The Constitution for Europe and an Enlarging Europe: Unity in Diversity?* (Groningen: Europa Law, 2005); Kochenov (n 114); M Maresceau, 'Quelques réflexions sur l'application des principes fondamentaux dans la stratégie d'adhésion de l'UE' in J Raux, *Le droit de l'Union européenne en principes: Liber amicorum en l'honneur de Jean Raux* (Paris: LGDJ, 2006) 69.

[125] Kochenov (n 29).

[126] Lachmayer (n 29), 436; HB Freeman, 'Austria: The 1999 Parliamentary Elections and the European Union Members' Sanctions' (2002) 25 *Boston College International. & Comparative Law Review*, 109–24.

compliance.[127] To consider how to do this, we should first revisit the dangers that the EU needs to protect against.

B. Persistent sources of threat to European values

(i) A democratic Member State undermining the Union from within

The first problem of the three outlined above—challenging the EU from within—is still acute, and not caught sufficiently by the duty of loyalty in Article 4(3) TEU.[128] This could be illustrated by the UK's sometimes obstructionist stance vis-à-vis reinforcing the Union before it left[129]—robbing all of its citizens of EU legal rights, even though nearly half of the electorate voted to remain. Given that the four freedoms express the essence of the internal market today as they did in the 1970s,[130] then David Cameron's pre-Brexit 'renegotiations' were exactly what Puissochet had been worried about.[131] Having one Member State negotiate a special deal so that it would not leave the Union was a political assault on EU law that proved futile however, and Brexit is a reality.[132] While the UK might be the most egregious example, one might also mention the repeated undermining of EU neighbourhood policies by Greece.These examples are clear reminders of the fact that 'undermining from within' is a problem that still awaits a solution.[133]

An open-minded observer might instead take these examples as evidence that there is room for political disagreement about the precise legal articulation of the internal market and of the European project more broadly conceived. It is clear, however, that it was precisely this political space that the founding *Herren der Verträge* were aiming to eliminate as certain fixed principles were assumed.[134] Given that the *acquis* largely fixes the rigidity of the objectives of integration and the predominance of the internal market logic at Treaty level,[135] the elements of

[127] Sadurski (n 30); Besselink (n 29).
[128] F Casolari, 'EU Loyalty after Lisbon: An Expectation Gap to Be Filled?' in LS Rossi and F Casolari (eds), *The EU after Lisbon: Amending or Coping with the Existing Treaties* (Berlin: Springer 2014); M Klamert, *The Principle of Loyalty in EU Law* (Oxford: Oxford University Press, 2014); T Roes, 'Limits to Loyalty: the Relevance of Article 4(3) TEU' (2016) *Cahiers de droit européen*, 253.
[129] E.g. Closa (n 2).
[130] For a grand overview, see, Barnard (n 42).
[131] S Peers, *The nine labours of Cameron: Analysis of the plans to change EU free movement law*, EU Law Analysis Blog 28 November 2014 <http://eulawanalysis.blogspot.com/2014/11/the-nine-labours-of-cameron-analysis-of.html>. C O'Brien, 'The ECJ sacrifices EU citizenship in vain: *Commission v. United Kingdom*', (2017), 54 *CML Rev*, 209.
[132] The traces of this assault are with us, however: Case C-308/14 *Commission v UK* ECLI: EU: C:2016:436 is still good law.
[133] Basheska and Kochenov (n 116).
[134] These efforts crystallized in the formulation of the first principle of EU enlargement law: the prohibition to renegotiate or permanently alter the existing *acquis*. This principle resulted in the rejection of the first UK application for membership: Kochenov (n 114).
[135] Davies (n 42); Larik (n 56).

which are not open for reconsideration (unless one wishes to rewrite the Treaties), it was only logical that scholars would propose to seek binding commitments from the acceding Member States when the established members of the EU club were concerned that the newcomers would be especially likely to fail to uphold the goals of integration once they joined. Judge Pescatore was among the proponents of the idea:

> Aux nouveaux venus, … il faut demander non seulement de définir leur position à l'égard des objectifs … déjà définis et consacrés par des engagements fermes. Il faut les interroger aussi sur leurs intentions en ce qui concerne les chances d'une evolution ultérieure vers l'union politique.[136]

The problem that a Member State might attempt to undermine the Union from within is therefore still not solved, even though a gradual constitutional rethink of the European Union might leave more room for democratic debate over the issue. As things stand now, however, the key features of the internal market cannot be changed, whether through challenges from the Member States or through a more democratic process.[137] This reality has been largely incorporated into the self-ascribed role of European legal academia too.[138] The very ridigity of the objectives of integration poses a serious qualification in any text characterizing the EU as such as a democracy, particularly in the age of austerity.[139] The Union has thus emerged as a democracy of means, not a democracy of ends.[140] That said, what is crucial for our purposes is that there are many tools, often strongly wielded, to prevent a Member State from deviating from what the internal market *acquis* requires. With regard to other purposes of the EU, let alone its fundamental values, the tools are not as robust nor as frequently used.

[136] Pescatore (n 107), 29. See also Puissochet (n 117).
[137] Davies (n 42).
[138] J Lindeboom, D Kochenov, G T Davies, and F Amtenbrink, 'Steering the Good Ship Lollipop', in Amtenbrink et al. (n 51). Cf. JHH Weiler, 'Epilogue: Judging the Judges—Apology and Critique' in M Adams, J Meeusen, G Straetmans, and H de Waele, *Judging Europe's Judges: The Legitimacy of the Case Law of the European Court of Justice* (Oxford: Hart Publishing, 2013); Bartl, (n 57); M Bartl, 'Internal Market Rationality: In the Way of Re-imagining the Future' (2018) 24 *European Law Journal*, 99.
[139] Menéndez (n 2); Case C-370/12, *Thomas Pringle v Government of Ireland and Others* [2012] ECLI: EU: C:2012:756. Cf. G Beck, 'The Court of Justice, the *Bundesverfassungsgericht* and Legal Reasoning during the Euro Crisis: The Rule of Law as a Fair-Weather Phenomenon' (2014) *European Public Law*, 539; G Beck, 'The Legal Reasoning of the Court of Justice and the Euro Crisis—The Flexibility of the Court's Cumulative Approach and the *Pringle* Case' (2013) *Maastricht Journal of European and Comparative Law*, 635–48; P Craig, '*Pringle*: Legal Reasoning, Text, Purpose and Teleology' (2013) *Maastricht Journal of European and Comparative Law*, 3; P Craig, '*Pringle* and the Nature of Legal Reasoning' (2014) *Maastricht Journal of European and Comparative Law*, 205.
[140] Kochenov (n 49).

(ii) A dysfunctional or weak Member State being generally unable to implement EU law

The second challenge to European values comes from the inability of a Member State to enforce and implement binding law sufficiently to guarantee that EU law rights and remedies are available everywhere. Described as weak, fragile, or even failed, these Member States face structural difficulties in ensuring that the law will be effective in practice. Sometimes, economic malfunctions or lack of resources limit the capacity of states to function effectively. In theory, at least, the EU's structural and investment funds are designed to reduce these differences in resources so that this problem is minimized.[141] But 'weakness' in 'cross-sectoral ability to implement the law' might also result from widespread corruption.[142] In the EU context, the specificity of the EU legal order and high demands for transparency and accountability make corruption harder to pull off, though not impossible.[143] But the same factors that undermine a state's ability to implement its own national law will also undermine the implementation of EU law at a national level, and this is particularly true where a competent and sufficiently independent judiciary has been compromised[144] or where austerity measures have starved the Member State of its ability to maintain basic state functions. National neglect of the Rule of Law domestically, whether through a lack of resources or through corruption and malfunctioning institutions, will eventually also damage the implementation of EU law. This shades over into the third problem with enforcement of EU law at Member State level, where the undermining of the Rule of Law is deliberate. But this second strand of concern focuses on the inability rather than the unwillingness of Member States to meet their EU-law commitments.

For example, during the euro-crisis, Greece was considered a 'failing state',[145] not only according to EU institutions, but also in the case law of the European Court of Human Rights (ECtHR). The rulings of the ECtHR[146] concerning a lack of enforcement of domestic judgments and extensive length of judicial

[141] For a very critical analysis, see D Kukovec, 'Law and the Periphery', (2015) 21 *European Law Journal*, 406; D Kukovec, 'Taking Change Seriously: The Rhetoric of Justice and the Reproduction of the *Status Quo*' in Kochenov, de Búrca, and Williams (n 2).

[142] M Ioannidis, 'Weak Members and the Enforcement of EU Law' in: Jakab and Kochenov (n 1), 480, 485.

[143] Ioannidis recognized three such features: (1) the closer interdependence of EU polities, (2) the higher requirements set by EU law regarding the implementation of supranational norms, (3) dual legitimation basis of the EU: Ibid, at 481.

[144] Pech and Platon (n 11), 1827.

[145] K Featherstone, The Greek Sovereign Debt Crisis and EMU: A Failing State in a Skewed Regime (2011) 49 *Journal of Common Market* Studie,s 193.

[146] Judgment of the ECtHR of 21 December 2010, *Vassilios Athanasiou and Others v Greece* (application no. 50973/08); Judgment of the ECtHR of 3 April 2012, *Michelioudakis v Greece* (application no. 54447/10); Judgment of the ECtHR of 30 October 2012, *Glykantzi v Greece* (application no. 40150/09).

proceedings demonstrated that the Rule of Law was endangered.[147] Moreover, when the migration crisis came hard on the heels of the euro-crisis, the Greek asylum system utterly failed because the state had been so starved of funds. Greece was then found by the ECtHR to have violated basic Convention obligations to prevent the cruel and inhuman treatment of the migrants.[148] Such a situation inevitably undermines the Rule of Law, since the adopted law is not enforced in practice and legal norms that cannot be effectively enforced contradicts the very essence of rule of law.[149] The Union's remedy has typically been to allocate European Structural and Investment Funds to such states, except when it imposes austerity measures on a Member State whose national debts threaten to discombobulate the Union. Because the EU institutions' measures themselves have sometimes exacerbated Member States' weaknesses, this problem has not been fully solved.[150]

(iii) A Member State deliberately attacking values, thus undermining the Union

The third problem has equally remained unsolved: the insufficient adherence of some Member States to the core principles of the Union, which can amount in some instances to direct attacks on values. Attempts to solve this problem are of fundamental importance, as they triggered the very inclusion of values in the Treaty text in the first place, thus giving previously unwritten principles a clear textual articulation in what is now Article 2 TEU.[151]

But despite the fact that values are now explicitly included in the Treaties, Member States are not thereby deterred from violating them. The two most egregious examples at the moment are Hungary and Poland. Prime Minister Viktor Orbán's rise to power in Hungary after 2010 was accompanied by a rapid and direct assault on all independent institutions, from the Constitutional Court, to the election commission, media council, audit office, procuracy, ombuds offices, central bank and, perhaps most centrally, the judiciary.[152] While the European Commission brought a few infringement actions to deal with the most egregious matters that fell very clearly into a narrow reading of the scope of EU law, as we will detail below, and the ECJ agreed with the Commission's charges, the remedies were too weak and narrow to change facts on the ground. When the PiS party came to power in Poland in 2015 by winning first the presidency and then

[147] Ioannidis (n 142), 486. On the enforcement of ECtHR judgments in a broader context, see, É Lambert Abdelgawad, 'The Enforcement of ECtHR Judgments' in Jakab and Kochenov (n 1).
[148] *M.S.S. v Belgium and Greece* (App. no. 30696/09) ECHR Grand Chamber 21 January 2011.
[149] C-441/17, *Commission v Poland (Białowieża Forest case)* [2017], ECLI: EU: C:2017:877.
[150] Eg Menéndez (n 2).
[151] Kochenov, *EU Enlargement and the Failure of Conditionality* (n 115), chs 1 and 2.
[152] M. Bánkuti, G. Halmai, and KL Scheppele, 'Hungary's Illiberal Turn: Dismantling the Constitution' (2012) 21 *Journal of Democracy*, 138.

both houses of the Parliament, it followed suit with relentless attacks on the judiciary and more.[153] As of this writing, the assault on independent institutions continues as the Commission's will to bring infringement actions to stop the damage wanes. But to see why this third source of threat to the Union has gone unsolved, it helps to see how and why values were first made explicit in the Treaties.

C. The insertion of values in the treaties and mechanisms for their enforcement

The beginning of the 1990s marked the time when the hitherto unwritten principles of enlargement law—the basic values the candidate countries were supposed to adhere to—came to be distilled in writing.[154]

Following the decision taken at the European Council in Copenhagen in 1993 to enlarge to the East, the European Union for the first time formulated formal standards for entry to the Union, called the Copenhagen Criteria.[155] These standards for candidate countries included adherence to the *acquis* coupled with the ability for their economies to cope with the competitive pressure within the internal market, as well as—crucially for our purposes—the 'political criteria': democracy, the Rule of Law, protection of human rights, and respect for and protection of minorities.

Having a 'political criteria' block of standards sent two messages. First, European values are crucially important and have to be observed by all the newcomers. Secondly, European values are simply *not* part of the *acquis* as such, because otherwise the political block—next to the requirement to take on-board the *acquis*—would simply be redundant. A clear picture thus emerged of the Union legal system as it operated before the mass accession, in which the key principles and values were unwritten and did not necessarily make part of the *koiné* of binding law (the *acquis*) strictly speaking. This fundamental distinction between the *acquis* and values is at the core of the problem of Rule of Law and democratic backsliding in the EU. To put it another way: full compliance with the EU's *acquis* before the incorporation of what is now Article 2 TEU into the Treaties did not *per se* guarantee that the Member State in question remained a democratic state respecting the Rule of Law.[156] What had been seen as 'natural'

[153] Kovacs and Scheppele (n 14).
[154] Inglis (n 124).
[155] The criteria read as follows: Membership requires that the candidate country has achieved stability of institutions guaranteeing democracy, the rule of law, human rights, and respect for and protection of minorities, the existence of a functioning market economy as well as the capacity to cope with competitive pressure and market forces within the Union. Membership presupposes the candidate's ability to take on the obligations of membership including adherence to the aims of political, economic, and monetary union. Cf C Hillion, 'The Copenhagen Criteria and Their Progeny' in C Hillion (ed.) (n 115); Kochenov (n 121).
[156] Kochenov (n 1), 419.

limitations of the EU's legal enforceability to matters covered by the *acquis* is precisely what needs to be overcome when we speak of values-enforcement in the EU today.[157]

The general wording of the political criteria, coupled with the *de facto* elimination of any *ratione materiae* constraints on the set of issues the EU could examine in the context of the required pre-accession adaptation of the candidate countries' constitutional structure and operation,[158] resulted in a reinterpretation of the Treaties then in force to produce a *legal* requirement of values compliance for entry to the Union.[159] Even more importantly, the establishment of these criteria produced a whole cottage industry within the European Commission, which ultimately released thousands of pages of reports assessing the entire corpus of law and practice in the candidate countries to ensure that they complied with EU demands.[160] This corpus of assessments allowed the Commission to formulate the essential components of the values which were then made binding on the candidate countries.[161] From these documents, we learn that candidate countries had to adhere not only to democracy, the Rule of Law, and human rights protection on the books, so to speak, but also had to demonstrate that each of these elements was carried out in practice.[162] The accession inspections went well beyond the *acquis*, strictly interpreted, into the constitutional identity of the accession state as such.

Although the Commission's engagement never produced a sharp set of general and clear rules that would govern the EU's pre-accession engagement with democracy and the Rule of Law, rules that would then apply within the EU's own internal legal order, and even though the accession assessments were marked by inconsistent, self-contradictory, oblivious, and inconsequential application of the Commission's own newly created rules,[163] the values became a definite part of the *lingua franca* of EU law and entered the Treaties as such. Indeed, the core effect of the Eastern Enlargement for the constitutional essence of the Union was precisely that values went from being assumed and implicit to being explicit and binding.[164]

[157] Kochenov (n 4).
[158] Kochenov (n 115).
[159] K Inglis, 'The Europe Agreements Compared in the Light of Their Pre-Accession Reorientation' (2000) 37 *CML Rev.*
[160] For analyses, see, Maresceau (n 124); Kochenov (n 121).
[161] Kochenov (n 121). This clarity did not translate, however, into a crisp approach to the same values in EU's external relations: L Pech, 'Promoting the Rule of Law Abroad: On the EU's Limited Contribution to the Shaping of an International Understanding of the Rule of Law' in Kochenov and Amtenbrink (n 3), 108; E Herlin-Karnell, 'EU Values and the Shaping of the Global Context' in Kochenov and Amtenbrink (n 3), 89.
[162] Kochenov (n 115).
[163] Ibid. For the most recent reassessment, see R Janse, 'Is the European Commission a Credible Guardian of the Values? A Revisionist Account of the Copenhagen Political Criteria during the Big Bang Enlargement' (2019) 17 *International Journal of Constitutional Law*, 43.
[164] W Sadurski, *Poland's Constitutional Breakdown* (n 14), 199–201; Sadurski (n 69).

Even though the values of democracy and the rule of law entered European constitutional law in the Treaties, however, their formal position within the corpus of the ordinary *acquis* remained uncertain, despite numerous attempts in the legal literature to elevate their legal status to binding law.[165] With the ECJ's recent recognition of the principle of the judicial independence as one positive face of the rule of law, some Article 2 TEU values are now starting to emerge as hard legal constraints of their own. This development only started in earnest in 2018, however.[166] The routine monitoring put in place to ensure that candidate countries' complied with values disappeared as soon as those countries became Member States,[167] with the only exception being the Cooperation and Verification Mechanism (CVM) of post-accession monitoring put in place for Romania and Bulgaria only and not to the rest of the 'new' Member States.[168] As a result, the morning when the other candidate countries woke up as Member States, the majority of the pre-accession constraints on how they should shape their statehood from the civil service law[169] to the training[170] and appointment rules for the judiciary,[171] and even the number of readings particular bills should receive in Parliament[172] were gone, together, apparently, with the EU's obvious ability to intervene should serious backsliding occur with regard to democracy, fundamental rights, or the Rule of Law. This dramatic transformation in values enforcement as accession states became new Member States was entirely predictable and awaited. Article 7 TEU was the key mechanism inserted into the Treaties with the purpose of enforcing EU values.

The need to come up with effective means to deal with backsliding Member States was not immediately obvious, but it became more visible as Member States started to wobble in their commitments to basic values—and the wobbling was not confined to the new Member States.[173] As some of the new Member

[165] For a detailed analysis, see Hillion (n 104).
[166] Case C-64/16 *Associação Sindical dos Juízes Portugueses* [2018], ECLI: EU: C:2018:117; Case C-619/18 *Commission v Poland* [2019] ECLI: EU: C:2019:531; Pech and Kochenov (n 13).
[167] Cf eg MA Vachudova, *Europe Undivided: Democracy, Leverage, and Integration after Communism* (Oxford: Oxford University Press, 2006).
[168] MA Vachudova and A Spendzharova, The EU's Cooperation and Verification Mechanism: Fighting Corruption in Bulgaria and Romania after EU Accession, *SIEPS European Policy Analysis* March 2012; C Lacatus and U Sedelmeier, 'Does monitoring without enforcement make a difference? The European Union and anti-corruption policies in Bulgaria and Romania after accession' (2020) 27 *Journal of European Public Policy*, 1236; R Carp, 'The Struggle for the Rule of Law in Romania as an EU Member State: The Role of the Cooperation and Verification Mechanism' (2014) 10 *Utrecht Law Review*, 1; R Vasileva: 'CVM Here, CVM There: The European Commission in Bulgaria's Legal Wonderland' *VerfBlog*, 16 June 2019, <https://verfassungsblog.de/cvm-here-cvm-there-the-european-commission-in-bulgarias-legal-wonderland>.
[169] For a detailed assessment, see, Kochenov (n 115).
[170] Ibid.
[171] Ibid.
[172] Ibid.
[173] F Hoffmeister, Enforcing the EU Charter in Member States' in von Bogdandy and Sonnevend (n 1).

States not only wobbled but fell out of compliance, the problem grew urgent. The standing presumption, that the values of Article 2 TEU were not part of ordinary *acquis* but only political desiderata, remained popular,[174] along with the view that the primary instrument available for dealing with the problem was the political remedy of Article 7 TEU. Given that Article 7 TEU can be invoked for non-compliance with basic values, not limited to *acquis* violations,[175] it seemed the most straightforward way to enforce the values of Article 2 TEU.

Much has been written about Article 7 TEU and its defects.[176] The instrument is oblivious to the core assumptions underlying the internal market. If mutual interpenetrations of economies make any military conflict too costly to pursue, the same surely applies to economic warfare of any kind. So by sanctioning Poland, Germany, the Netherlands, and Denmark will essentially be sanctioning their own enterprises, which makes political triggering of the procedure close to impossible for the European leaders to sell to the voters at home.[177] At a more technical level, Article 7 TEU is excessively difficult to trigger under any circumstances and widely assumed to be impossible to carry through to sanctions when the number of problematic states in the EU is greater than one.[178] In addition, its purely political nature, given the blocking role of the Council for Article 7(1) and the European Council for Article 7(2) as well as the near-complete exclusion of the ECJ from the process,[179] undermines the practical *legal* significance of the Article 2 TEU values.[180] Lastly, one would be hard-pressed to come up with a usable list of sanctions to impose under Article 7 on a backsliding Member State, which would actually result in a reversal of the course of a government aiming at the destruction of the liberal democracy. To put it in other words: regime change is an extremely costly affair and whether Article 7 is able to accomplish that is an open question, which comes hand in hand with the question of how much such 'top-down' change would actually be effective. These issues arise with regard to any legal course of action in an attempt to prevent further democratic and Rule of Law backsliding.[181]

At first, the sense that Article 7 TEU was the sole remedy for violations of the values in Article 2 TEU was so widespread that the Commission actually

[174] See, Mader (n 1), 136–8.
[175] Kochenov (n 29), 88–98.
[176] See, above, n 30.
[177] Kochenov (n 31).
[178] *Effet utile*-friendly reading of the provision would make overcoming this obstacle easy, however: Ibid; Kochenov (n 29); KL Scheppele, 'Can Poland be Sanctioned by the EU? Not Unless Hungary is Sanctioned Too' *VerfBlog*, 24 October 2016 <https://verfassungsblog.de/can-poland-be-sanctioned-by-the-eu-not-unless-hungary-is-sanctioned-too/>.
[179] On the fact that this exclusion is not complete, see Kochenov (n 19), 145.
[180] C Closa and D Kochenov, 'Reinforcement of the Rule of Law Oversight in the European Union: Key Options' in Schröder (n 1) 173, 179.
[181] Blokker (n 105). Cf. Adamski (n 13); T Theuns, 'Containing Populism at the Cost of Democracy? Political vs. Economic Responses to Democratic Backsliding in the EU' (2020) 12 *Global Justice*, 141.

inaugurated a 'pre-Article 7 Procedure'[182] when it became clear that triggering Article 7 required fact-finding and assessment, which the Treaties did not anticipate. The initial shy optimism resulting from the creation of a 'formal and structured procedure' which potentially 'should enjoy greater legitimacy than informal practice'[183] eventually had to face the fact that dialogue with a Member State not willing to participate sincerely in such a discussion was unlikely to produce the desired effect. That the Commission's new instrument proved to be ineffective is now a well-known secret,[184] which does not deter the Commission from insisting on its continued inclusion in the palette of tools to help solve the on-going Rule of Law problems.[185]

The Commission's 2019 Blueprint for Action,[186] like the 2014 Rule of Law Framework before it, seems to be designed for 'normal' times when slowing down a critical process made a friendly settlement possible or when having useful metrics for comparisons across Member States would allow the Commission to better plan for the future. The new plan included, among other things, an annual assessment of every Member State's compliance with the Rule of Law modelled on the process the Commission uses for assessing whether Member States have met European Semester requirements. With this new plan, however, the Commission seemed quite willing to act as if the first year of Rule of Law assessments was Year Zero in enforcing Article 2 values, erasing the previous years of bad behaviour of certain Member States. In this new framework, each Member State will be assessed *de novo* without any sense of urgency on a regular annual schedule. By not singling out the problematic states for urgent attention but instead requiring the same review of all Member States on a leisurely schedule, the procedure became more unwieldy and much more drawn out.[187]

[182] *Communication from the Commission to the European Parliament and the Council—A new EU Framework to strengthen the Rule of Law*, COM/2014/0158 final; for a criticism: Kochenov and Pech (n 72), 512.
[183] U Sedelmeier, 'Political Safeguards against Democratic Backsliding in the EU: The Limits of Material Sanctions and the Scope of Social Pressure, (2017) *Journal of European Public Policy*, 337, 346.
[184] Kochenov and Pech (n 72).
[185] Most recently this happened in the Commission's summer 2019 '*Blueprint for Action*' though a proposal currently working its way through the Parliament would drop the Commission's rule of law mechanism in favour of an investigatory mechanism run jointly by the Commission, Council, and Parliament. See: European Parliament resolution of 25 October 2016 with recommendations to the Commission on the establishment of an EU mechanism on democracy, the rule of law, and fundamental rights (2015/2254(INL)) and European Parliament resolution of 14 November 2018 on the need for a comprehensive EU mechanism for the protection of democracy, the rule of law, and fundamental rights (2018/2886(RSP)).
[186] European Commission, 'Strengthening the Rule of Law within the European Union: A Blueprint for Action. Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions' COM(2019) 343 final.
[187] Kochenov (n 72); Grabowska-Moroz and Kochenov (n 72).

D. How the obvious mechanisms for enforcing values have failed

The Commission seems not to have learned from experience that delaying action when the rule-of-law house is on fire does not bode well for the house. In the most serious cases where a values-rejecting Member State is committed to a political programme to dismantle constitutional constraints, all delays play to the strengths of a national government seeking to undermine the Rule of Law. Any pre-Article 7 procedure simply puts off the moment when Article 7 TEU mechanisms are invoked and the delay makes the problem to be solved bigger precisely because the values-rejecting Member State has more of an opportunity to entrench itself in power and capture all of the institutions through which change inside that Member State might be leveraged.[188] Activation of the pre-Article 7 procedure against Poland in January 2016[189] did not prevent ongoing constitutional destruction because, precisely during the period in which Poland was being actively reviewed, the government simply speeded up political capture of the Constitutional Tribunal and then went on to politically capture the public media,[190] civil service,[191] prosecutor's office,[192] ordinary courts,[193] and finally the Supreme Court.[194] The Commission objected in the course of its dialogue with Poland, but dialogue alone—which is, after all, the

[188] Pech and Scheppele (n 1), 6–7; Kochenov (n 31); Pech and Kochenov (n 68).
[189] Reasoned Proposal in accordance with Article 7(1) of the Treaty on European Union regarding the rule of law in Poland—Proposal for a Council Decision on the determination of a clear risk of a serious breach by the Republic of Poland of the rule of law, Brussels, 20 December 2017, COM(2017) 835 final; Sadurski (n 14), 202.
[190] A Chapman, 'Pluralism under Attack: The Assault on Press Freedom in Poland', Freedom House, June 2017 at: <https://freedomhouse.org/sites/default/files/2020-02/FH_Poland_Media_Report_Final_2017.pdf>; Polish president signs bill putting state media under government control, *Guardian* 7 January 2016 at: <https://www.theguardian.com/world/2016/jan/07/poland-president-signs-bill-putting-state-media-under-government-control>; D Głowacka and A Ploszka, 'Mała ustawa medialna w perspektywie standardów ochrony wolności słowa' (2016) 17 *Kwartalnik o Prawach Człowieka*, 21; M Wnuk, 'Media publiczne—obywatelskie czy narodowe? Najnowszy dyskurs parlamentarny o mediach w kontekście zmian w ustawie o radiofonii i telewizji' (2016) 66(3) *Studia Medioznawcze*, 77.
[191] Briefing on the Polish Civil Service Act: Risk of politicization in Polish civil service (Frank Bold Foundation 2016) at: <https://en.frankbold.org/sites/default/files/tema/briefing-risk_of_politicization_in_polish_civil_service-2016-03-24.pdf>; S Samol, 'Zmiana modelu służby cywilnej po nowelizacji ustawy o służbie cywilnej' (2016) *Ruch Prawniczy, Ekonomiczny i Socjologiczny*, 71; A Banaszkiewicz, 'Nowelizacja ustawy o służbie cywilnej z dnia 30 grudnia 2015 r. w kontekście wymogu neutralności politycznej członków korpusu służby cywilnej' (2016) XXV(4) *Studia Iuridica Lublinesia*, 9.
[192] Venice Commission, Opinion on the Act on the Public Prosecutor's office, as amended, adopted by the Venice Commission at its 113th Plenary Session (Venice, 8–9 December 2017); M Szeroczyńska, 'Międzynarodowy standard statusu i organizacji prokuratury a najnowsze zmiany polskiego porządku prawnego' (2017) XXI (2) *Czasopismo Prawa Karnego i Nauk Penalnych*, 109.
[193] Report of the Special Rapporteur on the independence of judges and lawyers on his mission to Poland (A/HRC/38/38/Add.1), April 2018.
[194] L Pech and P Wachowiec, '1095 Days Later: From Bad to Worse Regarding the Rule of Law in Poland (Part I)' *VerfBlog*, 13 January 2019, <https://verfassungsblog.de/1095-days-later-from-bad-to-worse-regarding-the-rule-of-law-in-poland-part-i>.

only mechanism in play at this stage—did not prevent continuing and severe damage being wrought on Polish institutions. The Polish case, like the Hungarian case before it, confirmed that timing is absolutely crucial when a Member State is determined to undermine the Rule of Law.[195] Furthermore, the Rule of Law Framework did not guarantee enough transparency in this 'constructive dialogue' between the Commission and Polish government to allow outsiders—including the European Parliament, the national opposition, or NGOs—to intervene or even alert the public to the problems. That said, the Commission's Rule of Law Framework did make the Rule of Law issues in Poland visible in the EU each time the Commission issued another formal (and public) warning to the country. This provided at least a little more information than had emerged from the parallel 'dialogue' process that had taken place in the Council,[196] but that is a very low standard.

The unwillingness of the Polish authorities to discuss Rule of Law issues with the Commission eventually led the Commission to a historic decision to initiate an Article 7(1) TEU procedure for the first time.[197] But the reasoned opinion that the Commission sent to the Council for its action was only sent almost two years after the rule of law 'dialogue' with the Polish government was initiated. The delay meant that the cumulative damage to the Rule of Law was extensive by the time that the Commission finally acted.[198] Even when it did act, the Commission only invoked Article 7(1) which 'warns' that a breach of EU values may be occurring when, by the time of the reasoned opinion, Poland had long since actually breached those values by capturing the Constitutional Tribunal and bringing parts of the ordinary judiciary to political heel. The subsequent futile Council meetings on the Rule of Law in Poland that were conducted in 2018 to determine whether the Council would confirm the Commission's opinion mostly confirmed the criticism of the Article 7 mechanism and its dialogical approach to rule of law backsliding. Perfectly illustrating the flaws of Article 7 design, which ignores the very underlying logic of the EU and the internal market, the Member

[195] L Pech and S Platon, 'Systemic Threats to the Rule of Law in Poland: Between Action and Procrastination' *Robert Schuman Foundation Policy Paper* 13 November 2017, 11; D Kochenov, The Commission vs Poland: The Sovereign State Is Winning 1-0, VerfBlog, 25 January 2016 at <https://verfassungsblog.de/the-commission-vs-poland-the-sovereign-state-is-winning-1-0/>.

[196] P Olivier and J Stefanelli, 'Strengthening the Rule of Law in the EU: The Council's Inaction' (2016) *Journal of Common Market Studies*, 1075; I Butler, 'The Rule of Law Dialogue: Five Ideas for Future EU Presidencies' *Liberties*, December 2015, <https://www.liberties.eu/en/news/five-ideas-for-eu-rule-of-law/6553>. Cf. E Hirsh Ballin, 'Mutual Trust: The Virtue of Reciprocity—Strengthening the Acceptance of the Rule of Law through Peer Review', in Closa and Kochenov (n 1), 133.

[197] Laurent Pech and Sébastien Platon rightly argued that it should have been initiated in November 2016 when 'it became clear that the Polish authorities were waiting for the departure of the President of the Constitutional Court in order to take over control over it': Pech and Platon (n 195), 10.

[198] Proposal for a Council decision on the determination of a clear risk of a serious breach by the Republic of Poland of the rule of law Brussels, 20 December 2017, COM(2017) 835 final, 2017/0360 (APP).

States acting in the General Affairs Council could not bring themselves to criticize one of their number, even though Article 7(1) is merely a warning with no actual sanctions attached.[199] Nearly three years after the Commission's reasoned opinion, the Council has still not decisively acted. In any case, given that the destruction of the Polish constitutional system is by now a fact, as Wojciech Sadurski has most meticulously documented,[200] proceeding with Article 7(1) TEU rather that 7(2) and (3) TEU is the dramatic invocation of the wrong legal basis. There are no threats of violation of EU values in Poland any more. Values are violated, full stop.

The same, unfortunately, applies to Hungary, but the EU got to its Hungarian impasse in a slightly different way than in the Polish story above. The activation of an Article 7 procedure against Hungary[201] in September 2018 was not the work of the Commission but was instead triggered by the European Parliament which then passed its work on to the Council. But being under review at the Council did not deter the Hungarian authorities from adopting a new law on administrative courts in December 2018 furthering endangering the judicial independence that the Article 7(1) procedure warned about.[202] Although that law was later retracted for other reasons, the Hungarian government has to this day never stopped putting the judiciary under political pressure,[203] later instituting a procedure through which any government official could take any decision by an ordinary court directly to the politically captured Constitutional Court to overturn that decision.[204] The scope of the Rule of Law infringements undertaken by Hungarian authorities is truly breath-taking, including not only attacks on judicial independence, but also open corruption in public procurement, assaults on academic freedom, destruction of the rights of the political opposition, failure to protect asylum seekers, pressures on civil society, infringements on the rights of data privacy, and the curtailment of media freedom. All of these things continued to occur in plain sight even while ordinary infringement actions launched by the Commission and the Article 7(1) procedure launched by the Parliament were pending before the ECJ and Council respectively.

[199] Kochenov and Pech (n 35); P Bárd, 'Scrutiny over the Rule of Law in the European Union' (2016) *Polish Yearbook of International Law*, 199.
[200] Sadurski (n 69).
[201] European Parliament resolution of 12 September 2018 on a proposal calling on the Council to determine, pursuant to Article 7(1) of the Treaty on European Union, the existence of a clear risk of a serious breach by Hungary of the values on which the Union is founded (2017/2131(INL)).
[202] R Uitz, 'An Advanced Course in Court Packing: Hungary's New Law on Administrative Courts', *VerfBlog*, 2019/1/02, <https://verfassungsblog.de/an-advanced-course-in-court-packing-hungarys-new-law-on-administrative-courts/>.
[203] Kovács and Scheppele (n 14); Hungarian Helsinki Committee, 'New Law Threatens Judicial Independence in Hungary—Again' January 2020 <https://www.helsinki.hu/wp-content/uploads/HHC_Act_CXXVII_of_2019_on_judiciary_analysis_2020Jan.pdf>.
[204] 'Judicial Independence (Still) Under Threat in Hungary' FIDH 12 June 2019 <https://www.fidh.org/en/region/europe-central-asia/hungary/judicial-independence-still-under-threat-in-hungary>.

In the cases of both Hungary and Poland, activation of Article 7 was perceived as an unavoidable step in order to 'demonstrate that the values of Article 2 are more than empty proclamations'.[205] However both Article 7 procedures were initiated with great delays—after two years of meaningless 'dialogue' in case of Poland and only in year eight of ongoing constitutional destruction in Hungary. In the only two cases in which Article 7 has ever been invoked, then, it is hard to find a reason for optimism that Article 7 can ever become an instrument bringing lasting constitutional change.[206] Furthermore, the fact that the Rule of Law Framework was never initiated by the Commission with regard to Hungary has fuelled the criticism that Member States are not treated equally.[207] Even the firm statement of the Commission's president that Article 7 'must be applied whenever the rule of law is threatened'[208] has not changed the situation. The lack of sanctions for any of the severe attacks on the Rule of Law over more than a decade now in the case of Hungary and more than five years in the case of Poland[209] led to a 'victory' statement by the Polish Foreign Minister Czaputowicz, that the Article 7 procedure is dead.[210]

The need for an instrument that is more effective than Article 7 is thus pressing and clear. It has proved impossible to generate even a warning that a breach of values may occur, let alone a finding that values have definitely been breached. The cases of Hungary and Poland have revealed that the obstacles to triggering Article 7 are sufficiently political and complicated that the procedure can functionally never be used. All potential sanctions under Article 7 have died at the Council. That has even been true when the only procedures put onto the table were Article 7(1) procedures which are not even a necessary step on the way to the sanctioning of a Member State, since the deployment of Article 7 can commence with Article 7(2).[211] The fact that even the four-fifths majority in the Council for passing Article 7(1) cannot be reached in these egregious cases also indicates that Treaty change, which would require unanimous agreement of the Member States, including the violators of the Rule of Law, is impossible, too.

[205] Kochenov (n 31); W Sadurski, 'That Other Anniversary' (2017) 13 *European Constitutional Law Review*, 417, 422.
[206] Bugarič (n 29).
[207] Bárd (n 199), 201; G Gotev, 'Tavares: Discussing rule of law in Poland separately from Hungary will lead "nowhere"', *Euractiv*, 13 January 2016, at: <http://www.euractiv.com/sections/justice-home-affairs/tavares-discussing-rule-law-poland-separately-hungary-will-lead>; Scheppele, Can Poland be Sanctioned by the EU? (n 178).
[208] 'State of the Union 2018, The Hour of European Sovereignty' at: <https://ec.europa.eu/commission/sites/beta-political/files/soteu2018-speech_en_0.pdf>.
[209] Sedelmeier (n 183).
[210] In December 2018 the Polish Minister of Foreign Affairs stated during TV interview that 'Article 7 is dead'. He added: 'Article 7 was to punish Poland. The commission lost, there is not enough majority. We've succeeded'.—"*Artykuł 7 jest martwy; Komisja Europejska przegrała*" <http://www.polsatnews.pl/wiadomosc/2018-12-11/czaputowicz-kosiniak-kamysz-goscmi-wydarzen-i-opinii-transmisja/>. One could agree and go one step further: it is not only dead, but was also still-born for the reasons outlined above. Cf. Kochenov (n 31).
[211] Eg Besselink (n 29).

If Article 7 TEU is broken, what could be a more effective strategy for coping with a violation of EU values? We suggest that the existing triad of Treaty provisions, from 258 to 260 TFEU, the classical infringement procedure, should be mobilized to address this problem. Rule of Law backsliding is not only a political matter as envisioned in Article 7 TEU, but it is also a legal issue because it directly affects the application of EU law in Member States. Furthermore, the capture of independent institutions in any Member States sooner or later will affect not only EU citizens in the backsliding Member State, but also all EU citizens from other Member States.[212]

Rule of Law backsliding, especially when it also harms both fundamental rights and democratic principles, impacts core European values. Adherence to those values is necessary to guarantee that the national institutions can ensure that EU law is applied and enforced equally across the Union. Therefore, the fundamental values in Article 2 TEU, particularly but not exclusively the Rule of Law, must be monitored by the Court of Justice in the context of Member States' Treaty obligations. The fact that there is a political process in Article 7 for addressing Rule of Law violations does not preclude judicial review in this matter. Infringement proceedings—in either the traditional (Article 258 TFEU) or intergovernmental (Article 259 TFEU) version—provide mechanisms for bringing systemic Rule of Law backsliding to the Court, which has the obligation of ensuring—as a matter of law—that the enforcement of EU law by Member States is not hampered by a lack of compliance with EU fundamental values.

III. Strengths and weaknesses of the ordinary infringement procedure

Given that Article 7 TEU is not working effectively to curb values violations and that inventing new mechanisms through Treaty change is effectively impossible, what can be done? We believe that the infringement action can be retooled as an effective instrument to address values backsliding.

Infringement actions under Article 258 TFEU are typically initiated by the Commission to challenge a specific and concrete violation of EU law by a Member State. They carry the assumption that these violations occur in a Member State that is otherwise generally compliant.[213] The general presumption of compliance applies to the domain of the material scope of the *acquis* as much as it does to the domain of the values of the Union reflected in Article 2 TEU. But what if the conduct of a Member State *persistently* undermines the

[212] M Ovadek, 'The Rule of Law in the EU: Many Ways Forward but Only One Way to Stand Still?' (2018) 40 *Journal of European Integration*, 497–8.

[213] This assumption is reinforced by the principle of sincere cooperation in Article 4(3) TEU. A Fuerea, 'Brief Considerations on the Principles Specific to the Implementation of the European Union Law' (2014) 21 *Lex ET Scientia International Journal*, 49.

enforcement of EU law within its jurisdiction, raising questions about its duty of loyalty under Article 4(3) TEU?[214] What if a Member State *generally* refuses to honour EU values in Article 2 TEU,[215] including basic EU principles of democracy, Rule of Law, and protection of human rights?

A. The limitations of ordinary infringement actions: the case of Hungary

Ordinary infringement actions are often too narrow to address the structural problems that persistently noncompliant states pose. Worse still, the core values of the EU, generally viewed as outside the scope of the *acquis sensu stricto*,[216] as we have seen from all the Copenhagen political criteria story, are usually not caught within the ambit of the classical infringement procedures that are specifically tailored to spotlight a particular single infringement. To take one example, consider the infringement action that the Commission brought against Hungary when it suddenly lowered the judicial retirement age and removed from office the most senior 10 per cent of the judiciary.[217] Lowering the retirement age permitted the Hungarian government to replace many judicial leaders with judges more to their liking, threatening the independence of the judiciary. National judiciaries are not only responsible for enforcing national law, but of course they are also the frontline enforcers of EU law. That said, the Commission did not recognize this larger issue of EU law enforcement and the threat to the essentials of the EU legal order, concentrating instead on the narrower violation of the *acquis*, age discrimination.[218] The Commission won a legal victory at the ECJ, but in the end, from the point of view of Article 2 TEU and the idea of strict compliance with the Rule of Law, the victory achieved nothing.[219] This is when the on-going problem of losing through winning started emerging.

[214] M Klamert, *The Duty of Loyalty in EU Law* (Oxford: Oxford University Press, 2014); A Hatje, *Loyalität als Rechtsprinzip in der Europäischen Union* (Baden-Baden: Nomos, 2001).
[215] V Perju, 'Proportionality and Freedom—an Essay on Method in Constitutional Law' (2012) *Global Constitutionalism*, 1.
[216] Kochenov (n 4).
[217] For the facts giving rise to the case, see KL Scheppele, 'How to Evade the Constitution: The Constitutional Court's Decision on the Judicial Retirement Age' (Parts I and II), *Verfassungsblog*, 9 August 2012, at http://www.verfassungsblog.de/evade-constitution-case-hungarian-constitutional-courts-decision-judicial-retirement-age/.
[218] Case C-286/12 *Commission v Hungary* [2012] ECLI : EU : C:2012:687.
[219] Belavusau (n 65); T Gyulavári and N Hôs, 'Retirement of Hungarian Judges, Age Discrimination and Judicial Independence: A Tale of Two Courts' (2013) 42 *Indiana LJ*, 289; A Vincze, 'The ECJ as the Guardian of the Hungarian Constitution: Case C-286/12 *Commission v. Hungary*' (2013) 19 *European Public Law*, 489; KL Scheppele, 'Constitutional Coups and Judicial Review: How Transnational Institutions Can Strengthen Peak Courts at Times of Crisis (With Special Reference to Hungary)' (2014) 23 *Transnational Law & Contemporary Problems*, 51; G Halmái, 'The Early Retirement Age of Hungarian Judges', in F Nicola and B Davies (eds), *EU Law Stories: Contextual and Critical Histories of European Jurisprudence* (Cambridge: Cambridge University Press, 2017), 471.

While the Commission expedited the case and won at the ECJ, the Hungarian government was able to avoid restoring nearly all of the judges to their prior jobs, particularly those judges in the top positions which had, while the case was pending, already been filled.[220] Instead, the government offered the judges compensation, a reasonable remedy in a discrimination case.[221] At the same time, the Hungarian government modified the pension law so that no judge who returned to the bench could continue to receive a pension, as judges previously had when they worked beyond the general retirement age.[222] Unsurprisingly, many of the judges reportedly chose to take the compensation and collect their pensions, rather than return to new jobs in the judiciary, especially when those jobs were at

[220] After an amendment to the law on the judiciary in March 2013 permitting previously retired judges to return to work, the Hungarian government reported that 152 judges had been reinstated although only 21 returned to their original high court administrative positions. Fifty-six chose lump sum compensation, one reached age 70, which was the original retirement age, and another died. US Department of State, Bureau of Democracy, Human Rights and Labor, Country Reports on Human Rights Practices for 2014, Report on Hungary, at <http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm?year=2014&dlid=236532>. The Hungarian government's figures indicate that three-quarters of the judges were reinstated, which may have been why the European Commission eventually found that Hungary had complied with the judgment of the ECJ, but these official statistics do not square with other sources of information about the fate of the judges. First, a number of judges seem to be missing from this report. The government's numbers only cover 210 judges, when the Venice Commission estimated that the number might have been as high as 270. Venice Commission, *Opinion on Act CLXII of 2011 on the Legal Status and Remuneration of Judges and Act CLXI of 2011 on the Organisation and Administration of Courts of Hungary*, adopted by the Venice Commission at its 90th Plenary Session (Venice, 16–17 March 2012), CDL-AD(2012)001-e, 27, at <http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD%282012%29001-e>. The International Bar Association thought the number was larger than 270. International Bar Association, *Courting Controversy: the Impact of the Recent Reforms on the Independence of the Judiciary and the Rule of Law in Hungary* 35 (September 2012), at <http://www.ibanet.org/Document/Default.aspx?DocumentUid=89D4991A-D61F-498A-BD21-0BAFFA6ABF17>. The Hungarian government's figures therefore do not seem to account for almost one quarter of the judges who were probably affected by the policy. The official statistics on the number of judges who returned to their jobs also contrasts sharply with detailed reports about the reinstatement of judges on particular courts, particularly the most important general court in Budapest, the Metropolitan Court. Gergely Mikó, court president, said that 14 of the 70 judges on his court were forced to retire by the change in the retirement age but only one was reinstated. 'Efficiency of criminal procedures increased, Metropolitan Court leader says', MTI (Hungarian News Agency), 21 July 2013, at <http://www.politics.hu/20130721/efficiency-of-criminal-procedures-increased-metropolitan-court-leader-says/>. So, in that particular key court the reinstatement rate was only 7% instead of the 72% the government claimed overall. For these reasons, it is possible to doubt the reliability of the numbers provided by the Hungarian government.

[221] European law requires that Member States ensure that people who experience discrimination have 'real and effective judicial protection', which has generally been interpreted to require individualized remedies rather than collective solutions. E Ellis and P Watson, *EU Anti-Discrimination Law* (2nd edn, Oxford: Oxford University Press,, 2013), 246–54 and 301–15; Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the Implementation of the Principle of Equal Opportunities and Equal Treatment of Men and Women in Matters of Employment and Occupation Art. 4, OJ 2006 No. L204/23, Art. 18 (requiring that states ensure that individual remedies for sex discrimination be 'dissuasive and proportionate to the damage suffered').

[222] G Halmai, 'The Early Retirement Age of the Hungarian Judges' in Nicola and Davies (n 219), 471–88.

lower levels of seniority and lower levels of pay, since the top jobs had already gone to others.

In the absence of judges clamouring to get their jobs back, the Commission declared a victory and certified that the Hungarian government had complied with the ECJ decision,[223] even though the government had nonetheless been able to engage in a major reshuffle of Hungary's judicial leadership to make it friendlier to the government. The Commission's conventional infringement action had been successful in legal terms, but it changed absolutely nothing in the troubling situation on the ground. This Pyrrhic victory did not lead to any improvement in the domain of the Rule of Law and judicial independence,[224] because it is hard to design remedies that address compliance with Article 2 TEU while pursuing narrowly tailored *acquis* violations taken out of the broader context. By framing serious challenges to the rule of law as a typical violation of secondary EU law, the gravity of the infringement of the basic EU values was not signalled in the infringement action. As a result, when the Commission won the case, the enforcement of the decision led to limited compliance with the principles that were never flagged as crucial to the matter in the first place.[225] Blauberger and Kelemen compared the Commission's focus on narrow technical violations in the Hungarian judges case with the US federal government's prosecution of mobster Al Capone for tax evasion, when Capone was notorious for having murdered many rival gang members.[226] But the analogy only works in part; Al Capone actually went to jail on the tax evasion charges so he could not murder again, but in the case of Hungarian judges the remedy did not fix any aspect of the problem, which was judicial independence. In the end, Orbán got the judges he wanted.

B. The Court's and Commission's learning curves: the case of Poland

After having failed to stem the attacks on judicial independence in Hungary, the Commission learned from its mistakes when the issue next arose in the case of Poland. The Polish *Independence of the Supreme Court* case,[227] decided on identical facts, but approached through the lens of Article 19(1) TEU is a radically

[223] European Commission, Press Release, 'European Commission Closes Infringement Procedure on Forced Retirement of Hungarian Judges', 23 November 2013, at http://europa.eu/rapid/press-release_IP-13-1112_en.htm.

[224] Those proceedings were criticized as 'quite impotent' which does not make a reliable tool in rule of law disputes, especially combined with the inaction of other Member States—Talking about European Democracy, Editorial, (2017) 13 *European Constitutional Law Review*, 207, 217; Scheppele, (n 36); Belavusau (n 65). For a somewhat more positive assessment of the *Commission v Hungary* cases, see an analysis by a lawyer who serves at the Commission: Hoffmeister (n 173).

[225] A Batory, 'Defying the Commission: Creative compliance and respect for the rule of law in the EU' (2016) 94 *Public Administration*, 685, 696.

[226] Blauberger and Kelemen (n 105), 325–6.

[227] Case C-619/18 *Commission v Poland (Independece of the Supreme Court)*, ECLI: EU: C:2019:531.

different story: exemplifying the steep learning curve of the Commission's and the ECJ's management of the Rule of Law backsliding in Poland as opposed to their involvement with Hungary.[228] Here the Commission and the Court departed from the Hungarian strategy and tackled the issue of principle at the heart of the matter: adherence to the Rule of Law via honouring judicial independence and irremovability: the issues of 'cardinal importance'.[229]

The watershed moment between the Hungarian and the Polish cases was the *Portuguese Judges* judgment of the ECJ,[230] which opened the gate to an EU law-based enforcement of national judiciaries' adherence to judicial independence and irremovability using Article 19(1) TEU, in particular, as a trigger of jurisdiction to move this particular matter within the scope of EU law. Once a matter is within the scope of EU law, Article 47 CFR equally applies. In the *Independence of the Supreme Court* case, the Court clarified that Article 19(1) TEU could be applied independently, even while its content was clearly informed by Article 47 CFR. It is unquestionable, in this regard, that Article 19(1) TEU also has a wider scope of application than any provision of the Charter, since it is not limited by Article 51 CFR. No return to the *Commission v Hungary* fiasco occurred in this case, as Article 19(1) TEU has now been deployed in further cases of the Court on similar subject matter.[231] Furthermore, interim measures in these cases have allowed for the restoration of the *status quo* since stopping the judges from being fired blocked changes before the 'reform' began.[232] The enforcement of values was also enhanced in an upgraded approach to compliance. Indeed, the Grand Chamber in the *Independence of the Supreme Court* case held that the Polish 'reform' was continuing and would be 'likely' to cause *serious* and *irreparable* 'damage to the EU legal order' and in particular the 'rights which individuals derive from EU law and to the values, set out in Article 2 TEU . . . in particular the rule of law'.[233] The Court recognized that paying compensation directly to judges while they were nonetheless forced to leave their positions, as occurred with the Hungarian judges, simply allowed the government to destroy the independence of the judiciary. While formally the Court judgment would be obeyed, however, the government's actions continued to undermine EU law in principle: the Polish Supreme Court was not saved by the judgment in the *Independence of the Supreme Court* case, as we will explain below.

Controversial though the argument may have been only a few short years ago that Article 2 TEU values would be judicially enforceable, the ECJ now agrees with us that matters that may be the subject of an Article 7 procedure may also

[228] Kochenov and Bárd (n 10). For a very detailed analysis, see also Pech and Kochenov (n 13).
[229] Case C-619/18 Commission v Poland (Independence of Ordinary Courts)[2019] ECLI: EU: C:2019:924, para. 79.
[230] Pech and Platon (n 11).
[231] Case C-192/18 *Commission v Poland (Independence of Ordinary Courts)*[2019] ECLI: EU: C:2019:924.
[232] Case C-619/18 R *Commission v Poland* [2018] ECLI: EU: C:2018:1021.
[233] Ibid., paras 68 and 70.

be raised in infringement actions. AG Tanchev explicitly stated that starting infringement proceedings under Article 258 TFEU is not in any way pre-empted by a pending Article 7(1) TEU procedure concerned with the same or significantly similar issues.[234]

The progress made by the Commission and the Court between the Hungarian and Polish judicial independence cases boasting essentially identical facts but handled differently by both institutions is thus absolutely evident. The implications for EU law extend beyond the four corners of the Hungarian and Polish judicial independence cases. The keystone of this story is the inventive deployment of Article 19(1) TEU as interpreted by the Court in *Portuguese Judges*. But not all attacks on European values by Member States can be connected to Article 19(1) TEU. In fact, judicial irremovability, however important, is but one element in a complex structure of Article 2 TEU values. For *the totality* of EU values to be covered, Article 19(1) TEU is thus not enough: a much more inclusive approach is needed—and that is what we advocate.

C. Key drawbacks of the infringement procedures in the context of values enforcement

If a Member State threatens the basic values of the Treaties or casts doubt on the basic legal guarantees presumed by EU law, it is probably violating more than one precise part of EU law of the sort that the Commission tends to single out in an infringement action. Article 19(1) TEU is just one example in this regard. While we applaud the significant progress achieved between the two cases described above, we believe it is necessary to keep a bigger picture in mind, where the shift from technicalities of the *acquis* towards a broader perspective indispensable for upholding Article 2 TEU values has not yet happened beyond this one topic.

The Commission tends to pick its battles and bring only a tiny fraction of all infringements that it has the power to launch in the first place. And if it launches a handful of infringements, it almost always bargains many of them away without bringing them to the ECJ—and this without any public disclosure of what the concessions were on both sides. By targeting a particular practice for its most specific connection with EU law, the Commission ignores the fact that there is more to the EU constitutional system than the provisions of the *acquis sensu stricto*, especially when they are taken one by one. If the *acquis* is enforced only in the narrow technical terms in which it is written, while at the same time a Member State dismantles the institutional guarantees that ensure that the Member State is a democracy guaranteeing the Rule of Law and fundamental rights, then *acquis*

[234] AG Tanchev dealt with this issue explicitly: 'There are firm grounds for finding that Article 7 TEU and Article 258 TFEU are separate procedures and may be invoked at the same time': Opinion of AG Tanchev in Case C-619/18 *Commission v Poland (Independence of the Supreme Court)*, para. 50.

compliance becomes an empty shell. EU lawyers sensed this all too well as they prepared enlargements of the Union, as discussed above, and recent Article 19 TEU case law shows that the lesson has not been forgotten. It is, however, not enough in order to live up to the promise of Article 2 TEU.

All in all, it is possible to outline three core drawbacks inherent in the typical use of infringement actions in the context of enforceing the Rule of Law, democracy, and other Article 2 TEU principles:

1. Infringement actions are presently confined to direct violations of the *acquis*, violations that are usually symptoms of Rule of Law backsliding rather than the primary problem. As a result, even if the symptoms can be fixed, the disease may still worsen.
2. Time is of the essence in Rule of Law and democracy backsliding cases, so the slow speed of infringement actions can be a problem. While the infringement action is either in the dialogue stage or queuing at the Court of Justice, violations often continue and, in fact, they may become so much worse that they cannot be fixed with the remedies available. Even when cases are expedited, they can be decided too late to have any practical value after irreparable damage has been done.
3. Most crucially, a flurry of separate infringement actions presented to the ECJ makes it impossible for the ECJ to recognize and act on the pattern that the multiple infringements represent. Under its procedural rules, the ECJ cannot fix actions brought in the wrong posture to begin with and so an opportunity is lost.

The ECJ has started to address some of these drawbacks in the recent case law (eg, encouraging interim measures) but the ECJ must rely on the Commission to identify the proper scope and scale of the infringement action in the first place.

D. Missed opportunities: Failing to connect the dots

When it comes to dealing with backsliding states, the Commission has generally brought a number of separate infringement actions dealing with different aspects of the same large problem. With regard to Hungary, the Commission has brought to the ECJ alleged infringements of EU law with regard to the migration and asylum system,[235] higher education,[236] financing of non-governmental organizations,[237] and economic protectionism by the Hungarian government. In general, the Commission has followed the strategy adopted in the *Hungarian Judges* case. It highlights one issue at a time, does not expedite the case or ask for

[235] Case C-808/18, *Commission v Hungary* (*Asylum Procedures*) (pending).
[236] Case C-66/18, *Commission v Hungary (Lex CEU)* [2020].
[237] Case C-78/18, *Commission v Hungary* (*NGOs*) [2020] ECLI: EU: C:2020:476.

interim measures and fails to connect the dots to identify the pattern of government action that is undermining the central values at stake.

For example, in the case of so-called 'Lex CEU', which imposed additional requirements on foreign universities located in Hungary (in effect, singling out the Central European University (CEU)), the European Commission argued that the new law violated obligations arising from the General Agreement on Trade in Services (GATS), Directive 2006/123/EC on Services in the Internal Market,[238] and the Charter of Fundamental Rights.[239] The Central European University booked a decisive victory in the *Lex CEU* case. Yet, as so often, it was too late: the University had already moved to Vienna, obeying the challenged law by the time Hungary was condemned for violating EU law.[240] Given the costs of relocating a leading institution of higher education from one country to another, the CEU's return to Budapest anytime soon is unlikely. The Orbán regime fighting against academic freedom has won, in the end.

In infringement proceedings dealing with the 'law on the transparency of organisations that receive financial support from abroad', which imposed special reporting obligations on NGOs and required them to declare themselves foreign agents if they received foreign donations above a minimal amount, the Commission argued that Hungary violated a primary law—Article 63 TFEU and Articles 7, 8, and 12 of the CFR.[241] The ECJ eventually agreed,[242] but once again by the time that the Court decided, the Open Society Institute and other prominent NGOs affected by the law had already moved their operations out of the country. EU law had helped no one and did not challenge the climate of values abuse in the country, even as it was technically enforced. The Commission, again, lost through winning.

NGOs were also affected by another law that imposed a 25 per cent tax on donations from any organization 'supporting illegal migration' (primarily aimed at any institution affiliated with Hungarian-American philanthropist George Soros) and the law also criminalized 'facilitating illegal immigration' (including legal help for asylum seekers) with punishment up to one year of imprisonment.[243] The Open Society Institute is challenging this tax at the European Court of Human Rights, but years later, the case has yet to be acted upon by that

[238] Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market, OJ L 376, 27 December 2006, pp. 36–68.
[239] Case C-66/18, *Commission v Hungary (Lex CEU)* [2020]. See, AG Kokott's opinion delivered on 5 March 2020.
[240] T Dezso Ziegler, 'Academic Freedom in the European Union. Why the Single European Market is a Bad Reference Point', *MPIL Research Paper Series* No. 2019-03.
[241] Case C-78/18, *Commission v Hungary (NGOs)* [2020] ECLI: EU: C:2020:476.
[242] Case C-78/18, *Commission v Hungary (NGOs)* [2020] ECLI: EU: C:2020:476.
[243] Open Society takes Hungary to court over 'Stop Soros' law, Politico 24 September 2018 <https://www.politico.eu/article/open-society-takes-hungary-to-court-over-stop-george-soros-law-asylum-seekers-ecj/>.

court.[244] The Commission stated that the new law not only violates secondary legislation on the rights of migrants and asylum seekers but also the free movement rights of EU citizens.[245] But it failed to see the restrictions as part of a general assault on human rights NGOs.

It is beyond any doubt that the three laws—Lex CEU and the two laws affecting NGOs—were all enacted as part of a general campaign by the government of Hungary designed to drive organizations funded by George Soros out of the country. But the Commission treated these as three separate problems and responded to each one in different ways. The end result is that the cases were pending for so long that all of the attacked institutions left the country before more Pyrrhic victories could be celebrated. And with the three cases handled separately, the ECJ was not in a position to see that the violation of EU law involved might rise above the specific *acquis* infringements cited to challenge the values in the Treaties.

These laws, and others, should be seen as a coherent programme adopted by the government to limit freedom of information, media pluralism, academic freedom, challenges from civil society, and domestic criticism of the government. These attacks not only threaten the Rule of Law but also democracy, which is clearly in the crosshairs of this effort. The civil sector watchdogs affected by this coordinated campaign on the part of the Hungarian government are crucial to ensuring the fairness of elections, and of course rigged elections in turn lead to more 'Rule of Law backsliding'.[246] However, the Commission preferred to submit multiple infringement proceedings without urgency as the combination of these attacks on independent institutions undermined the very democratic foundations required under the Treaties to be maintained in every Member State.

Despite repeatedly expressing 'concern', the Commission has yet to bring any infringement procedures that challenge the steadily narrowing field of media

[244] This work deals primarily with the EU but it is worth nothing that the Council of Europe system has also failed to act quickly enough to stop autocracy from becoming entrenched. In fact, the European Court of Human Rights has aggressively made matters worse with its 2018 decision requiring that all cases headed for the Strasbourg court first pass through the Hungarian Constitutional Court before national remedies can be said to be exhausted. *Mendrei v Hungary*, App. No. 54927/15 (5 July 2018). Of course, the Hungarian Constitutional Court has long since been captured by the appointment of judges friendly to the government and it can delay cases indefinitely before they can make their way to Strasbourg. In the NGO tax case, the Constitutional Court waited nearly a year before issuing a judgment approving the government's actions which meant that the case was not even filed at the ECtHR until August 2019. Open Society Justice Initiative, 'Open Society Justice Initiative Challenges Hungarian Constitutional Court Ruling on Anti-NGO Laws' 26 August 2019 at <https://www.justiceinitiative.org/newsroom/open-society-justice-initiative-challenges-hungarian-constitutional-court-ruling-on-anti-ngo-laws>. No action has yet been taken by the ECtHR. Cf. Kosař and Šipulová (n 92).

[245] European Commission, Asylum: Commission takes next step in infringement procedure against Hungary for criminalizing activities in support of asylum applicants, Press release, Brussels, 24 January 2019.

[246] Office for Democratic Institutions and Human Rights, Hungary Parliamentary Elections April 2018—ODIHR Limited Election Observation Mission Final Report, Warsaw June 2018; P Krekó and Z Enyedi, 'Explaining Eastern Europe: Orbán's Laboratory of Illiberalism' (2018) 29 *Journal of Democracy*, 39–51.

pluralism, even though the Hungarian government consolidated nearly 500 media outlets in one 'public foundation' and promptly exempted it from European competition law. A state aid inquiry into the well-documented practice of the Hungarian government to withdraw state advertising from critical publications and to lavish it all on government-friendly publications has gone nowhere. In response to a parliamentary question, the Commission declared that this was outside its jurisdiction because 'it is the primary responsibility of Member States to take action to protect media freedom and pluralism in line with the values on which the Union is founded and which are enshrined in the EU's Charter of Fundamental Rights.'[247]

Although the Commission has clearly improved in its handling of attacks on the Polish judiciary compared with similar attacks in Hungary, the Commission's approach to the Polish case of Rule of Law backsliding in general still reveals the same unwillingness or perceived incapacity to act forcefully and to connect the dots across multiple individual infringements. We believe this perceived incapacity is not grounded in the law as it stands and could be overcome without Treaty change. The Polish and the Hungarian cases—with the exception of a handful of actions grounded in Article 19(1) TEU—are essentially the same and offer a grim picture, when approached from the standpoint of wholehearted adherence to the values of Article 2 TEU. In Poland, too, the Commission brought numerous limited infringement procedures that all completely missed the more fundamental point, which was that the elimination of checks and balances struck at the core of EU values.[248]

The first sign that the Commission was following the Hungarian path in Poland was the infringement procedure dealing with amendments to the Law on Ordinary Courts adopted in 2017 as a part of so-called 'judiciary reform'.[249] Even though the law threatened the independence of the judiciary by lowering the judicial retirement age, mirroring the Hungarian case, the Commission's press release focused on an issue which, important though it may have been, did not address the central threat to the rule of law: 'The Commission's key legal concern identified in this law relates to the discrimination on the basis of gender due to the introduction of a different retirement age for female judges (60 years) and male judges (65 years).'[250] The Commission finally supplemented this diagnosis with the charge that Poland violated primary (Article 157 TFEU) and secondary

[247] Question for written answer P-000235-19 to the Commission, Csaba Molnár (S&D) (18 January 2019) at: <https://www.europarl.europa.eu/doceo/document/P-8-2019-000235_EN.html>; Answer given by Ms Vestager on behalf of the European Commission (5 March 2019), at <https://www.europarl.europa.eu/doceo/document/P-8-2019-000235-ASW_EN.html>.
[248] Schmidt and Bogdanowicz (n 28), 1093.
[249] Act of 12 July 2017 amending Act on ordinary courts and other acts.
[250] European Commission, Rule of Law: European Commission acts to defend judicial independence in Poland, Brussels 20 December 2017 <https://europa.eu/rapid/press-release_IP-17-5367_en.htm>.

(Directive 2006/54 on gender equality in employment[251]) EU anti-discrimination law with the additional charge that the Minister of Justice was given discretionary power to prolong the mandate of judges who had reached this newly lowered retirement age, a practice that violated Article 19(1) TEU and Article 47 of the Charter.[252] The action was, however, limited to only one of the Minister's new powers—to decide whether to extend the period of active service of judges of ordinary courts once they hit this new retirement age. But the Minister's other powers[253]—for example the ability to arbitrarily remove presidents of ordinary courts during a six-month window (which indirectly allowed the Minister of Justice to take control over the administration of courts) as well as new powers to discipline judges[254]—constituted an altogether more dangerous threats to judicial independence. But these additional powers were ignored by the Commission in this first infringement proceedings, which focused narrowly on the practice of lowering the retirement age of judges.[255] In consequence, the ordinary courts are now dominated by newly appointed presidents who have the approval of the Minister of Justice and the newly revamped disciplinary proceedings against judges and prosecutors have been broadly used by the Minister against numerous judges to attack the independence of the judiciary as a whole.[256] But the Commission never challenged those powers—only the

[251] Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation, OJ L 204, 26 July 2006, pp. 23–36.

[252] European Commission, *Rule of Law: European Commission acts to defend judicial independence in Poland*, Press release, Brussels 20 December 2017.

[253] W. Jasiński, Charakterystyka zmian w ustroju i organizacji sądownictwa powszechnego w Polsce w latach 2016–2018, (2018) 1 *Krajowa Rada Sądownictwa*, 62–78; D. Mazur, Sędziowie pod specjalnym nadzorem, czyli "wielka reforma" wymiaru sprawiedliwości, in Bojarski, Krajewski, Kremer, Ott, and Żurek (n 83), 261–367.

[254] B Grabowska-Moroz and M Szuleka, *It starts with personnel. Replacement of common court presidents and vice presidents from August 2017 to February 2018*, Helsinki Foundation for Human Rights, April 2018 <http://www.hfhr.pl/wp-content/uploads/2018/04/It-starts-with-the-personnel.pdf>.

[255] Taborowski (n 72).

[256] M Szuleka and M Kalisz, *Disciplinary proceedings against judges and prosecutors* (Helsinki Foundation for Human Rights, February 2019) at: <http://www.hfhr.pl/en/disciplinary-proceedings-against-judges-and-prosecutors/>; *A country that punishes. Pressure and repression of Polish judges and prosecutors* (Justice Defence Committee, February 2019) at: <http://komitetobronysprawiedliwosci.pl/app/uploads/2019/02/Raport-KOS_eng.pdf>; M. Strzelecki, 'Poland Starts to Discipline Judges Criticizing Court Reforms', Bloomberg, 11 September 2018—<https://www.bloomberg.com/news/articles/2018-09-11/poland-starts-to-discipline-judges-who-criticized-court-reforms>; Ch Davies, Hostile Takeover: How Law and Justice Captured Poland's Courts, Nations in Transit brief, Freedom House May 2018 <https://freedomhouse.org/report/special-reports/hostile-takeover-how-law-and-justice-captured-poland-s-courts>; Ch. Davies, '"They're trying to break me": Polish judges face state-led intimidation, *The Guardian* 19 June 2018 at: <https://www.theguardian.com/world/2018/jun/19/theyre-trying-to-break-me-polish-judges-face-state-led-intimidation>; Speech of the Commissioner for Human Rights Adam Bodnar. Public hearing—LIBE Committee (20 November 2018) <https://www.rpo.gov.pl/en/content/adam-bodnar-public-hearing-%E2%80%9C-situation-rule-law-poland-particular-regards-independence-judiciary%E2%80%9D>.

discretionary power of the Minister to extend the period of service for judges who were prematurely retired.[257]

Such a conservative approach adopted in the Polish *Independence of Ordinary Courts* case[258] recalled *Commission v Hungary (judicial retirement age)* by focusing again on what was easiest to prove rather than on what would do the most damage to the judiciary with the most far-reaching implications for the state of democracy and the Rule of Law in the country. This is notwithstanding the learning curve mentioned above: the Commission started deploying Article 19(1) TEU, often in conjunction with Article 47 CFR, only after they came to be perceived as sufficiently 'safe' and clear instruments because the ECJ had endorsed their use, which made them akin to the gender equality provisions. The fact that the Commission's narrow approach has now been supplemented with arguments based on Article 19(1) TEU, asserting an obligation of Member States to maintain an independent judiciary is thus of importance in the general context of ensuring full compliance with Article 2 TEU. But it is not enough to reach everything of critical importance in the decline of Hungarian and Polish democracy.

E. Judicial independence and irremovability as a special (but limited) case of values-based effectiveness

In considering the powerful new tool that allows attacks on the independence of the judiciary to be recognized as a violation of the Rule of Law as specified in Article 19(1), it is the Court that deserves the laurels here, rather than the Commission. Indeed, all the 'new' Article 19 TEU arguments cannot be attributed to the Commission's creativity. Instead, the original Article 19(1) arguments were handed to the Commission by the ECJ through a reference brought by judges from Portugal. Instead of narrowing the ruling to answer the specific legal issue presented, the Court decided to use the case as a vehicle for announcing a general theory of judicial independence and later judicial irremovability under the Treaties and to operationalize the main guarantee thereof—an interpretation of Article 19(1) TEU—as a way to enforce concrete elements of the principle of

[257] European Commission launches infringement against Poland over measures affecting the judiciary, Press release, Brussels 29 July 2017 at: <https://ec.europa.eu/commission/presscorner/detail/en/IP_17_2205>; Independence of the judiciary: European Commission takes second step in infringement procedure against Poland, Press release Strasbourg 12 September 2017, at: <https://ec.europa.eu/commission/presscorner/detail/en/ip_17_2205>; Rule of Law: European Commission acts to defend judicial independence in Poland, Press release, Brussels 20 December 2017 at: <https://ec.europa.eu/commission/presscorner/detail/en/ip_17_5367>.

[258] Case C-192/18, *Commission v Poland* [2019] ECLI: EU: C:2019:924. A. Rasi, 'Effetti indiretti della Carta dei diritti fondamentali? In margine alla sentenza *Commissione c. Polonia (Indépendance de la Cour suprême)*' (2019) 4(2) *European Papers*, 615; Taborowski (n 72).

the Rule of Law in Article 2 TEU.[259] The ECJ therefore found that Article 19(1) TEU required that the Member States ensure that national courts are independent in order to give EU law full effect.[260] This obligation is reinforced by the duty of Member States under Article 4(3) to 'ensure, in their respective territories, the application of and respect for EU law'.[261] In consequence, the ruling is considered revolutionary because it transforms the 'rule of law into (an) enforceable standard . . . applicable *in abstracto* as an objective principle'.[262] These developments turned the issues of judicial independence and irremovability into a special sub-set of issues covered by Article 2 TEU, different from other values in the provision. The Commission proceeded to benefit from the opening created by the Court in the form of the reinvention of Article 19(1) TEU as a tool to police judicial independence and irremovability: 'cardinal principles' within the ambit of Article 2 TEU.

Truth be told, the Commission could have deployed Article 19(1) TEU from the very beginning of the Hungarian backsliding. It chose not to be too inventive in taking risks, however, notwithstanding the fact that the arguments it needed received significant attention in the academic literature over the last quarter of a century.[263] As a result, the Commission's performance has been somewhat disappointing. Trying to play safe, the Commission keeps achieving nominal victories, while the battle, again and again, has been lost—as illustrated by the dozens of the moving trucks flooding Nádor ut. in Budapest in August 2020 to move the campus of the most successful academic institution in the country, the Central European University, away from Hungary[264]—or when an illegally appointed 'judge' of the Polish Supreme Court nonetheless took office of the First President of that court[265] following a whole successful line of cases at the ECJ aiming to shield the Polish judiciary from political attacks. The CEU is out of Hungary and the Supreme Court of Poland has been politically captured, just as were the constitutional courts in both countries. The Polish Supreme Court is now partly staffed and presided over by impostors, rather than judges.[266] And that has occurred even though the Commission has never lost any of the infringement actions it brought challenging the attacks on the Polish judiciary.

[259] Case C-64/16 *Associação Sindical dos Juízes Portugueses v Tribunal de Contas* [2018] EU:C:2018:117, para. 32
[260] Ibid., paras 32–33.
[261] Ibid., para. 34.
[262] Pech and Platon (n 11).
[263] See the literature in n 12 above.
[264] P Bárd, 'To leave or not to leave? Viktor Orbán's war against George Soros and the CEU dilemma' *RECONNECT Blog* 14 February 2019 at <https://reconnect-europe.eu/blog/bard-orban-ceudilemma/>.
[265] Krajewski and Ziółkowski (n 84).
[266] L Pech, 'Dealing with "Fake Judges" under EU Law: Poland as a Case Study in Light of the Court of Justice's Ruling of 26 March 2020 in *Simpson and HG*'(2020) *RECONNECT Working Paper* (Leuven) No. 8.

It is difficult to imagine what the Rule of Law compliance landscape would look like without the Court's decisive approach in *Portuguese Judges*, which has contributed to singling out judicial independence and irremovability as a special sub-set of issues in the broader landscape of the Rule of Law. *Portuguese Judges* encouraged the European Commission to initiate infringement proceedings against Poland, broadening its rather technical prior arguments to now include Article 19(1) TEU.[267] The Commission thus addressed the attempts of the Polish government to undermine the independence of the Supreme Court[268] and also the ordinary courts,[269] essentially siding with vocal domestic and international criticism.[270] For the Constitutional Tribunal, however, it was already too late.[271]

What unites the Commission's actions against Polish Rule of Law backsliding is the Commission's constant reliance on Article 19(1) TEU. The instrument became a new 'technical' rule allowing the Commission to feel safe: judicial independence has definitely entered the realm of the 'ordinary *acquis*' since *Portuguese judges* was decided. The issues that do not squarely fall within the scope of Article 19(1) TEU—such as the sustained attacks on prosecutors for instance, or on ordinary lawyers—both not constituting part of the judiciary and thus, in the eyes of the Commission, unsafe candidates for protection under Article 19(1) TEU, remained outside the realm of values the Commission was willing to defend, creating an abyss between those elements of Article 2 TEU values that could be brought within the ambit of Article 19(1) TEU and all the other values, however important.

That said, Article 19(1) TEU has not been useless. Let us trace some of the progress achieved by the Commission in front of the ECJ with 'Article 19(1) TEU' values.[272]

The challenged Polish law on the Supreme Court echoed the previous law on the ordinary courts, contesting both the lowering of judges' retirement age and the assignment of discretionary decisions on their continued ability to remain on

[267] See Case C-192/18, *Commission v Poland (Independence of the Ordinary Courts)* [2019], ECLI: EU: C:2019:924; Case C-619/18, *Commission v Poland (Independence of the Supreme Court)* [2019] ECLI: EU: C:2019:531; Case 791/19, *Commission v Poland* (pending).
[268] Case C-619/18, *Commission v Poland (Independence of the Supreme Court)* [2019] ECLI: EU: C:2019:531.
[269] Case C-192/18, *Commission v Poland (Independence of the Ordinary Courts)* [2019], ECLI: EU: C:2019:924.
[270] Venice Commission, Opinion on the Draft Act amending the Act on the National Council of the Judiciary; on the Draft Act amending the Act on the Supreme Court, proposed by the President of Poland, and on the Act on the Organisation of Ordinary Courts, adopted by the Commission at its 113th Plenary Session (Venice, 8–9 December 2017), CDL-AD(2017)031-e.
[271] Venice Commission, Opinion on the Act on the Constitutional Tribunal, adopted by the Venice Commission at its 108th Plenary Session, (Venice, 14–15 October 2016), CDL-AD(2016)026-e, para. 128.
[272] For a most detailed analysis of all the relevant cases, please see Pech and Kochenov (n 13).

the bench to the President of Poland. Later amendments,[273] which brought the already politically captured National Council of Judiciary into the mix of judicial appointments and assessments, did not improve the situation. As a result of these changes, 27 Supreme Court judges were forced to leave office, including the First President of the Supreme Court. Her five-year term of office is prescribed directly in the Constitution but was cut short by this statute.[274] In addition, the number of Supreme Court judges was increased and the procedure for appointing new judges to that court was organized by the politically appointed National Council on the Judiciary, which has since been suspended from the European Network on Councils of the Judiciary because it is no longer independent of political influence.[275]

In its infringement action on the changes to the Supreme Court, the European Commission argued first that lowering the retirement age of judges appointed before new law entered into force breached the principle of security of tenure of judges. Second, the Commission argued that granting the President of the Republic of Poland discretion to extend the active mandate of Supreme Court judges, infringed the principle of judicial independence.[276] The Commission's Letter of Formal Notice of July 2018 referred to a broader picture of changes introduced recently into the Polish judicial system, such as the appointment of judicial members of the National Council of Judiciary which did not meet the European standards of judicial independence.[277] Unfortunately, such an approach was dropped by the Commission at a later stage of the infringement proceedings without any public account of what led to such a decision. In the end, only the alleged infringement caused by the forced retirements and changing the procedure of appointment went forward to the ECJ. This is typical of the

[273] Act of 12 April 2018 amending Act on the Supreme Court; Act of 12 April 2018 amending Act on the Ordinary Courts, Act on the National Council of the Judiciary and Act on the Supreme Court; Act of 10 May 2018 amending Act on the Ordinary Courts, Act on the Supreme Court, and other acts.

[274] Article 183(3) of the Constitution of Poland. Cf. Sadurski (n 14); Bernatt and Ziółkowski (n 14).

[275] *ENCJ Suspends Polish National Judicial Council—KRS*, 17 September 2018 at <https://www.encj.eu/node/495>. A Rakowska-Trela, 'Krajowa Rada Sądownictwa po wejściu w życie nowelizacji z 8.12.2017—organ nadal konstytucyjny czy pozakonstytucyjny?', in Bojarski, Krajewski, Kremer, Ott, and Żurek (n 83), 107–22; A. Śledzińska-Simon, 'The Rise and Fall of Judicial Self-Government in Poland: On Judicial Reform Reversing Democratic Transition' (2018) 19 *German Law Journal*, 1839.

[276] Case C-619/18 R *Commission v Poland*.

[277] European Commission, Rule of Law: Commission launches infringement procedure to protect the independence of the Polish Supreme Court, Press release, Brussels, 2 July 2018 at: <http://europa.eu/rapid/press-release_IP-18-4341_en.htm>; European Commission, Rule of Law: European Commission takes next step in infringement procedure to protect the independence of the Polish Supreme Court, Press release, Brussels, 14 August 2018—<http://europa.eu/rapid/press-release_IP-18-4987_en.htm>. Such a finding was confirmed by the European Network of Councils of Judiciary, whose General Assembly suspended the membership of NCJ in September 2018. The Board of the Network argued previously that NCJ did not fulfil the requirement of independence from legislative and executive power.

Commission—to allege a number of infringements in the vicinity of a troubling practice, but to bring only some narrow piece of the overall picture to the ECJ for review without visibly fixing the other things complained of at the start.

The Commission's actions in the matter of the *Polish Supreme Court* are crucial for another reason. At the start of the case, the Commission sought and the ECJ's vice-president, granted in October 2018, interim measures suspending the relevant provisions of new law and ensuring the judges would remain in the positions they held at the time that the new law entered into force.[278] Because the government could not then replace these judges, it was possible that a judgment finding that their terms had been terminated prematurely might actually result in their being allowed to remain on the bench. Furthermore, the Court ordered the Polish government to refrain from adopting any measures concerning the appointment of a new First President of that court. As a result, the First President of the Supreme Court held her office until end of her term in April 2020.[279] She was then replaced, in violation of the rules of procedure, with an illegally appointed "judge". And unfortunately the story ended there, despite the Commission's ECJ victory.

In the period before the deadline set in the interim measures order, however, an intense debate took place in Poland regarding whether the government should comply with the order. Such a debate happened despite the fact that judges who were involuntarily retired returned to office directly after the ECJ order was announced and so the government did not have to do much else to, in fact, comply.[280] The government did not agree with the interim measures order but

[278] Order of 19 October 2018, Case C-619/19, *Commission v Poland (Independence of the Supreme Court)*. The interim measure was based on Article 160 (7) of the Rules of the Procedure of the Court, so it was granted before the Member State's observations had been submitted. The CJEU press release directly underlined the 'retroactive effect' of the Court's decision—Court of Justice of the European Union, Press release No 159/18, Luxembourg, 19 October 2018 <https://curia.europa.eu/jcms/upload/docs/application/pdf/2018-10/cp180159en.pdf>; Z. Kmieciak, 'Ochrona tymczasowa w sprawie ze skargi Komisji przeciwko Polsce dotyczącej przepisów ustawy obniżającej wiek przejścia w stan spoczynku sędziów SN. Glosa do postanowienia TSUE z 19.10.2018 r., C-619/18 R' (2019) 1 *Państwo i Prawo*, 143–50.

[279] Rules regarding appointment of new First President were amended by so called "muzzle law" in December 2019: Act of 20 December 2019 amending Law on Ordinary Courts Organization and Law on Supreme Court and other acts. The appointment procedure of the new First President started in May 2020 and lasted more than two weeks. After selecting 5 candidates, the President of Poland appointed Małgorzata Manowska for the position of First President of the Supreme Court. Due to the doubts regarding the procedure and the fact that M. Manowska was nominated to the Supreme Court by the "new" National Council of Judiciary, many concerns regarding lawfulness of the appointment were expressed: Statement by 50 judges of the Supreme Court on the irregularities of the election procedure of 23 May 2020, at: <http://themis-sedziowie.eu/materials-in-english/statement-by-50-judges-of-the-supreme-court-on-the-irregularities-of-the-election-procedure-of-23-may-2020/>; Krajewski and Ziółkowski (n 84).

[280] The First President of the Supreme Court summon of the Supreme Court judges—<http://www.sn.pl/aktualnosci/SiteAssets/Lists/Wydarzenia/EditForm/2018.10.22%20-%20First%20President%20-%20Summon%20of%20judges%20-%20EN.pdf>.

decided to amend the law in order to appear to comply.[281] But the method that the government chose to implement the interim measures order was criticized as incorrect[282] and the interim measure was confirmed by the ECJ in December 2018. The ECJ's reaction underlined the loss of confidence that the Court had and in the dangers posed to the independence of the Polish courts by these changes, dangers that were neither fictional nor hypothetical but actually very real.[283]

This was not the first time that the Commission had sought interim measures against Poland. In the *Białowieża Forest* case,[284] the Commission sought and obtained an interim measures order to prevent the Polish government from continuing to log in a protected forest.[285] But the government continued to engage in the conduct after they were ordered to stop. As a result, when the interim measures order was confirmed in a later proceeding, the ECJ ensured that the order swept more broadly under Article 279 TFEU by using its powers to 'adopt . . . any measure intended to ensure that the interim order is complied with by that party. Such a measure may entail, inter alia, provision for a periodic penalty payment to be imposed should that order not be respected by the relevant party.'[286] The aim of this kind of Treaty interpretation was to ensure the effectiveness of enforcement of EU law, which is 'an essential component of the rule of law . . . on which the European Union is founded'.[287] The threat of periodic penalty payments of at least EUR 100,000 per day convinced the Polish government to comply with the interim measure, not only in the *Białowieża Forest* case in November 2017, but almost a year later in a Supreme Court case.

Ultimately, in *Commission v Poland (Independence of the Supreme Court)* the ECJ ruled that Poland violated its Treaty obligation under the second subparagraph of Article 19(1) TEU. The Court clearly stated that, despite the fact that

[281] Law of 21 November 2018 amending Law on the Supreme Court (published in the Official Journal on 31 December 2018).

[282] M Taborowski, P Marcisz, 'The first judgment of the ECJ regarding a breach of the rule of law in Poland?' VerfBlog 29 May 2019, https://verfassungsblog.de/the-first-judgment-of-the-ecj-regarding-a-breach-of-the-rule-of-law-in-poland/; Kmieciak (n 278), 146; E Łętowska, Mechanizm współdziałania prawa europejskiego i polskiego przy retroaktywnym skutku postanowienia zabezpieczającego (TSUE C-619/18), *Konstytucyjny.pl Blog* 11 November 2018, at: <http://konstytucyjny.pl/mechanizm-wspoldzialania-prawa-europejskiego-i-polskiego-przy-retroaktywnym-skutku-postanowienia-zabezpieczajacego-tsue/>; E Łętowska, Kto i jak ma wykonać decyzję Trybunału w Luksemburgu o zabezpieczeniu, Rp.pl 30 October 2018, at: <https://www.rp.pl/Opinie/310309922-Prof-Ewa-Letowska-Kto-i-jak-ma-wykonac-decyzje-Trybunalu-w-Luksemburgu-o-zabezpieczeniu.html>.

[283] Case C-619/18 R *Commission v. Poland* (*Independence of the Supreme Court*) [2018] (order) ECLI: EU: C:2018:1021, paras 74 and 77.

[284] Case C-441/17 R *Commission v Poland (Białowieża Forest)* [2017] (order), ECLI: EU: C:2017:877.

[285] Cf. Wennerås, 'Saving a Forest and the Rule of Law' (n 102).

[286] Case C-441/17 R *Commission v Poland (Białowieża Forest)* [2017] (order), ECLI: EU: C:2017:877, para. 100.

[287] Ibid. para. 102. Elevating the supremacy of EU law to such hights is of course somewhat ironic, as Wennerås has rightly noted: Wennerås (n 102).

the organization of justice in the Member States falls within the competence of those Member States, 'the fact remains that, when exercising that competence, the Member States are required to comply with their obligations deriving from EU law'.[288] The Court applied a proportionality test to assess whether the principle of irremovability of judges was breached in the Polish Supreme Court case.[289] After reviewing all the aims of the 'reform' provided by the government, the Court reached the conclusion that lowering the retirement age was not justified by a legitimate objective.[290] Furthermore, the Court found that the discretion held by the President of the Republic regarding prolongation of the terms of office of individual judges 'is such as to give rise to reasonable doubts, *inter alia* in the minds of individuals, as to the imperviousness of the judges concerned to external factors and as to their neutrality with respect to any interests before them'.[291] The Court's ruling confirmed that 'accelerated infringement actions ought to be the default position when a Member State openly violates the rule of law'.[292]

Interestingly enough, the first case regarding independence of the judiciary in Poland dealt with changes introduced into the law on ordinary courts in July 2017.[293] After the Commission submitted the case to the Court,[294] the Court had its first opportunity to rule on a case in which the relevance of the *Portuguese Judges* decision for the Polish situation became clear. Despite the fact that the case was submitted in March 2018, it was decided only in November 2019, so almost half a year after the *Independence of the Supreme Court* case, where the *Portuguese Judges* case was applied first. AG Tanchev's Opinion in *Commission v Poland*

[288] Case C-441/17 R *Commission v Poland (Białowieża Forest)* [2017] (order), ECLI: EU: C:2017:877, para. 52.
[289] Ibid., para. 79.
[290] Ibid., para. 96
[291] Ibid., para. 118.
[292] P Bogdanowicz and M Taborowski, 'How to Save a Supreme Court in a Rule of Law Crisis: The Polish Experience' (2020) 16 *European Constitutional Law Review*, 306; L Pech and S Platon, 'The beginning of the end for Poland's so-called "judicial reforms"? Some thoughts on the ECJ ruling in Commission v Poland (Independence of the Supreme Court case)' RECONNECT Blog 2 July 2019 https://reconnect-europe.eu/blog/pech-platon-poland-ecj-rule-of-law-reform/. P Bogdanowicz and M Taborowski, 'Regulacje dotyczące stanu spoczynku jako narzędzie służące odsunięciu określonej grupy sędziów od pełnienia urzędu na stanowisku sędziego Sądu Najwyższego—uwagi na tle wyroku Trybunału Sprawiedliwości z 24.06.2019 r., C-619/18, Komisja Europejska przeciwko Rzeczypospolitej Polskiej' (2019) 12 *Europejski Przegląd Sądowyi*, 15–25; P Filipek, 'Nieusuwalność sędziów i granice kompetencji państwa członkowskiego do regulowania krajowego wymiaru sprawiedliwości—uwagi w świetle wyroku Trybunału Sprawiedliwości z 24.06.2019 r., C-619/18, Komisja Europejska przeciwko Rzeczypospolitej Polskiej' (2019) 12 *Europejski Przegląd Sądowy*, 4–14.
[293] Act of 12 July 2017 amending Law on ordinary courts and other acts.
[294] European Commission launches infringement against Poland over measures affecting the judiciary, Press release, Brussels 29 July 2017 at: <https://ec.europa.eu/commission/presscorner/detail/en/IP_17_2205>; Independence of the judiciary: European Commission takes second step in infringement procedure against Poland, Press release Strasbourg 12 September 2017, at: <https://ec.europa.eu/commission/presscorner/detail/en/ip_17_2205>; Rule of Law: European Commission acts to defend judicial independence in Poland, Press release, Brussels 20 December 2017 at: <https://ec.europa.eu/commission/presscorner/detail/en/ip_17_5367>.

(*Independence of the Ordinary Courts* case) delivered in June 2019 argued that the second subparagraph of Article 19(1) TEU provided guarantees essential to judicial independence, confined, 'in the context of irremovability and independence of judges, to correcting problems with respect to structural infirmity in a given Member State'.[295] The Court found that Poland violated the second subparagraph of Article 19(1) TEU with respect to rules relating to the retirement age of prosecutors and judges of the ordinary courts, coupled with the new rules governing a possible extension to the period of active service of those judges.[296] The Court decided the case solely on the basis of the second subparagraph of Article 19(1) TEU without reference to Article 47 of the Charter. Furthermore, the Court confirmed the breach of Article 157 TFEU and Articles 5(a) and 9(1)(f) of Directive 2006/54 due to the fact that the rules in dispute fixed different retirement ages directly on the basis of sex. It was the second case where the Court found a violation of the second subparagraph of Article 19(1) TEU.

The steps taken by the Court in the *Białowieża Forest* case, *Portuguese Judges*, and in the *Independence of the Supreme Court* and *Independence of Ordinary Courts* infringement actions definitely strengthened some of the tools available under EU law in order to secure the Rule of Law in Member States. The breakthrough in those cases was provided by the reinterpretation of the scope of Article 19(1) TEU as well as the timely use of interim measures to prevent a deterioration of the situation while the case was being decided. Despite those milestone developments, however, Article 19 TEU is not enough to tackle the systemic nature of Rule of Law backsliding taking place in some Member States.[297] This is precisely where systemic infringements could play a significant role.

IV. The case for systemic infringement procedures

A. Why does the Commission not think bigger?

The Commission has absolute discretion to bring and frame infringement cases under Article 258 TFEU.[298] Under present practice, the Commission focuses on the detail of the *acquis* and exhibits a tendency to see problems as individual trees rather than as larger forests. The Commission also tends to launch larger numbers of small cases rather than smaller numbers of large cases.[299] Unfortunately,

[295] Opinion of Advocate General Tanchev delivered on 20 June 2019, Case C192/18, *European Commission v Republic of Poland*, ECLI: EU: C:2019:529, paras 93 and 115.
[296] Case C-192/18, *Commission v Poland (Independence of the Ordinary Courts)* [2019] ECLI: EU: C:2019:924.
[297] Kochenov (n 31), 187.
[298] Eg Opinion of AG Tizzano in Joined cases C-466 and 476/98 *Commission v UK et al.* [2002] ECR I-9741, para. 30. Cf. L Prete and B Smulders, 'The Coming of Age of Infringement Proceedings', (2010) 47 *CML Rev*, 9–61.
[299] Wennerås (n 97).

the Court's reinterpretation of the scope of Article 19(1) TEU, as we have just seen, has not changed any of these tendencies at the Commission. In fact, the ECJ has generally and persistently encouraged the Commission to consolidate actions to highlight more 'general and persistent' violations, but the Commission uses this option very infrequently.[300] As current Commission practice stands, only some violations—and not necessarily the most substantial ones—are raised in infringement procedures, giving rise to a general under-enforcement of EU law. In fact, between 2007 and 2017, the number of infringement actions brought by the Commission was cut nearly in half in its core single market enforcement.[301]

The situation is most problematic with regard to values enforcement,[302] where the Commission has either shied away from action entirely, or has brought narrowly framed cases on the basis of concrete provisions of secondary law, while ignoring the larger dangers posed to democracy, human rights protection, and the Rule of Law on the part of the respondent Member State. We have seen that the Hungarian situation discussed above has never risen above this level and while the Commission is doing better with regard to Poland since the ECJ gave it the tool of Article 19(1) TEU to use, the Commission has never addressed the destruction of the Polish Constitutional Tribunal (or for that matter the Hungarian Constitutional Court), whose job it was to ensure the legality of the whole domestic legal order so that, had it been saved, it could have prevented the rest from occurring. The Commission has also not adequately addressed the political control over the National Council of the Judiciary (KRS) or the creation of specialized and politically captured chambers at the Supreme Court to handle political hot-button cases and judicial discipline. (It is a relief that these issues have arisen in preliminary references from the Polish Supreme Court itself so that the ECJ has an opportunity to opine on them.)[303] While there could be some question about what the Polish or Hungarian governments are doing when one takes any one of these developments alone, there is no doubt about these governments' aims when the set of 'reforms' is taken together.

The reasons for the Commission's tunnel vision are numerous but one is surely the Commission's unwillingness to open the Pandora's box of the federal question by second-guessing how national institutions should be structured.[304] The

[300] Ibid., notes 51–60.
[301] European Commission, Single Market Scoreboard: Trends at https://ec.europa.eu/internal_market/scoreboard/performance_by_governance_tool/infringements/index_en.htm.
[302] Kochenov (n 4).
[303] See, Joined Cases C-585/18, C-624/18, and C-625/18, *A. K. and Others v Sąd Najwyższy* [2019] ECLI: EU: C:2019:982; M Krajewski and M Ziółkowski, 'EU judicial independence decentralized: *A.K.*' (2020) 57 *CML Rev*, 1107; M Safjan, Prawo do skutecznej ochrony sądowej—refleksje dotyczące wyroku TSUE z 19.11.2019 r. w sprawach połączonych C-585/18, C-624/18, C-625/18' (2020) 5 *Palestra*, 5–29; E Łętowska, 'Czego uczą odpowiedzi na pytania prejudycjalne dotyczące polskiego wymiaru sprawiedliwości' (2020) 5 *Palestra*.
[304] Cf. the literature in n 55.

Commission may also have anticipated that the legal enforcement of Article 2 TEU values by the ECJ was unlikely,[305] since the ECJ had already missed the chance to condemn the tweaking of the criminal law by the (then) Prime Minister of Italy Silvio Berlusconi so that he could avoid responsibility for his alleged crimes.[306] That case did not tackle a broader pattern of problematic developments but nonetheless it missed the opportunity to strengthen the supranational rule of law.[307] The Commission's unwillingness to see Article 258 TFEU as something broader than an occasional instrument of ensuring Member States' adherence to clear-cut technical rules of secondary EU law leads it to being over-cautious with values and rights which are not entirely rooted in the concrete rules found within the scope *ratione materiae*, as currently interpreted, of the supranational legal order. In short, the Commission has preferred to focus on small technical violations rather than larger structural problems.

As a result, even after the ECJ invigorated Article 19(1) TEU in the *Portuguese Judges* case, the Commission had continued its practice of identifying a few—and by no means all—technical violations in each infringement action and avoiding general arguments that would have identified better where the trouble lay. As a result, the Commission's current practice of Article 258 TFEU deployment remains clearly unsuited for dealing with the cases of Rule of Law undermining and democratic backsliding, when Member States' adherence to the basic values of Article 2 TEU is put into question. The technical violations that the Commission identifies are often symptoms and not the cause of the underlying disease. By only addressing the symptoms, however, the disease remains uncured. The general academic assessment of the current practice of Article 258 TFEU as: 'perpetually grounded and unable to take flight'[308] is particularly apt when it comes to defending basic Article 2 values.

While some have argued that 'not all possible threats to the rule of law in a Member State can be addressed by infringement proceedings',[309] at some point, the failure to bring infringement actions when Member States are flouting EU values in plain sight seriously undermines the EU's credibility and legitimacy.[310] When the Commission brought Hungary to the ECJ because it failed to impose the proper VAT on homemade *pálinka*,[311] while at the same time the Venice Commission and countless other sources were documenting that the essential

[305] On the enforcement of EU law through the use of the preliminary ruling procedure, see M. Broberg, 'Private Enforcement through Preliminary Ruling Procedure', in Jakab and Kochenov (n 1); Krajewski and Ziółkowski (n 303).
[306] Case C-387/02 *Berlusconi and others* [2005] ECR I-3565, paras 68–69: Hoffmeister (n 173), 206–8.
[307] Kochenov (n 5).
[308] Smith (n 103); Łazowski (n 87).
[309] E Crabit and N Bel, 'The EU Rule of Law Framework', in Schröder (n 1), 200.
[310] Wennerås (n 97); Wennerås (n 102).
[311] Taxation: Commission refers Hungary to Court over tax exemption of pálinka, European Commission press release, Brussels, 21 February 2013 http://europa.eu/rapid/press-release_IP-13-138_en.htm.

aspects of constitutionalism in the country were being undermined,[312] no reasonable external observer could agree that the Commission had set the proper priorities around the use of Article 258 TFEU if considering the long-term viability of the European Union. Enforcement actions brought by the Commission emerged as farcical in this context, especially if one also takes the Commission's victory in the *Hungarian Judges* case into account. The fault does not lie with the ECJ because it cannot act on cases that are not brought to it. So the silence of the ECJ when the Polish Constitutional Tribunal and the Hungarian Constitutional Court were destroyed was not its fault. The fault lies at the foot of the European Commission which failed to bring any infringement procedure on point. This meant that the EU missed an opportunity to head off constitutional breakdown in Poland and Hungary before it became much harder to stop.[313]

Under its current interpretation of Article 258 TFEU, the Commission is destined to win pointless battles in infringement actions against narrow violations of the EU *acquis*. The Commission's current approach explains why Berlusconi can change criminal law by passing *de facto ad personam* legislation to avoid prosecution,[314] why Hungary can attack its own judiciary,[315] or the data-protection supervisor office,[316] or why Poland can pack its courts with impostors and even send one of the usurpers to the Venice Commission,[317] without being thrown the slightest bit off course by losing the infringement actions as the Commission framed them. After all, notwithstanding the notable wins under the hailed Article 19(1) TEU in all of the *Commission v Poland* cases on the judiciary, the Supreme Court of Poland is currently deeply compromised, presided over by a usurper who should not even sit on the body, let alone be its First President. As with the Constitutional Tribunal, it is still very much in doubt, even after all the Commission's victories, whether the Polish Supreme Court would meet the condition of being 'established by law'.[318]

The Commission evidently starts with the unhelpful presumption that the *acquis* and the values of Article 2 TEU are the creatures of two different planets. But the Treaties are all legal all the way down. Article 258 TFEU addresses itself to breaches of EU law and Article 2 TEU is part of that law, as Jean-Claude Piris, Christophe Hillion, and numerous other scholars and practitioners have consistently argued. It is the unhelpfully narrow interpretation of the law—which has

[312] L Sólyom, 'The Rise and Decline of Constitutional Culture in Hungary', in von Bogdandy and Sonnevend (n 1), 5–32.
[313] Venice Commission, Opinion on the Act on the Constitutional Tribunal, adopted by the Venice Commission at its 108th Plenary Session, (Venice, 14–15 October 2016), CDL-AD(2016)026-e.
[314] Hoffmeister (n 173), 206–8.
[315] Sólyom (n 312).
[316] G Polyák, 'Context, Rules and Praxis of the New Hungarian Media Laws: How Does the Media Law Affect the Structure and Functioning of Publicity?', in von Bogdandy and Sonnevend (n 1).
[317] Pech (n 266).
[318] Ibid.

become the usual reaction of the Commission[319]—which profoundly undermines the effectiveness of the provisions in question. The Commission fails at its job and this has to change.

B. How could the Commission think bigger?

The Commission could easily change course by using the infringement procedure to enforce the broader principles on which the EU rests, principles which consist of a common commitment to the values of Article 2 and the requirement that Member States engage in sincere cooperation with the EU's goals, among others. A systemic infringement procedure could be launched when the Commission identifies that a Member State is engaging in a systemic violation of EU principles and is not just violating a particular narrow provision of EU law. A systemic infringement action would aim directly at the systemic nature of the violation by compiling a single legal action from a set of troubling laws, decisions, and actions of the Member State in question to argue that a pattern of violations show that values are breached. A pattern of violations demonstrates more than the sum of its parts. Such a pattern would allow the Commission to capture a whole worrisome trend and not just a component part. As Matthias Schmidt and Piotr Bogdanowicz rightly put it, bundling numerous infringements together into a coherent whole 'serves to tackle the underlying political intent and behaviour that gives rise to an infringement, rather than only addressing a particular concrete manifestation.'[320] A business-as-usual infringement action addresses the symptom but a systemic infringement action targets the disease.

That said, the systemic infringement action needs to be more than simply a bundle of unrelated complaints, linked only by virtue of their common origin in a single Member State. The case should be tied together with an overarching legal theory which binds the allegations together, making the systemic violation clear and pointing to a systemic remedy. Systemic infringement actions will allow Article 258 TFEU to serve a larger goal of ensuring Article 2 TEU compliance. The Commission has long claimed that Article 2 values cannot be enforced by a legal action, but the ECJ's decisions are now showing how the values of Article 2 can receive concrete expression through provisions like Article 19(1) TEU. The Court now recognizes that the values of Article 2 TEU are legal and not just political requirements because they make the EU what it is, and sooner or later, the Court's insistence on the legal importance of EU values will push the Commission to fill this gap by bringing the infringement actions that the Court has clearly indicated it is ready to hear. In such cases, pointing out the systemic nature of the breach of values on the part of a Member State and proving it in

[319] Eg LW Gormley, 'Judicial Review: Advice for the Deaf?' (2005) 29 *Fordham International Law Journal*, 655.
[320] Schmidt and Bogdanowicz (n 28), 1068.

front of the Court will allow the Commission to restore its role as the guardian of the Treaties.

Bundling together a set of violations to demonstrate a larger pattern is hardly radical. The Commission has already successfully taken a similar approach in the cases dealing with the violations of the *acquis sensu stricto* and the Court has confirmed the practice.[321] In *Commission v Ireland*,[322] the Commission provided evidence that 12 different waste disposal sites in Ireland had been allowed to operate in flagrant violation of the Waste Directive.[323] The number mattered: one or two sites might have been the fault of specific local governments or site operators. Twelve sites, located all over the country, spoke of a general lack of enforcement of a Directive which had been in force for nearly 25 years at the time that the Commission brought its action. 'This tolerant approach [to the enforcement of the Directive]', wrote the Court, 'is indicative of a large-scale administrative problem . . . and it was sufficiently general and long-lasting to enable the conclusion to be drawn that a practice attributable to Irish authorities existed'.[324] As the Court argued, one instance of violation could be explained in many ways and would not alone have been enough for the Court to attribute the failure to a generalized lack of enforcement on the part of the Member State. While the Court did not outline a general standard for determining when the individual violations would add up to more than the sum of the parts, AG Geelhoed opined that a 'structural infringement' required demonstration that the violations were of sufficient duration, persisted over a range of particular examples, and demonstrated sufficient seriousness to warrant a finding of a pattern of infringement.[325]

The Court issued a similar judgment against Italy, also for violation of the Waste Directive, after the Commission documented 4,866 illegal pits, located all over the country.[326] The Commission referred to its approach in that case as 'horizontal', enabling it to 'identify and correct more effectively the structural problems'.[327] The Court agreed, finding that the Italian government had 'generally and persistently, failed to fulfil its obligations'.[328]

'General and persistent' violations have been found in a number of cases where the Commission has brought together evidence of a pattern of violation.[329] But there are also a depressingly large number of cases in which the Commission's

[321] See the discussion of this issue in K Lenaerts, I Maselis, and K Gutman, *EU Procedural Law* (Oxford: Oxford University Press, 2014) at s. 5.11, pp 166–7 (with splendid references therein).
[322] Case C-494/01 *Commission v Ireland* [2005] ECR I-3331.
[323] Council Directive 75/442/EEC on Waste, OJ 1975 No. L194.
[324] Case C-494/01 *Commission v Ireland* [2005] ECR I-3331, para. 133.
[325] AG Geelhoed, Opinion in Case C-494/01 *Commission v Ireland* [2005] ECR I-3331.
[326] Case C-135/05 *Commission v Italy* [2007] ECR I-3475, para. 10.
[327] Case C-135/05 *Commission v Italy* [2007] ECR I-3475, para. 19.
[328] Case C-135/05 *Commission v Italy* [2007] ECR I-3475, para. 44.
[329] See eg Case C-88/07 *Commission v Spain* [2009] ECR I-1353 (finding Spain in violation of the Directive on medicinal products for human use because it withdrew more than 200 products which were in circulation in other Member States if they were not specifically listed in a national law that did not assess on a case-by-case basis whether the items were dangerous to human health;

'general and persistent' violation cases were not affirmed by the Court. In each case where the Court rejected the concrete case, however, the Court also asserted its willingness to hear 'bundled' cases in general. The cases collapsed over the proof of the pattern, however, either because not enough instances were investigated, because the duration of the violations was not clear or because the instances investigated did not add up to a pattern on a common subject.[330] The problem, therefore, seems to be evidentiary and not jurisprudential.[331]

As these examples indicate, however, bundling a series of specific violations together to demonstrate a larger pattern from which one would draw more sweeping legal conclusions is no longer a radically novel idea at the ECJ. But the Commission has not yet tried to use that strategy to defend basic Article 2 values. The reason why observers know that a Member State is not just engaged in 'ordinary' infringements of EU law but is instead engaged in more worrying 'backsliding' is that the Member State is systematically disabling checks on executive power, undermining comprehensively the independence of the judiciary, neutralizing human rights protection and other more comprehensive actions.

To address backsliding, the Commission needs to bundle enough of these violations together to demonstrate deep shifts in adherence to the fundamental constitutional principles of democracy and the Rule of Law, which is what the systemic infringement procedure aims to do. Instead of simply documenting a pattern that shows EU law has been violated in precise and small ways, the systemic infringement procedure focuses on claims that raise questions of a more fundamental sort, where the pattern of violations demonstrates that the Member State's commitment to European values is in serious doubt. The systemic infringement procedure would therefore be distinguished from the pattern-based cases by the seriousness of the violations alleged in European constitutional terms and by the way that fundamental principles of EU law are raised in the infringement, allowing the Union to protect its constitutional essence, as opposed to merely enforcing the rules it creates. Through alleging systemic infringements,

the case depended on challenging not only the limiting law but also the 200 examples of substances actually removed from pharmacy shelves).

[330] Case C-34/11 *Commission v Portugal* ECLI: EU: C:2012:712, paras 41–50 (Commission failed to establish air pollution violations for a sufficient number of locations or over a long enough span of years); Case C-68/11 *Commission v Italy* [2012] ECLI: EU: C:2012:815, paras 49–57 (Commission failed to specify locations and duration of air pollution); Case C-160/08 *Commission v Germany* [2010] ECR I-3713, paras 113–123 (Commission failed to show that the lack of public tenders was widespread in a particular substantive field); Case C-416/07 *Commission v Greece* [2009] ECR I-5703, paras 44–49 and 97–100 (Commission failed to provide adequate proof that Greece had failed its obligations to protect animals during transport to slaughter); Case C-342/05 *Commission v Finland* [2007] ECR I-4713, paras 32–39 (administrative practice can be a violation of EU law, but it must be shown to be consistent and general); Case C-156/04 *Commission v Greece* [2007] ECR I-4129, paras 44–53 (establishing an administrative practice requires more than two cases); Case C-441/02 *Commission v Germany* [2006] ECR I-3449, paras 44–56 (Commission failed to establish an administrative practice of a consistent and general nature).

[331] Gormley (n 28).

the Commission could turn infringement procedures into functioning guarantors of EU- and national-level constitutionalism.

C. The legal bases for systemic infringement actions

Systemic infringement procedures before the Court could be structured doctrinally in one of several ways, which all rest directly or indirectly on the justiciability of Article 2 TEU. The move is absolutely crucial, since Article 19 TEU *per se*—even with all its potential interpretations—cannot reach all the elements of Article 2 TEU, even after *Portuguese Judges* and all the *Commission v Poland* cases demonstrated that Article 19 could give meaning to some of Article 2's values.

How could systemic infringement actions supplement this already existing link between Articles 2 and 19 TEU in the case law of the ECJ? First, and perhaps most ambitiously, they could directly allege that a pattern of Member State conduct violates one or more of the basic principles outlined in Article 2 TEU, rather than implicating Article 2 values only indirectly through another provision of the Treaties. Secondly, invoking Article 2 TEU cumulatively with other Treaty provisions of more general scope—for example, the duty of loyalty in Article 4(3) TEU[332]—could expand the reach of Article 2 values in understanding the constitutional framework established by the Treaties. A number of similar combinations can be proposed, alongside Christophe Hillion's most enlightening analysis of Article 2 TEU and its possible application.[333] In other words, Article 19 TEU may not be the only Treaty provision better read in light of the values of Article 2 TEU. Thirdly, systemic infringement proceedings could flag Article 2 values through linking them to violations of the Charter of Fundamental Rights in combination with the violations of both primary (such as Article 19 TEU) and secondary EU law (substantive legal provisions which require, eg independent judicial review) to show how the sum total of the violations alleged amount to a violation of the values of Article 2 TEU. Finally, the Commission could also group together various possible infringements[334] affected by a dismantling of separation of powers as this affects a variety of branches of EU law (eg state aid and cooperation in criminal justice matters). As we will show in Section V, however, it will be fundamentally important to secure the transparency of systemic infringement proceedings, at least at the pre-judicial stage so that the interlocutors of the Member State in question understand how the Commission is diagnosing the problem. But first, we will elaborate each of these different doctrinal strategies for bundling together a set of infringements in turn.

[332] Art. 4(3) TEU.
[333] Hillion (n 104).
[334] Blauberger and Kelemen (n 105), 321–36.

(i) Building a systemic infringement action on Article 2 TEU

There is an overwhelming agreement in the literature today, led, *inter alia*, by Christophe Hillion and Jean-Claude Piris, that Article 2 TEU is not merely an aspirational provision confined to purely political enforcement via Article 7 TEU, but falls directly within the scope of the enforcement procedures.[335] Piris is absolutely right in stating that 'Article 2 TEU on the Union's values is not only a political and symbolic statement. It has concrete legal effects'.[336] The Commission joined the choir of those reaffirming this reality, as Commissioner Reding, then still holding the Justice portfolio,[337] and the Barroso Commission as a college, proposed the 'pre-Article 7 Procedure' and insisted on combatting values' violations through the deployment of infringement procedures.[338] The same approach has been reaffirmed in the most recent 'Blueprint for Action' released by the Commission in the summer of 2019.[339] Direct enforcement of Article 2 TEU without recourse to Article 7 TEU is thus possible.[340]

We agree with Christophe Hillion that the Commission as guardian of the Treaties has an obligation to enforce Article 2 TEU using legal means first, precisely to ward off more serious violations that would justify the political sanctions envisaged in Article 7 TEU.[341] He envisions judicial enforcement of Article 2 as a precautionary measure seeking to dissuade offending Member State from engaging in conduct which could later ground an Article 7 TEU procedure. As the 'Editorial Comments' in the *CML Rev* noted in 2015, 'the Treaties neither restrain nor exclude the Court of Justice's jurisdiction in relation to Article 2 TEU. Had such limitation been wanted, the primary law-makers could have made it explicit'.[342] And they, of course, have not. Similarly, Armin von Bogdandy argues that given the lack of any 'explicit ban' on the legal enforcement of Article 2 TEU and the ECJ's general role in establishing the coherence of EU law, there is good reason to assume that values can and should play a role in the procedures under

[335] Closa, Kochenov, and Weiler (n 70); Hillion (n 104); J-C Piris, *The Future of Europe: Towards a Two-Speed EU?* (Cambridge: Cambridge University Press, 2011); Klamert and Kochenov (n 4), 22–30.
[336] J-C Piris, *The Lisbon Treaty* (Cambridge: Cambridge University Press, 2010), 71. See for a detailed analysis, Hillion (n 104).
[337] 'We could go further, by creating a new specific procedure to enforce the rule of law principle of Article 2 TEU against Member States by means of an infringement procedure brought by the Commission or another Member State before the Court of Justice': Reding (n 88).
[338] The Commission underlined in its pre-Article 7 procedure communication that the procedure is not supposed to replace ordinary infringement procedures in the Treaties: Communication from the Commission to the European Parliament and the Council, *A new EU Framework to strengthen the Rule of Law*, Brussels, 11 March 2014, COM(2014) 158 final, at 3 and 6.
[339] Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee, and the Committee of the Regions. *Strengthening the rule of law within the Union: A blueprint for action*, COM/2019/343 final, 14.
[340] Klamert and Kochenov (n 4), 26.
[341] Hillion (n 104).
[342] Editorial Comments, 'Safeguarding EU Values in the Member States—Is Something Finally Happening?' (2015) 52 *CML Rev*, 619, 622.

Articles 257, 258, and 267 TFEU.[343] Moreover, the wording of Article 258 TFEU refers to violations of 'the Treaties', which must cover violations of Article 2 TEU as well.[344] By now, there is substantial agreement that the Commission has the power to enforce Article 2 TEU directly through infringement actions, eventually in combination with other provisions of the Treaties. The ECJ has supported this reading in its jurisprudence on judicial independence. This is the ground that the systemic infringement procedure builds upon.[345]

It would take some serious work to compile the novel form of infringement action that we propose. In particular, many of the Article 2 TEU values are stated very broadly, and critics say it would be difficult to create workable definitions of those general terms to make Article 2 TEU legally enforceable.[346] But the ECJ has already started with the Rule of Law, which is not a mysterious concept to a judge. Surely, the Rule of Law includes the idea of judicial independence, as the Court has already found. Even before the cases on judicial independence that we have reviewed, the ECJ had already developed jurisprudence specifying what it means for other important EU institutions to be independent.[347] Using these standards, the ECJ could easily assess whether the independence of a Member State's crucial institutions had been compromised, something that would raise serious questions about the Member State's commitment to the Rule of Law and perhaps even to democracy under Article 2 TEU. A rich academic literature,[348] as well as the pre-accession work of the Commission and other institutions,[349] supplemented by Council of Europe practice and jurisprudence[350] will assist in this process of filling in what the values listed in Article 2 TEU might mean.

We can see how this would work by taking Hungary as an example. As we have seen, the ECJ already found that the government of Hungary had committed unlawful age discrimination when it suddenly lowered the judicial retirement age and dismissed the most senior 10 per cent of its judiciary. But surely the problem was not *just* age discrimination. When the criteria for holding office can be changed so that current judges can be suddenly removed from office, this is

[343] A von Bogdandy, 'Principles and challenges of a European doctrine of systemic deficiencies' *MPIL Research Paper Series* No. 2019-14, 23.
[344] Wilms (n 29), 81.
[345] Schmidt and Bogdanowicz (n 28); Gormley (n 28).
[346] Gormley (n 28), 78; K. Tuori, From Copenhagen to Venice, in: Closa and Kochenov (n 1), 236. Cf. Editorial Comment, 'Safeguarding EU Values in the Member States—Is Something Finally Happening?' (2015) 52 *CML Rev*, at 625. The authors of the Editorial Comment went on, however (at 626), to argue that the EU judiciary could also contribute to the clarification of Article 2 TEU.
[347] See, for example, the cases on the independence of data protection commissioners: Case C-288/12 *Commission v Hungary* ECLI: EU: C:2014:237; Case C-518/07 *Commission v Germany* [2010] ECR I-1885; Case C-614/10 *Commission v Austria* ECLI: EU: C:2012:631.
[348] Eg L Pech, 'The Rule of Law as a Constitutional Principle' (n 19); ML Fernández Esteban, *The Rule of Law in the European Constitution* (The Hague: Kluwer Law International, 1999).
[349] Kochenov (n 121).
[350] Venice Commission, Rule of Law Checklist, adopted by the Venice Commission at its 106th Plenary Session (Venice, 11–12 March 2016), CDL-AD(2016)007-e.

also an infringement of the independence of the judiciary. In assessing what it means for an institution to be independent, the ECJ could have, even at that time, taken a page from its own jurisprudence on the independence of data protection officers in Member States. In fact, Hungary had just such a case before the Court when the office of data protection ombudsman was reorganized and the incumbent dismissed before the end of his term. In that case, the ECJ said:

> 54. If it were permissible for every Member State to compel a supervisory authority to vacate office before serving its full term, in contravention of the rules and safeguards established in that regard by the legislation applicable, the threat of premature termination to which that authority would be exposed throughout its term of office could lead it to enter into a form of prior compliance with the political authority, which is incompatible with the requirement of independence.[351]

Finding that a country had altered qualification criteria for sitting judges in order to allow them to be dismissed before the lawful end of their terms should be enough for a systemic infringement action alleging a violation of the independence of the judiciary, too. Independence is independence, and the same standard can be used across different institutions whose legitimacy rests on their independence from political control. We can even imagine this standard of institutional independence carrying over to the independence of the procuracy, state audit offices, election commissions, ombudspersons, media regulators, and central banks, many of which will be crucial in assessing whether a Member State is still a democracy or is capable of honouring fundamental rights.

While the Commission has been slow to make this leap, the Court of Justice has been educating the Commission on what is possible and necessary in infringement cases. In *Commission v Poland (Independence of the Supreme Court)* the ECJ applied a proportionality test to assess the alleged violation of the principle of irremovability of judges and found that Article 19(1) TEU had been violated. But Article 19(1) TEU, powerful in this particular case, might still be an insufficient tool to tackle some of the more extreme steps taken by Member States to establish political control over courts through the adoption of constant legislative amendments. This is not an imaginary situation; take actually existing examples from Hungary and Poland in which those states increased the numbers of judges who would be appointed by a captured judicial council, changed the jurisdiction of the courts so that cases that appeared as settled law could be reopened again after the bench had been purged of long-standing judges, and accomplished other end-runs around the principle of judicial independence.[352] These changes, made by law, undermine not only the independence of the judiciary,

[351] Case C-288/12 *Commission v Hungary* [2014] ECLI: EU: C:2014:237.

[352] W Sadurski (n 14), 111; M Ziółkowski, 'Two Faces of the Polish Supreme Court After "Reforms" of the Judiciary System in Poland' (2020) 5 *European Papers*, 348, 351 and 355. For a general overview of the 'court-packing' issue, see D Kosař and K Šipulová, 'How to Fight Court-Packing?' (2020) 6 *Constitutional Studies*, 133.

but also—more broadly—lead to a general distrust in law because the courts are politically staffed and invited to overturn settled law across the board. The preliminary reference procedure—initiated in numerous cases by national courts in these states—might turn out to be procedurally awkward and insufficient to tackle the systemic threats to other elements of rule of law, such as legal certainty and the transparency of law, because they are limited to the issues posed by single cases.

Some judges in Hungary and Poland have attempted to raise more general questions about judicial independence through preliminary references, but they must stretch to do so since the scope of the reference is confined to the case before them. The ECJ has already clarified that even in the context of the crucial fight for judicial independence Article 267 TFEU is not a *passpartout* solution, since the courts must still find the 'substantive' link to EU law. For example, in the recent *Miasto Łowicz and Prokurator Generalny* case law, the ECJ found inadmissible the references from Polish courts that were trying to use the judicial independence rulings of the ECJ to defend themselves.[353] In contrast to preliminary references, however, the infringement action is precisely designed to cover any action attributed to a Member State (and this includes actions undertaken by legislative, executive, or judicial branches).[354] Infringement actions generally lend themselves to a more structural framing and can result in a more clearly articulated demand to comply,[355] as opposed to a set of more detailed explanations about EU law that must be put into effect by the very institutions whose compromised position provided the occasion for the initial reference.[356]

[353] Joined Cases C-558/18 and C-563/18, *Miasto Łowicz and Prokurator Generalny* EU: C:2020:234; annotated by S Platon in *CML Rev* (2020, forthcoming) For a detailed analysis, see, Pech and Kochenov (n 13).

[354] B Schima, 'Article 258', in: Kellerbauer, Klamert, and Tomkin (n 4), 1776.

[355] Eg Case C619/18, *Commission v Poland (Independence of the Supreme Court)* [2019] ECLI: EU: C:2019:531; Case C192/18 *Commission v Poland (Independence of the Ordinary Courts)*[2019] ECLI: EU: C:2019:924.

[356] As happened, for instance, following the case *A.K.*, where implementation of the ruling by the Supreme Court (see Supreme Court Resolution on the formation of the combined Civil Chamber, Criminal Chamber, and Labour Law and Social Security Chamber adopted on 23 January 2020, case no. BSA I-4110-1/20) resulted in twofold actions from the Government and loyal institutions. On the one hand, the so called 'muzzle law' (see, Act of 20 December 2019 amending Act on Organisation of the Ordinary Courts and Act on the Supreme Court, and other acts) was adopted, despite criticism from the Venice Commission (see, Joint Urgent Opinion of the Venice Commission and the Directorate General of Human Rights and Rule of Law (DGI) of the Council of Europe on amendments to the Law on the Common courts, the Law on the Supreme court, and some other Laws, endorsed by the Venice Commission on 18 June by a written procedure replacing the 123rd Plenary Session, CDL-AD(2020)017-e). It in fact aimed at punishing justices who question (eg by applying EU law and ECJ rulings) controversial judicial reforms. On the other hand, the captured Constitutional Tribunal first 'suspended' the application of the Supreme Court resolution (see, decision of 28 January 2020, case no. Kpt 1/20) and then in the two rulings announced on 20 and 21 April 2020 nullified the resolution of the Supreme Court inter alia on the basis of Articles 2 TEU and 4(3) TEU and also found that the Supreme Court had interpreted relevant legal provisions in 'a law-making manner' (see, judgment of 20 April 2020, case no. U 2/20). In consequence, judges of the Disciplinary Chamber, despite the fact they were found not to

A systemic infringement procedure should analyse and link together a set of changes—for example, the lowering of the retirement age and the consequent termination of judicial appointments, the change of qualifications for judges already in office, the new system for appointing judges which concentrates power in the hands of politically selected officials together with the power of politically selected officials to ensure cases get to government-friendly judges. Add to this the new systems for disciplinary control of existing judges, new forms of legal action that allow state officials to change existing case law by moving cases to politically compliant tribunals and more—and the extent of the threat to judicial independence can be more fully and accurately captured as a comprehensive assault on the Rule of Law.

The Commission should not ignore that in the most compromised Member States, these problems can no longer be fixed domestically because the Constitutional Court/Tribunal has been politically captured through court-packing, destroying the ordinary self-correcting mechanisms built into the domestic constitutional order. Both Hungary and Poland are clear examples of this. Instead of taking each new assault on the judiciary one by one, the Commission should understand these elements together as a system, since they were designed by the governments in these Member States to operate together.

Taking all of these different pieces of the puzzle and putting them all together, the Commission can properly diagnose and the Court can properly find that the independence of the judiciary had been infringed—not only by each change separately but even more comprehensively when all are taken together. In this way, the systemic infringement action is like the environmental cases mentioned above in which the ECJ was able to attribute non-enforcement of environmental law to a plan of state action and not just to the negligent behaviour of particular waste site operators. Here, too, the set of changes to the judiciary of the sort just described are not just a set of separable and random changes, but they show when added up together a deliberate effort on the part of the Member State to bring the judiciary under political control. The Article 2 TEU Rule of Law provision could provide a doctrinal anchor for this action.

Critics contend that it is impossible to enforce the general principles of Article 2, like the Rule of Law, without a precise definition of what it included. But it is not necessary to have a precise definition covering all cases at the margins to identify a situation which attacks the heart of a principle and it is not necessary to have a precise definition of every single value in Article 2 TEU to be able to enforce the elements more amenable to adjudication. Crucially even if we only focus on the Rule of Law among the numerous values of Article 2 TEU it is clear that it cannot be confined to judicial independence in the conventional way. A more general doctrinal trigger than Article 19(1) TEU is thus absolutely

be judges in the light of the Supreme Court resolution of 23 January 2020, took part in the procedure of selecting a new First President of the Supreme Court in May 2020.

indispensable and systemic infringements based on Article 2 could supply such a trigger.

(ii) Building a systemic infringement action on Article 2 TEU in conjunction with Article 4(3) TEU

In tune with Kim Scheppele's earlier writings,[357] Schmidt and Bogdanowicz also argue that systemic infringements can be built to focus on a specific sub-principle of the Rule of Law,[358] for example going beyond judicial independence to legal certainty and equality under the law. Systemic infringement procedures could be also framed in such a way that a systemic violation of the basic principles of EU law puts a Member State in violation of Article 4(3) TEU, which requires sincere cooperation in the European project. This is familiar ground to the ECJ, which can draw on an already developed extensive jurisprudence on the duty of loyalty.[359] Using this rubric, the Commission would argue that the laws and practices of the challenged Member State systematically interfere with the operation of EU law in the Member State's jurisdiction and thus violate Article 4(3).[360]

The principle of sincere cooperation became relevant in Poland when the Prosecutor General (who is also Minister of Justice because the two offices were merged) submitted a motion to a captured Constitutional Tribunal in order to review the constitutionality of Article 267 TFEU itself.[361] The motion was a response to a set of preliminary references made by the Supreme Court to the Court of Justice questioning whether the new law on the Supreme Court lowering the retirement age of the judges was compatible with EU law.[362] If the Constitutional Tribunal—now composed partially of unlawfully appointed impostors who act as 'judges'—agrees with the Prosecutor's arguments and finds Article 267 TFEU unconstitutional under the Polish Constitution, the infringement of Article 4(3) TEU by this decision will be more than obvious.[363] Correcting only the obvious problem that the Polish government has barred Polish judges from sending references to

[357] Scheppele (n 36).
[358] Schmidt and Bogdanowicz (n 28), 1089.
[359] For a comprehensive account of the loyalty principle in EU law, see Klamert (n 128). See also the innumerable expert works by the patriarch of this topic, John Temple Lang, spanning many a Treaty revision.
[360] B Grabowska-Moroz, 'Rule of law framework—is it time for Romania?' RECONNECT Blog, 5 June 2019, https://reconnect-europe.eu/blog/grabowska-moroz-rule-of-law-romania-timmermans/.
[361] Motion of Prosecutor General, 4 October 2018, at: <https://ipo.trybunal.gov.pl/ipo/dok?dok=F694069373%2FK_7_18_pg_2018_10_04_ADO.pdf>.
[362] S Biernat and M Kawczyńska, 'Why the Polish Supreme Court's Reference on Judicial Independence to the CJEU is Admissible after all', 23 August 2018 *VerfBlog*, at: <https://verfassungsblog.de/why-the-polish-supreme-courts-reference-on-judicial-independence-to-the-cjeu-is-admissible-after-all/>.
[363] S Biernat and M Kawczyńska, 'Though this be Madness, yet there's Method in't: Pitting the Polish Constitutional Tribunal against the Luxembourg Court' 26 October 2018 *VerfBlog*, at: <https://verfassungsblog.de/though-this-be-madness-yet-theres-method-int-the-application-of-the-prosecutor-general-to-the-polish-constitutional-tribunal-to-declare-the-preliminary-ruling-procedure-unconstitut/>. Pech (n 266).

the ECJ and doing it through launching an infringement action against this particular decision, however, will only address one small piece of the puzzle.

Poland could not have gotten to the stage of barring judicial references to the ECJ without a captured Constitutional Tribunal and a Minister of Justice who possesses substantial power over the careers of individual judges through his appointments to the National Council of the Judiciary and his appointments to the new chamber of the Supreme Court that disciplines judges. Reversing a Constitutional Tribunal judgment that an EU Treaty provision violates the Polish Constitution—something that might be addressed with a more narrowly drawn and traditional infringement action—leaves the real problem of the captured judiciary unaddressed. One would not need the Constitutional Tribunal to find formally that a Treaty provision violates the Constitution for judges to come under disciplinary pressure to avoid referring cases to the ECJ. The problem is that the judiciary has now been structured so that it must do what the government asks it to do. Singling out one Constitutional Tribunal decision for correction while leaving the whole system in place will ensure that the same issue will arise over and over again.

The pattern of judicial 'reform' in Poland is based on the creation of a cobweb of new powers assigned to the executive (primarily the Minister of Justice), who then influences disciplinary proceedings against existing judges and prosecutors,[364] the conduct of pre-trial investigations, the administration of courts,[365] and the appointment of new judges.[366] In order to give the executive this power over the judiciary, a number of controversial personnel decisions were made—unlawful appointments to the Constitutional Tribunal (December 2015), the merger of the office of Prosecutor General and Minister of Justice (March 2016), the removal of presidents and deputy presidents of ordinary courts and their replacement by new ones (September 2017–February 2018), the politically influenced appointment of disciplinary advocates and disciplinary courts for judges (June–July 2018) and the appointment of new judge members of National Council of Judiciary which in turn appoints the new judges (March 2018)[367]

[364] Szuleka and Kalisz (n 256).

[365] Administrative directors of the courts are fully subordinated to the Ministry of Justice (MoJ). Moreover, the presidents of the courts are appointed by the MoJ.

[366] On 27 August 2018 the National Council of Judiciary refused to appoint Prof. Kamil Zaradkiewicz (head of the department in the Ministry of Justice) to the office of Supreme Court judge. The next day Zbigniew Ziobro (Minister of Justice) supported the candidacy of Zaradkiewicz during a meeting of the NCJ. Finally, Zaradkiewicz was appointed for that position. *Judiciary Council recommends 7 candidates for the Supreme Court's Civic Chamber*—<https://www.tvn24.pl/tvn24-news-in-englishkrs-recommends-7-candidates-for-the-supreme-court-s-civic-chamber , 864311.html>.

[367] OSCE/ODIHR Final Opinion on Draft Amendments to the Act of the National Council of the Judiciary and Certain Other Acts of Poland—https://www.osce.org/odihr/315946; Poland—Opinion on the Draft Act amending the Act on the National Council of the Judiciary; on the Draft Act amending the Act on the Supreme Court, proposed by the President of Poland, and on the Act on the Organisation of Ordinary Courts, adopted by the Commission at its 113th Plenary Session (Venice, 8–9 December 2017), CDL-AD(2017)031-e.

and which later appointed government-friendly judges to a newly established Disciplinary Chamber of the Supreme Court (August 2018). Three chambers of Supreme Court in its resolution[368] of 23 January 2020 adopted to give full effect within the Polish legal system to the ECJ's interpretation of EU law in the *A.K. et al.* ruling found that the procedure for appointing judges to the Disciplinary Chamber violated the European standards of independence and therefore the rulings of the Disciplinary Chamber may not be enforced. Also the interim measure issued on 8 April 2020 by the ECJ ordered Poland to suspend provisions of the law on the Supreme Court which allocated disciplinary cases to the Disciplinary Chamber.[369] As a result of the ECJ order, then, First President Gersdorf suspended the whole Disciplinary Chamber,[370] whereas her temporary successor appointed by the President of Poland limited the effect of the *A.K.* decision to only the disciplinary cases against judges.[371] The absence of domestic constitutional review because the Constitutional Tribunal has already been politically hijacked meant that disproportionate political influence has already been brought to bear on the entire judiciary and, as a result, the proper application of EU law is itself threatened. It is threatened by each of those moves individually, but it is even more threatened by the sum of them together. Surely the set of changes made to the judiciary violate not only the Rule of Law principle in Article 2 TEU but also the principle of loyalty under Article 4(3). Merely invoking Article 19 TEU is not enough to capture what is going on here, for while some of these elements violate judicial independence directly, others create the conditions in which the whole Polish state can unmoor itself from European law. It is hard to imagine a more profound violation of Article 4(3), read together with the Rule of Law provision of Article 2 TEU.

These violations of EU law are no longer speculative. The judges appointed prior to these political aggressions against the judiciary have been trying to ensure the proper application of EU law, but they have faced retaliation at home for doing so from politicians as well as from 'judges' who were later political appointees. For example, the Supreme Court's decisions to refer to the ECJ

[368] Resolution of the Supreme Court (Civil Chamber, Criminal Chamber, Labour and Social Security Chamber) of 23 January 2020, case III PO 7/18. Cf. P Tuleja, 'Ustrojowe znaczenie uchwały SN z 23.01.2020 r.' (2020) *Państwo i Prawo* 10/2020, 48; M Ziółkowski, 'Konstytucyjna kompetencja sądu do ochrony własnej niezależności (uwagi na marginesie uchwały SN z 23.01.2020 r.)' (2020) *Państwo i Prawo* 10/2020, 71.

[369] Case C-791/19, *Commission v Poland* [2020] ECLI: EU: C:2020:277.

[370] Ordinance no. 48/2020 of the First President of the Supreme Court of 20 April 2020, at: <http://www.sn.pl/aktualnosci/SiteAssets/Lists/Wydarzenia/NewForm/Zarz%C4%85dzenie%20nr%2048_2020%20Pierwszego%20Prezesa%20SN%20z%20dnia%2020%20kwietnia%202020r.pdf>.

[371] Ordinance No. 55/2020 of the First President of the Supreme Court of 5 May 2020 concerning enforcement of the decision of the Court of Justice of the European Union of 8 April 2020 granting interim measures in case C-791/19 and revoking the Ordinance of 20 April 2020, at: <http://www.sn.pl/aktualnosci/SiteAssets/Lists/Wydarzenia/AllItems/Zarz_PP_SN_55_2020_EN.pdf>.

questions concerning the amendments to the Supreme Court Act faced radical political criticism at home. Similar preliminary references sent to the ECJ by ordinary courts on other aspects of the 'judicial reforms' resulted in the initiation of disciplinary proceedings against the judges who made the references.[372] In such an environment, the fact that the Commission limited its infringement actions only to the retirement age issue and to the political appointment procedure for the National Council of the Judiciary—and then in separate procedures which would not permit the ECJ to see these two things as part of a larger package—identifies only small pieces of a much bigger picture and it is this bigger picture that threatens the application of EU law within Poland. A targeted infringement action just focusing on Article 19 TEU will not be able to fully address the systemic undermining of the duty of loyalty in Poland.

As this example demonstrates, in the general context of a fully-fledged assault on the Rule of Law in a given Member State, only a more systemic approach to infringement actions would allow the Commission to adequately act as a guardian of the Treaties. Individual infringement actions building on the possibilities offered by Article 19(1) TEU, however useful for identifying problems with particular courts, are bound to miss the systemic nature of a comprehensive programme of judicial 'reform' aimed at undermining the independence of the whole judiciary. If a Member State is engaged in wholesale destruction of the independent institutions that the EU needs to rely upon to ensure EU law is properly enforced, then singling out only one small part of the reforms for legal attention means losing the war even if the Commission wins the battle. The fact that the ECJ, first in the *Portuguese Judges* case and then in the *Polish Supreme Court* case, was willing to so dramatically expand its protection of the judicial independence of Member States' courts indicates that the ECJ sees what is at stake. It was practically inviting the Commission to bring more systemic and structural infringement procedures to stop Member States' courts from being brought under national political tutelage. The Commission should accept the invitation.

There are some signs, however hesitant, that the Commission is doing so. The infringement action it initiated against Poland in April 2019[373] had the potential to become the first (at least partially) systemic infringement action initiated by

[372] K Gajda-Roszczynialska and K Markiewicz, 'Disciplinary Proceedings as an Instrument for Breaking the Rule of Law in Poland' (2020) *Hague Journal of the Rule Law* (early view);*A country that punishes* (n 256); Szuleka and Kalisz (n 256); Speech of the Commissioner for Human Rights Adam Bodnar (n 256); 'Polish judges face the music as state tightens grip' *Financial Times*, 4 October 2018, at: <https://www.ft.com/content/42c6ecc0-c26a-11e8-95b1-d36dfef1b89a>; 'Editorial Comments: 2019 shaping up as a challenging year for the Union, not least as a community of values' (2019), 56, *CML Rev*, 3, 17.

[373] European Commission, 'Rule of Law: European Commission launches infringement procedure to protect judges in Poland from political control', Press release, Brussels, 3 April 2019, at: <http://europa.eu/rapid/press-release_IP-19-1957_en.pdf>. Similarly, see, European Commission, 'Rule of Law: European Commission takes new step to protect judges in Poland against political control', Brussels 17 July 2019, at: <https://europa.eu/rapid/press-release_IP-19-4189_en.htm>.

the Commission. The Commission based its infringement action on a number of different elements, as a systemic infringement action should be. First, the Commission criticized the Polish law that allows ordinary court judges to be subjected to disciplinary investigations on account of the content of their judicial decisions. Secondly, the Commission noted that judges named to the Disciplinary Chamber of the Supreme Court are appointed by the National Council for the Judiciary (NCJ) whose own members are appointed by politicians. This structure, according to the Commission, fails to guarantee the independence and impartiality of either the NCJ or the Disciplinary Chamber. Third, the Commission argued that the new disciplinary regime for judges fails to ensure that a court 'established by law' will decide in first instance disciplinary proceedings against ordinary court judges, since it empowers the President of the Disciplinary Chamber to determine, on an ad-hoc basis and with almost unfettered discretion, which disciplinary court of first instance will hear each specific case. Fourth, the Commission alleged that these arrangements undermine defendants' rights in disciplinary procedures by 'allowing the Minister of Justice and the President of the Republic to keep charges permanently pending over judges through disciplinary officers appointed by them'.[374] Finally, according to the infringement action, Poland breached Article 267 TFEU because the 'disciplinary regime allows for judges to be subject to disciplinary proceedings for the content of their judicial decisions. This includes decisions to refer questions to the Court of Justice'.[375] But the Commission argued that Poland had violated its obligations under the second subparagraph of Article 19(1) TEU, without connecting this pattern of violations either to Article 2 TEU or to Article 4(3) TEU, thereby missing an opportunity to provide a framework within which a declining democracy could be diagnosed as a values violator. The case was referred to the Court of Justice in October 2019.[376] Even though it had already had substantial success with interim measures in these Polish cases, however, the Commission failed—at first—to ask for interim measures in this case.[377]

By the time that the Commission launched this more comprehensive infringement procedure, however, the Polish judiciary was already seriously compromised. The law amended in December 2017 had terminated the tenures of the

[374] European Commission, 'Rule of Law: European Commission launches infringement procedure to protect judges in Poland from political control' Press release, Brussels, 3 April 2019, at: <http://europa.eu/rapid/press-release_IP-19-1957_en.pdf>.
[375] Ibid., see Action brought on 25 October 2019—*European Commission v Republic of Poland*, Case C-791/19, at: <http://curia.europa.eu>.
[376] European Commission, 'Rule of Law: European Commission refers Poland to the Court of Justice to protect judges from political control' Press release 10 October 2019, https://ec.europa.eu/commission/presscorner/detail/en/IP_19_6033.
[377] Case C-791/19, *European Commission v Republic of Poland* (pending).

previous judges who were members of the National Council of the Judiciary (NCJ) which appoints new judges, and these new vacancies allowed the Parliament to appoint new members of that body who were more to their liking. The new NCJ, with its politically appointed members, then appointed new judges to the newly established chambers of the Supreme Court, most particularly its Disciplinary Chamber deciding cases against judges. With this new structure, the NCJ was suspended as a member of the European Network of Councils of the Judiciary because it ceased to be independent.[378] Ordinary judges in Poland could see the threat this posed to judicial independence as it was occurring, so they filed numerous preliminary references to the ECJ alleging that the independence of the NCJ had been compromised and therefore that the Disciplinary Chamber of the Supreme Court was too.[379] The Commission, however, still failed to rise above what the reference cases were asking by connecting the dots and bringing each of the individual violations they identified under one theoretical roof, such as a violation of the Rule of Law under Article 2 TEU and/or the principle of sincere cooperation under Article 4(3) TEU.

In the end, it was a reference case and not an infringement action that declared that the system of disciplining judges in Poland violated European law. In his opinion in the case of *A.K. et al.* combining a number of these preliminary references,[380] AG Tanchev found that the Disciplinary Chamber did not meet the requirements of judicial independence provided for in EU law because it was composed 'exclusively of judges selected by a national body tasked with safeguarding the independence of the courts . . . which, having regard to the systemic model for the way in which it is formed and the way in which it operates, is not guaranteed to be independent from the legislative and executive authorities'.[381] The NCJ, not surprisingly, criticized the Opinion[382] and filed a motion to reopen the oral phase of the procedure before the ECJ.[383]

The ECJ decided the *A.K.* case concerning the Disciplinary Chamber of the Supreme Court on 19 November 2019 and followed the findings of AG Tanchev. It did so, however, without basing the decision as he did on 'guidelines issued by European and international bodies, embodying principles shared by

[378] *ENCJ suspends Polish National Council—KRS*, at: <https://www.encj.eu/node/495>.
[379] Joined Cases C-585/18, C-624/18, and C-625/18, *A. K. and Others v Sąd Najwyższy* [2019] ECLI: EU: C:2019:982.
[380] Opinion of AG Tanchev delivered on 27 June 2019, Joined Cases C-585/18, C-624/18, and C-625/18, *A. K. and Others v Sąd Najwyższy* ECLI: EU: C:2019:551, para. 69.
[381] Ibid., para. 157
[382] NCJ resolution of 28 June 2019 http://krs.pl/admin/files/rp2013/uchwala%20630%202019%20tsue_en.pdf.
[383] Motion of the NCJ submitted to the ECJ, at: <http://krs.pl/admin/files/rp2013/wniosek%20krs%20do%20tsue%20_en.pdf>.

the Member States relating to judicial independence'.[384] Instead, the ECJ relied on the case law of the European Court of Human Rights.[385] The Court additionally found that Article 47 of the Charter and Article 9(1) of Directive 2000/78/EC must be interpreted as 'precluding cases concerning the application of EU law from falling within the exclusive jurisdiction of a court which is not an independent and impartial tribunal, within the meaning of the former provisions'.[386] The Court established a set of criteria that should be used to evaluate the independence of national courts—for example, the manner in which the court was formed, its characteristics, and the means by which its members were appointed. The ECJ found that the new Disciplinary Chamber's configuration might give rise to 'legitimate doubts, in the minds of subjects of the law'[387] regarding its independence. The ECJ said that it could not guarantee the 'imperviousness of that court to external factors, in particular, as to the direct or indirect influence of the legislature and the executive and its neutrality with respect to the interests before it'.[388] Such doubts might lead to that 'court not being seen to be independent or impartial',[389] which might further prejudice the trust 'which justice in a democratic society must inspire in subjects of the law'.[390]

Because this was a preliminary reference case and not an infringement action, the Court decided that 'it is for the referring court to determine . . . whether that applies to a court such as the Disciplinary Chamber'.[391] The Polish Supreme Court then implemented the ECJ ruling twice—in December 2019[392] and in January 2020[393]—finding that the Disciplinary Chamber did not meet the requirement of independence and therefore could not be regarded as a 'court'. In reaction, the government passed new legislation that made the application of the ECJ ruling impossible.[394] The new 'muzzle law' prohibits judges from criticizing judicial appointments and so would therefore prevent judges from ruling that judges on another court—for example, the Disciplinary Chamber—were improperly appointed. Reviewing this new law, the Venice Commission found that the Polish courts would

[384] Eg the Council of Europe Committee of Ministers Recommendation CM/Rec(2010)12, Judges: independence, efficiency, and responsibilities, 17 November 2010 ('2010 Recommendation').
[385] Joined Cases C-585/18, C-624/18, and C-625/18, *A. K. and Others v Sąd Najwyższy* [2019] ECLI: EU: C:2019:982.
[386] Joined Cases C-585/18, C-624/18, and C-625/18, *A. K. and Others v Sąd Najwyższy* [2019] ECLI: EU: C:2019:982, para. 171.
[387] Ibid., para. 153.
[388] Ibid.
[389] Joined Cases C-585/18, C-624/18, and C-625/18, *A. K. and Others v Sąd Najwyższy* [2019] ECLI: EU: C:2019:982, paras 153 and 117.
[390] Ibid., para. 153.
[391] Ibid., paras 140 and 145.
[392] Judgment of the Supreme Court of 5 December 2019, case III PO 7/18.
[393] Resolution of the Supreme Court (Civil Chamber, Criminal Chamber, Labour and Social Security Chamber) of 23 January 2020, case III PO 7/18.
[394] Act of 20 December 2019 amending the Act on the Organisation of the Ordinary Courts, the Act on the Supreme Court, and the Act on the National Council of the Judiciary.

be effectively prevented from examining whether other courts within the country are 'independent and impartial' under the European rules.[395] Despite that assessment and other strong international criticism, the new law was signed by the President.[396] Judges may now be disciplined for finding that another court in their system is not independent even when this finding is directly mandated by the interpretation of EU law provided by the Court of Justice in *A.K.et al.*

The reaction of the Polish government to the ECJ ruling of 19 November 2019 convinced the Commission to finally apply in January 2020 for interim measures in the infringement case that had been originally referred to the Court in October 2019, requesting the ECJ to suspend the functioning of the Disciplinary Chamber.[397] On 8 April 2020, the ECJ granted interim measures but on the specific and narrow grounds on which the Commission had based its request. The Commission asked the ECJ to suspend operation of the Disciplinary Chamber pending the ECJ final judgment, to order the Polish authorities to refrain from referring new cases to that chamber in the meantime, and to order these authorities to report to the Commission whether these things had been done. The Court found that the continuing operation of the Disciplinary Chamber 'is likely to cause serious and irreparable harm to the EU legal order',[398] but pointedly did not say a word about the 'muzzle law' which was prohibiting Polish judges, on an ongoing basis, from following the ECJ's prior decision. Nor did the Commission raise the issue in a new infringement, as it might have done. By taking the problem in a piecemeal fashion, the Commission risks solving one problem only to find it popping up in a different form, without making any headway on the enforcement of EU values.

The Polish cases on the Disciplinary Chamber show both why reference cases cannot substitute for systemic infringement actions and also why Article 19 TEU is not enough alone to stop the damage being done to the Polish courts. While the Polish judges are trying to bring cases to the ECJ to call attention to the dire situation they face—and they do so often at substantial risk to themselves—it is in the nature of reference procedures that they cannot raise a whole series of collateral issues that only indirectly shape the questions raised by the case before the referring judge. So even though some great leaps forward in European law have been made with the springboard of reference cases, reference procedures cannot

[395] Urgent Joint Opinion on the amendments to the Law on organisation on the Common Courts, the Law on the Supreme Court and other Laws, CDL-PI(2020)002-e, para. 59.
[396] 'In Poland, Controversial Legislation Restricting Judiciary Is Signed Into Law', *New York Times* 4 February 2020, at: <https://www.nytimes.com/2020/02/04/world/europe/Poland-judiciary-law.html>.
[397] EU executive asks EU top court to suspend work of Poland's supreme court disciplinary chamber, *Reuters* 14 January 2020 <https://www.reuters.com/article/us-poland-eu-judges-injunction/eu-executive-asks-eu-top-court-to-suspend-work-of-polands-supreme-court-disciplinary-chamber-idUSKBN1ZD29I>.
[398] Case C-791/19 R *Commission v Poland* [2020] (order) ECLI: EU: C:2020:147. Cf. Annotation by L Pech in *CML Rev*, 2020 (forthcoming).

raise the sorts of structural and systemic issues that infringement procedures can. That is why the Commission must rise to the challenge and begin structuring its infringement procedures so that these more structural issues can be addressed by the ECJ. When a Member State government is creating institutions such as the Discipinary Chamber and passing laws like the 'muzzle law', that prohibits judges from sending references to the ECJ, this is a clear violation of Article 2 on the Rule of Law and Article 4(3) on sincere cooperation.

The Polish situation regarding the Disciplinary Chamber of the Supreme Court also shows why defending judicial independence alone is absolutely not enough. It is possible to do an end-run around the problem of political appointments to the bench by ordering the other judges to refuse to take note of how their fellow judges are appointed. Better to think of the whole set of problems as an effort by the Polish government to thwart sincere cooperation with the EU, and silence inter-court dialogue in direct violation of Article 4(3) TEU along with a violation of Article 19 TEU, and both in the service of achieving the realization of the values in Article 2 TEU. As long as rogue governments see all of these pieces as connected in a common web, the Commission will never successfully address the challenges posed unless the Commission sees all of the pieces together in a common web as well. The result of all the disjointed Commission's efforts speaks for itself: the Disciplinary Chamber of the Polish Supreme Court is not only 'likely to cause serious and irreparable harm to the EU legal order', as the ECJ perceptively put it, it *is* causing this harm to numerous judges who are expressing their concern over judicial independence in Poland[399] and who are trying to apply relevant EU law.[400] Unless the Commission learns to connect the dots just as the Member State governments do, it is doomed to generate a resounding failure.

(iii) Using Article 2 TEU in conjunction with the EU Charter of Fundamental Rights

Systemic infringement actions provide an opportunity for the robust use of the Charter of Fundamental Rights (CFR)[401] for the purpose of securing basic elements of the Rule of Law in the European Union. Unfortunately, the use of the Charter in infringement proceedings has been rather limited in these EU values cases.[402] This situation may be explained by the limitations on the application of

[399] 'Poland: end unjustified disciplinary proceedings against judges' International Commission of Jurists 6 December 2019, at: <https://www.icj.org/poland-end-unjustified-disciplinary-proceedings-against-judges/>.

[400] 'The Disciplinary Chamber suspends Justice Paweł Juszczyszyn from his post and reduces his remuneration' *Iustitia*, 6 February 2020, at: <https://www.iustitia.pl/en/disciplinary-proceedings/3680-the-disciplinary-chamber-suspends-justice-pawel-juszczyszyn-from-his-post-and-reduces-his-renumeration>.

[401] A Jakab, 'The EU Charter of Fundamental Rights as the Most Promising Way of Enforcing the Rule of Law against EU Member States' in Closa and Kochenov (n 1).

[402] M Kuijer, 'Fundamental rights protection in the legal order of the European Union' in A Łazowski and S Blockmans (eds), *Research Handbook on EU Institutional Law* (Cheltenham:

the Charter created by Article 51 CFR, which confines enforcement of these rights to the direct application of EU law. But this limitation should be less constraining when dealing with a case of European values violation, now that we have established that the values constitute a foundational part of EU law.

The Commission's strategy for the effective implementation of the Charter of Fundamental Rights by the European Union started by strictly following a narrow logic, looking for a direct link with the *acquis*[403] instead of recognizing that it had an obligation to enforce the values of Article 2 TEU as well.[404] Interestingly, however, in 2017, the Commission hinted at a broader view, when it announced that it would 'pursue cases in which national law provides no effective redress procedures for a breach of EU law or otherwise prevents national judicial systems from ensuring that EU law is applied effectively in accordance with the requirements of the rule of law and Article 47 of the Charter on Fundamental Rights of the EU'.[405] Since that time, all of the major infringement proceedings against Hungary either pending currently before the Court, such as the asylum cases[406] and the two cases involving restrictions on NGOs,[407] or lost by Hungary, such as Lex CEU,[408] all include alleged violations of the Charter of Fundamental Rights.[409] This could mean two things. On one hand, it may be a sign that the Commission is more willing to use the Charter because it increases the chances of success before the Court now that the Court has recognized the seriousness of Rule of Law problems. On the other hand, the inclusion of rights violations in these infringement procedures may simply signal that Rule of Law backsliding in each case had become so severe that backsliding Member States are now routinely infringing fundamental rights as they violate other aspects of EU law at the same time.

With regard to Poland, Article 47 CFR has emerged as the central right at issue in the infringement actions that revolve around judicial independence because it

Edward Elgar, 2016) 231. The Charter was not even used in the Hungarian retirement age case (C-286/12). Data on the use of the Charter in the infringement proceedings are not even mentioned in the Commission's annual report on application of the Charter.

[403] Communication from the Commission, 'Strategy for the effective implementation of the Charter of Fundamental Rights by the European Union' (COM/2010/0573 final).

[404] Kochenov and Morijn (n 79).

[405] Communication from the Commission, 'EU law: Better results through better application' C/2016/8600.

[406] Eg Case C-808/18, *Commission v Hungary* (*Asylum Procedures*).

[407] Case C-78/18, *Commission v Hungary* (*NGOs*) [2020] ECLI: EU: C:2020:476. The second case is still at the administrative stage, see: 'Commission takes Hungary to Court for criminalising activities in support of asylum seekers and opens new infringement for non-provision of food in transit zones', Press release, Brussels 25 July 2019, at: <https://ec.europa.eu/commission/presscorner/detail/EN/IP_19_4260>; Hungary: Commission takes next step in the infringement procedure for non-provision of food in transit zones, Press release Brussels 10 October 2019, at: <https://ec.europa.eu/commission/presscorner/detail/EN/IP_19_5994>.

[408] Case C-66/18, *Commission v Hungary (Lex CEU)* [2020].

[409] Editorial Comment (n 372), 16–17.

guarantees the right to an effective remedy and the right to a fair trial. It requires an 'independent and impartial tribunal . . . established by law' in order to guarantee those rights, and so it therefore connects rights in the Charter with the structural issues pertaining to judicial independence flagged by Article 19(1) TEU. In a broader sense, however, the right to a fair trial and effective remedy can also be seen as devices for protecting other fundamental rights—for example privacy rights, freedom of speech, the right of assembly or good governance—as these rights are vindicated in the course of litigation. The inbuilt limitation of Article 51 CFR can undermine the direct application of Article 47 CFR if the specific cases at issue do not directly implicate the *acquis*. Fortunately, the *Portuguese Judges* ruling did not rely primarily on Charter violations and their limitations, but went straight to Article 19 TEU to ground the obligation to ensure judicial independence as a general duty of Member States. This marginalized Article 47 of the Charter[410] leaving it in a mere 'supporting' role[411] since the principle expressed in Article 19 TEU is broader in application.[412] In the *Independence of the Supreme Court* case, AG Tanchev addressed this point directly. He found that Poland failed to fulfil its obligations under the second subparagraph of Article 19(1) TEU but added that Article 47 of the Charter was not applicable in this case due to Article 51 CFR limitation.[413]

That said, Article 47 CFR features prominently in the European Arrest Warrant (EAW) system, where the rights of the transferred individuals are at stake. In the preliminary reference case *LM*, an Irish judge sent a reference to the ECJ asking whether she was obliged to honour a European Arrest Warrant request from Poland if the courts there could not be reliably trusted to be independent.[414] In this case, Article 47 CFR provided the textual hook for assessing judicial independence, and the question was whether an exemption from the principle of mutual trust might be warranted.[415] The ECJ in *LM* underlined the 'protective' nature of the right to a fair trial, not only with reference to other fundamental rights but also with regard to common values expressed in Article 2 TEU.[416] Even so, the ruling has been criticized as too narrow, since it requires

[410] Pech and Platon (n 11).
[411] Bonneli and Claes (n 11), 634; Kochenov and Morijn (n 79).
[412] *Portuguese Judges* (n 26), para. 29.
[413] Opinion of AG Tanchev of 11 April 2019, C-619/18, *Commission v Poland*, para. 61; P Bogdanowicz, 'Three Steps Ahead, One Step Aside: The AG's Opinion in the Commission v. Poland Case' *VerfBlog* 11 April 2019, at: <https://verfassungsblog.de/three-steps-ahead-one-step-aside-the-ags-opinion-in-the-commission-v-poland-case/>.
[414] Case C216/18 PPU *Minister for Justice and Equality v LM*. [2018] ECLI: EU: C:2018:586. Cf.: C Rizcallah, 'Arrêt "LM": un risqué de violation du droit fundamental à un tribunal indépendant s'oppose-t-il à l'exécution d'un mandat d'arrêt européen?' (2018) *Journal de droit européen*. 348; Bárd and van Ballegooij (n 7), 360–1; Wendel (n 7).
[415] Bonneli and Claes (n 11), 634.
[416] Case C-216/18, *Minister for Justice and Equality v LM*, para. 48. A broader interpretation of use of Article 47 CFR was proposed by LD Spieker: 'Article 47 CFR translates the abstract and objective content of Article 19 (and thus incidentally of Article 2) into the domain of individual, subjective fundamental rights. This leads to a far reaching implication: Article 2 does not only become

the judge in an EAW case to assess whether the *particular court in the particular proceeding* that would hear the transferred person's case is compromised. Under the *LM* standard, the EAW request may only be declined where such a targeted effect is probable. While the sending judge may conduct an overall assessment of the national judiciary in the receiving state in order to determine whether to honour the EAW, that alone is not enough.[417] The Court confirmed, however—both in *Portuguese Judges* and *LM*—that judicial independence and the organization of the judiciary at a national level are not purely the exclusive competence of Member States,[418] a finding of fundamental importance in framing systemic infringement proceedings. That said, the threshold of the fair trial violation was set so high in the *LM* case that it might appear to be easier to postpone the surrender of a suspect by finding the prospect of inhuman treatment[419] in the receiving state rather than finding a breach of fair trial rights.[420] In the *LM* case itself, the Irish courts eventually gave up attempting to make the impossible determination of whether the person sought by Poland would be personally affected by a transfer to a Polish court, and the suspect was eventually extradited.[421] Since that time, however, other courts have started to take note of the extraordinary dysfunctions in the Polish system, and a Dutch court has just sent another reference to the ECJ pointedly asking whether a sending court in an EAW case involving Poland must disregard 'a real danger in the issuing Member State of the violation of the fundamental right to a fair trial for any suspect, which is linked to structural and fundamental shortcomings as regards the independence of the judiciary of that Member State'.[422] National courts appear to be rebelling against the ECJ

a relevant standard of review within the "triangular Solange" conception—the EU rule of law in its general dimension has been made justiciable through individual action. Within the frame of Article 47 CFR, an individual can address even abstract components of the rule of law.' (LD Spieker, 'From moral values to legal obligations. On how to activate the Union's common values in the EU rule of law crisis' *MPIL Resaerch Paper Series*, No. 2018-24, p. 21).

[417] KL Scheppele, 'Rule of Law Retail and Rule of Law Wholesale: The ECJ's (Alarming) "Celmer" Decision' *VerfBlog* 28 July 2018 at: <https://verfassungsblog.de/rule-of-law-retail-and-rule-of-law-wholesale-the-ecjs-alarming-celmer-decision/>; W van Ballegooij and P Bárd, 'The CJEU in the Celmer case: One Step Forward, Two Steps Back for Upholding the Rule of Law Within the EU' *VerfBlog* 29 July 2018 at: <https://verfassungsblog.de/the-cjeu-in-the-celmer-case-one-step-forward-two-steps-back-for-upholding-the-rule-of-law-within-the-eu/>; Opinion of Advocate General Sharpston delivered on 18 October 2012 in Case C-396/11 *Radu*, para. 83.

[418] Editorial Comment (n 372).

[419] Joined Cases C-404/15, C-659/15 PPU, *Pál Aranyosi and Robert Căldăraru v Generalstaatsanwaltschaft Bremen* [2016] ECLI: EU: C:2016:198. Cf. G Anagnostas, 'Mutual Confidence Is Not Blind Trust! Fundamental Rights Protection and the Execution of the European Arrest Warrant: *Aranyosi and Căldăraru*' (2016) *CML Rev*, 1683. For a detailed analysis of *Aranyosi and Căldăraru* and *LM* connections, see, also, C Rizcallah, 'Le principe de confiance mutuelle' (n 7), 297.

[420] Bard and van Ballegooij (n 7), 360–1.

[421] M Carolan, 'Extradition ordered of Polish man in controversial landmark case' *Irish Times*, 12 November 2019 at <https://www.irishtimes.com/news/crime-and-law/courts/supreme-court/extradition-ordered-of-polish-man-in-controversial-landmark-case-1.4080428>.

[422] P Bárd and J Morijn, 'Luxembourg's Unworkable Test to Protect the Rule of Law in the EU (Part I)' (*Verfassungsblog* 18 April 2020) <https://verfassungsblog.de/luxembourgs-unworkable-

standard, given the egregious violations of judicial independence on display in Poland.

If the ECJ focuses only on judicial independence writ small in a rogue Member State when a sending judge decides on the surrender of a suspect to Poland or Hungary on the basis of an EAW, it risks missing the most important threats to the Rule of Law. Even with these apparent weaknesses, however, the *LM* ruling opened the doors for a robust invocation of Article 47 CFR in infringement proceedings when the Commission asked the ECJ to examine secondary law that requires a domestic judicial review of decisions, for example in the field of criminal law.[423] EU law is implicated when a judge limits access to a lawyer in criminal proceedings or fails to secure translation rights or fails to secure legal aid in criminal cases. But the threat to the EU's basic legal order sweeps more broadly than this. Without independent courts there can be no mutual trust between Member States, so once judges in one Member State cannot be certain about the independence of courts in other Member States, the whole edifice of mutual trust is endangered. This would affect not just EAWs but also the mutual recognition of court judgments more generally.[424] While the EAW cases are the first to raise these issues starkly, the implications for other cases that stretch across the breadth of EU law should not be ignored.

Given what we know about the state of judicial independence in Poland,[425] the European Commission should consider initiating infringement proceedings based on these issues. Here, too, bundling a set of violations together in a common package would allow the ECJ to see the bigger picture in which judicial independence in Poland is seriously threatened from these multiple legal 'reforms' that affect EU secondary law in the field of criminal justice. Furthermore, systemic deficiencies regarding the independence of courts in a Member State will directly undermine other fundamental rights and freedoms protected by the Charter of Fundamental Rights (such as the freedoms of speech, association, data protection, and more).

test-to-protect-the-rule-of-law-in-the-eu/>; P Bárd and J Morijn, 'Domestic Courts Pushing for a Workable Test to Protect the Rule of Law in the EU (Part II)' (*Verfassungsblog* 19 April 2020) <https://verfassungsblog.de/domestic-courts-pushing-for-a-workable-test-to-protect-the-rule-of-law-in-the-eu/>.

[423] Hoffmeister (n 173), 233.

[424] R Grzeszczak and S Terrett, 'The EU's role in policing rule of law: reflections on recent Polish experience' (2018) *Northern Ireland Legal Quarterly*, 69(3), 352—Article 19 seems to be a cornerstone of mutual trust among Member States and among different judicial systems within the Member State. That is why 'it is not realistically possible for the EU to rely on national courts, in the spirit of the *Simmenthal* formula when those courts have been subjugated to the executive power, as in the case in Poland and Hungary'.

[425] B Grabowska-Moroz, 'Unijna dyrektywa o prawie dostępu do obrońcy—zadanie dla ustawodawcy, wyzwanie dla sądów' *Przegląd Sądowy*, 3/2019, 45–59.

In a broader sense, however, Rule of Law backsliding can lead to a situation in which fundamental rights are undermined in a systemic way as a routine matter and not just in a few spectacular cases. It can also lead to a general distrust of courts in a particular country, which would cause the whole web of mutual recognition of judgments to come unravelled. Lack of effective judicial review at the constitutional level brought about by the capture of constitutional courts in Hungary and Poland has meant that there is no longer a neutral judicial body within these countries that can verify the conformity of legislation and decisions of public authority with the Constitution or, for that matter, with EU law. This has allowed the governments in Poland and Hungary to pass legislation threatening freedom of speech and access to information,[426] the right to private life and personal data protection,[427] or even the right to free and fair elections (eg to the European Parliament).[428] And it has allowed these governments to threaten the general application of EU law in cases that implicate not only rights but also the supremacy of EU law.[429]

As the Commission considers how to construct a systemic infringement action, it should not ignore the rights violations that take place during Rule of Law backsliding. In fact, given that Article 2 TEU also commits Member States to protect human rights, a pattern of rights violation would violate Article 2 directly without needing to go through the mediation of the Rule of Law clause. The use of the Charter of Fundamental Rights not only in infringement proceedings but also to document the need for an Article 7 TEU procedure has been advocated as a tool to strengthen the legitimacy of both proceedings.[430]

[426] P Kingsley, 'Orbán and His Allies Cement Control of Hungary's News Media' *New York Times*, 29 November 2018 https://www.nytimes.com/2018/11/29/world/europe/hungary-orban-media.html.

[427] Judgment of the ECtHR of 12 January 2016, *Szabó and Vissy v Hungary*, case no. 37138/14; Venice Commission, Opinion on the Act of 15 January 2016 amending the Police Act and certain other Acts, adopted by the Venice Commission at its 107th Plenary Session (Venice, 10–11 June 2016), CDL-AD(2016)012-e.

[428] Hungary Parliamentary Elections—ODIHR Limited Election Observation Mission Final Report (8 April 2018) https://www.osce.org/odihr/elections/hungary/385959?download=true; R Bazsofy and E Goat, 'Fresh evidence of Hungary vote-rigging raises concerns of fraud in European elections' Open Democracy 17 May 2019, at: <https://www.opendemocracy.net/en/breaking-fresh-evidence-hungary-vote-rigging-raises-concerns-fraud-european-elections/>.

[429] After its capture by government-friendly judges, the Hungarian Constitutional Court ruled that the nation's 'constitutional identity' prohibits it from accepting asylum seekers at the urging of the EU, a decision that put it on a collision course with the EU asylum system and required Hungary to violate a decision of the European Council of Ministers. Hungary, Constitutional Court 22/2016 (XII. 5.) AB 30 November 2016). For an analysis of the decision, see G Halmai, 'The Hungarian Constitutional Court and Constitutional Identity' *Verfassungsblog*, 10 January 2017 at <https://verfassungsblog.de/the-hungarian-constitutional-court-and-constitutional-identity/>. A later decision of the Constitutional Court held that migrants have no rights in Hungary and those who assist them by providing shelter, food or legal advice can be found guilty of human trafficking under EU law. Hungary, Constitutional Court, IV/1565/2018 (25 February 2019) at <https://alkotmanybirosag.hu/uploads/2019/02/sz_iv_1565_2018.pdf>.

[430] O De Schutter, *Infringement proceedings as a tool for the Enforcement of Fundamental Rights in the European Union* (Open Society Justice Initiative 2017), 38.

D Procedural safeguards in systemic infringement actions

Because the systemic infringement procedure would be a significant and visible attempt to deal with substantial challenges in a Member State, all eyes will be on the Commission that takes this step. It is therefore crucial that the Commission consider methods to make its actions particularly accountable and justifiable. Towards that end, we propose some procedural safeguards that, in our view, could be usefully applied with regard to infringements generally but that could be particularly important with regard to systemic infringement procedures.

(i) Transparency

Making infringement proceedings transparent, reasoned, and supported with objective data is of crucial importance in any case, and this will be especially true when it comes to systemic infringements. But under current practice, most of what occurs in an infringement procedure happens in secret. Launching an infringement procedure also launches a formal dialogue between the Commission and the offending Member State, a dialogue that may have already begun in an even less visible 'pre-infringement' or pilot procedure.[431] If the dialogue is unsuccessful through several rounds of increasing formality, the matter is referred to the Court. While the bare bones outline of the infringement is conveyed in a public press release at the formal start of the proceedings and at the movement from one formal stage to another in the process, it would be helpful for the other EU institutions, other Member States and outside observers to see the legal analysis leading to the allegation of infringement and to understand better what causes the Commission to narrow down its allegations and drop some elements of the initial infringement case, as it almost always does before taking a Member State to the ECJ. Were those now-dropped issues resolved? And if so—how? Or was the Commission just picking its battles by prioritizing some issues over others? More transparency about how the Commission works in these cases would allay fears that the Commission has just dropped the ball on important matters or is treating some Member States more leniently than others.

When a case is finally filed at the ECJ, the Commission's legal submissions to the ECJ as well as the national responses are kept secret until the end of the proceedings, making it impossible for other Member States, EU citizens, and rule of law monitors to understand the legal arguments being made. This is perhaps the most outrageous element of the non-transparency of infringement procedures in comparative perspective. Not only would allegations of double standards or

[431] The 'pre-infringement' or pilot phase of an infringement procedure was created by the Commission to establish a dialogue between a Member State and the Commission at the earliest moment to address complaints that could give rise to an infringement procedure were brought to its attention. Commission Communication 'A Europe of Results—Applying Community Law' (COM(2007) 502).

suspicions that the Commission is not taking certain matters seriously be dispelled with more transparency if the legal arguments were public, but a more open process would allow the ECJ itself to benefit from *amicus* briefs that could assist in filling in the factual record or suggesting supplementary legal arguments. Right now the whole process is secret, except for the public hearing whose content is only available if one is actually pesent in person in Luxembourg, until after the case is closed.

More transparency of the factual record and legal arguments should not be seen as threatening the Commission's role as the guardian of the Treaties. Rather the reverse. Transparency aims at protecting the Commission from the arguments that its decisions to bring infringement actions are either baseless or politically biased. This will be all the more important with the introduction of systemic infringement proceedings which have higher stakes and more political implications. While infringements do not require any amendments to the existing procedural rules in order to be framed as systemic,[432] such cases would probably need to meet higher standards of evidence because they have to demonstrate the variety and persistence of the infringements alleged in order to demonstrate a violation of Article 2 values. Moreover, because of the gravity of systemic infringement proceedings,[433] the requirements of procedural fairness accompanying these proceedings should be much higher compared with 'simple' infringements. Transparency dispels the fear that discretion easily turns into discrimination.[434] Making systemic infringements more public will secure the legitimacy of both the systemic infringement proceedings themselves and the Commission as their initiator. That said, even the simple infringement could benefit from more public legal argument and demonstration of a factual predicate for the action involved.[435]

With its annual Rule of Law reviews initiated in 2019, the Commission has already demonstrated how a stronger evidentiary record could be compiled. The Commission could follow some of the procedural elements that it has already codified in its Rule of Law reviews, such as openness to expert advice. Data about infringements should be collected not just from the Member State in question and the Commission but also from the third parties,[436] using the Rule of Law

[432] M Dawson, *The Governance of EU Fundamental Rights* (Cambridge: Cambridge University Press, 2017), 174.
[433] Editorial, 'Enforcing the Rule of Law in the EU. In the Name of Whom?' (2016) 1 *European Papers*, 711–76
[434] 'Discretion may be a necessary evil in modern government; absolute discretion coupled with an absolute lack of transparency, however, is fundamentally contrary to the rule of law' (European Parliament (2006) Report on the Commission's 21st and 22nd Annual reports on monitoring the application of Community law A6-0089 /2006 final).
[435] Prete (n 28), 351, 355–6.
[436] Ibid., 357.

reviews as a model.[437] The submissions of national groups (eg councils of judiciary, ombudsmen, and NGOs) and international entities (eg the Venice Commission, the Committee of Ministers, and the Parliamentary Assembly of the Council of Europe as well as ombudsmen from the Organization for Security and Co-operation in Europe (OSCE) and election monitors, the International Bar Association, human rights organizations, and groups devoted to international press freedom) should be admissible as part of the holistic assessment. Transparency ensures that all input can be checked and either confirmed or refuted in a public process. Sunlight is the best disinfectant for contaminated evidence.

The transparency of infringement procedures directly impacts their legitimacy. Now when the Commission brings a case, it negotiates in secret with the Member State through a protracted process, drops some allegations and forwards others to the Court of Justice through briefs that are not public. In such a context, cynicism about secret deals and double standards can flourish. More transparency in the process once the case is referred to the Court of Justice would allow 'pre-trial' *amicus* briefs to be submitted during this judicial stage. Adding the voices of observers and legal experts at this stage would allow EU citizens to contribute to the documentation of rule of law backsliding.[438] It is in the best interests of the Commission to improve transparency and encourage civic involvement in such proceedings.[439] This involvement should not be limited, as it is now, to simply filing a complaint with the European Commission,[440] only to have the complaint disappear without a trace.

Finally, data gathered by the Commission that makes the case empirically ripe for a systemic infringement action (data that are both supportive and critical) should be publicly available.[441] Diverse sources of information gathered during transparent, fair, and impartial proceedings are crucial in order to holistically

[437] An analogous recommendation can be addressed to the CJEU: 'In order to compensate for this [Article 40 of the Statute], the CJEU could, in the future, request from the complainant an expert opinion, as allowed in Article 25 of its Statute': O De Schutter (n 430), 67.

[438] 'The legitimacy and credibility of the process, in the eyes of citizens and undertakings, is therefore of vital importance' (Prete (n 28), 357). As F de Witte put it 'the problem of democracy in Europe is a lack of voice': F de Witte, 'Less Constraint of Popular Democracy, More Empowerment of Citizens' *VerfBlog* 22 March 2013 at: <https://verfassungsblog.de/less-constraint-of-popular-democracy-more-empowerment-of-citizens/>.

[439] Compare the ECI on triggering the rule of law procedure against Hungary—Wake up Europe! Taking action to safeguard the European democratic project—http://ec.europa.eu/citizens-initiative/public/initiatives/obsolete/details/; 2015/000005. Paul Blokker has done a lot of significant research on this issue.

[440] Administrative procedures for the handling of relations with the complainant regarding the application of European Union law—Annex to Communication from the Commission—*EU law: Better results through better application.*

[441] De Schutter (n 430), 55.

assess the nature of an alleged infringement of values and to determine whether the threats to values have been properly considered and remedied.[442]

A common complaint against 'rogue' Member States engaged in Rule of Law backsliding is that they take crucial decisions and adopt new laws in a non-transparent way, without public consultations, impact assessment, or public explanation. Indeed, citizens of these states believe that laws are passed under cover of darkness precisely because they aim to achieve self-interested political goals. When the Commission acts in a non-transparent way, it invites the same inferences. The Commission's reaction to Rule of Law backsliding must therefore be secured against the accusation of arbitrariness.[443] Only in this way can it gain the required legitimacy for its actions, both with regard to having a firm basis for a particular action taken against particular Member States as well as for more generally reassuring other Member States that they are not under threat from a 'rogue' Commission.[444] One of the problems with the pre-Article 7 Rule of Law Framework created in 2014 has been its inscrutability.[445] Why did the Commission act with regard to Poland but has not acted yet with regard to Hungary? Why did the Commission push ahead on some aspects of Rule of Law violations in Poland but not others? EU citizens need to understand why the EU common values in one of the Member States might be at risk, what the Commission is doing about it, and whether the Commission's actions have fixed the problems. Transparency is the key to legitimacy of the process.

(ii) Good administration

In order to guarantee the Rule of Law in the Member States through the systemic infringement action, the European Commission itself should model adherence to the CFR right to good administration by improving the procedure surrounding the systemic infringement action. That the Commission should link its Rule of Law efforts with modelling good administration has already been floated in the academic literature.[446] Here, we have in mind a particular connection. Under Article 41 CFR, the duty to give public reasons is broadly stated. It includes providing justification for all formal legal enactments as well as for administrative decisions.[447] In our view, the duty to give public reasons should also extend to explanations of decisions to *not* initiate systemic infringement actions when many complaints alleging violations of European values have been made. The right of access to documents under Article 42 CFR should be secured in these

[442] B Schlipphak and O Treib, 'Playing the blame game on Brussels: the domestic political effects of EU interventions against democratic backsliding' (2017) 24 *Journal of European Public Policy*, 352–65.
[443] De Schutter (n 430), 65.
[444] Smith (n 103).
[445] K Niklewicz, 'Safeguarding the Rule of Law within the EU: Lessons from the Polish Experience' (2017) 16 *European View*, 287–8.
[446] Lock, 'Article 41 CFR', in: Kellerbauer, Klamert and Tomkin (n 4), 2205.
[447] Ibid., para. 10, p. 2206.

proceedings as well. In short, as the Commission moves forward to enforce the Rule of Law more vigorously, its own conduct must be above reproach.

In January 2017, the European Commission issued a communication called '*EU law: Better results through better application*' which announced that the Commission would 'give high priority to infringements that reveal systemic weaknesses which undermine the functioning of the EU's institutional framework', such as 'infringements which affect the capacity of national judicial systems to contribute to the effective enforcement of EU law'.[448] The communication was cause for optimism among those who believed that infringement proceedings challenging the damage done to the Hungarian legal system or the ongoing 'judicial reform' in Poland would then be brought.[449] But the Commission did not live up to its announcement. Instead of targeting the systemic attack against the entire Polish judiciary that was then underway, the Commission only singled out very specific grievances (like gender discrimination in retirement ages) when it finally acted.[450] And it did nothing about the Hungarian judiciary. The Commission simply failed to acknowledge the systematic nature of the attack on judicial independence going on in Poland and Hungary despite abundant evidence and many complaints. A systemic infringement procedure has to this day never been brought against Hungary for the many ways it has compromised independent institutions in the country, especially including the judiciary. Even the full-scale assault on the civil sector in Hungary that accelerated after the 2014 election was met by the Commission with only several narrowly targeted challenges to Lex CEU and the laws undermining the finances and independence of NGOs—each brought separately as if each existed in a vacuum instead of as part of a concerted campaign. Because there is no transparency of Commission decisions when they fail to bring infringements, we do not know whether the Commission simply failed to see the threat or whether the Commission erroneously believed the governments of Hungary and/or Poland when they said that they did not intend to do what they plainly had done or that their actions did not accomplish what they plainly did. Both the Commission's decisions to proceed as it did as well as the Commission's decisions to refrain from acting in equally, and even sometimes in more pressing,

[448] Communication from the Commission—*EU law: Better results through better application*, C/2016/8600.

[449] Schmidt and Bogdanowicz (n 28), 1066.

[450] Certain elements of the 'pattern' have been already recognized and described by academia—eg in the case of Poland: 'In Poland it is fairly clear that the forced retirement of Supreme Court judges would have been damaging to the Rule of Law as it formed part of a wider pattern of government hostility to judicial independence and the separation of powers' (J van Zyl Smit, 'After Poland's Attempted Purge of "Communist-era" Judges, Do We Need New International Standards for Post-authoritarian Countries Reforming Their Judiciary? (Part II)' *UK Constitutional Law Association Blog* 16 January 2019 at: <https://ukconstitutionallaw.org/2019/01/16/jan-van-zyl-smit-after-polands-attempted-purge-of-communist-era-judges-do-we-need-new-international-standards-for-post-authoritarian-countries-reforming-their-judiciary-2/>).

matters seem random and unmotivated to outside observers. Public reasons would help allay fears that the Commission is simply not doing its job.

Without systemic intervention from the EU, however, Rule of Law backsliding has been occurring apace in both Poland and Hungary. But while the two countries share certain similarities, the legal tools used in the two countries are not the same. In Poland, ordinary legislation violates the Constitution but since the Constitutional Tribunal has been captured, there is no mechanism to bring this legislation into line with constitutional (and for that matter EU) values; in Hungary, a new Fundamental Law and numerous constitutional amendments permitted the Rule of Law to be 'lawfully' dismantled without violating the domestic constitutional order.[451] In both cases, however, formerly independent institutions were captured, power was consolidated in very few hands and rights were violated. Systemic infringement procedures can tackle both kinds of violations—the blatantly illegal as well as the legalistic—because the crucial element around which the systemic infringement action is built is the violation of European values as expressed in Article 2 TEU, regardless of how, specifically, these values were breached. Actions against each of these Member States would therefore require different reasoning about precisely how EU values are breached, which the Commission should feel pressed to provide. But actions against both are warranted and the failure to act should also be reasoned.

E. Possible limits of the legal approach

A systemic infringement action requires the Commission to acknowledge that a violation of EU values as specified in Article 2 TEU is in fact a violation of EU law, and that the violation of values can be demonstrated by showing a systemic pattern of violation of a number of different more specific legal provisions. This is no longer a fringe idea; it was already partially recognized by the European Parliament in October 2016 in its resolution on the establishment of an EU mechanism on democracy, the rule of law, and fundamental rights (DRF). The Parliament recommended the compilation of so-called 'DRF European Reports' that the Commission could use as the basis to 'launch a "systemic infringement" action under Article 258 TFEU as the foundation for an action that would bundle several infringement cases together' in a single action.[452] Unfortunately, the exact wording of the EP resolution missed the essence of what we have proposed as a 'systemic infringement', by which we mean the need to establish the pattern of the infringement of the Article 2 TEU values by a Member State and not just a technical combination of several individual provisions of the *acquis*.[453] Even so,

[451] Sadurski (n 205), 424; Kovács and Scheppele (n 14).

[452] Art. 10 of European Parliament Resolution of 25 October 2016 on the establishment of an EU mechanism on democracy, the rule of law, and fundamental rights.

[453] The Commission's overall approach to the resolution was rather critical (European Commission, Report on the application of the EU Charter of Fundamental Rights in 2016, 14–

identifying a pattern across multiple separate violations so that the overall assessment leads to a more systemic conclusion than the sum of the parts is a good start. The DRF reports could provide one basis for the Commission to generate systemic infringement actions.

Taking the hint from the Parliament's DRF initiative, the European Commission in April 2019 initiated a debate about strengthening the Rule of Law in the European Union.[454] After seeking input from Member States, NGOs, and academia, the Commission presented a policy brief in which it announced that it was 'determined to bring to the Court of Justice rule of law problems affecting the application of EU law, when these problems could not be solved through the national checks and balances'.[455] Furthermore, the Commission announced that it would 'pursue a strategic approach to infringement proceedings, building on the developing case law of the European Court of Justice and promote the standards developed in the Court of Justice case law, including by compiling the relevant findings of the Court..[456] At the same time, in the name of equal treatment of the Member States the Commission proposed starting from a clean slate—as if nothing was already known about the ongoing state of affairs in Hungary and Poland.[457]

It is true that purely legal instruments such as infringement actions might not be sufficient to guarantee in practice all of the values provided in Article 2 TEU.[458] To achieve values like solidarity and equality requires a much broader vision and a more far-reaching political will. But the enforcement of EU law is absolutely necessary for the realization of many Article 2 values, including the Rule of Law, which are not primarily matters of political contestation but which establish the ground rules within which contestation of political visions is structured.[459] Litigation before the ECJ places the emphasis on this constituting effect of EU values for the EU system as a whole, and that should be a much less politicized topic.

Bringing infringements to enforce values so that the ECJ can give them legal meaning is a familiar activity within the EU; any new institution created to tackle values backsliding would need time to gain the deep support that the ECJ already has.[460] Backsliding states can of course charge the ECJ with becoming

15). Interestingly, the Commission argued that 'the best possible use should be made of existing instruments, while avoiding duplication. A range of existing tools and actors already provide a set of complementary and effective means to promote and uphold common values'.

[454] Communication from the Commission—Further strengthening the Rule of Law within the Union, Brussels, 3 April 2019, COM(2019) 163 final.

[455] Communication from the Commission—Strengthening the rule of law within the Union, Brussels, 17 July 2019, COM(2019) 343 final, 13.

[456] Ibid., 16.

[457] Cf. Kochenov (n 72); Grabowska-Moroz and Kochenov (n 72).

[458] Communication from the Commission—Strengthening the rule of law within the Union, Brussels, 17 July 2019, COM(2019) 343 final, p. 16.

[459] Blauberger and Kelemen (n 105), 331.

[460] Ibid., 325.

politicized, but the ECJ has generated a great deal of public confidence and such accusations could be quickly shown to be false.[461] The fact that law sometimes deals with political subjects does not automatically make law political.

Infringement actions are legal tools for achieving legal aims, and this would be true of systemic infringement actions as well. In fact, emphasizing the legal character of values violations, confirmed through judicial decision, could provide the sort of cool-headed and rational foundation necessary for securing the inviolability of core values.[462] Of course the law provides only a partial answer, as Paul Blokker rightly notes, since other political considerations such as populism or 'fragile democratic systems'[463] lacking 'sociological legitimacy'[464] call for a reckoning that goes beyond formal legality as such.[465] But without a legal basis to confirm the problems that Rule of Law backsliding creates, the other political and social interventions are built on sand. Securing judicial independence not only secures the Rule of Law, but it also stabilizes democracy which desperately needs a separation of powers and independent institutions in order to be healthy. That is why legal actions undertaken to secure the Rule of Law should be supplemented with political and social interventions, but those only have a chance to succeed if the ground rules are stable.[466]

F. Systemic infringement actions: How to start?

Where could the Commission start? In our view, the reasoned opinion of the European Commission on the Rule of Law in Poland (of December 2017) should be translated into a systemic infringement procedure focused on judicial independence by bundling together the following:

1. The interpretation of Article 19 TEU proposed by the CJEU in the *Portuguese Judges* case provides a basis for extending the requirement of judicial independence to the Constitutional Tribunal in Poland. The Commission found in its annual report on application of the Charter in 2016 that 'the fact that the legitimacy, integrity and proper functioning of the Constitutional Tribunal [in Poland] are adversely affected prevents an

[461] Ibid.
[462] A von Bogdandy, P Bogdanowicz, I Canor, M Taborowski, and M Schmidt, 'Guest Editorial: A potential constitutional moment for the European rule of law—The importance of red lines' (2018) 55 *CML Rev*, 983, 985.
[463] P Blokker, 'Systemic infringement action: an effective solution or rather part of the problem?' *VerfBlog*, 2013/12/05, <https://verfassungsblog.de/systemic-infringement-action-an-effective-solution-or-rather-part-of-the-problem/>.
[464] P Blokker, 'Response to "Public Law and Populism"' (2019) 20 *German Law Journal*, 284. See also Blokker (n 105), 249.
[465] See also the literature in n 15.
[466] As was discussed above, AG Tanchev confirmed the possibility of introducing procedure under 258 TFEU when Article 7 was triggered and the Court dealt with a number of Article 258 TFEU cases, which overlapped with the issues covered by on-going Article 7 TEU procedures.

effective constitutional review. Addressing this situation is a matter of common interest.'[467]

2. The Commission already analysed the situation in Poland in the light of the Article 2 TEU requirement that Member States honour and defend human rights. In its report on the application of the Charter of Fundamental Rights in 2017, the Commission found that 'even when acting outside the implementation of the EU law, Member States are obliged to respect the values on which the EU is founded. In particular, respect for the rule of law is a precondition for the protection of fundamental rights.'[468]
3. Third, the ECJ's *LM* ruling revealed that the Court recognizes the legal importance and value of the Commission's reasoned opinion initiating an Article 7 TEU procedure by noting that national judges could take it into account in determining whether the judiciary in Poland remained independent.

Putting these pieces together in a systemic infringement action to restore independence to the Polish judiciary would allow the ECJ to issue a ruling that could provide the basis for systemic compliance, about which more below.

Similarly, the European Parliament's resolution concerning the situation in Hungary adopted in September 2018 triggered Article 7 TEU against Hungary's Rule of Law backsliding[469] laid out a case for a systemic infringement action as well. Because the Hungarian consolidation of autocracy is farther along than Poland's, the European Parliament's list of particulars is longer and more diverse. The Parliament's resolution focused on the weakened functioning of the constitutional and electoral systems, on attacks on the independence of the judiciary (politically compromising both the Constitutional Court and the ordinary judiciary), on the growing corruption and conflicts of interest prevalent in (among other things) the use of EU funds, on assaults against privacy and data protection, on limitations of freedom of expression (especially through the weakening of media pluralism), on attacks on academic freedom, on infringements of freedom of religion, on incursions into freedom of association and the right to equal treatment, including the rights of persons belonging to minorities, on limitations on the rights of asylum, and on the failure to maintain basic social and economic protections. While not everything on the list can be framed as a simple violation of the *acquis*, the sum total of these assaults on democracy, the rule of law, and fundamental rights surely adds up to more than the sum of the parts and could ground

[467] European Commission, *2016 report on the application of the EU Charter of Fundamental Rights*, 16.
[468] Ibid., 14–15.
[469] European Parliament resolution of 12 September 2018 on a proposal calling on the Council to determine, pursuant to Article 7(1) of the Treaty on European Union, the existence of a clear risk of a serious breach by Hungary of the values on which the Union is founded (2017/2131(INL)).

an action that charges Hungary with violating the Rule of Law as specified in Article 2 TEU. At a minimum, this collection of violations demonstrates that Hungary is not living up to its obligations of sincere cooperation with the EU under Article 4(3) TEU.

Schmidt and Bogdanowicz argue that future values-based infringement actions should concentrate on the most serious infringements, instead of bundling a great many cases together, which might make the overall picture too complex.[470] How the Commission proceeds in each instance will of course depend on the record before it and what is most urgent when such an infringement is brought to the Court. In case of Hungary, for instance, the Commission may need to introduce a number of systemic infringement actions dealing with different topics (eg independence of the judiciary, media freedom, assaults on data privacy, and minority rights) to get at the consolidation of power in the country which has harmed the Rule of Law and strangled democracy. But the timely use of systemic infringements by the Commission when the first signs of backsliding come to light will prevent a general deterioration from taking place in a Member State. The more time has been allowed to pass, the more complex the Rule of Law violations become. Because Rule of Law backsliding is often accompanied by speedy legislative amendments adopted without any substantial debate, Member States can often win the facts on the ground before an infringement action is framed, goes through all of the relevant stage's and is then taken to the Court of Justice.[471] Thus, the use of all available procedural measures, such as expediting the earlier stages of an infringement action and asking for interim measures when a case is filed about a deteriorating situation, is strongly encouraged to prevent things from getting worse while an infringement action goes through all of the prescribed stages.

V. Systemic infringement actions by the Member States

In addition to systemic infringement actions initiated by the Commission, the Treaties offer a possibility for Member States to initiate such actions directly based on Article 259 TFEU,[472] which contains the following rule: 'A Member State which considers that another Member State has failed to fulfil an obligation (or bundle of obligations) under the Treaties may bring the matter before the Court of Justice of the European Union.'[473] If the European Commission can bring a systemic infringement action along the lines mentioned above, a Member State could do the same. In fact, deployment by a Member State or group of Member States under Article 259 TFEU has much to recommend it. Article 259

[470] Schmidt and Bogdanowicz (n 28), 1077.
[471] Kovacs and Scheppele (n 14).
[472] See most importantly, Kochenov (n 38). Cf. Butler (n 96).
[473] Art. 259(1) TFEU.

TFEU sidesteps the worry that systemic infringement actions allow the Commission to grow its enforcement powers beyond the scope of conferral as represented by the *acquis sensu stricto*. In addition, Article 259 TFEU, as we will show, can also provide a way for Member States, frustrated with the Commission's inaction (or useless action, resulting from its being unable to connect the dots and solve the outstanding problems), to push the Commission to join them in enforcing the values of the Treaties in order to achieve better results.

A. Putting Member States in control

Article 259 TFEU works by putting the Member States themselves—not the Union and its institutions—into the driver's seat. In an Article 259 infringement action, a Member State (or group of Member States) would call out violations by another Member State of the values expressed in Article 2 TEU by bringing a case to the ECJ. In doing so, the Member State is acting as a guardian of the Treaties, rather than resting that responsibility solely on an institution of the Union. Article 258 TFEU infringement actions are subject to the continuous criticism that the Commission may be overstepping its proper role, but a similar action by a Member State does not raise the same concerns. In an Article 259 TFEU case, the ECJ would be called upon to address the values of Article 2 TFEU in a different legal posture.

Activating Article 259 TFEU cannot be accused of expanding the role of the Commission, thus driven by some shady institutional logic, but instead builds on a view of the EU that has been called by one of us 'biting intergovernmentalism'[474] Biting intergovernmentalism occurs when the Member States take the enforcement of values into their own hands. They would not be breaking EU law, as a horizontal *Solange* approach would do through withdrawing the Member State from EU-centred enforcement,[475] nor would they be moving the dispute beyond the confines of EU law, as was done when the Member States together exited the Treaty framework to address a threat from Austria, acting *ad hoc* at best—illegally at worst.[476] Article 259 TFEU is thus a particularly sensitive way, in the context of EU federalism, to enforce Article 2 TEU, which—by virtue of being invoked by one Member State against another—would demonstrate the importance of EU law as a shared commitment of Member States to a common project. Moreover, an Article 259 TFEU action could supply the much-needed momentum to push the Commission to take a somewhat more active stance on the matter in question, acting as a counterweight to the currently underused practice of Article 258 TFEU deployment more generally, as demonstrated in the previous sections.

[474] Cf. Kochenov (n 38) in detail.
[475] Canor (n 7).
[476] von Toggenburg (n 29); Lachmayer (n 29); Kochenov (n 31), 166.

Article 259 TFEU has come in for criticism before because some of its most well-known uses have been accompanied by international scandals and political tensions.[477] But this is not a sound argument against deploying it in the struggle for the much-needed uniform observance of Article 2 TEU values throughout the Union. Of course, any enforcement of values is bound to provoke scandalous reactions from the self-proclaimed 'illiberal democracies', but that is just evidence of why the infringement action is necessary rather than being an argument against the practice. Quite naturally, any intervention with the aim of correcting backsliding is bound to be viewed by the authorities of a troubled Member State as an unfriendly act. The practices within the Council of Europe, where largely similar—if not identical—values are at stake,[478] proves that direct state-versus-state actions can indeed be deployed in Europe, albeit in generally extreme circumstances of a junta takeover, military conflicts, annexations, and responsibility for the downing of a civilian plane causing multiple casualties.[479] But the crisis of values in the EU is also becoming extreme, which is why a similar mechanism might be invoked in the Union. And, as long as systemic violations are being carried out, there is no reason why a Member State or group of Member States could not frame their infringement action in systemic terms. The goal of the systemic infringement procedure is precisely to bring about compliance, not to remain friendly with an autocratic government undermining the core of Article 2 TEU and thus threatening the very existence of the EU as a Rule-of-Law-based regime.

[477] As we will explain below.

[478] See T Altwicker, 'Convention Rights as Minimum Constitutional Guarantees? The Conflict between Domestic Constitutional Law and the European Convention on Human Rights', in von Bogdandy and Sonnevend (n 1). The Union constitutional system fully recognizes this by accepting the ECHR rules among its sources of inspiration, in addition to the obligation on the Union to join the Convention inscribed in the Treaties. For a criticism, see, Kochenov and Morijn (n 79).

[479] A handful of inter-state cases have been brought before the ECtHR. The full list is as follows: *Greece v UK* (I and II) (application nos 176/56 and 299/57); *Austria v Italy* (application no. 788/60); *Denmark, Norway, Sweden and the Netherlands v Greece* (I and II) (application nos 3321–3323/67, 3344/67, and 4448/70); *Ireland v UK* (I and II) (application nos 5310/71 and 5451/72); *Cyprus v Turkey* (I, II, and III) (application nos 6780/74, 6950/75, and 8007/77); *Denmark, France, Norway, Sweden and the Netherlands v Turkey* (application nos 9940–9944/82); *Cyprus v Turkey* (IV) (application no. 25781/94); *Denmark v Turkey* (application no. 34382/97); *Georgia v Russia* (I, II, and III) (application nos 13255/07, 38263/08, and 61186/09) *Ukraine v Russia* (I and II) (application nos 20958/14 and 43800/14). Recent ones: *The Netherlands v Russia* (see, New inter-State application brought by the Netherlands against Russia concerning downing of Malaysia Airlines flight MH17, ECHR Press release 15 July 2020) and *Liechtenstein v Czech Republic* (see Liechtenstein brings an Inter-State case against the Czech Republic, ECHR Press release 19 August 2020). The absolute majority of these cases relate to open conflicts between states. For a critical appraisal, see B Browning, 'Georgia, Russia and the Crisis of the Council of Europe: Inter-State Applications, Individual Complaints, and the Future of the Strasbourg Model of Human Rights Litigation', in J. Green and C. Waters (eds), *Conflict in the Caucasus: Implications for International Legal Order* (London: Palgrave Macmillan, 2010). For an analysis which approaches the ECHR procedure in the context of other international inter-state actions, see eg, S Leckie, 'The Inter-State Complaint Procedure in International Human Rights Law: Hopeful Prospects or Wishful Thinking?' (1988) 10 *Human Rights Quarterly*, 249, 271–6.

When the violations have effects that start to spill over borders, willing Member States will emerge in due course. In the earliest example in the ongoing Rule of Law crisis, the 'letter of foreign ministers'[480] signed by Denmark, Finland, Germany, and the Netherlands called for cutting funds to values-violating Member States when Hungary started its steep descent into autocracy. This was a clear sign that some Member States became more upset than others with the state of affairs in values enforcement in the EU. In fact, since Article 259 TFEU does not exclude actions brought by several Member States we might see the case of *The Four Willing Member States v Poland*,[481] given the constant deterioration of the situation there.

The Court of Justice is no stranger to the practice of one Member State calling out the violations of another Member State, but sometimes this criticism is *de facto* hidden from the public when Member States' interventions are submitted during the course of the infringement or preliminary reference proceedings in Luxembourg.[482] Member States are generally free to chime in on proceedings before the Court and often do, so one can see that, if the practice had a higher and better profile, Member States might be willing to initiate the case in the first place. For example, the volume of Member State interventions submitted in the preliminary reference concerning the amendment to the law on the Supreme Court in Poland demonstrated that the rule of law backsliding and judicial independence were of fundamental general concern.[483]

There are some preliminary signs that a number of Member States may be considering taking the leap to bring an Article 259 TFEU action on their own initiative rather than simply intervening in an existing case. In the contentious

[480] See the letter of 6 March 2013 sent by four Foreign Affairs Ministers to the President of the Commission, at: <http://www.rijksoverheid.nl/bestanden/documenten-en-ublicaties/brieven/2013/03/13/brief-aan-europese-commissie-over-opzetten-rechtsstatelijkheidsmechanisme/brief-aan-europese-commissie-over-opzetten-rechtsstatelijkheidsmechanisme.pdf>. The crucial thing to understand about such letters is that *all* Member States are always invited, through their Foreign Ministers, to sign. That only four Ministers ultimately signed thus means that 24 others do not consider extending the EU's capacity for action in the domain of values either timely or necessary.

[481] Garnering large numbers of initiating Member States is actually absolutely unnecessary, as all the Member States would be able to submit observations anyway, once the case reaches the Court.

[482] For a summary of the parties' positions presented during the hearing in *LM* preliminary procedure, see: A Dori, '*Hic Rhodus, hic salta*: The ECJ Hearing of the Landmark "Celmer" Case', Verfassungsblog 6 June 2018, at: <https://verfassungsblog.de/hic-rhodus-hic-salta-the-ecj-hearing-of-the-landmark-celmer-case/> and *Proces przed Trybunałem Sprawiedliwości UE w Luksemburgu w sprawie pytań prejudycjalnych SN z 2 sierpnia 2018 r.*, Supreme Court Press release 4 January 2019, at <http://www.sn.pl/aktualnosci/SitePages/Wydarzenia.aspx?ItemSID=501-292d9931-9fa5-4b04-8516-5c932ff6bdf2&ListName=Wydarzenia>.

[483] Case C-522/18. Positions were submitted ie by Netherlands, Belgium, Denmark, and Latvia. Moreover, the EFTA Surveillance Authority—which also submitted their position—concluded that amendments to law on the Supreme Court undermined the trust which private entities should have in relation to courts when claiming for remedy on the basis of EU Treaties and EEA agreement. In January 2020 the Court ordered that there was no longer any need to adjudicate on the request for a preliminary ruling. See: Case C-522/18 *DŚ v Zakład Ubezpieczeń Społecznych Oddział w Jaśle* [2020] ECLI: EU: C:2020:42.

European Council meeting in July 2020, where the contours of the Multi-annual Financial Framework (MFF) and Recovery Package were being negotiated, a number of Member States emerged as strong defenders of the Rule of Law. In particular, they supported making disbursements from EU funds conditional on generalized Rule of Law compliance, a measure that the Commission had already proposed.[484] Since the MFF requires unanimous adoption, however, threatened vetoes from the Rule-of-Law-challenging states led to some speculation that the proposed Rule of Law conditionality in the budget might be weakened. If that occurs, the Rule of Law enforcers might feel strongly enough about the issue to take the matter to a different venue. An Article 259 TFEU infringement action brought by several states against the rogue states of the Union might therefore not be far away.

B. Exploring the relevant procedural rules

Procedurally speaking, Article 259 TFEU does not set a high threshold for launching an infringement action. Just as with Article 258 TFEU, the mere allegation of a breach of EU law is sufficient to bring a case.[485] The wording of Article 259 TFEU is truly broad with regard to its requirements for standing: 'A Member State which considers that another Member State has failed to fulfil an obligation under the Treaties can bring the matter before the Court of Justice of the European Union'.[486] Failure to adhere to general principles of law, proven on the basis of a systemic analysis of an array of possible infringements following the methodology described above, will unquestionably fall within the scope of fulfilling 'obligations under the Treaties', as required by the provision. Note the absence from the text of the provision of any obligation on the Member State bringing the action to demonstrate direct and individual concern with the violation in question. The EU is based, *inter alia*, on the principle of subsidiarity and also requires blocking *ultra vires* action. Article 259 TFEU provides for obvious respect for both such considerations, as the Member States are empowered by the Treaty to seize the Court in a situation where the violation of the law is ongoing and the institutions are silent.

[484] Proposal for a Regulation of the European Parliament and of the Council on the protection of the Union's budget in case of generalized deficiencies as regards the rule of law in the Member States, COM(2018)324, procedure file 2018/0136 (COD). See also n 13 above.
[485] This is the case since Art. 259 TFEU—just like 258 TFEU—is not intended to protect the claimants' rights. Rather, the provisions aim to ensure general compliance with EU law: eg Case C-431/92 *Commission v Germany* [1995] ECR I-2189, para. 21. Compare Prete and Smulders (n 298), 13.
[486] For an analysis see Lenaerts, Maselis, Gutman (n 321); Prete and Smulders (n 298); A Łazowski (n 87).

But there is one additional requirement for Member State infringement actions—and that is that the Member State must first bring the case before the Commission. The Commission is then given three months to deliver a reasoned opinion after hearing each Member State over the dispute. If the Commission decides not to present such an opinion, then the initiating Member State is entitled to submit a case to the Court.[487] In such cases, the Commission mainly plays the role of attempted conciliator,[488] whose main task is to limit 'potentially inflammatory disputes among member states'.[489] The aim of Article 259, however, relates to ensuring general compliance with EU law and does not encourage empty interstate disputes.

The Commission can, however, do more than attempt to conciliate. It can decide that the Member State filing the Article 259 TFEU action is right, and the Commission can at that point take over the matter directly as an Article 258 TFEU case. That is why the most meritorious Article 259 TFEU cases are not famous. When they succeed in convincing the Commission without convincing the other Member States, then the case becomes an ordinary Commission-initiated infringement procedure and its origins in an Article 259 TFEU action are forgotten.

C. Problematic current use of Member-State-initiated infringements

The fact that enforcement efforts based on Article 259 TFEU do not appear frequently is therefore not surprising.[490] Given that the Commission can always convert a meritorious Article 259 action into a conventional Article 258 infringement procedure,[491] Article 259 TFEU in the minds of many is quite rightly associated with the futile attempts by the Member States to distort the cogent functioning of the EU law enforcement system for particular domestic political ends, as opposed to empowering the expression of genuine concern about the enforcement of EU law. Only the cases that the Commission will not join move forward as Article 259 TFEU actions, and they are generally not the strongest cases.

Take two telling examples. In *Hungary v Slovakia*[492] Hungary invoked the free movement of persons to argue that Slovakia's refusal to let the Hungarian President cross the border to be present at the unveiling of a statute of Saint

[487] Prete (n 28), 202.
[488] Ibid., 203.
[489] A Burley and W Mattli, 'Europe Before the Court: A Political Theory of Legal Integration' (1993) 47(1) *International Organization*, 41, at 71–2.
[490] Only a handful of cases have been brought based on Art. 259 TFEU, most of them highly controversial: eg Case 141/78 *France v UK* [1979] ECR 2923; Case C-388/95 *Belgium v Spain* [2000] ECR I-3123; Case C-145/04 *Spain v UK* [2006] ECR I-7917; C-364/10 *Hungary v Slovakia* [2012] ECLI: EU: C:2012:630.
[491] See, most importantly, Lenaerts, Maselis, Gutman (n 321); Prete and Smulders (n 298).
[492] C-364/10 *Hungary v Slovakia* [2012] ECLI: EU: C:2012:630.

Stephan, the founder of the Hungarian state, was in violation of EU law.[493] Stopping the Hungarian President at the border occurred on the very sensitive anniversary of the invasion of Czechoslovakia in 1968 by Warsaw pact troops, among which were Hungarian soldiers. The Hungarian President could have whipped up nationalist passions around that anniversary. That said, the Slovak Republic had already displayed some nationalism of its own in institutionalizing the humiliation of its citizens belonging to minorities, by expressly introducing the legal requirement that those accepting a foreign nationality (including the persons belonging to the Hungarian minority who accept the Hungarian nationality) be stripped of their Slovak citizenship[494]—a move which is out of tune with the rising importance of EU citizenship[495] and a growing toleration of dual nationality in the EU.[496] Given that Slovakia had already targeted a particular ethnic minority,[497] namely ethnic Hungarians, it is difficult to argue that the main problem with blocking the Hungarian President at the border was mostly about free movement. The ECJ confirmed the absurdity of this artificially concocted case.

Similarly, in *Spain v UK*,[498] Spain alleged that the UK was not in full sovereign control of Gibraltar,[499] trying to use this rather artificial pretext in the context of EU law to block the UK government's compliance with the decision of the European Court of Human Rights in *Matthews v UK*,[500] which obliged the UK

[493] Annotated by LS Rossi, 'EU citizenship and the free movement of heads of State: *Hungary v. Slovak Republic*' (2013) 50 *CML Rev*, 1451.

[494] J-M Araiza, 'Good Neighbourliness as the Limit of Extra-territorial Citizenship: The Case of Hungary and Slovakia', in Kochenov and Basheska (n 116); D Kochenov, 'The Internal Aspects of Good Neighbourliness in the EU: Loyalty and Values, in Kochenov and Basheska (n 116), 57.

[495] For the particular effects of EU citizenship on the nationalities of the Member States showcasing the key processes of importance in the Slovak context, see D. Kochenov, 'Member State Nationalities and the Internal Market: Illusions and Reality', in N Nic Shuibhne, L Gormley (eds), *From Single Market to Economic Union: Essays in Memory of John A. Usher* (Oxford: Oxford University Press, 2012); Gormley (n 28).

[496] P Spiro, 'Dual Citizenship as a Human Right' (2010) 8 *I-CON*, 111. See, also, D Kochenov, 'Double Nationality in the EU: An Argument for Tolerance' (2011) 17 *European Law Journal*, 323 (providing an EU law perspective). On the rising trend in the case law connecting dual (EU) nationality with the precarity of EU citizenship rights and status, see DAJG de Groot, 'Free Movement of Dual EU Citizens', in N Cambien, D Kochenov, and E. Muir (eds), *European Citizenship under Stress: Social Justice, Brexit, and Other Challenges* (Boston MA: Brill-Nijhoff, 2020); D Kochenov, 'The *Tjebbes* Fail' (2019) 4 *European Papers*, 319.

[497] D Kochenov (n 494); J-M Araiza (n 494).

[498] Case C-145/04 *Spain v UK* [2006] ECR I-7917.

[499] For a general discussion in the context of EU law, see A Khachaturyan, 'Applying the Principle of Good Neighbourliness in EU Law: The Case of Gibraltar', in Kochenov and Basheska (n 116). The facts of *Spain v UK* are obscure and atypical enough to be fascinating and concerned a claim of violation of EU law through the undue unilateral amendment of an *ad hoc sui generis acquis* instrument by the UK in order to ensure compliance with an ECtHR judgment. See the annotation by LFM Besselink in (2008) 45 *CML Rev*, 787.

[500] *Matthews v U.K.* (application no. 24833/94). T King, 'Ensuring Human Rights Review of Intergovernmental Acts in Europe' (2000) 25 *ELRev*, 79; O De Schutter and O L'Hoest, 'La cour européenne des droits de l'homme juge du droit communautaire: Gibraltar, l'Union européenne, et la Convention européenne des Droits de l'Homme' (2000) 36 *Cahiers de droit européen*, 141.

to enfranchise the inhabitants of Gibraltar for European Parliament elections.[501] However carefully Spain tried to make its weak point, questioning the enfranchisement of non-nationals in particular,[502] the goals of the Spanish action, as well as its illegal assumptions regarding the undisputed legal position of Gibraltar (however much Spain pretends that this is not the case)[503] did not conceal the fact that the case was unrelated to instilling compliance with EU law in a deviant Member State. In fact, the direct opposite was true, as Spain was trying to block compliance. *Spain v UK*, like *Hungary v Slovakia*, was thus a covert attempt to abuse EU law[504] to achieve internal political goals which had nothing in common with the aim of the provision under which the case was brought. The ECJ was clear in both cases that one cannot speak of an infringement of EU law when the primary drivers of both grievances lie outside EU law.

The connection between Articles 258 and 259 TFEU explains why the latter has a notorious reputation of channelling unsavoury cases like *Hungary v Slovakia* and *Spain v UK* through to the Court. By making an honest assessment of the alleged violation of EU law, the Commission, for quite obvious reasons, would never be inclined to support such highly politicized actions which invent a violation of EU law where none exists. But it does join the meritorious Article 259 TFEU cases, which then lose their identity as such.

This chequered history of the public uses of Article 259 TFEU should not discourage Member States from bringing meritorious claims under EU law. In a context where self-help is traditionally prohibited,[505] Article 259 TFEU acquires crucial importance in the values-enforcement field if the Union institutions use their discretion either to be silent in the face of concrete violations or to bring cases in such a way that they have little or no bearing on the actual state of the Rule of Law in the non-compliant Member States.[506] Unfortunately, that has so far been the usual practice in deploying Article 258 TFEU. In fact, in the context of systemic infringements, Article 259 TFEU might act as a spur to push the Commission to do the job it should have done in the first place but that it might have feared being criticized for doing. With the support—even the encouragement—from some Member States who see what systemic Rule of Law challenges do to the Union and who understand that the protection of their own legal

[501] For a detailed discussion, see F Fabbrini, 'The Political Side of EU Citizenship in the Context of EU Federalism', in Kochenov, *EU Citizenship and Federalism* (n 39).
[502] On the unnecessary connection between political rights and nationality, see H Lardy, 'Citizenship and the Right to Vote' (1997) *OJLS*, 75, 97–8.
[503] K Azopardi, *Sovereignty and the Stateless Nation: Gibraltar in the Modern Legal Context* (Oxford: Hart Publishing, 2009).
[504] It is conceded that this is a somewhat atypical use of the term. For the general state of the art, see A Saydé, *Abuse of EU Law and Regulation of the Internal Market* (Oxford: Hart Publishing, 2014).
[505] Joined cases 90&91/63 *Commission v Luxembourg and Belgium* [1964] ECR 625. See also n 6 above.
[506] As has been demonstrated above and with a view to the Pyrrhic victories of the Commission against Hungary and Poland discussed above.

interests and those of their citizens depend on Rule of Law compliance, the Commission would realize it was not alone. A systemic Article 259 TFEU action could strengthen the spine of the Commission to bring a systemic Article 258 TFEU action.

The generic reluctance by Member States to initiate judicial procedures against other Member States should probably be overcome in light of the ongoing Rule of Law crisis endangering the very essence of EU integration, particularly when the European Commission has not shown signs of being either proactive or effective in handling the problem. It is in the compliant Member States' interests to protect themselves against 'the influence of creeping autocracy'.[507] One might even say that Member States are bound by the duty of loyalty to the EU under Article 4(3) TEU *requiring* them to bring such actions when the EU is threatened by the non-compliance with the basic values of Article 2 TEU by infringing Member States.

Finally, the procedure based on Article 259 TFEU provides the opportunity for a Member State to protect its own citizens against potential abuse of their rights when they are subject to jurisdictions affected by Rule of Law backsliding.[508] Such an EU-citizenship-based approach makes an Article 259 TFEU infringement action less politicized than might be originally assumed.[509] We therefore conclude that a Member State challenge to Rule of Law backsliding—supported by the legal analysis of the Court of Justice—might finally generate the political will required to handle the current crisis.[510]

VI. Systemic compliance

Systemic infringements must be remedied by systemic compliance. If the ECJ agrees that a Member State's conduct rises to the level of a systemic violation, regardless of whether the case is brought under Article 258 or 259 TFEU, then compliance with the Court's judgment should also be systemic. A Member State should be required to fix not just small technical violations in its implementation of EU law, but it should also be required to fix systemic threats to EU principles. The requirement of systemic compliance could prevent Member States from 'cherry-picking' and ignoring the essentials of the proven infringement.[511] Compliance should therefore be assessed differently in systemic infringement actions than in more highly targeted ones.

[507] Pech and Scheppele (n 1), 46.
[508] Editorial, 'Enforcing the Rule of Law in the EU. In the Name of Whom?' (n 433), 775.
[509] Prete (n 29).
[510] P Tyler, 'For EU, Poland Is Not Yet Lost' *Politico*, 23 November 2016, at: <https://www.politico.eu/article/for-eu-poland-is-not-lost-yet-jaroslaw-kaczynski-sanctions/>.
[511] Batory (n 225).

A systemic infringement action should therefore open up a wider range of options for what would count as compliance, something to which the ECJ would contribute by finding a range of linked practices to be violations of EU values. Simply assessing compliance with an ECJ judgment as following the motions to remove the surface violations, without touching the deeper problems of deteriorating democracy,[512] is not enough. Given that the political tools and other forms of pressure that were applied before the systemic infringement action was brought to the Court of Justice did not lead the infringing state to back down in the current crisis, more structural reforms must be required to ensure that the problem is truly solved. Furthermore, failing to require compliance not just with the letter but also with the spirit of the ECJ rulings issued in systemic infringement actions ignores potential deleterious effects down the road. As we have repeatedly emphasized, all delays in addressing backsliding in a rogue state will make it much harder to root out the entrenched autocracy and corruption of democratic forms that will have already taken place. This will be a challenging operation. Any country which is not merely becoming autocratic, but is *already there* is most unlikely to change its ways.[513] New tools—or at least retooled tools—need to be brought to bear here as well.

A. Problems with the current practice

Pål Wennerås has noted that the Commission often seems not to be looking ahead to the compliance and sanctions phases when it files infringement procedures under Article 258 TFEU.[514] As a result, the Commission sometimes finds that it must file a fresh Article 258 TFEU action to mop up the spill-over from its initial action to make the sanctions effective. If the Commission returns to the ECJ under Article 260 TFEU to seek a fine for failing to comply with the Court's initial decision, the sanctions must be limited to the failure to do what the ECJ had specifically ordered in the initial infringement action. If the ECJ found no violation of a neighbouring provision or practice which would now need to be changed in order to achieve full compliance with its ruling, then the ECJ will not approve of sanctions which target a provision or practice that was not raised in the initial action. This problem, which becomes particularly apparent in reviewing the existing case law arising under Article 260 TFEU, no doubt blows back on the ability of the Commission to enforce a judgment effectively as it seeks compliance. If an infringing Member State can see that the Commission's hands are tied to enforcing the Court's precise ruling and no more, the Member State can evade systemic compliance by limiting its responses as narrowly as possible to those specific items.[515] If infringement of EU law extends to the infringement of

[512] Blokker (n 463).
[513] Kochenov (n 4), 19.
[514] Wennerås (n 97).
[515] Kochenov and Pech (n 35), 1068.

EU values but the Commission has not raised these values in its initial case, however, a narrowly drafted ECJ ruling may not provide enough leeway to the Commission to ensure full compliance.

Take the Hungarian judicial age discrimination case, for example. Instead of bringing the case as a matter of age discrimination, suppose the Commission had brought the question of judicial independence before the ECJ in a systemic infringement procedure, claiming that Hungary was violating the Rule of Law under Article 2 TEU or that it was infringing the loyalty principle under Article 4(3) TEU. The Commission could have argued that lowering the judicial retirement age and therefore firing the leadership of the ordinary courts threatened judicial independence of national courts, as guaranteed by Article 19 TEU, which in turn gives a concrete meaning to the Rule of Law clause of Article 2 TEU. If the ECJ had confirmed the systemic infringement, then the Hungarian government would have had to address the structural problem of a captured judiciary rather than simply honouring the wishes of the specific judges discriminated against by the one-off lowering of the retirement age. Given that the matter was framed as a discrimination case, the usual remedy would be payment of compensation to those affected, rather than restoring the judiciary to its prior independent state. That would not address the broader threat to the judiciary. With a more systemic framing, however, compliance would require measures to ensure that faith in the neutrality and objectivity of the judiciary was restored. This could include ensuring in law and practice that judges were secure in their positions and could not be arbitrarily dismissed, demoted or disciplined if they ruled against the government. If the prematurely retired judges no longer wanted to return to their jobs, then compliance could consider the difference it had made that they had been removed. By framing the case as a garden-variety *acquis* violation, however, the Commission missed the chance to leverage a remedy that would have solved the problem that the Commission no doubt recognized but did not manage to include in its infringement case. As a result, the Commission may have won the case but the Hungarian government got to keep the judges it wanted and to get rid of those it did not.

The Commission shows signs of having learned this lesson, at least in part. The next time this happened—in Poland—the Commission asked for interim measures in *Commission v Poland (Independence of the Supreme Court)*. This allowed the judges who had just been removed to return to the Supreme Court because the government had not yet had time to replace them. When the Commission eventually won this case, the concrete result on the ground was that the prematurely retired judges were able to stay until the ends of their normal terms, which was a true victory. Even with interim measures being awarded to keep the senior judges in place in Poland, however, there was a dispute over whether the interim measure required legislative changes or was self-enforcing. But this does not change the fact that an ECJ decision undertaken in the

accelerated procedure secured the essence of the infringement action precisely because interim measures ensured that the real solution was not made impossible.

Even with these improvements, however, the Commission did not go far enough. The law on the Polish Supreme Court that the Commission challenged with regard to the lowering of retirement ages also expanded the number of judges on the Supreme Court. So even while interim measures prevented the most senior judges from being dismissed, the new judgeships were filled apace—which meant that even though the Commission won the battle on the removal of the older judges, it lost the war on the overall composition of the Supreme Court. Surely this is another lesson that a broader, more systemic approach by the Commission to pervasive Rule of Law violations would be the only way to achieve the desired result. So while the Commission learned from the Hungarian judicial retirement case that it needed to preserve the judges in place so that when the Commission won its case it could restore the *status quo ante*, it did not learn the lesson that it needed to look more broadly at how the Polish government was attacking the Supreme Court in multiple ways at the same time. Without addressing the whole package of 'reforms', the Commission cannot save the independent judiciary in Poland. And in fact it has so far failed to do so, despite all of its activity and superficial victories. Note, too, that when the Commission failed to raise an objection to expanding the number of judges on the Supreme Court in its initial infringement, it also lost the ability to go back to the ECJ under Article 260 TFEU to argue that the independence of the Polish Supreme Court was being dismantled in another way. It would have had an Article 260 action if the Polish government had fired those judges in the face of the ECJ decision, but it had no Article 260 action when the Polish government just swamped the Supreme Court with new judges to outvote the ones they had to keep. To accomplish the end result that the Commission seeks—in this case the preservation of judicial independence—it needed to put all of the objectionable features of the national laws into a single infringement action so that it could insist on getting the real remedy it sought when it won its case at the ECJ. Otherwise the remedies on offer fail to reach the problem.

B. Introducing systemic compliance obligations

In this example, and in fact in almost any case one can imagine that would rise to this level of seriousness, the Commission under Article 258 TFEU or the complaining Member State under Article 259 TFEU will probably not be the first to take note of the problems and to assess both what is happening and what should be done to correct the problem. In the Hungarian case, as judicial independence was being dismantled, the Venice Commission reviewed the country's judicial

reform three times.[516] It had found fault with the political nature of the judicial appointments and had argued for a stronger role for the National Judicial Council in personnel matters so that judges' careers would be largely controlled by judges instead of by a hand-picked political appointee with near-absolute powers.[517] Moreover, the Venice Commission disapproved of the system in which all Hungarian judges were continually being subjected to performance reviews by the presidents of their courts,[518] many of whom had themselves been appointed in a highly politicized process. The Hungarian government made some minor changes in response to the Venice Commission's report, but the Venice Commission assessed those changes and argued that they did not go far enough to guarantee the independence of the judiciary.[519] There were other specific recommendations in the multiple Venice Commission reports on the Hungarian judiciary that the Hungarian government never acted upon. This should have provided a well-researched opening for the European Commission to start with those recommendations as a way of framing a systemic infringement action aimed at ensuring the independence of the judiciary. The same was true in Poland, where a common denominator of the 'reform of judiciary' in Poland was also to strengthen the—formal and informal—influence of the executive on the administration of justice, so the Commission could have and should have learned from the Hungarian case that judicial independence requires seeing the problem in broader perspective and looking in particular at all of the ways that independence was threatened by increasing political control over the appointment and disciplinary processes. In the Polish case, too, the three Venice Commission reports on the ordinary judiciary plus the additional opinion on the Constitutional Tribunal could have provided a recipe for a systemic infringement action. The Commission did not have to start from scratch.[520]

[516] The last one (adopted in March 2019) dealt with the newly established system of administrative courts. The system of administrative courts introduced in December 2018, despite being slightly criticized by the Venice Commission, was finally suspended due to political pressure between the EPP and Fidesz. But the Hungarian government then reversed tis decision, and gave the captured Constitutional Court more power to overturn any judgment of the ordinary courts, upon appeal from a government official.

[517] European Commission for Democracy through Law (Venice Commission), *Opinion on Act CLXII of 2011 on the Legal Status and Remuneration of Judges and Act CLXI of 2011 on the Organisation and Administration of Courts of Hungary*, adopted by the Venice Commission at its 90th Plenary Session (Venice, 16–17 March 2012), CDL-AD(2012)001-e, para. 65, at <http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD%282012%29001-e>.

[518] Ibid., para. 53.

[519] European Commission for Democracy through Law (Venice Commission), *Opinion on the Cardinal Acts on the Judiciary that were amended following the adoption of Opinion CDL-AD(2012)001 on Hungary*, adopted by the Venice Commission at its 92nd Plenary Session (Venice, 12–13 October 2012). CDL-AD(2012)020-e, paras 35, 44, available at <http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD%282012%29020-e>.

[520] Yet, it seems to be assuming this is the case even in its 2019 'Blueprint for the Rule of Law', demonstrating a deficit of long-term vision.

The criticism of both the Hungarian and Polish governments expressed by international institutions made ir clear that judicial independence, taken as a whole, was seriously threatened in both countries. But the Commission was paralysed by counterarguments that similar institutional arrangements were binding law in other Member States that were not accused of Rule of Law backsliding. It is no secret in comparative law that an institutional arrangement that works perfectly well in one context fails to work the same way if it is taken out of context when moved to a new location. If one takes one element at a time, as an ordinary infringement action does, the 'double standards' argument may seem compelling. A systemic infringement action therefore makes it easier, rather than more challenging, to show why a particular practice is problematic in the first place because it demonstrates why *that combination of pieces* is distinctive, and it should guide the assessment of compliance once the systemic infringement has been demonstrated.

To ensure the independence of the judiciary in daily practice, the Commission should build in a monitoring mission to ascertain whether the reforms worked.[521] Obviously having the Venice Commission reports and other expert assessments of the problem would be helpful in designing what compliance with EU principles should look like. The general point, however, is that a finding of the ECJ that there has been a systemic violation should be followed by a plan for systemic compliance. If the Commission draws up its infringement action too narrowly—for example, focusing only on specific judges who are being dismissed rather than on the threats to judicial independence as a whole—then it will not have the power once it wins its case at the ECJ to get the results it seeks with the remedies available.

As this example illustrates, the point of a systemic infringement action ultimately is to bring the Member State into compliance with European values. Given this goal, the Commission should decide how to frame a systemic infringement action from the start by thinking ahead to what it would need to accomplish in the compliance phase to achieve that goal. The Commission should therefore include in the systemic infringement action the changes to laws and practices that contribute to the systemic problem, if the ECJ confirms the systemic infringement. Challenging a broader set of laws, practices, and outcomes would enable the Commission to fashion a remedy which would permit the key principles of the EU to be realized in practice. In fact, the systemic infringement action's primary justification is that it focuses attention on compliance with the principles underlying EU law rather than simply fixing one-off complaints with small and specific patches that miss the bigger point. In order to ensure systemic compliance, however, it might be necessary to employ the expedited procedure before

[521] The European Parliament called for just such a monitoring mechanism to be created as an 'Article 2 TEU/Alarm Agenda', European Parliament, Resolution of 3 July 2013 on the Situation of Fundamental Rights: Standards and Practices in Hungary (Pursuant to the European Parliament Resolution of 16 February 2012) (2012/2130(INI)), para. 70.

the ECJ and seek interim measureorders which will prevent the situation from deteriorating while proceedings are pending.

VII. Non-compliance and the suspension of EU funds

In considering what should be done about Rule of Law backsliding in EU Member States, the point is often made that the rogue states are not just undermining EU values, but they are doing it using EU money.[522] Both EU institutions[523] and Member States have already discussed how to tie the receipt of EU funds to adherence to the Rule of Law. As we will explore in this section, we believe that the enforcement of ECJ decisions in cases growing from systemic infringement actions can also be tied to the withholding of EU funds. We believe that such the 'suspension' mechanism based on interpretation of Article 260 TFEU may be used for this purpose.

A. Suspending EU funds generally for violation of values

The first public proposal to tie the distribution of EU funds to Member State violations of the Rule of Law came in March 2013 from the foreign ministers of Germany, the Netherlands, Finland, and Denmark,[524] who wrote to the European Commission suggesting that new tools were needed to bring persistently deviant Member States into line:

> At this critical stage in European history, it is crucially important that the fundamental values enshrined in the European Treaties be vigorously protected. The EU must be extremely watchful whenever they are put at risk anywhere within its borders. And it must be able to react swiftly and effectively to ensure compliance with its most basic principles. We propose addressing this issue as a priority and believe that the Commission has a key role to play here.[525]

In particular, they proposed that 'as a last resort, the suspension of EU funding should be possible'.[526] But they did not suggest what mechanism might permit the Commission to suspend funds.

[522] T Garton Ash, 'Europe must stop this disgrace: Viktor Orbán is dismantling democracy' <https://www.theguardian.com/commentisfree/2019/jun/20/viktor-orban-democracy-hungary-eu-funding>.
[523] J Rankin, 'EU nations to be vetted on their adherence to the rule of law' *The Guardian*, 17 July 2019, at: <https://www.theguardian.com/world/2019/jul/17/eu-nations-to-be-vetted-on-their-adherence-to-the-rule-of-law>.
[524] I Traynor, 'Hungarian Prime Minister Warned over Moves to Increase His Power' *The Guardian*, 8 March 2013, at <http://www.theguardian.com/world/2013/mar/08/hungarian-prime-minister-warned-power>.
[525] The text of the letter is at: <http://www.rijksoverheid.nl/bestanden/documenten-en-publicaties/brieven/2013/03/13/brief-aan-europese-commissie-over-opzetten-rechtsstatelijkheidsmechanisme/brief-aan-europese-commissie-over-opzetten-rechtsstatelijkheidsmechanisme.pdf>.
[526] Ibid.

Other European actors started proposing various ways that EU funds could be withheld to rogue Member States. Different proposals were advocated by MEPs,[527] some Member States,[528] EU agencies,[529] non-state actors, and academia.[530] Finally, in May 2018, the European Commission proposed a regulation which—if adopted as originally drafted—would allow for a suspension or reduction of EU funds in case of 'generalised deficiencies as regards rule of law'.[531] According to the proposed regulation, the Council would have to reject by a qualified majority (in a so-called 'reverse QMV' procedure) a proposal from the Commission finding that a Member State had generalized deficiencies in the Rule of Law that were severe enough to threaten the financial interest of the EU.[532] The Commission's proposal could be based, for example, on the judgments of the Court of Justice or on the Rule of Law reviews that the Commission later proposed to conduct. As with the Excessive Deficit Procedure on which this sanctions mechanism was modelled, the Commission could not act over a substantial Council objection. But it could act without a substantial Council majority. This proposal has been adopted by the Parliament, but was only taken up by the Council in summer 2020 when the shape of the MFF had become more definite.

Interestingly enough, the proposal to link EU funds and Rule of Law has been supported not only by the Commission, whose competences would increase as a result, but also by a number of Member States, who object to financially supporting Rule of Law backsliding in other Member States.[533] It has been objected to, not surprisingly, by precisely the Member States who are likely to be targeted by this measure. Under a threat in July 2020 by Hungary to veto the Multiannual Financial Framework, which must pass unanimously, the European Council

[527] G Verhofstadt, 'The EU Must Stop Funding Illiberalism' *Project Syndicate*, 30 April 2018 <https://www.project-syndicate.org/commentary/poland-hungary-freeze-eu-cohesion-funds-by-guy-verhofstadt-2018-04>.

[528] F Eder, Berlin looks into freezing funds for EU rule-breakers, *Politico* 30 May 2017, at: <https://www.politico.eu/article/poland-rule-of-law-europe-germany-berlin-looks-into-freezing-funds-for-eu-rule-breakers/>; A Brzozowski, 'Belgium, Germany make joint proposal for EU rule of law monitoring mechanism' *Euractiv*, 19 March 2019, at: <https://www.euractiv.com/section/justice-home-affairs/news/belgium-germany-make-joint-proposal-for-eu-rule-of-law-monitoring-mechanism/>; G Gotev, 'Finnish presidency commits to linking rule of law with EU funding' *Euractiv*, 17 July 2019, at: <https://www.euractiv.com/section/justice-home-affairs/news/finnish-presidency-commits-to-linking-rule-of-law-with-eu-funding/>.

[529] Fundamental Rights Agency, 'Challenges and opportunities for the implementation of the Charter of Fundamental Rights' Vienna 24 September 2018 at: <https://fra.europa.eu/sites/default/files/fra_uploads/fra-opinion-04-2018_charter-implementation.pdf>.

[530] RD Kelemen and KL Scheppele, 'How to Stop Funding Autocracy in the EU' *VerfBlog* 10 September 2018 at: <https://verfassungsblog.de/how-to-stop-funding-autocracy-in-the-eu/>; Halmai (n 77); J Selih, I Bond, and C Dolan, 'Can EU Funds Promote the Rule of Law in Europe?' *Centre for European Reform*, November 2017.

[531] Proposal for a Regulation of the European Parliament and of the Council on the protection of the Union's budget in case of generalized deficiencies as regards the rule of law in the Member States, Brussels, 2 May 2018, COM(2018) 324 final, 2018/0136 (COD).

[532] For an analysis, see, Fisicaro (n 77).

[533] Gotev (n 528).

President Charles Michel proposed to amend the proposed Commission regulation to reverse the procedure for a Council vote on a Commission proposal to suspend funds so that instead of going forward in the absence of a qualified majority against, it could only go forward with an affirmative qualified majority.[534]

Even before this proposal to weaken the proposed Commission regulation, the general proposal for the Commission to suspend funds had already been criticized by many. The Council Legal Service argued—in deviation from the position implicitly adopted by the ECJ and, especially, outlined by AG Tanchev[535]—that protection of Article 2 TEU values was reserved for the Article 7 TEU procedure,[536] so therefore no other mechanism may aim at enforcing compliance with EU values.[537] Other critics have argued that the Commission draft regulation itself was not precise enough due to a lack of clear defining criteria that permit unambiguous assessment of whether the Rule of Law is present or absent in any particular Member State.[538] The Commission's draft regulation was criticized by the European Court of Auditors for not providing relevant legal remedies for those affected by the adoption of the tools provided in the draft regulation[539] because at no stage in the process must the potential impact on either the final beneficiaries or the national budget be taken into account.[540] But even if the Commission were required to take everything into account before suspending funds, some have argued that economic and political consequences of this action might be difficult to predict.[541]

[534] V Makszimov, 'Michel proposal offers Council more control over Rule of Law conditionality' *Euractiv*, 10 July 2020, at: <https://www.euractiv.com/section/justice-home-affairs/news/michel-proposal-offers-council-more-control-over-rule-of-law-conditionality/>.

[535] Opinion of AG Tanchev delivered on 11 April 2019(1), Case C-619/18 *Commission v Poland* (*Independence of the Supreme Court*), ECLI: EU: C:2019:325.

[536] This is not the first time when the Council legal service behaved openly politically, servicing the institution with an opinion clearly not rooted in the law in force: the same applies to the Council legal service's attempts to obstruct the Commission's pre-Article 7 procedure and well as to prevent the European Parliament from making its case against Hungary at the Article 7 hearing at the Council. Cf. Kochenov and Pech (n 35); L Pech, D Kochenov, and S Platon, 'The European Parliament Sidelined: On the Council's distorted reading of Article 7(1) TEU' *VerfBlog*, 8 December 2019, at: <https://verfassungsblog.de/the-european-parliament-sidelined>.

[537] K Scheppele, L Pech, and RD Kelemen, 'Never Missing an Opportunity to Miss an Opportunity: The Council Legal Service Opinion on the Commission's EU budget-related rule of law mechanism' *VerfBlog* 12 November 2018, at: <https://verfassungsblog.de/never-missing-an-opportunity-to-miss-an-opportunity-the-council-legal-service-opinion-on-the-commissions-eu-budget-related-rule-of-law-mechanism>.

[538] S Gopalan, 'Linking EU funds to "rule of law" is innovative—but vague' *EU Observer*, 7 May 2018, at: <https://euobserver.com/opinion/141757>.

[539] J Łacny, 'Zawieszenie wypłat funduszy UE przekazywanych państwom członkowskim naruszającym zasadę praworządności—nowy mechanizm warunkowości w prawie UE' *Europejski Przegląd Sądowy*, 12/2018, 17.

[540] European Court of Auditors, Opinion No 1/2018 concerning the proposal of 2 May 2018 for a regulation of the European Parliament and of the Council on the protection of the Union's budget in case of generalised deficiencies as regards the rule of law in the Member States—<https://www.eca.europa.eu/Lists/ECADocuments/OP18_01/OP18_01_EN.pdf>.

[541] M Michelot, 'How can Europe repair Breach of the Rule of Law?' *Jacques Delors Institute*, Policy Paper no. 221, at: <https://institutdelors.eu/wp-content/uploads/2018/04/BreachesoftheRuleofLaw-Michelot-March18.pdf>.

A number of these shortcomings have been addressed during the ongoing legislative process and, as we write, the European Parliament has already made some amendments to strengthen the proposal[542] while the Council has been generating compromises to weaken it. Even if the regulation were to pass, though, the question is whether financial sanctioning that involves the suspension of EU funds could ever become a truly effective measure that would achieve better protection of the Rule of Law in Member States than the available mechanisms on offer, particularly if the more political voice at the Council plays a larger role. Giving the Commission the tools to cut EU funds to rogue states, say the critics, might backfire because it might affect direct beneficiaries, including EU citizens,[543] in such a way as to increase Euro-scepticism, polarization,[544] and East–West divisions inside the EU.[545]

Some of us believe that the Commission's proposal might be helpful, but it is actually unnecessary since existing legal provisions already permit the suspension EU funds when the Rule of Law is threatened.[546] The current Common Provision Regulation (CPR) Article 142,[547] for example, already permits the Commission to suspend funds to Member States when 'there is a serious deficiency in the effective functioning of the management and control system of the operational programme'. It is hard to imagine that serious damage to the Rule of Law within a Member State would not meet this criterion. But even without that assessment on the part of the Commission for each individual programme, we believe that there is an even more effective tool already existing and ready to be used to permit the Commission to suspend EU funds for violation of EU values. If a Member State fails to comply with a decision of the ECJ in a systemic infringement action in which the ECJ has found a violation of EU values, Article

[542] Amendments adopted by the European Parliament on 17 January 2019 on the proposal for a regulation of the European Parliament and of the Council on the protection of the Union's budget in case of generalised deficiencies as regards the rule of law in the Member States (COM(2018)0324—C8-0178/2018—2018/0136(COD)), at: <https://www.europarl.europa.eu/doceo/document/TA-8-2019-0038_EN.html>.

[543] M Sutowski, 'Verhofstadt's plan to save the rule of law in Poland and Hungary is doomed to fail' *Political Critique*, 21 June 2018, at: <http://politicalcritique.org/world/eu/2018/verhofstadt-sutowski-ue-poland-hungary-budget/>.

[544] W Rech, 'Some remarks on the EU's action on the erosion of the rule of law in Poland and Hungary' (2018) 26 *Journal of Contemporary European Studies*, 334.

[545] F Eder, 'Juncker: German plan to link funds and rules would be "poison"' *Politico*, 1 June 2017 <https://www.politico.eu/article/juncker-german-plan-to-link-funds-and-rules-would-be-poison/>. Cf., for a broader context: Adamski (n 13), 654.

[546] Kelemen and Scheppele (n 530); I. Butler, 'Securing "rule of law" with economic power' *EU Observer*, 3 April 2018, <https://euobserver.com/opinion/141490>.

[547] Regulation (EU) No. 1303/2013 of the European Parliament and of the Council of 17 December 2013 laying down common provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund, the European Agricultural Fund for Rural Development, and the European Maritime and Fisheries Fund and laying down general provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund, and the European Maritime and Fisheries Fund and repealing Council Regulation (EC) No. 1083/2006, OJ L 347, 20 December 2013, 320.

260 TFEU allows the Commission to return to the ECJ seeking authorization for potentially steep fines.

B. Suspending EU funds with Article 260 TFEU fines

How can fines under Article 260 TFEU affect the distribution of EU funds? Article 260 TFEU does not specify how the fines shall be charged. The practice has been to bill the Member State and settle up accounts at the end of the process. But we see no reason why the Commission cannot withhold EU funds in the amount of the fine awarded, pending Member State compliance with the ECJ decision. This would allow a direct link between suspension of EU funds and non-compliance with an ECJ ruling, a link that is already available in the Treaties and something that the Court and the Commission already have some practice at deploying. Both the CPR and the use of Article 260 TFEU, then, are existing mechanisms that may already make the distribution of EU funds conditional on the willingness of the Member State in question to honour the Rule of Law.[548]

We believe that tried and true instruments provide a better starting point to link the distribution of EU funds to adherence to European values. New instruments often require high thresholds for approval (eg Treaty change) or they can generate blocking coalitions who object to any new powers being given to the EU (as we presently see with the proposed Commission regulation on Rule of Law conditionality). New instruments also take time to understand and deploy, and they may be subject to legal challenges on first use. For many reasons, then, existing instruments are likely to be more effective, both because they are already well-known and because the problem of the Rule of Law is urgent so that further delay is simply inexcusable. If existing instruments can do the trick, we believe that they should be used first.

How would tying the withholding of EU funds to non-compliance with an ECJ judgment work? In an ordinary infringement action, the Commission would go back to the ECJ for an assessment of a fine under Article 260(2) TFEU for general violations of ECJ decisions[549] or Article 260(3) TFEU for a failure to transpose directives. Interestingly, the ECJ also introduced—without any Treaty amendments[550]—the possibility to order a fine or periodic payment in case of non-compliance with interim measures ordered under 279 TFEU.[551] In this way, the Court has already closely linked that provisional enforcement

[548] V Viță, 'Revisiting the Dominant Discourse on Conditionality in the EU: The Case of EU Spending Conditionality' (2017) 19 *Cambridge Yearbook of European Legal Studies*, 116, 143.
[549] Pål Wennerås suggests that Article 260 TFEU might not be limited to enforcement only in Article 258 TFEU procedures, but argues that it might also be used with actions brought under Article 108(2) TFEU, Article 114(9) TFEU, and Article 348(2) TFEU: Wennerås (n 97).
[550] Luca Prete however presented such amendment: Prete (n 28), 397.
[551] Case C-441/17 R *Commission v Poland*. Although Pål Wennerås was critical about the reasoning underpinning this move, he applauded its result: Wennerås (n 102).

mechanism with the Rule of Law.[552] The use of interim measures for the purpose of strengthening the Rule of Law as part of ensuring the application of Article 2 TEU led to the situation when 'it is now starting to take shape as a relevant normative utensil in the Court of Justice's toolbox'.[553] Already, the Court has linked the purpose of interim measures with the final outcome of the proceedings which need to be secured in order to make the ruling truly effective. This was demonstrated first in the *Białowieża* ruling (the Polish logging case) so that the government of Poland could realize that defiance of an interim measures order would have unpleasant consequences, and this then led the government in the infringement proceedings concerning judges of the Supreme Court in Poland to return the 'forcefully retired' judges to office when fines were threatened again.

The designation of fines would obviously be available to the Commission under Article 260 TFEU in a systemic infringement procedure if the Member State did not engage in systemic compliance with the ruling of the ECJ. However, we would argue that these cases should be accompanied by a new fining option. Instead of charging a fine to be paid from the Member State's treasury, the Commission should instead seek to suspend payment of EU funds to the offending Member State equal to the value of the fine.

Why seek fines at all? At the moment, the only sanction available under Article 260 TFEU is the payment of fines. But as the comprehensive study by Brian Jack has concluded,[554] the threat of fines rarely results in the actual payment of money, because states typically comply at the last minute before the payments must be made. However, such compliance is achieved only after substantial delays, regardless of whether the fines are charged per day or charged in a lump sum. Since the average time between an adverse judgment against a Member State in an infringement procedure under Article 258 TFEU and the subsequent judgment about penalties under Article 260 TFEU is nine years: 'In truth, the EU lacks an effective mechanism to prevent Member States from using penalty payments to "purchase" continued noncompliance or indeed from simply ignoring both Court judgements'.[555] The problem is thus not only in levying the fines, but also in reaching the necessary amounts in order to make them sufficiently painful so that the backsliding governments will comply.[556] A change of approach is thus required.

Revisions in the Lisbon Treaty were designed to streamline the Article 260 TFEU proceedings to make them more effective. Now the Commission can seek sanctions for failure to transpose directives directly under Article 260(3) TFEU

[552] Case C441/17 R *Commission v Poland*, para. 102.
[553] D Sarmiento, 'Provisional (And Extraordinary) Measures in the Name of the Rule of Law' *Despite Our Differences Blog*, 24 November 2017, at: <https://despiteourdifferencesblog.wordpress.com/2017/11/24/provisional-and-extraordinary-measures-in-the-name-of-the-rule-of-law/>.
[554] B Jack, 'Article 260(2) TFEU: An Effective Judicial Procedure for the Enforcement of Judgements?' (2013) 19 *European Law Journal*, 404.
[555] Ibid., 421.
[556] Kochenov (n 19).

and no longer needs to produce a separate reasoned opinion for the sanctions sought in other cases under Article 260(2) TFEU.[557] Jack's investigation shows that these adjustments worked: fines are being requested and granted faster now than before the Lisbon amendments.[558] Nonetheless, Member States still drag their feet and stall recognition of judgments—and then when Member States finally come into compliance, the sums they owe are completely forgiven.[559] Jack concluded that the sanctions available are not doing the work that they should because Member States suffer no actual penalty for delaying compliance for years and years, and this is an open secret. While the lack of enforcement capacity already seems a persistent problem, it is an even more serious problem with persistently and pervasively violating states because their non-compliance is a more substantial threat to the operation of the European Union as well as to the realization of rights for EU citizens. A more effective sanction is needed in these extreme cases. This concerns not only levying the fines, but also, significantly, increasing the *amounts* requested.

We therefore propose that instead of billing the offending Member State's treasury, the Commission instead withhold the payments that the Member State would otherwise have received under the agricultural and/or European Structural and Investment Fund programmes. This should be combined with a significant scaling up of the amounts of fines and lump sums in question. Attaching the suspension of EU funds to a judgment of non-compliance by the ECJ has the virtue of making such a sanction a multi-institutional process, something true of other serious EU sanctions. The usual Article 258 infringement procedure requires the ECJ to agree with the Commission before a Member State can be instructed to comply. The Excessive Deficit Procedure permits cutting Cohesion Funds for violation of fiscal rules, but requires ECOFIN to agree with the Commission before the funds are cut.[560] Article 7 TEU requires both the Council and the Parliament to agree before sanctions take effect. As a result, attaching EU funding cuts to a process initiated by the Commission that must first generate two adverse ECJ judgments (the initial finding of a violation and the subsequent finding of non-compliance) has the requisite safeguards against arbitrariness. Cutting EU funds should not simply be a matter at the discretion of the Commission but should be built into an inter-institutional process in the same way as other EU sanctions.

[557] Wennerås (n 97); Prete (n 28), 11.
[558] Jack (n 554), 404.
[559] In actions under Article 260(2) TFEU, fines are rarely if ever collected because there is usually some accommodation before the fines are due. See Kochenov (n 19), 145.
[560] Council Regulation (EC) 1466/97 on the Strengthening of the Surveillance of Budgetary Positions and the Surveillance and Coordination of Economic Policies, as amended by Council Regulation (EC) 1055/2005 of 27 June 2005 and Regulation (EU) No 1175/2011, OJ L 209, 2 August 1997, 1–5.

The Commission already has in place a system for calculating fines under Article 260 TFEU[561] and, in the case of systemic non-compliance, it could use the same formula so that the freezing of EU funds would be made proportionate to the seriousness of the violation of EU law, which should translate in significantly scaling up the amounts. The only new twist besides the reassessment of the fines and lump sums charged, would be that the Commission would then request that the fines be collected by deducting this amount from the money that the EU would otherwise pay to the offending Member State. Rather than waiting to extract a fine from a Member State while it delays compliance, the Commission would be able to carry out sanctions immediately by suspending the payment of EU funds in the amount which would otherwise have been sought as a fine. This gets the incentives right: the persistently violating Member State would have to prove its compliance in order to release the funds rather than being able to stall in violation until the fines are finally demanded. Suspending the payment of EU funds changes the baseline against which the State is acting and it would provide much greater incentives for early compliance.[562] Right now, as Jack's study shows, a state has nothing to lose when it waits as long as it can to comply—which can stretch from years to decades.

If the Commission sought suspension of EU funds as a sanction, then the suspension should be timed to occur as soon as the ECJ issues an Article 260 TFEU judgment. Even more, attaching suspensions to the measures under Article 279 TFEU, thus building on the *Białowieża Forest* case law would increase the effectiveness of this approach even further and expand it to interim relief measures. It is a trickier problem to figure out when the sanctions should cease, however, as Pål Wennerås notes.[563] If the Commission wants to maintain sanctions because it feels that the Member State has not yet complied, while the Member State claims that it has, then this conflict must be resolved by the ECJ.[564] Importantly, Wennerås's worry that the Commission might be tempted to continue sanctions after a Member State has complied applies not just to cases where EU funds might be cut, but equally to determining when any daily penalties assessed by the ECJ must cease.[565] In both cases the question is what happens to the sanctions while the ECJ is resolving the conflict between the Member State and the Commission, so our proposal does not generate any new problems, at least in

[561] For the Commission's method of calculating fines, see Communication from the Commission, Application of Article 258 of the EC Treaty, SEC(2005) 1658, available at <http://ec.europa.eu/atwork/applying-eu-law/docs/sec_2005_1658_en.pdf> and Communication from the Commission—Updating of data used to calculate lump sum and penalty payments to be proposed by the Commission to the Court of Justice of the European Union in infringement proceedings, C/2019/6434, OJ C 309, 13 September 2019.

[562] Of course, Member States which are net contributors and which do not receive cohesion or other funds might not have EU accounts to freeze. Their violations would have to be addressed using the existing fining system.

[563] Wennerås (n 97).

[564] Schima, 'Article 260', in: Kellerbauer, Klamert and Tomkin (n 4), 1792.

[565] Case T-33/09 *Portugal v Commission* [2011] ECR II-1429, paras 69–72.

theory. With fines, the question does not arise in practice because the fines are not collected until the end, if at all. However, with funding streams, the penalties could be ongoing until they are halted.

An option to solve the practical difficulty of how the suspension of EU funds is managed when there is a disagreement about compliance between the Member State and the Commission is that the ECJ could insist upon a credible demonstration of compliance in a proceeding like that required in an interim measures case.[566] Until the matter is resolved, the Member State could access these funds until a final judgment is made by the ECJ. Then, if the final ruling goes against the Member State, it would have to pay the funds back. At that point, the problem already identified with Article 260 sanctions would appear—that Member States do not pay while the non-compliance continues and all fines are ultimately forgiven. Therefore, perhaps the funds to be returned in cases such as this should be deducted from ongoing funding streams. This is a technical issue to be resolved with this new sanctions mechanism, but it is nothing new in theory.

If a Member State were to be found to have violated its obligations under EU law in a systemic infringement procedure, full compliance would require serious changes and may take some time to accomplish. This is all the more reason for the *status quo* to be accompanied by incentives to change quickly. If the Member State faces an immediate freeze on funds from the EU, this will focus the government's attention on compliance as a high priority. Once the Member State complies, it can be rewarded by the release of the funds which were suspended. Ultimately, the result will be the same as under the current system: The Member State would end up paying nothing once it complies. But the interim situation is quite different under the two systems. Under our proposal, the Member State would bear the burden until compliance is assured, while under the current situation, the Member State could engage in non-compliance for years and then get off scot free at the end.

We believe that this proposal would not require any Treaty change, or even secondary legislation. The language of Article 260 TFEU already contemplates a monetary penalty for violation of a ECJ decision under Article 258 TFEU without specifying how the fine should be paid. In particular, the language of Article 260(2) TFEU does not say that the fine must be paid from the treasury of the Member State to the EU. The precise language of Article 260(2) says, 'If the Court finds that the Member State concerned has not complied with its judgment it may impose a lump sum or penalty payment on it'. Given that this language does not specify *how* the penalty should be collected, it seems a matter of

[566] The rules of the ECJ already allow applications to suspend the operation of judgments in other cases pending a final hearing, but at present these rules do not cover cases brought under Article 258. Rules of Procedure of the Court of Justice of 25 September 2012 (OJ L 265, 29 September 2012), as amended on 18 June 2013 (OJ L 173, 26 June 2013, 65), on 19 July 2016 (OJ 217, 12 August 2016, 69), on 9 April 2019 (OJ L 111, 25 April 2019, 73) and on 26 November 2019 (OJ L 316, 6 December 2019, 103, Article 160).

interpretation of Treaty language to find that the money could be withheld from payments already committed from the EU to the Member State treasury rather than being paid from the Member State treasury to the EU. In both cases the fine is the same, since money is fungible. The only difference is that the Commission could immediately create stronger incentives for compliance by suspending payment of EU funds to the Member State without waiting for the Member State to pay the EU down the road.

If this seems an interpretation too far and the Commission wanted unquestioned legal permission, it could seek secondary legislation to make this option clear. Given the Court's interpretation of Article 279 TFEU in *Białowieża Forest*, however, an approach awaiting some secondary legislation could be characterized as an unreasonably cautious one. But this should not be seen as a complete novelty. In other contexts, most notably the Excessive Deficit Procedure (EDP), secondary legislation has already permitted funds allocated for one purpose (eg Cohesion) to be docked for failure to comply with the requirements of another part of EU law (eg Stability and Growth).[567] The same sort of secondary legislation could be proposed to deal with Member States which persistently refuse to comply with basic European values, allowing EU funding streams to be cut for ECJ-certified infringements of basic EU values.

One possible objection to having the Member State do without its designated funding while it fails to comply is that the reversal of systemic injury to EU values by a Member State could require substantial reforms that would require money. We believe that if a Member State presented serious and realizable plans for engaging in systemic reform, EU funds could then be gradually released to enable the Member State to carry out these plans, monitored of course to ensure that the values violations are not repeated in the new programmes. The point of suspending EU funds, as with ECJ fines more generally, is not to hurt the country and especially not its citizens, but to encourage compliance at the earliest possible moment and to provide assistance for projects that demonstrate solidarity with EU principles.

VIII. Conclusion

The European Union is experiencing a crisis of values, as some Member States are openly flouting the basic principles of EU law. This could be regarded as a political crisis to be addressed by EU political bodies invoking Article 7 TEU. However, even if it represents a political crisis as envisioned by Article 7 TEU, it also simultaneously constitutes a legal crisis, as key provisions of EU law are being violated systematically without a meaningful attempt on the part of EU institutions to enforce EU law. When violations are not neat and singular but

[567] N De Sadeleer, 'The New Architecture of the European Economic Governance: A Leviathan or a Flat-Footed Colossus' (2012) 19 *Maastricht Journal of European and Comparative Law*, 354.

plural and complex, the Commission needs to rise to the occasion and adapt the instruments at its disposal to meet the new challenges. Picking around the edges of the problem will not only fail to address the more serious issues at stake, and they may waste valuable time during which the problems will become more entrenched and harder to solve.

Complex crises require complex solutions.[568] Our analysis in this article covered two possible solutions to the existing Rule of Law crisis based on existing legal provision of the Treaty, which could employ a common method. Systemic infringement actions could be brought in either of two procedural frameworks—the classical (Article 258 TFEU) or the intergovernmental (Article 259 TFEU) form. The classical infringement action is perceived as a clearly legal tool, whereas the second intergovernmental infringement action is often seen as a more politicized one. Given that Rule of Law backsliding constitutes a dual—a political and a legal—challenge, it is perhaps appropriate to have these two different legal avenues for mounting more comprehensive challenges to Member States that are engaged in the gross violation of EU values.

The Rule of Law crisis not only undermines EU political integration, but it also endangers the protection of Treaty freedoms and fundamental rights at the core of EU law. When facing those challenges, as we have tried to show, EU institutions and Member States are not toothless, even without any additional mechanisms being added to the toolkit.[569] As the *Commission v Poland (Independence of the Supreme Court)* case has shown, judicial response can be swift and can actually work in practice, at least as far as the case goes.[570] This leads us to believe that the judicial protection of EU values is a more reliable method for ensuring their realization than political mechanisms,[571] especially in cases where the systemic infringement procedure could avoid a 'meaningless political ping-pong' with the rogue Member State in 'dialogue' with various EU institutions, a so-far useless exercise at the EU level which only strengthens the populists at the national level.[572] The recent case law of the ECJ based on an interpretation of Article 19(1) TEU read in conjunction with Article 2 TEU values proves that the judicial response to the ongoing Rule of Law crisis has so far been the most effective one.[573] However heartening the use of Article 19(1) TEU has been so far, though, this provision alone is not capable of solving the majority of problems related to Rule of Law

[568] Schmidt and Bogdanowicz (n 28), 1064.
[569] 'The EU's toolbox provides ammunition that can be used in case of a breach of EU legislation proper. However, it leaves the EU almost toothless when it comes to cases of flagrant breaches of rule of law', see: Editorial, 'Winter is Coming. The Polish Woodworm Games' (2017) 2 *European Papers*, 801–2.
[570] Blokker (n 463).
[571] Jakab, (n 401), 190.
[572] A Łazowski, 'Is there a way out of the Polish pickle?' *CEPS Commentary*, no. 31/22 January 2016, 3.
[573] Pech and Kochenov (n 13); Kochenov and Bárd (n 10).

and democratic backsliding, and does not even provide a complete answer for the problem of assaults on judicial independence, narrowly conceived.

Systemic infringement proceedings based on a holistic assessment by the Commission or by a Member State (or States) of the Rule of Law problems in a rogue Member State therefore create a more promising route forward. It stays on the legal and judicial path without falling prey to the political calculations that run through the Article 7 TEU procedure and that run the risk of sacrificing values on the altar of political expediency. If the Commission, as guardian of the Treaties, or a Member State, using its intergovernmental powers, argues that a fellow Member State has committed a systemic breach of EU values under Article 2 TEU, and demonstrates this by bundling a group of specific alleged violations together to underwrite this claim, then the argument can be made before the ECJ that the infringement of EU law in a Member State is not minor, transient, and incidental, but systemic, persistent, and important. If the ECJ agrees with this assessment, it would find a systemic breach of EU values. By making the *pattern* of Member State conduct the subject of a single infringement action and demonstrating to the ECJ that the pattern constitutes a systemic violation of EU values, the parties empowered to bring infringement actions could be given the tools to develop a programme of systemic remedy that would not just encourage the construction of surface-level patches, but would instead require the offending Member State to restore its compliance with the core values of the Treaties. If a Member State can play cat and mouse with the Commission by changing its infringing practices just enough to meet the narrow tests of narrow decisions, or if the Commission fails to anticipate the remedies that would be needed as it designs infringement actions in the first place, then the principles of EU law can devolve into petty legalisms which are honoured only superficially. Something more needs to be done if we are to avoid a moral crisis in Europe. We believe that systemic infringement procedures can do the job.

Systemic infringement actions, if properly constructed, do not require Treaty change or even secondary legislation to be used immediately. Infringement actions are already there in the Treaties, and yet reframing infringement actions in this systemic way represents an important step forward in the recognition that EU values are legal and not political. To avoid the inferences that the Commission is acting in a merely political manner, however, we believe that the Commission should reconsider its policies regarding transparency of infringement proceedings and should strengthen its adherence to the right to good administration by providing public legal reasons at every step of the procedure.

We have also argued that systemic violations, when confirmed by the ECJ, should be met with a plan for systemic compliance. If a Member State balks at coming back into compliance with EU values, withholding the funds that flow from the EU to the Member State in question can act as a powerful motivator to comply at the earliest possible moment. We expect that withholding EU funds immediately would provide an even stronger motivation than the prospect of

paying a fine in some distant future.[574] If a Member State continues to refuse to comply with systemic infringement judgments once EU funds are withheld, it will be clear that the European Union cannot always make a Member State change its ways, but at least Europe will not continue to subsidize a Member State which flaunts the EU's basic values.[575] At the very least, withholding funds from a systematically violating Member State probably helps the fight against corruption in that state.[576] But even more crucially, financing autocratic practices undermines EU credibility[577] and transforms the fundamental values of the EU into empty concepts.[578] We have proposed a way here to restore the vibrancy and commitment of Member States to EU values using the tools already at hand.

Those improvements in the way that infringement actions are brought—improvements in scope, legal basis, and procedural guarantees—are essential to secure effective protection of the EU values. The EU stands at the precipice of a constitutional crisis of the Union[579] one that will interfere with the future of integration and the effective implementation of the EU law unless it is contained. We believe that systemic infringement actions can strengthen EU integration and secure EU values. We have tried to make the case here that systemic infringement actions need no further stage-setting, law-making, or tool-creation to be used. They are ready to go, starting now.

[574] Prete (n 28), 225. Behavioural economics research has long shown that subjects will feel the loss of what they clearly expected more acutely than an equal sanction which is not immediate. For the classic source, see D Kahneman and A Tversky, 'Choices, Values, and Frames' (1984) 39 *American Psychology*, 341–50.
[575] A Łazowski, 'Time to stop the Polish danse macabre' *CEPS Commentary*, 20 July 2017, at: <https://www.ceps.eu/ceps-publications/time-stop-polish-danse-macabre/>.
[576] J Selih, I Bond, and C Dolan, 'Can EU Funds Promote the Rule of Law in Europe?', *Centre for European Reform*, November 2017, 1.
[577] Butler (n 546).
[578] 'Orban's design; Election in Hungary' *The Economist*, vol. 427, no. 9086, 7 April 2018, 45.
[579] von Bogdandy (n 343), 3.