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**A new dawn for the Infringement Procedure -
New possibilities to safeguard the rule of law under
Article 258 TFEU**

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Abstract

The 'rule of law crises' in Hungary and Poland have shown weaknesses in the European Union's system of enforcing the values enshrined in Article 2 TEU after accession. Especially Article 7 TEU as well as the other enforcement procedures have proven to be incapable of forcing Member States back into compliance with the values enshrined in Article 2 TEU so far. However, this thesis contests the claim that the Commission has found two new approaches to use the infringement procedure under Article 258 TFEU that could make the infringement procedure more effective in enforcing these values in the 'rule of law crisis' in Hungary and Poland. The approaches identified in the Commission's pending infringement proceedings *C - 619/18 Commission v Republic of Poland*, in which the Commission is relying on Article 19 TEU in connection with Article 47 of the Charter, and *C-235/17 Commission v Hungary*, where the Commission is relying on the Charter independently, are therefore at the centre of the thesis. However, before each case can be described, analysed and evaluated regarding its possible outcome and effect to the 'rule of law crisis', it must be analysed whether such an approach is possible under the current law and why such an approach has not been applied yet. Hence, more specifically in the second chapter, it is discussed why the Commission can use infringement proceedings even where Article 7(1) TEU has been invoked, why the infringement procedure cannot be based on Article 2 TEU directly, and how Article 19 TEU as applied in the case *C-619/18 Commission v Republic of Poland* in connection with Article 47 of the Charter fits into the picture. In the third chapter, the discussion starts with establishing how fundamental rights were developed and why there are problems in regard to the scope of application of fundamental rights towards Member States. This builds the foundation to understand why the Charter has not been used before case *C-235/17 Commission v Hungary* as a sole basis for bringing infringement proceedings against a Member State. On the basis of the knowledge acquired, it is argued the request of the Commission in *C-619/18 Commission v Republic of Poland* and in *C-235/17 Commission v Hungary* should be followed by the CJEU, and that this will make the rule of law enforcement in the European Union not only more visible and legitimate but also more effective.

Preface

This thesis does not only mark the end of the master's program but also the end of a wonderful, unique time at Lund University as well as the end of my university education in general. It has been a very long and challenging journey in order to get to this point. Even though this path was not always easy and victorious, I can say with certainty that the journey was as important as the outcome and that I could not have done it without the people that accompanied and supported me on this exciting path.

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Franziska-Marie Hilpert, Lund, 27th May 2019

Abbreviations

Charter	Charter of Fundamental Rights of the European Union
CJEU	Court of Justice of the European Union
Commission	European Commission
Council	Council of the European Union
EC	European Community
ECHR	European Convention of Human Rights
ECtHR	European Court of Human Rights
e.g.	For example
EU	European Union
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union

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1 INTRODUCTION

1.1 BACKGROUND

Fundamental rights, the rule of law and democracy are the common principles on which the European Union (EU) is founded.¹ The European Court of Justice (CJEU) and the European Court of Human Rights (ECtHR) have held that the rule of law is a constitutional principle with both formal and substantive components, this means that there can be no democracy and respect for fundamental rights without respect for the rule of law and vice versa.² Thus, their relationship might be described best as triangular.³ Compliance with these principles, even though they have not been black-letter law for a long time, was regarded as important since the creation of the European Coal and Steel Community and its enlargement.⁴ Currently, these *principles* are enshrined in Article 2 of the Treaty on European Union (TEU) which lists democracy, the rule of law and respect for human rights as well as, freedom, equality, respect for human dignity as the common *values* on which the EU is founded.⁵ Also, with entry into force of the Lisbon Treaty in 2009 the EU included, for the first time, a binding document where the personal, civic, political, economic and social rights of individuals are codified in a single text: The Charter of Fundamental Rights of the European Union (Charter).⁶ The preamble to the Charter also mentions the rule of law as a founding principle of the EU.⁷

¹ Petra Bárd and others, *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, 2016) 1; Dimitry Kochenov, 'The Acquis and Its Principles' in András Jakab and Dimitry Kochenov (eds), *The Enforcement of EU Law and Values: Ensuring Member States' Compliance* (Oxford Scholarship Online 2017) 9.

² European Commission, *A new EU Framework to strengthen the Rule of Law* (Communication from the Commission to the European Parliament and the Council, COM(2014) 158 final) 4; Joined Cases C-402/05 P and C-415/05 P *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union* ECLI:EU:C:2008:461 para. 316; *Stafford v United Kingdom* 28 May 2001 (ECtHR) para 63.

³ Laurent Pech and others, *An EU mechanism on democracy, the rule of law and fundamental rights Annex I - An EU mechanism on democracy, the rule of law and fundamental rights* (European Parliamentary Research Service April 2016) 22.

⁴ Dimitry Konchev, 'Behind the Copenhagen facade. The meaning and structure of the Copenhagen political criterion of democracy and the rule of law' (2004) 8 *European Integration Online Papers* 1, 3; Christophe Hillion, 'The Copenhagen Criteria and Their Progeny' in Christophe Hillion (ed), *EU enlargement: A legal Approach* (Oxford, Hart Publishing 2004) 1, 4.

⁵ Consolidated version of the Treaty on European Union [2012] OJ C 326/01; Bárd and others, *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* 1.

⁶ Bárd and others, *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* 2; European Commission, 'Why do we need the Charter? The Charter of Fundamental Rights, what it covers and how it relates to the European Convention on Human Rights.' (*European Commission*, 2019) <https://ec.europa.eu/info/aid-development-cooperation-fundamental-rights/your-rights-eu/eu-charter-fundamental-rights/why-do-we-need-charter_en> accessed 12 March 2019.

⁷ Christophe Hillion, 'Overseeing the Rule of Law in the EU: Legal Mandate and Means' in Carlos Closa and Dimitry Kochenov (eds), *Reinforcing rule of law oversight in the European Union* (Cambridge University Press 2016) 57.

While the compliance with these principles is of fundamental importance, as it is a prerequisite for upholding all rights and obligations from the Treaties as well as a precondition for the accession to the EU as part of the ‘Copenhagen Criteria’ underlined by Article 49(1) TEU which refers to Article 2 TEU,⁸ there is no enforcement mechanism *sensu stricto* after accession.⁹ This gap between the declaration of these fundamental principles and their enforcement (‘Copenhagen Dilemma’), has contributed to the issues the EU is facing today: Several ‘rule of law crises’¹⁰ with limited enforcement measures.¹¹ However, the limited enforcement measures are not due to a total lack of Treaty instruments, quite the opposite Article 2 TEU is peculiar as it can be enforced via Article 7 TEU.¹²

Article 7 TEU is a purely political procedure and was often presumed to be too difficult to invoke and the outcome said to be too devastating.¹³ This view was also reflected *inter alia* in the way the former President of the European Commission (Commission) Barroso referred to Article 7 TEU: ‘the nuclear option’.¹⁴ This misconception of Article 7 TEU and the use of the metaphor has led to continuous criticism and reluctance of the European institutions to use Article 7 TEU against Hungary.¹⁵ Hence, and in order to fill the gap between mere political persuasion and the use of Article 7 TEU the Commission in 2014 developed a new EU

⁸ Konchev, ‘Behind the Copenhagen facade. The meaning and structure of the Copenhagen political criterion of democracy and the rule of law’ 1; Hillion, ‘The Copenhagen Criteria and Their Progeny’ 13, 14; European Commission, *A new EU Framework to strengthen the Rule of Law* 4; Consolidated version of the Treaty on European Union [2012] OJC 326/01.

⁹ Bárd and others, *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* 2; Dimitry Konchenov, ‘How to turn Article 2 TEU into a down-to-Earth provision?’ (*Verfassungsblog*, 8 December 2013) <<https://verfassungsblog.de/how-to-turn-article-2-teu-into-a-down-to-earth-provision/>> accessed 14 March 2019.

¹⁰ Vice-President of the European Commission, Reding, Viviane, ‘The EU and the Rule of Law – What next?’ *Speech at the Centre for European Policy Studies* (Brussels, 4 September 2013) <http://europa.eu/rapid/press-release_SPEECH-13-677_en.htm> accessed 14 March 2019; Dimitry Kochenov and Laurent Pech, ‘Monitoring and Enforcement of the Rule of Law in the EU: Rhetoric and Reality’ (2015) 11 *European Constitutional Law Review* 512, 512.

¹¹ Wouter van Ballegooij, Tatjana Evas and European Added Value Unit, *An EU mechanism on democracy, the rule of law and fundamental rights European Added Value Assessment accompanying the legislative initiative report (Rapporteur: Sophie in 't Veld)* (An EU mechanism on democracy, the rule of law and fundamental rights, 2016) 4; Bárd and others, *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* 2.

¹² Kochenov, ‘The Acquis and Its Principles’ 10.

¹³ Dimitry Kochenov, *Busting the Myths Nuclear: A Commentary on Article 7 TEU* (EUI Working Papers LAW 2017/10 European University Institute: Department of Law, 2017) 6; Eva-Maria Poptcheva, *Member States and the rule of law Dealing with a breach of EU values* (European Parliamentary Research Service, 2015) 4.

¹⁴ Kochenov, *Busting the Myths Nuclear: A Commentary on Article 7 TEU* 6; President of the European Commission, José Manuel Durão Barroso, ‘State of the Union 2012 Address’ *Speech/12/596* (European Parliament Strasbourg, 12 September 2012) <http://europa.eu/rapid/press-release_SPEECH-12-596_en.htm> accessed 15 March 2019.

¹⁵ Kochenov, *Busting the Myths Nuclear: A Commentary on Article 7 TEU* 6; Leonard Besselink, ‘The Bite, the Bark, and the Howl Article 7 TEU and the Rule of Law Initiatives’ in András Jakab and Dimitry Kochenov (eds), *The Enforcement of EU Law and Values Ensuring Member States' Compliance* (Oxford University Press 2017) 134.

Framework to strengthen the Rule of Law,¹⁶ and in 2013, introduced a Justice Scoreboard.¹⁷ The former provides a three step-approach, first creating a dialogue, second a recommendation by the Commission and third a follow-up by the Commission on the recommendations where there are clear indications of a systematic threat to the rule of law, while the latter device merely provides comparable data on the functioning of justice systems of all Member States where independence, quality and efficiency are the key components.¹⁸ These measures were soon followed by the decision of the Council of the European Union (Council) to adopt its own rule of law initiative, not only because it seems to find that the Commission did not have the legitimacy to adopt the Framework to strengthen the Rule of Law, but also to establish an annual dialogue between the Member States and the Council.¹⁹

While especially the mechanisms created by the Commission are a step in the right direction, the main issue remains: The enforcement of the values of the EU cannot be ensured through dialogue, where the Member State diverged from the values by choice.²⁰ This has become very clear through the refusal by the Polish government to implement the recommendations adopted by the Commission on 27th July 2016 under the Commissions Framework to strengthen the Rule of Law.²¹ Following the unwillingness of the Polish government to implement the Rule of Law Recommendations and the continuous deterioration of the rule of law in the Republic of Poland (Poland), the Commission, besides issuing a fourth Rule of Law Recommendation, has finally proposed to the Council to adopt a decision under Article 7(1) TEU, determining a clear risk of a serious breach of the rule of law by Poland.²²

¹⁶ European Commission, *A new EU Framework to strengthen the Rule of Law*; Besselink, 'The Bite, the Bark, and the Howl Article 7 TEU and the Rule of Law Initiatives' 135.

¹⁷ Besselink, 'The Bite, the Bark, and the Howl Article 7 TEU and the Rule of Law Initiatives' 135; European Commission, *The EU Justice Scoreboard A tool to promote effective justice and growth* (Communication from the Commission to the European Parliament, the Council, the European Central Bank, the European Economic and Social Committee and the Committee of the Regions, COM(2013) 160 final).

¹⁸ European Commission, *The EU Justice Scoreboard A tool to promote effective justice and growth*; European Commission, *A new EU Framework to strengthen the Rule of Law*.

¹⁹ Kochenov and Pech, 'Monitoring and Enforcement of the Rule of Law in the EU: Rhetoric and Reality' 525; Council of the European Union, *Conclusions of the Council of the EU and the Member States meeting within the Council on ensuring respect for the rule of law 17014/14* (Brussels, 16 December 2014); Besselink, 'The Bite, the Bark, and the Howl Article 7 TEU and the Rule of Law Initiatives' 138.

²⁰ Dimitry Kochenov and Laurent 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, 1070.

²¹ Laurent Pech, 'Systemic Threat to the Rule of Law in Poland: What should the Commission do next?' (*Verfassungsblog*, 31 Oktober 2016) <<https://verfassungsblog.de/systemic-threat-to-the-rule-of-law-in-poland-what-should-the-commission-do-next/>> accessed 15 March 2019.

²² European Commission, 'Rule of Law: European Commission acts to defend judicial independence in Poland' *European Commission Press Release Database* (Brussels, 20 December 2017) <http://europa.eu/rapid/press-release_IP-17-5367_en.htm> accessed 15 March 2019; Dimitry Konchev, Laurent Pech and Kim Lane Scheppele, 'The European Commission's Activation of Article 7: Better Late than Never?' (*Verfassungsblog*, 23 Dezember 2017) <<https://verfassungsblog.de/the-european-commissions-activation-of-article-7-better-late-than-never/>> accessed 15 march 2019.

The Council,²³ on 22nd December 2017, adopted the decision under Article 7(1) TEU, determining that there is a clear risk of a serious breach by Poland of the rule of law.²⁴ Almost a year later and after a proposal from the Parliament, the Council, on 20th September 2018, adopted a decision under Article 7(1) TEU against Hungary as well.²⁵ While the warning process (Article 7(1) TEU) has been invoked, it seems nearly impossible to activate the sanction mechanism under Article 7(2) TEU²⁶ and Article 7(3) TEU²⁷ due to the requirement of unanimity of the European Council, where one rogue state is joined by another.²⁸ Besides the clear language of the Treaty in Art 7(2) TEU (unanimity) many have argued, based on the *effet utile* doctrine, that ‘the fellow-traveller veto’ cannot apply in situations where Article 7(1) TEU is invoked against both Member States.²⁹ Thus, neither Hungary nor Poland should be able to vote in a determination under Article 7(2) TEU, as it would be illogical that Article 7 TEU would lose its deterrent effect where there is more than just one rogue Member State.³⁰ Nevertheless, it remains to be seen whether the European Council and the Council, at last, take up their responsibility to enforce the values of the EU by invoking the sanction mechanism under Article 7(2) and 7(3) TEU.³¹

²³ The Council, acting by a majority of four fifths of its members, may determine that there is a clear risk of a serious breach by a Member State of the values referred to in Article 2, (Art 7 (1) TEU) after obtaining the consent of the European Parliament. The consent of the Parliament requires a two-thirds majority of the votes cast, representing an absolute majority of all Members (Art 354(4)TFEU). (Consolidated version of the Treaty on European Union [2012] OJ C 326/01; Consolidated version of the Treaty on the Functioning of the European Union [2012] OJ C 326/01.)

²⁴ European Commission, *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 COM (2017) 835 final (2017/0360 (NLE)*, Brussels, 22 December 2017).

²⁵ Council of the European Union, *Proposal for a Council Decision on the determination of a clear risk of a serious breach by Hungary of the rule of law* (Brussels, 2018/0902 (NLE), 20 September 2018).

²⁶ Article 7 (2) TEU requires the European Council to act by unanimity on a proposal made by one third of the Member States or by the Commission and after obtaining the consent of the European Parliament in order to determine the existence of a serious and persistent breach by a Member State of the values referred to in Article 2 TEU (Consolidated version of the Treaty on European Union [2012] OJ C 326/01).

²⁷ In order to suspend certain of the rights deriving from the application of the Treaties to the Member State in question under Article 7 (3) TEU, the Council, must act by a qualified majority (Consolidated version of the Treaty on European Union [2012] OJ C 326/01).

²⁸ Poptcheva, *Member States and the rule of law Dealing with a breach of EU values* 5; Kim Lane Scheppele, ‘Can Poland be Sanctioned by the EU? Not Unless Hungary is Sanctioned Too’ (*Verfassungsblog*, 24 Oktober 2016) <<https://verfassungsblog.de/can-poland-be-sanctioned-by-the-eu-not-unless-hungary-is-sanctioned-too/>> accessed 15 March 2019.

²⁹ Scheppele, ‘Can Poland be Sanctioned by the EU? Not Unless Hungary is Sanctioned Too’; Konchev, Pech and Scheppele, ‘The European Commission’s Activation of Article 7: Better Late than Never?’.

³⁰ Scheppele, ‘Can Poland be Sanctioned by the EU? Not Unless Hungary is Sanctioned Too’; Pech, ‘Systemic Threat to the Rule of Law in Poland: What should the Commission do next?’; Konchev, Pech and Scheppele, ‘The European Commission’s Activation of Article 7: Better Late than Never?’.

³¹ Kim Lane Scheppele, Laurent Pech and R. Daniel 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’ (*Verfassungsblog*, 12 November 2018). <<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/>> accessed 17 March 2019; Laurent Pech and Kim Lane Scheppele, ‘Poland and the European Commission, Part II: Hearing the Siren Song of the Rule of Law’ (*Verfassungsblog*, 6 January

The lack of an effective enforcement framework and effective cooperation between the European institutions has further led to doubts regarding the EU's ability to protect the values enshrined in Article 2 TEU particularly in regard to fundamental rights, democracy and the rule of law.³² Over the past years especially the Commission has received much criticism in this regard, as many have lost hope in an effective intervention by the Commission.³³ This was not only due to the reluctance of the Commission to promptly activate Article 7(1) TEU against Hungary and Poland,³⁴ but also due to the resistance to bring infringement proceedings based on Article 2 TEU or the Charter.³⁵ This rendered the use of infringement proceedings ineffective.³⁶ A worrying example for this, is the case of *C-286/12 Commission v Hungary*, even though the Commission has successfully brought infringement proceedings on the grounds of age discrimination against Hungary's legislation that radically lowered the retirement age of Hungarian judges, the threat to the independence of the judiciary was, however, not averted as the judges affected by the legislation have not been reinstated.³⁷ The Commission's intervention was thus ineffective towards ensuring the protection of democracy, the rule of law and fundamental rights.³⁸

At the beginning of 2017 the Commission announced that it will be using the infringement procedure more strategic and more efficient in line with the Juncker Commission's commitment to be 'bigger and more ambitious on big things, and smaller and more modest on small things'.³⁹ In this regard, two new developments in infringement proceedings give reason to hope that the Commission finally found its confidence to enforce the values of the EU enshrined in Article 2 TEU. These two developments are identified in the cases of *C-619/18 Commission v Republic of Poland*, where the Commission launched infringement proceedings on the grounds of Article

2017) <<https://verfassungsblog.de/poland-and-the-european-commission-part-ii-hearing-the-siren-song-of-the-rule-of-law/>> accessed 17 March 2019.

³² Bárd and others, *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* 13.

³³ See for example: Maciej Taborowski, 'The Commission takes a step back in the fight for the Rule of Law' (*Verfassungsblog* 3 January 2018) <<https://verfassungsblog.de/the-commission-takes-a-step-back-in-the-fight-for-the-rule-of-law/>> accessed 26 March 2019; Laurent Pech and Kim Lane Scheppele, 'Poland and the European Commission, Part I: A Dialogue of the Deaf?' (*Verfassungsblog*, 3 January 2017) <<https://verfassungsblog.de/poland-and-the-european-commission-part-i-a-dialogue-of-the-deaf/>> accessed 26 March 2019.

³⁴ Pech and Scheppele, 'Poland and the European Commission, Part I: A Dialogue of the Deaf?'.

³⁵ Dimitry Kochenov, 'Biting Intergovernmentalism: The Case for the Reinvention of Article 259 TFEU to Make It a Viable Rule of Law Enforcement Tool' (2015) 7 *Hague Journal on the Rule of Law* 153, 161.

³⁶ Taborowski, 'The Commission takes a step back in the fight for the Rule of Law'.

³⁷ *C-286/12 European Commission v Hungary* ECLI:EU:C:2012:687; Dimitry Kochenov and Laurent Pech, 'Upholding the Rule of Law in the EU: On the Commission's 'Pre-Article 7 Procedure' as a Timid Step in the Right Direction' (2015) 24 *Robert Schuman Centre for Advanced Studies Research RSCAS* 512, 4.

³⁸ Kochenov, 'Biting Intergovernmentalism: The Case for the Reinvention of Article 259 TFEU to Make It a Viable Rule of Law Enforcement Tool' 166.

³⁹ European Commission, *EU law: Better results through better application* (OJ 2017 C 18/10, 19 January 2017).

19 TEU in connection with Article 47 of the Charter, and *C-235/17 Commission v Hungary*, where the Commission is bringing infringement proceedings based solely on the Charter due to a breach of a fundamental right. The effectiveness of these new approaches by the Commission in these instances, as well as the possibility of these cases providing new effective tools in the fight to protect the rule of law, shall be explored.

1.2 RESEARCH QUESTIONS AND AIM OF THE STUDY

The research question and aim of this study is to explore whether the infringement procedure can be applied in a manner that effectively enforces the rule of law and the values enshrined in Article 2 TEU. In this regard, the thesis will analyse two new approaches identified in the Commission's infringement proceedings under Article 258 Treaty on the Functioning of the European Union (TFEU). The first approach is taken by the Commission in *C-619/18 Commission v Republic of Poland* which indicates that the Commission is relying on Article 19 TEU in connection with Article 47 of the Charter in infringement proceedings, the second one is taken by the Commission in *C-235/17 Commission v Hungary* which indicates that the Commission is trying to rely on the Charter independently in order to enforce the rule of law in these Member States. As these approaches are not directly connected, the thesis will be divided into two separate chapters, each dealing with one case and thus one development.

The second chapter of the thesis will thus analyse the approach in *C-619/18 Commission v Republic of Poland*. In order to investigate whether this approach can help to enforce the rule of law, the questions, whether Article 258 TFEU proceedings can be used in order to enforce the rule of law and the values enshrined in Article 2 TEU, whether Article 2 TEU is a legal basis for such proceedings and what role Article 19 TEU plays in this regard must be addressed first. In a second stage, the focus will shift to the proceedings in *C-619/18 Commission v Republic of Poland* and the Opinion of the Advocate General Tanchev therein. In a third step, the Opinion shall be analysed, and an interim conclusion is drawn on whether such an approach is effective in enforcing the values of the EU in the 'rule of law crisis' in Hungary and Poland.

The third chapter of this thesis will deal with the approach identified in *C-235/17 Commission v Hungary* and thus the possibility to bring infringement proceedings solely based on the Charter. This approach will be analysed to its effect on ensuring compliance with the rule of law as a core value of the EU enshrined in Article 2 TEU. In this respect, it shall first be reflected on why the Commission has not relied solely on the Charter in infringement proceedings before. Afterwards, the focus will shift to address the approach taken in *C-235/17 Commission v Hungary*. Similar to the previous chapter, the focus will first be on the proceedings and the Opinion of the Advocate General, before they are analysed. This will be

followed by an interim conclusion, on why such an approach should be applied and whether this makes the infringement procedure an effective tool in enforcing the ‘rule of law crisis’ in Hungary. Last, the decision of the CJEU in *C-235/17 Commission v Hungary* shall be addressed and commented on.

In the last chapter, the previous findings shall be summarised, and some remaining issues highlighted. These findings shall contribute to the discussion on how to effectively enforce the rule of law and the values of the EU. The question shall be answered whether the traditional enforcement mechanism can be regarded as a valuable tool in defending these democratic values and especially the rule of law or whether the critique by some commentators was correct and there is truly a desperate need for new procedures, institutions or treaty amendments to safeguard the values of the Union.

1.3 DELIMITATIONS

This thesis sets out to identify whether there is a new dawn for the infringement procedure which makes Article 258 TFEU effective in addressing and enforcing the rule of law and the values enshrined in Article 2 TEU in Hungary and Poland. In order to analyse whether the new approaches in the Commission application of the infringement procedure can be effective in this regard, the two aforementioned cases will be analysed in this respect. This study, therefore, restricts itself to closely scrutinising these two cases against Poland and Hungary and therefore also to addressing only the ‘rule of law’ concerns regarding these two Member States.

In order to identify whether infringement proceedings can be effective in enforcing the rule of law the relationship between Article 7 TEU with Article 258 TFEU will be analysed, the relationship thereof with preliminary reference proceedings and infringement proceedings brought by Member States under Article 259 TFEU will not be addressed as this is not subject to this study. Furthermore, only the relevant provisions such as Article 2 TEU, 19 TEU as well as Article 51 of the Charter and the relevant case law of the CJEU dealing with and developing the applicability of the new approaches shall be analysed. The study will, however, not analyse related provisions in depth such as Article 7 TEU nor will Article 53 of the Charter be addressed. Moreover, as it is not the purpose of this thesis to develop a complete legal analysis of the developments of fundamental rights, only the necessary developments of the case law in relation to the Charter and its scope of application towards Member States will be deliberated on. Finally, the study will not analyse the effectiveness of the infringement procedure in general, nor will the process of the procedure or the position of the Commission in the procedure be debated. This study also does not elaborate on proposals of commentators that maintain that

the infringement procedure must be changed, or other proceedings adopted to uphold the rule of law.

1.4 METHODOLOGY AND SOURCES

The thesis is literature-based and involves the analysis, interpretation and discussion of two cases, one pending and one recently decided at the CJEU as well as of the relevant legislation and case law. In this regard, a traditional legal dogmatic will be applied to all aspects. The primary sources of the thesis include EU primary law, judgments of the CJEU, Opinions of the Advocate General, academic literature, Commission Press – Releases, Blog-Posts and other academic materials such as journals and books as well as relevant case law from other courts.

The principal methods used in this thesis are descriptive as well as analytical. In this regard, the second and the third chapter start by setting out what the current status of the law is, through the description and analysis of the most important provisions and legal documents, case law and the developments thereof. This is followed by the description of the proceedings of the case and the Opinion of the Advocates General. The Opinion of the Advocates General will be analysed and serve as a point of departure for the assessment of the current state of the law and an interpretation on how the law should be applied in this instance. The evaluating method is further used to assess whether the opinions of the Advocates General portrayed, should be followed by the CJEU. Last, the thesis includes normative statements, which will be based on the author's opinion and her interpretation of the way the law should be applied, the way the case should be decided as well as the preference for the future state of the law and its enforcement. Normative statements will also be applied in the fourth and last chapter where the findings will be summarized, remaining issues highlighted and put in perspective as well as future outlook be presented.

2 THE INFRINGEMENT PROCEDURE AND ARTICLE 2 TEU

The Commission may bring infringement proceedings before the CJEU where a Member State has failed to comply with its obligations under EU law.⁴⁰ The infringement procedure by the Commission on which the focus lies here, as there are only very limited examples of infringement proceedings by Member States under Article 259 TFEU, are part of the public enforcement mechanism intended to ensure the general and uniform observance of EU law.⁴¹ The Commission's enforcement mechanism has been used very successfully over the last years in thousands of cases, forcing non-compliant Member States back into line with EU law.⁴² The effectiveness of the infringement procedure was further strengthened with the Maastricht Treaty due to the inclusion of Article 260 TFEU (ex Article 228 Treaty establishing the European Community), which grants the power to the CJEU to impose penalty payments on Member States when they fail to take the necessary measures to comply with its judgement taken under Article 258 TFEU.⁴³ Despite the positive results achieved in many instances by the Commission and the general strengths of the procedure, several commentators have highlighted weaknesses and limitations regarding Article 258 TFEU when dealing with breaches of the rule of law, fundamental rights and other values enshrined in Article 2 TEU.⁴⁴

Before focusing on the first approach, enforcing the values of the EU enshrined in Article 2 TEU through Article 19 TEU, and its application in case of *C-619/18 Commission v Republic of Poland* the relationship between Article 7 TEU and Article 258 TFEU must be addressed as well as the reason why enforcing the values enshrined in Article 2 TEU has been regarded as difficult.

2.1 RELATIONSHIP BETWEEN ARTICLE 7 TEU AND ART 258 TFEU

A continuous point of debate has been whether Article 7 TEU is the only enforcement mechanism of the values enshrined in Article 2 TEU, or whether as an alternative or supplement the infringement procedure (Article 258 TFEU and Article 259 TFEU) can be used to enforce these values.⁴⁵ Whether Article 7 TEU prevents the use of Article 258 TFEU, for the protection

⁴⁰ Kochenov and Pech, 'Monitoring and Enforcement of the Rule of Law in the EU: Rhetoric and Reality' 517.

⁴¹ Paul Craig and Gráinne De Burca, *EU Law Text, Cases and Materials* (sixth edn, Oxford University Press 2015) 436; Pech and others, *An EU mechanism on democracy, the rule of law and fundamental rights Annex I - An EU mechanism on democracy, the rule of law and fundamental rights* 43.

⁴² Michael Blauberger and R. Daniel Kelemen, 'Can courts rescue national democracy? Judicial safeguards against democratic backsliding in the EU' [Routledge] 24 *Journal of European Public Policy* 321, 323.

⁴³ *Ibid* 323.

⁴⁴ *Ibid* 323.

⁴⁵ Kochenov, 'The Acquis and Its Principles' 11; Mark Dawson, Elise Muir and Monica Claes, 'A Tool-box for Legal and Political Mobilisation in European Equality Law' in Dia Anagnostou (ed), *Rights and Courts in Pursuit of Social Change: Legal Mobilisation in the Multi-Level European System* (Hart Publishing 2014) 116; Matthias Schmidt and Piotr Bogdanowicz, 'The infringement procedure in the rule of law crisis: How to make effective use of Article 258 TFEU' (2018) 55 *Common Market Law Review* 1061, 1069.

of the values enshrined in Article 2 TEU, is depended on whether Article 7 TEU acts as *lex specialis* for any other enforcement procedure.⁴⁶

Even though this is frequently advocated,⁴⁷ nothing in the Treaties would imply such a reading nor are there any legal restraints that would uphold it.⁴⁸ This is why Gormley stated: ‘[t]he first reaction to this question is that the existence of a particular political remedy should not as such stand in the way of the availability of a legal remedy’.⁴⁹ This can also not be altered by the fact that Article 7 TEU in combination with Article 269 TFEU makes specific arrangements in regards to Article 2 TEU.⁵⁰ While Article 269 TFEU limits the jurisdiction of the CJEU regarding Article 7 TEU to purely ‘procedural stipulations’⁵¹ it cannot be concluded therefrom that the jurisdiction of the CJEU is limited from ruling on a situation that has already been decided upon under Article 7 TEU.⁵² This is due to the *ratio legis* of Article 269 TFEU, which is to protect that the Member State receives a procedurally correct determination under Article 7 TEU while acknowledging that the CJEU does not have an influence on the substance of the decision.⁵³ It is therefore not to exclude the adjudication of the CJEU a *limine* from a situation that has already formed the basis of a decision under Article 7 TEU.⁵⁴ This can further be substantiated by the fact that Article 46 Treaty of Nice, which imposed limitations on the adjudication of the CJEU in regards to Article 6 Treaty of Nice (now Article 2 TEU) has been erased.⁵⁵

Furthermore, Article 258 TFEU, which can be found in the chapter of jurisdiction of the CJEU, empowers the Commission to bring matters before the CJEU where it considers that a Member State has failed to fulfil an obligation under the Treaties; the values enshrined in

⁴⁶ Schmidt and Bogdanowicz, ‘The infringement procedure in the rule of law crisis: How to make effective use of Article 258 TFEU’ 1069.

⁴⁷ The most extreme example of how restrictively the values are approached is from the Council Legal Service’s as expressed in a non-public Opinion: Council of the EU, Opinion of the Legal Service 10296/14, of 14 May 2014, esp. para 28 as analysed in: Scheppele, Pech and 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’; Kochenov, ‘The Acquis and Its Principles’ 11.; see also: Kochenov and Pech, ‘Monitoring and Enforcement of the Rule of Law in the EU: Rhetoric and Reality’.

⁴⁸ Schmidt and Bogdanowicz, ‘The infringement procedure in the rule of law crisis: How to make effective use of Article 258 TFEU’, 1070.

⁴⁹ Laurence W Gormley, ‘Infringement Proceedings’ in András Jakab and Dimitry Kochenov (eds), *The Enforcement of EU Law and Values Ensuring Member States’ Compliance* (Oxford University Press 2017) 74.

⁵⁰ Schmidt and Bogdanowicz, ‘The infringement procedure in the rule of law crisis: How to make effective use of Article 258 TFEU’ 1071.

⁵¹ *Ibid* 1071.

⁵² *Ibid* 1071.

⁵³ *Ibid* 1071.

⁵⁴ Treaty of Nice amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts [2001] OJ C 80/01; Schmidt and Bogdanowicz, ‘The infringement procedure in the rule of law crisis: How to make effective use of Article 258 TFEU’ 1070.

⁵⁵ Armin Von Bogdandy and others, ‘Reverse Solange—Protecting the Essence of Fundamental Rights against EU Member States’ (2012) 49 *Common Market Law Review* 489.

Article 2 TEU are thus clearly included within the scope of the Treaties.⁵⁶ Indeed, nothing within the primary law of the EU seems to exclude the provisions of Article 2 TEU from the express enforcement powers of the Commission.⁵⁷ The only limits to the Commission's enforcement powers, as set out in Article 24(1) TEU concern the Area of Common Foreign and Security Policy, if any such limitation would have been intended by the primary lawmakers in regards to Article 2 TEU they could have made it equally explicit.⁵⁸ Moreover, if Article 7 TEU would indeed prevent the adoption of other mechanisms enforcing Article 2 TEU, this would effectively diminish the reach of the values enshrined in Article 2 TEU as it would exclude the possibility to read any other provision of the Treaty in light of this provision.⁵⁹

Thus, the values enshrined in Article 2 TEU should, in principle, be enforceable through infringement proceedings.⁶⁰ In fact the Commission already confirmed this view and points out that the infringement procedure has already proven to be an important instrument in addressing rule of law concerns.⁶¹ Nevertheless, these proceedings were always limited to situations where a specific and concrete provision of EU law was breached at the same time as the rule of law.⁶² Therefore, the question arises whether Article 2 TEU itself imposes an obligation under the Treaties, which can be enforced and lead to successful infringement proceedings under Article 258 TFEU?

2.2 ENFORCING THE VALUES IN ARTICLE 2 TEU THROUGH THE INFRINGEMENT PROCEDURE

Many commentators have constantly argued that the Commission should not and could not bring infringement proceedings on the basis of Article 2 TEU.⁶³ For one, Konchev stated that

⁵⁶ Bárd and others, *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* 23.

⁵⁷ Hillion, 'Overseeing the Rule of Law in the EU: Legal Mandate and Means' 69.

⁵⁸ *Ibid.*

⁵⁹ Carlos Closa, Dimitry Kochenov and J.H.H. Weiler, *Reinforcing Rule of Law Oversight in the European Union* (EUI Working Papers, Robert Schuman Centre for Advanced Studies Global Governance Programme-87, 2014) 9.

⁶⁰ Schmidt and Bogdanowicz, 'The infringement procedure in the rule of law crisis: How to make effective use of Article 258 TFEU' 1071; Hillion, 'Overseeing the Rule of Law in the EU: Legal Mandate and Means' 69.

⁶¹ European Commission, *A new EU Framework to strengthen the Rule of Law* 5; Vice-President of the European Commission, 'The EU and the Rule of Law – What next?'; see for example case: *C-286/12 European Commission v Hungary*.

⁶² Pech and others, *An EU mechanism on democracy, the rule of law and fundamental rights Annex I - An EU mechanism on democracy, the rule of law and fundamental rights* 44; European Commission, *A new EU Framework to strengthen the Rule of Law*.

⁶³ Jan-Werner Müller, 'Should the EU Protect Democracy and the Rule of Law inside Member States?' (2015) 21 *European Law Journal* 141, 146; Kochenov and Pech, 'Upholding the Rule of Law in the EU: On the Commission's 'Pre-Article 7 Procedure' as a Timid Step in the Right Direction' 4; Scheppele, Pech and 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'.

‘Article 2 TEU, has arguably never been intended to leave the world of high ideas to land on a prettore’s desk’.⁶⁴ This was usually based on the critique that Article 2 TEU is substantively vague, political and programmatic.⁶⁵ In short, values were not seen to create obligations.⁶⁶ This would make a Treaty change necessary, in order for Article 2 TEU to create obligations which in turn could then be deployed as a legal measure *stricto sensu*.⁶⁷

The Commission seemed to share this view that the values enshrined in Article 2 TEU could not be enforced through Art 258 TFEU unless they fall within the scope of EU law.⁶⁸ Thus, it was held that there could be situations that pose a systematic threat to the rule of law but cannot be considered a breach of an obligation under the Treaties, because they do not infringe a specific provision.⁶⁹ To come back to the case *C-286/12 Commission v Hungary* mentioned before, the Commission believed, in accordance with the prevailing view of the commentators, that in the absence of a specific EU provision over independence and impartiality of the national judiciary, it had no choice than to rely on the principle of non-discrimination on the ground of age to challenge Hungary’s legislation.⁷⁰ This, however, has not provided effective protection of the rule of law and the values enshrined in Article 2 TEU.⁷¹

Under these circumstances, the Commission seemed to be left with a limited tool-kit, unable to enforce systematic violations of values that are enshrined in Article 2 TEU.⁷² In this light, it was only logical that commentators, as well as the European institutions (e.g. the Commission and the Council), have put forward many proposals to enhance rule of law enforcement. Besides the Commissions adoption of the Framework to strengthen the Rule of Law and the Justice scoreboard as well as the Councils adoption of its own rule of law initiative,⁷³ commentators proposed inter alia the ‘Reverse Solange’ approach,⁷⁴ the proposal

⁶⁴ Konchenov, ‘How to turn Article 2 TEU into a down-to-Earth provision?’.

⁶⁵ Hillion, ‘Overseeing the Rule of Law in the EU: Legal Mandate and Means’ 5; Müller, ‘Should the EU Protect Democracy and the Rule of Law inside Member States?’ 146; Schmidt and Bogdanowicz, ‘The infringement procedure in the rule of law crisis: How to make effective use of Article 258 TFEU’ 1080.

⁶⁶ Müller, ‘Should the EU Protect Democracy and the Rule of Law inside Member States?’ 146; Kochenov and Pech, ‘Monitoring and Enforcement of the Rule of Law in the EU: Rhetoric and Reality’ 520.

⁶⁷ Closa, Kochenov and Weiler, *Reinforcing Rule of Law Oversight in the European Union* 9.

⁶⁸ European Commission, *A new EU Framework to strengthen the Rule of Law* 5.

⁶⁹ Ibid.

⁷⁰ *C-286/12 European Commission v Hungary*; Kochenov and Pech, ‘Upholding the Rule of Law in the EU: On the Commission’s ‘Pre-Article 7 Procedure’ as a Timid Step in the Right Direction’ 4.

⁷¹ Kochenov and Pech, ‘Upholding the Rule of Law in the EU: On the Commission’s ‘Pre-Article 7 Procedure’ as a Timid Step in the Right Direction’ 4.

⁷² Ibid.

⁷³ European Commission, *A new EU Framework to strengthen the Rule of Law*; Council of the European Union, *Conclusions of the Council of the EU and the Member States meeting within the Council on ensuring respect for the rule of law 17014/14*; European Commission, *The EU Justice Scoreboard A tool to promote effective justice and growth*.

⁷⁴ Von Bogdandy and others, ‘Reverse Solange—Protecting the Essence of Fundamental Rights against EU Member States’.

for a ‘Copenhagen Commission’,⁷⁵ ‘the Fundamental Rights Agency’,⁷⁶ the ‘Horizontal Solange’⁷⁷ concept and ‘systematic infringement actions’⁷⁸. Especially the approach of Scheppele, the ‘systematic infringement action’, has received much attention in this regard.⁷⁹ While some of these proposals built upon existing legal bases and merely require a reinterpretation of existing tools (such as ‘the systematic infringement action’) others require Treaty or legislative amendments (e.g. the proposal to amend Article 51 of the Charter) or the creation of new institutions (e.g. ‘the Copenhagen Commission’).⁸⁰ Thus while these approaches are innovative and some more likely to be effective than others, especially in the current context of urgency,⁸¹ they are still dependent on the willingness of the EU institutions and the Member States to use them.

However, this might not deem necessary if Article 2 TEU is read, as proposed by Hillion, as not a mere declaration.⁸² When Article 2 TEU is read not separately but in the context of other Treaty provisions, especially together with Article 3(1) and 13 TEU and Articles 4(3) and 7 TEU it appears to produce an obligation on Member States which should be enforceable.⁸³ While Article 3(1) and 13 TEU create an obligation on the EU and its institutions to respect and promote the EU’s values, the principle of sincere cooperation under Articles 4(3) TEU prohibits the Member States to take any measure which could jeopardise the attainment of the EU’s objectives, which, as we have just established, entails the respect for the values enshrined in

⁷⁵ Müller, ‘Should the EU Protect Democracy and the Rule of Law inside Member States?’.

⁷⁶ Gabriel N. Toggenburg and Jonas Grimheden, ‘Upholding Shared Values in the EU: What Role for the EU Agency for Fundamental Rights?’ (2016) 54 *Journal of Common Market Studies* 1093.

⁷⁷ Iris Canor, ‘My brother’s keeper? Horizontal solange: “An ever closer distrust among the peoples of Europe”’ (2013) 50 *Common Market Law Review* 383.

⁷⁸ Kim Lane Scheppele, ‘Enforcing the basic principles of EU law through systemic infringement actions’ in *Reinforcing Rule of Law Oversight in the European Union* (Closa, Carlos; Kochenov, Dimitry 2016).

⁷⁹ *Ibid*; Blauberger and Kelemen, ‘Can courts rescue national democracy? Judicial safeguards against democratic backsliding in the EU’ 324; Schmidt and Bogdanowicz, ‘The infringement procedure in the rule of law crisis: How to make effective use of Article 258 TFEU’ 1066; Closa, Kochenov and Weiler, *Reinforcing Rule of Law Oversight in the European Union* 10.

⁸⁰ Daniel Hegedüs, ‘Is there a New Impetus or a Political Paralysis regarding the protection of the EU’s Fundamental Values? A comparative analysis of policy proposals and adopted procedures from the Copenhagen Commission proposal to the Rule of Law Initiative of the European Commission’ (*Friedrich-Naumann-Stiftung*, 2015)

<https://www.academia.edu/15151337/Is_there_a_New_Impetus_or_a_Political_Paralysis_regarding_the_protection_of_the_EU_s_Fundamental_Values_A_comparative_analysis_of_policy_proposals_and_adopted_procedures_from_the_Copenhagen_Commission_proposal_to_the_Rule_of_Law_Initiative_of_the_European_Commission> accessed 31 March 2019; Closa, Kochenov and Weiler, *Reinforcing Rule of Law Oversight in the European Union*.

⁸¹ For comparative analyses, see e.g. Dimitry Kochenov, ‘On Policing Article 2 TEU Compliance - Reverse Solange and Systemic Infringements Analyzed’ (2013) 33 *Polish Yearbook of International Law* 145; Closa, Kochenov and Weiler, *Reinforcing Rule of Law Oversight in the European Union* 15.

⁸² Hillion, ‘Overseeing the Rule of Law in the EU: Legal Mandate and Means’ 2.

⁸³ Closa, Kochenov and Weiler, *Reinforcing Rule of Law Oversight in the European Union* 10; Hillion, ‘Overseeing the Rule of Law in the EU: Legal Mandate and Means’ 2.

Article 2 TEU.⁸⁴ Thus Article 2 TEU appears to produce an obligation not only in the EU Institutions but also on Member States, which should be enforceable.

This interpretation also finds support in the case law of the CJEU. In *Opinion 2/13*⁸⁵ the CJEU held that the premise that each Member State shares with all the other Member States a set of *common values* on which the EU is founded (*as stated in Article 2 TEU*), *implies and justifies* the existence of mutual trust between the Member States.⁸⁶ In consequence, the observance of the values in Article 2 TEU is a requirement for a proper functioning of the EU legal system.⁸⁷ In *Associação Sindical dos Juizes Portugueses*⁸⁸ the CJEU now further clarified that ‘Article 19 TEU, which gives concrete expression to the value of the rule of law stated in Article 2 TEU, entrusts the responsibility for ensuring judicial review in the EU legal order not only to the Court of Justice but also to national courts and tribunals’,⁸⁹ this means that the values enshrined in Article 2 TEU are obligatory and in consequence create concrete duties on Member States.⁹⁰

This view that Article 2 TEU creates an obligation is moreover supported by the fact that the sanction mechanism under Article 7 TEU operationalises the values of the EU enshrined in Article 2 TEU, as it allows for an enforcement thereof.⁹¹ For all these reasons, a strong argument can be made that Article 2 TEU is not a mere declaration but creates an obligation under the Treaties.⁹²

It is, therefore, my view that, while Article 2 TEU is in fact substantively vague, as the values under Article 2 TEU are relatively open-ended and the content therefore ambiguous,⁹³ this does not mean that Article 2 TEU is not a legally binding provision nor a mere political

⁸⁴ Closa, Kochenov and Weiler, *Reinforcing Rule of Law Oversight in the European Union* 10; Hillion, ‘Overseeing the Rule of Law in the EU: Legal Mandate and Means’ 2.

⁸⁵ *Opinion 2/13 of the Court (Full Court)* ECLI:EU:C:2014:2454.

⁸⁶ *Ibid* para 168.

⁸⁷ Dimitry Konchev and Marcus Klamert, ‘Article 2 TEU’ in Manuel Kellerbauer, Marcus Klamert and Jonathan Tomkin (eds), *The Treaties and the Charter of Fundamental Rights – A Commentary* (Oxford University Press 2019) 6; see also *Opinion 2/13 of the Court (Full Court)* para 168.

⁸⁸ C-64/16 *Associação Sindical dos Juizes Portugueses v Tribunal de Contas* ECLI:EU:C:2018:117.

⁸⁹ *Ibid* para. 32.

⁹⁰ Xavier Groussot and Johan Lindholm, ‘General Principles: Taking Rights Seriously and Waving the Rule-of-Law Stick in the European Union’ in K. Ziegler et al (ed), *Constructing Legal Orders in Europe: General Principles of EU Law*, Edward Elgar, Forthcoming, vol 01/2019 (Lund University Legal Research Paper 28 March 2019) 10; Konchev and Klamert, ‘Article 2 TEU’ 6.

⁹¹ Hillion, ‘Overseeing the Rule of Law in the EU: Legal Mandate and Means’ 2.

⁹² Kochenov and Pech, ‘Upholding the Rule of Law in the EU: On the Commission’s ‘Pre-Article 7 Procedure’ as a Timid Step in the Right Direction’ 4; Hillion, ‘Overseeing the Rule of Law in the EU: Legal Mandate and Means’ 2.

⁹³ Kochenov and Pech, ‘Monitoring and Enforcement of the Rule of Law in the EU: Rhetoric and Reality’ 520; Müller, ‘Should the EU Protect Democracy and the Rule of Law inside Member States?’ 146; Kochenov and Pech, ‘Upholding the Rule of Law in the EU: On the Commission’s ‘Pre-Article 7 Procedure’ as a Timid Step in the Right Direction’ 4.

declaration.⁹⁴ Nevertheless, Article 2 TEU is too ambiguous and open-ended to be in and of itself enforceable; therefore the focus shall thus turn to Article 19 TEU, which gives concrete expression to the value of the rule of law stated in Article 2 TEU. In this regard, the judgment of the CJEU in *Associação Sindical dos Juizes Portugueses* is of central importance and the power of the Commission to enforce breaches of the rule of law and the values enshrined in Article 2 TEU under Article 258 TFEU not to be underestimated.

2.3 A TOOL AT THE COMMISSIONS DISPOSAL

The judgement in *Associação Sindical dos Juizes Portugueses* mentioned previously, is not only important because it shows that Article 2 TEU creates legal effects,⁹⁵ but also because it declares that Article 19(1)(2) TEU provides for an objective principle of effective judicial protection which is binding upon the Member States.⁹⁶ The importance of the judgement for the rule of law oversight in the EU legal order cannot be overstated. It is important to analyse this judgement a bit closer and to bring it into the context of the ‘rule of law crisis’ and thus the current situation in Poland and Hungary.

2.3.1 *Associação Sindical dos Juizes Portugueses*

The case, that originated in the Supremo Tribunal Administrativo (Supreme Administrative Court, Portugal) where the *Associação Sindical dos Juizes Portugueses*, an association of Portuguese magistrates, acting on behalf of the Court of Auditors’ judges brought an action for annulment against the implementation of administrative measures, that reduced the remuneration of the Court of Auditor’s judges,⁹⁷ was already compared to judgement of the CJEU in *Les Verts*⁹⁸ and held to be the most important since that time, at least as regards the principle of the rule of law and its relevance for effective judicial protection.⁹⁹ While the Supreme Administrative Court, which referred only one question to the CJEU, was asking, whether the temporary reductions of remuneration infringed the principle of judicial

⁹⁴ Kochenov and Pech, ‘Upholding the Rule of Law in the EU: On the Commission’s ‘Pre-Article 7 Procedure’ as a Timid Step in the Right Direction’ 4; Hillion, ‘Overseeing the Rule of Law in the EU: Legal Mandate and Means’ 2.

⁹⁵ Scheppele, Pech and 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’; Schmidt and Bogdanowicz, ‘The infringement procedure in the rule of law crisis: How to make effective use of Article 258 TFEU’ 1096.

⁹⁶ Michał Krajewski, ‘Associação Sindical dos Juizes Portugueses: The Court of Justice and Athena’s Dilemma’ (2018) 3 European Papers A journal on law and integration 395, 406.

⁹⁷ C-64/16 *Associação Sindical dos Juizes Portugueses* para. 12; Krajewski, ‘Associação Sindical dos Juizes Portugueses: The Court of Justice and Athena’s Dilemma’ 397.

⁹⁸ C-294/83 *Les Verts v Parliament* ECLI:EU:C:1986:166.

⁹⁹ Laurent Pech and Sébastien Platon, ‘Rule of Law backsliding in the EU: The Court of Justice to the rescue? Some thoughts on the ECJ ruling in Associação Sindical dos Juizes Portugueses’ (*EU Law Analysis*, 13 March 2018) <<http://eulawanalysis.blogspot.com/2018/03/rule-of-law-backsliding-in-eu-court-of.html>> accessed 3 April 2019.

independence enshrined in Article 19(1) TEU and Article 47 of the Charter,¹⁰⁰ the CJEU had to answer to far more important questions.¹⁰¹ Indeed, the CJEU had to determine whether the organisation of the national judicial branch of Member States comes within the review of the CJEU.¹⁰² The case *Associação Sindical dos Juizes Portugueses* thus started as an austerity case and was turned by the CJEU into a rule of law case with far-reaching consequences also for effective judicial protection.¹⁰³

In order to understand the CJEU's judgement, it has to be read in the light of the 'rule of law crisis' in Hungary and Poland, where especially the judiciary is under attack.¹⁰⁴ Thus, one has to be aware of the motives of the CJEU. These become apparent when analysing the issues the Commission is facing if it wants to bring infringement proceedings, e.g. against Poland.¹⁰⁵ The case *C-192/18 Commission v Republic of Poland* shall illustrate this.¹⁰⁶

The Commission outlined in the press release on 12th September 2017 three potential breaches of EU law by the Law of ordinary Courts, (1) a discrimination against individuals on the basis of gender by introducing a different retirement age for female judges (60 years) and male judges (65 years), (2) an undermining of the independence of Polish courts by giving discretionary power the Minister of Justice to prolong the mandate of judges who have reached retirement age, (3) as well as an undermining of the independence of Polish courts by giving discretionary power the Minister of Justice to dismiss and appoint Court Presidents.¹⁰⁷ A month later in the press release from 20th December 2017, the Commission has dropped the last set of charges.¹⁰⁸ While the Commission did not give reasons for this, Taborowski identified that the third claim, unlike the other charges, did not relate directly to a specific secondary legal act

¹⁰⁰ *C-64/16 Associação Sindical dos Juizes Portugueses* para. 13.

¹⁰¹ Krajewski, 'Associação Sindical dos Juizes Portugueses: The Court of Justice and Athena's Dilemma' 396; Matteo Bonelli and Monica Claes, 'Judicial serendipity: how Portuguese judges came to the rescue of the Polish judiciary: ECJ 27 February 2018, Case C-64/16, Associação Sindical dos Juizes Portugueses' 14 *European Constitutional Law Review* 622 626.

¹⁰² Krajewski, 'Associação Sindical dos Juizes Portugueses: The Court of Justice and Athena's Dilemma' 396; Bonelli and Claes, 'Judicial serendipity: how Portuguese judges came to the rescue of the Polish judiciary: ECJ 27 February 2018, Case C-64/16, Associação Sindical dos Juizes Portugueses' 632.

¹⁰³ Bonelli and Claes, 'Judicial serendipity: how Portuguese judges came to the rescue of the Polish judiciary: ECJ 27 February 2018, Case C-64/16, Associação Sindical dos Juizes Portugueses' 628.

¹⁰⁴ *Ibid* 623.

¹⁰⁵ Maciej Taborowski, 'CJEU Opens the Door for the Commission to Reconsider Charges against Poland' (*Verfassungsblog*, 13 March 2018) <<https://verfassungsblog.de/cjeu-opens-the-door-for-the-commission-to-reconsider-charges-against-poland/>> accessed 3 April 2019; European Commission, 'Independence of the judiciary: European Commission takes second step in infringement procedure against Poland' *European Commission Press Release Database* (Strasbourg, 12 September 2017) <http://europa.eu/rapid/press-release_IP-17-3186_en.htm>.

¹⁰⁶ *C-192/18 Action brought on 15 March 2018 — European Commission v Republic of Poland*.

¹⁰⁷ European Commission, 'Independence of the judiciary: European Commission takes second step in infringement procedure against Poland'.

¹⁰⁸ European Commission, 'Rule of Law: European Commission acts to defend judicial independence in Poland'.

(directive).¹⁰⁹ The Commission could have only based its charge on the general role of the national courts in the EU legal order, that have no link with any specific EU legislation, which under existing case law of the CJEU would have been difficult, as these issues would have fallen outside the scope of EU law as traditionally understood.¹¹⁰ The most controversial measures on the judiciary planned by Poland would therefore not be enforceable through Article 258 TFEU, as understood by the Commission.

This, in turn, makes it logical that the CJEU in *Associação Sindical dos Juizes Portugueses* wanted to clarify that the organisation of the national judiciaries is not a purely domestic matter, which would be excluded from the supervision of the CJEU. Hence the CJEU indicated that Member States are under an obligation, contained in primary EU law (Article 19(1)(2) TEU), to ensure that their courts and judges meet the requirements of effective judicial protection, and that independence is an essential requirement of that.¹¹¹ Therefore, also ensuring that the most controversial measures on the judiciary planned by Poland will fall within the ‘new’ scope of EU law.¹¹²

In order to achieve this result, the CJEU had to overcome some hurdles, especially regarding its jurisdiction.¹¹³ It is particularly noteworthy how the CJEU brought the case within the scope of EU law by focussing exclusively on Article 19(1)(2) TEU, thus avoiding any discussion on whether austerity measures fall within the scope of EU law and on the scope of application of the Charter.¹¹⁴ The judgement, in consequence, centred on the position of national courts acting as ‘European Courts’ and therefore on Article 19 TEU.¹¹⁵

At the bases of the judgement is the material scope of Article 19(1)(2) TEU, which the CJEU points out relates to ‘the fields covered by Union law’, irrespective of whether ‘Member

¹⁰⁹ Taborowski, ‘CJEU Opens the Door for the Commission to Reconsider Charges against Poland’.

¹¹⁰ Ibid.

¹¹¹ Bonelli and Claes, ‘Judicial serendipity: how Portuguese judges came to the rescue of the Polish judiciary: ECJ 27 February 2018, Case C-64/16, Associação Sindical dos Juizes Portugueses’ 623; Alessandra Silveira and Sophie Perez Fernandes, ‘A Union based on the rule of law beyond the scope of EU law – the guarantees essential to judicial independence in Associação Sindical dos Juizes Portugueses’ (*UNIO EU Law Journal*, 3 April 2018) <<https://officialblogofunio.com/2018/04/03/a-union-based-on-the-rule-of-law-beyond-the-scope-of-eu-law-the-guarantees-essential-to-judicial-independence-in-associação-sindical-dos-juizes-portugueses/>> accessed 5 April 2019.

¹¹² Bonelli and Claes, ‘Judicial serendipity: how Portuguese judges came to the rescue of the Polish judiciary: ECJ 27 February 2018, Case C-64/16, Associação Sindical dos Juizes Portugueses’ 628.

¹¹³ For a complete analysis of the ECJ’s decision see e.g. Ibid; and Krajewski, ‘Associação Sindical dos Juizes Portugueses: The Court of Justice and Athena’s Dilemma’.

¹¹⁴ Pech and Platon, ‘Rule of Law backsliding in the EU: The Court of Justice to the rescue? Some thoughts on the ECJ ruling in Associação Sindical dos Juizes Portugueses’; Bonelli and Claes, ‘Judicial serendipity: how Portuguese judges came to the rescue of the Polish judiciary: ECJ 27 February 2018, Case C-64/16, Associação Sindical dos Juizes Portugueses’ 630; *C-64/16 Associação Sindical dos Juizes Portugueses* paras 27.

¹¹⁵ Bonelli and Claes, ‘Judicial serendipity: how Portuguese judges came to the rescue of the Polish judiciary: ECJ 27 February 2018, Case C-64/16, Associação Sindical dos Juizes Portugueses’ 630.

States are implementing Union law’, within the meaning of Article 51(1) of the Charter.¹¹⁶ This statement itself is quite striking as the CJEU since *Åkerberg Fransson*¹¹⁷ held that ‘situations cannot exist which are covered in that way by European Union law without those fundamental rights being applicable’¹¹⁸, therefore commentators have labelled this as the Charter being the ‘shadow’ of EU law.¹¹⁹ Consequently, some have argued that the CJEU in *Associação Sindical dos Juizes Portugueses* is creating a ‘new’, broader scope of EU law that covers situations that might not fall under the notion ‘Member States implementing EU law’ but are still falling within the jurisdiction of the CJEU.¹²⁰ The required link to fall under the jurisdiction of the CJEU, it seems, is the function of national courts acting as ‘European Courts’ and thus their affiliation to the ‘European judiciary’, it is for that reason not necessary for the CJEU to ascertain whether Portugal is ‘implementing EU law’ when applying salary reductions.¹²¹ The CJEU has in this way extended its jurisdiction, through Article 19 TEU, over courts and tribunals of Member States that may potentially apply or interpret EU law; this reaches far into the domestic territory.¹²²

The CJEU continued by connecting the principle of the effective judicial protection of individuals’ rights under EU law, Article 19(1)(2) TEU, on the one hand, to Article 2 TEU and, on the other hand, to the constitutional traditions common to the Member States (enshrined in Articles 6 and 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), as reaffirmed by Article 47 of the Charter) which gave substance to the concept of effective judicial protection.¹²³ It subsequently concluded therefrom, ‘that every Member State must ensure that the bodies which, as ‘courts or tribunals’ within the meaning of EU law, come within its judicial system in the fields covered by that law, meet the requirements of effective judicial protection’.¹²⁴ Basing its reasoning on the case law

¹¹⁶ C-64/16 *Associação Sindical dos Juizes Portugueses paras 27, 29.*

¹¹⁷ C-617/10 *Åklagaren v Hans Åkerberg Fransson* ECLI:EU:C:2013:105.

¹¹⁸ *Ibid* para 21.

¹¹⁹ Daniel Sarmiento, ‘Who's afraid of the charter? The court of justice, national courts and the new framework of fundamental rights protection in Europe’ (2013) 50 *Common Market Law Review* 1267, 1278; Koen Lenaerts and José Antonio Gutiérrez-Fons, ‘The Place of the Charter in the EU Constitutional Edifice’ in *The EU Charter of Fundamental Rights* (Oxford Hart Publishing 2014) 1567.

¹²⁰ Bonelli and Claes, ‘Judicial serendipity: how Portuguese judges came to the rescue of the Polish judiciary: ECJ 27 February 2018, Case C-64/16, *Associação Sindical dos Juizes Portugueses*’ 631.

¹²¹ *Ibid.*; C-64/16 *Associação Sindical dos Juizes Portugueses paras 34, 37, 40.*

¹²² Bonelli and Claes, ‘Judicial serendipity: how Portuguese judges came to the rescue of the Polish judiciary: ECJ 27 February 2018, Case C-64/16, *Associação Sindical dos Juizes Portugueses*’ 632.

¹²³ C-64/16 *Associação Sindical dos Juizes Portugueses paras 30-36*; Bonelli and Claes, ‘Judicial serendipity: how Portuguese judges came to the rescue of the Polish judiciary: ECJ 27 February 2018, Case C-64/16, *Associação Sindical dos Juizes Portugueses*’ 632.

¹²⁴ C-64/16 *Associação Sindical dos Juizes Portugueses para 37.*

of Article 267 TFEU and Article 47 of the Charter the CJEU next included the principle of judicial independence in the requirements of effective judicial protection.¹²⁵

2.3.2 Implications of *Associação Sindical dos Juizes Portugueses*

The CJEU has made clear with its judgement in *Associação Sindical dos Juizes Portugueses* that Article 19(1)(2) TEU provides for an objective principle of effective judicial protection which is binding upon Member States and can be enforced by means of infringement proceedings autonomously, without the Commission having to rely on other more precise EU provisions ‘in the fields covered’ by Union law.¹²⁶ This is not only important for the infringement procedure on the Law on Ordinary Courts in case *C-192/18 Commission v Republic of Poland* brought on 15th March 2018 but it can also be seen as a clear signal to the Commission to bring infringement proceedings against other Polish legislative changes directly on the basis of Article 19 TEU, as the CJEU seems to be willing to assess these measures irrespective of whether the Charter applies, if they allegedly undermine the independence of the national judiciary as part of the EU judiciary.¹²⁷ The CJEU with the *Associação Sindical dos Juizes Portugueses* judgement has opened the door for the Commission to use Article 19(1)(2) TEU directly in infringement proceedings.¹²⁸ Whether the Commission will successfully use its powers, depends therefore largely on the political will of the Commission.¹²⁹

2.4 DEPLOYING ARTICLE 19 TEU

While Commentators have for a long time argued that there is no legal obstacle preventing the Commission from using infringement proceedings to enforce the rule of law, be it by using infringement proceedings against diffuse or cumulative breaches of EU values in conjunction with either Article 2 or Article 4(3) TEU or by relying on Article 19(1)(2) TEU, the Commission has not pursued this possibility.¹³⁰ This is why many commentators have stated

¹²⁵ Ibid paras 38-41; Michal Ovádek, ‘Has the CJEU just Reconfigured the EU Constitutional Order?’ (*Verfassungsblog*, 28 February 2018) <<https://verfassungsblog.de/has-the-cjeu-just-reconfigured-the-eu-constitutional-order/>> accessed 11 April 2019.

¹²⁶ Krajewski, ‘Associação Sindical dos Juizes Portugueses: The Court of Justice and Athena’s Dilemma’ 406; Bonelli and Claes, ‘Judicial serendipity: how Portuguese judges came to the rescue of the Polish judiciary: ECJ 27 February 2018, Case C-64/16, Associação Sindical dos Juizes Portugueses’ 635.

¹²⁷ Bonelli and Claes, ‘Judicial serendipity: how Portuguese judges came to the rescue of the Polish judiciary: ECJ 27 February 2018, Case C-64/16, Associação Sindical dos Juizes Portugueses’ 636.

¹²⁸ Taborowski, ‘CJEU Opens the Door for the Commission to Reconsider Charges against Poland’.

¹²⁹ Krajewski, ‘Associação Sindical dos Juizes Portugueses: The Court of Justice and Athena’s Dilemma’ 407.

¹³⁰ Closa, Kochenov and Weiler, *Reinforcing Rule of Law Oversight in the European Union* 9; Kochenov and Pech, ‘Better Late than Never? On the European Commission’s Rule of Law Framework and its First Activation’ 1065.

that the likelihood of the Commission using infringement proceedings based on Article 2 TEU seems little more than zero.¹³¹

However, on 2nd July 2018, by sending a Letter of Formal Notice to Poland regarding the Polish law on the Supreme Court, the Commission has launched infringement proceedings, based on Article 19(1)(2) TEU, read in conjunction with Article 47 of the Charter.¹³² The Commission held therein that it is of the opinion that the new Polish law on the Supreme Court, which lowers the retirement age of Supreme Court judges from 70 to 65 years, undermines the principle of judicial independence, including the irremovability of judges.¹³³ Thus it seems that the Commission has finally initiated precedent-setting proceedings under Article 258 TFEU in the fight for the rule of law in the EU. As a positive ruling by the CJEU could not only clarify that the Commission is competent to assess the status of the rule of law in Member States, which includes the national judiciary,¹³⁴ but also potentially clarify the material scope of Article 19(1)(2) TEU in relation to that of Article 47 of the Charter.¹³⁵ The impact of this procedure for the ‘rule of law crisis’ as well as its effectiveness shall be discussed after summarising the facts of the case, the procedure before the CJEU and the Opinion of the Advocate General.

2.4.1 Background of case *C-619/18 Commission v Poland*

The law of 8th December 2017 on the Supreme Court passed by Poland’s ruling Law and Justice (PiS) party entered into force and applied from 3rd April 2018.¹³⁶ The new Law on the Supreme Court lowered the retirement age for Supreme Court judges to 65 years, also for those who were appointed before the date of entry into force.¹³⁷ It remained, however, possible for Supreme Court judges to have their mandate prolonged if the President of the Republic of Poland consented.¹³⁸ In order to get consent the judge had to submit (1) a statement indicating his desire to continue to perform his duties and (2) a certificate stating that his state of health

¹³¹ Gormley, ‘Infringement Proceedings’ 78.

¹³² European Commission, ‘Rule of Law: Commission launches infringement procedure to protect the independence of the Polish Supreme Court’ *European Commission Press Release Database* (Brussels, 2 July 2018) <http://europa.eu/rapid/press-release_IP-18-4341_en.htm> accessed 27 March 2019.

¹³³ *Ibid.*

¹³⁴ Piotr Bogdanowicz and Maciej Taborowski, ‘Why the EU Commission and the Polish Supreme Court Should not Withdraw their Cases from Luxembourg’ (*Verfassungsblog*, 3 Dezember 2018) <<https://verfassungsblog.de/why-the-eu-commission-and-the-polish-supreme-court-should-not-withdraw-their-cases-from-luxembourg/>> accessed 13 April 2019.

¹³⁵ C-619/18 *Opinion of the Advocate General Tanchev in European Commission v Republic of Poland* ECLI:EU:C:2019:325.

¹³⁶ Court of Justice of the European Union, ‘Advocate General Tanchev: the Court should rule that the provisions of Polish legislation relating to the lowering of the retirement age for Supreme Court judges are contrary to EU law’ *The contested measures violate the principles of irremovability of judges and of judicial independence* (Luxembourg, 11 April 2019) <<https://curia.europa.eu/jcms/upload/docs/application/pdf/2019-04/cp190048en.pdf>> accessed 13 April 2019.

¹³⁷ *Ibid.*

¹³⁸ *Ibid.*

allows him to perform these duties, but there are no criteria set upon which the President's decision must be founded as well as no possibility for a judicial review.¹³⁹ Thus, forcing possibly 27 out of 72 Supreme Court judges on 4th July 2018 into retirement, unless the President of the Republic of Poland permits them to continue in active service.¹⁴⁰

Even though the Commission and the Polish authorities already discussed the Law on the Supreme Court under the Rule of Law dialogue, the Commission found the subject not sufficiently resolved and therefore decided on 2nd July 2018 to launch infringement proceedings as a matter of urgency.¹⁴¹ Thus with Letter of Formal Notice from 2nd July 2018, the Commission has started infringement proceedings and granted the Polish government one month to reply to the Commission's Letter of Formal Notice.¹⁴² Because the Polish authorities on 2nd August 2018 with a reply to the Letter of Formal Notice, rejected the Commission's concerns, the Commission on 14th August 2018 sent a Reasoned Opinion to the Polish authorities on the matter.¹⁴³ On 14th September 2018 the Commission received a response which failed to discard the Commission's legal concerns and thus the Commission has decided to move to the next stage of the infringement procedure: referring the case to the CJEU and, at the same time, ask the CJEU to order interim measures and requested an expedited procedure at the CJEU.¹⁴⁴

With action on 2nd October 2018, the Commission has therefore brought infringement proceedings before the CJEU against the Republic of Poland for failing to fulfil its obligations under the combined provisions of Article 19(1)(2) TEU and Article 47 of the Charter.¹⁴⁵ The Commission claims, on the one hand, that the national measures lowering the retirement age of the judges of the Supreme Court of Poland appointed to that court before 3rd April 2018 infringes the principle of security of tenure (irremovability) of judges, and on the other hand

¹³⁹ Ibid.; European Commission, 'Rule of Law: Commission launches infringement procedure to protect the independence of the Polish Supreme Court'.

¹⁴⁰ Court of Justice of the European Union, 'Advocate General Tanchev: the Court should rule that the provisions of Polish legislation relating to the lowering of the retirement age for Supreme Court judges are contrary to EU law'; European Commission, 'Rule of Law: Commission launches infringement procedure to protect the independence of the Polish Supreme Court'.

¹⁴¹ European Commission, 'Rule of Law: Commission launches infringement procedure to protect the independence of the Polish Supreme Court'.

¹⁴² Ibid.

¹⁴³ European Commission, 'Rule of Law: European Commission refers Poland to the European Court of Justice to protect the independence of the Polish Supreme Court' (Brussels, 24 September 2018) <http://europa.eu/rapid/press-release_IP-18-5830_en.htm> accessed 13 April 2019.

¹⁴⁴ Ibid.

¹⁴⁵ C-619/18 *Action brought on 2 October 2018 — European Commission v Republic of Poland*; European Commission, 'Rule of Law: European Commission refers Poland to the European Court of Justice to protect the independence of the Polish Supreme Court'.

that the new powers of the President of the Republic of Poland, to prolong the mandate of the Supreme Court judges, infringes the principle of judicial independence.¹⁴⁶

With its application for interim measures pursuant to Article 279 TFEU and Article 160(2) and (7) of the Rules of Procedure of the Court of Justice, lodged on 2nd October 2018, the Commission requested the CJEU to order the Republic of Poland, first, to suspend the application of the contested national provisions, as well as any measure taken pursuant to those provisions, second, to ensure that the judges of the Supreme Court, which would be concerned by those provisions, can perform their duties in the same post, while enjoying the same status and the same rights and conditions of employment as they did before entry into force of the Law of the Supreme Court, third, to refrain from any measure aimed at the appointment new judges that would replace the judges concerned by the main action, as well as to refrain from any measure to appoint a new first president of that court and last to inform the Commission every month about all the measures it has adopted to comply fully with this order.¹⁴⁷ Further to this, the Commission under Article 160(7) Rules of Procedure of the Court of Justice requested, that the interim measures shall be ordered even before the defendant has submitted its observations.¹⁴⁸ Thus, on 19th October 2018 the Vice-President of the Court, on the request that it be decided *inaudita altera parte*, provisionally granted the interim measures sought by the Commission.¹⁴⁹ The CJEU sitting in Grand Chamber on 17th December 2018 after hearing the observations of Poland confirmed the decision of the Vice-President of the Court and granted all requests by the Commission.¹⁵⁰

Meanwhile, on 15th November 2018, the President of the Court ordered that the case *C-619/18 Commission v Republic of Poland* shall be determined pursuant to the expedited procedure,¹⁵¹ and on 21st November 2018 the Sejm (lower house) approved an amendment of the Law of the Supreme Court reinstating the previous retirement age of 70 years of age, this amendment also applies to judges who performed their duties prior to the date of entry into force of the Supreme Court Act.¹⁵² Even though the Law on the Supreme Court was amended, the Commission did not withdraw the infringement action.¹⁵³ Bogdanowicz and Taborowski

¹⁴⁶ *Action brought on 2 October 2018 — C-619/18 European Commission v Republic of Poland.*

¹⁴⁷ C-619/18 R Order of the Vice-President of the Court *European Commission v Republic of Poland* ECLI: EU: C: 2018: 852 para 1.

¹⁴⁸ *Ibid* para 2.

¹⁴⁹ *Ibid* para 26.

¹⁵⁰ C-619/18 R Order of the Court (Grand Chamber) *European Commission v Republic of Poland* ECLI:EU:C:2018:1021 para 118.

¹⁵¹ C-619/18 Order of the President of the Court (Expedited procedure) *European Commission v Republic of Poland* ECLI:EU:C:2018:910.

¹⁵² Bogdanowicz and Taborowski, 'Why the EU Commission and the Polish Supreme Court Should not Withdraw their Cases from Luxembourg'.

¹⁵³ *C-619/18 Opinion of Advocate General Tanchev in European Commission v Republic of Poland* para 25.

outline many good reasons why the Commission should not withdraw the action, however, more importantly the Commission itself stated in the hearing on 12th February 2019 that the action shall be maintained as ‘it is not certain whether that law eliminates the alleged violations of EU law, and in any event, there remains an interest in deciding this case in view of the importance of judicial independence in the Union legal order’.¹⁵⁴

2.4.2 Opinion of Advocate General Tanchev in *C-619/18 Commission v Poland*

Advocate General Tanchev in his Opinion delivered on 11th April 2019 in case *C-619/18 Commission v Republic of Poland* also notes the importance of this case, as he states ‘this case presents the Court with the opportunity to rule, for the first time within the context of a direct action for infringement under Article 258 TFEU, on the compatibility of certain measures taken by a Member State concerning the organisation of its judicial system with the standards set down in the second subparagraph of Article 19(1) TEU, combined with Article 47 of the Charter, for ensuring respect for the rule of law in the Union legal order’.¹⁵⁵ The Opinion is delivered in four main parts.¹⁵⁶ The Opinion deals first with the admissibility of the action in connection with the Law of 21st November 2018, second, the relationship between Article 258 TFEU and Article 7 TEU, third with the material scope Article 19(1)(2) and Article 47 of the Charter as well as the Commission’s reliance on these provisions in combination, and last with the merits of the action.¹⁵⁷

In regard to the admissibility, the Advocate General, siding with the Commission on this matter, held that the fact that the provisions challenged in these proceedings have been repealed does not make the matter inadmissible, because in order to determine whether a Member State has failed to fulfil its obligations under Article 258 TFEU, it is not the situation at the time of the judgement given that matters but the situation on 14th September 2018, as this is the end date of the period laid down in the reasoned opinion.¹⁵⁸ The amendment, however, entered into force only on 1st January 2019, thus the Law passed on 21st November 2018 does not eliminate the need for the CJEU to rule on this case.¹⁵⁹ The Advocate General further, recalling settled case law of the CJEU, stated that the Commission still has an interest in bringing infringement

¹⁵⁴ Bogdanowicz and Taborowski, ‘Why the EU Commission and the Polish Supreme Court Should not Withdraw their Cases from Luxembourg’; *C-619/18 Opinion of Advocate General Tanchev in European Commission v Republic of Poland* para 25.

¹⁵⁵ *C-619/18 Opinion of Advocate General Tanchev in European Commission v Republic of Poland* para 2.

¹⁵⁶ *Ibid* para 43.

¹⁵⁷ *Ibid* para 43.

¹⁵⁸ *Ibid* para 44.

¹⁵⁹ *Ibid* paras 46, 47.

proceedings, which may consist in creating the basis of the liability that the Member State could incur towards persons affected by the failure.¹⁶⁰

After having considered the question of admissibility of the action in connection with the Law of 21st November 2018 the Advocate General Tanchev held, in line with the argumentation mentioned above (see section 2.1), that the engagement of Article 7(1) TEU mechanism does not preclude the infringement actions.¹⁶¹ He mainly argues that the wording of each provision does not rule out the other, that both procedures, Article 7 TEU and Article 258 TFEU, have a different scheme and purpose (Article 7 TEU being a ‘political’ procedure and Article 258 TFEU a ‘legal’ action) and that Article 269 TFEU cannot diminish the Court’s authority to rule on the basis of its jurisdiction under Article 258 TFEU.¹⁶²

Advocate General Tanchev subsequently considers that a separate assessment of Article 19(1)(2) TEU and Article 47 of the Charter is required, finding support in the Courts case law which refers to the relationship between Article 47 Charter and Article 19(1) TEU, as while the two provisions are ensuring effective judicial protection, the scope of Article 47 of the Charter is limited, as far as Member States are concerned, by Article 51 Charter to situations where Member States are ‘implementing Union law’.¹⁶³ In his opinion this view is supported by the *Associação Sindical dos Juizes Portugueses* case, as it may be inferred from that judgment that the material scopes of Article 19(1)(2) TEU and Article 47 of the Charter are different.¹⁶⁴ Thus, in his view, Article 19(1) TEU constitutes an *autonomous* standard for ensuring that Member States provide effective legal protection and it, therefore, complements Article 47 of the Charter.¹⁶⁵ The Advocate General concluded therefrom, that a combined application of Article 19(1) TEU and Article 47 Charter in the absence of assessment under Article 51(1) of the Charter, as relied on by the Commission, cannot be maintained.¹⁶⁶ In consequence, the Advocate General found that the complaints are well founded in so far as they are based on Article 19(1)(2) TEU but that they are not admissible in so far as they are based on Article 47 of the Charter, due to the fact that the Commission has not provided any arguments to illustrate that Poland has implemented EU law in the sense of Article 51(1) of the Charter.¹⁶⁷

As concerns the case substance, the Advocate General proposed that the Court should declare that Poland, by passing the new Law on the Supreme Court, that lowered the retirement

¹⁶⁰ Ibid para 45.

¹⁶¹ Ibid paras 48-51.

¹⁶² Ibid para 50.

¹⁶³ Ibid para 54.

¹⁶⁴ Ibid para 56.

¹⁶⁵ Ibid para 58.

¹⁶⁶ Ibid para 60.

¹⁶⁷ Ibid paras 61-67.

age for Supreme Court judges to 65 years and which also granted the President of the Republic the discretion to prolong the time before retirement, failed to fulfil its obligations under Article 19(1)(2) TEU to ‘provide remedies sufficient to ensure effective legal protection in the fields covered by Union law’.¹⁶⁸

Regarding the first complaint,¹⁶⁹ the Advocate General recalls that the Court has held that protection against removal from office of the judiciary is not only one of the guarantees essential to judicial independence but ‘the basis and the reflection of judicial independence’.¹⁷⁰ In order to demonstrate that the contested measures violate the principle of irremovability of judges, the Advocate General, avoiding Article 47 of the Charter, *inter alia* referred to the case law under Article 6(1) of the ECHR where appearances are of a certain importance to exclude any legitimate doubt towards the impartiality of the body, he thus recalled that ‘justice must not only be done, it must also be seen to be done’.¹⁷¹ While not indicating what this means in relation to the case at hand, he held that the public’s confidence which courts in a democratic society must inspire is at stake.¹⁷² Thus after finding that the Commission has sufficiently demonstrated that Poland has failed to meet the requirements of effective judicial protection under Article 19(1)(2) TEU, he continues distinguishing the circumstances of the case in depth from those in *Associação Sindical dos Juizes Portugueses* and drawing comparison with the case *C-286/12 Commission v Hungary*.¹⁷³ Finding that it does not follow from the judgement in *Associação Sindical dos Juizes Portugueses* that provisions applicable to judges related to general policies are automatically not contrary to the principle of judicial independence, but rather that this depends on the circumstances of the specific case and that the objective of the contested provision was to align the retirement age of Supreme Court judges with the general retirement age, such objectives cannot be allowed to diminish the independence of judges under EU law.¹⁷⁴

In regard to the second complaint,¹⁷⁵ the Advocate General, reciting established case law of the CJEU,¹⁷⁶ held, that the concept of independence presupposes ‘that the body concerned

¹⁶⁸ Ibid para 99.

¹⁶⁹ The first complaint is that the lowering the retirement age of Supreme Court judges violates the principle of irremovability of judges (Ibid para 68).

¹⁷⁰ *C-619/18 Opinion of Advocate General Tanchev in European Commission v Republic of Poland para 70.*

¹⁷¹ Ibid para 71.

¹⁷² Ibid para 71.

¹⁷³ Ibid paras 74-81.

¹⁷⁴ Ibid paras 74-81.

¹⁷⁵ The second complaint by the Commission is that the President of the Republic’s discretion, to extend the active mandate of Supreme Court judges upon reaching the lowered retirement age allows him to exert influence on the Supreme Court and its judges, violates the principle of judicial independence (Ibid para 84).

¹⁷⁶ *C-506/04 Graham J. Wilson v Ordre des avocats du barreau de Luxembourg* EU:C:2006:587 para 51; *C-64/16 Associação Sindical dos Juizes Portugueses para 44.*

exercises its functions wholly autonomously, without being subject to any hierarchical constraint or subordinated to any other body and without taking orders or instructions from any source whatsoever, thus being protected against external interventions or pressure liable to impair the independent judgment of its members and to influence their decisions'.¹⁷⁷ Based thereof and on the principles stemming from the European Court of Human Rights (ECtHR), the Advocate General finds that the Commission has sufficiently demonstrated that the contested measures violate the requirements of judicial independence, dismissing Poland's arguments based on the laws of the other Member States, as they are not comparable to the situation in Poland, since they operate in a different legal, political and social context, and the CJEU, as it is situated at the supranational level entailing a different regime.¹⁷⁸

2.4.3 Analysis of *C-619/18 Commission v Poland*

While the Advocate General's Opinion is not binding on the CJEU, the Opinion represents a legal solution to the case which the judges tend to follow.¹⁷⁹ Thus the Opinion of the Advocate General in *C-619/18 Commission v Republic of Poland* is highly welcomed, at least in large parts.

First, the fact that the Advocate General took the opportunity to discuss in three paragraphs the relationship between Article 258 TFEU and Article 7 TEU, matters as it will hopefully resolve any remaining discussion on the applicability of Article 258 TFEU.¹⁸⁰ This will be important for future cases brought by the Commission under Article 258 TFEU against Poland and Hungary where Article 7(1) TEU has been invoked, as the Commission might not bring further infringement proceedings where these are not likely to be effective due to fear of its credibility.¹⁸¹ Thus if the CJEU follows the Opinion of the Advocate General in this aspect, the Rule of Law Framework will be strengthened as it adds the infringement procedure as one of

¹⁷⁷ *C-619/18 Opinion of Advocate General Tanchev in European Commission v Republic of Poland para 86.*

¹⁷⁸ *Ibid para 93.*

¹⁷⁹ Statute of the Court of Justice of the European Union (Consolidated Version) as amended by Regulation (EU, Euratom) No 741/2012 of the European Parliament and of the Council of 11 August 2012 (OJ L 228 of 23.8.2012, p. 1) Art 2, 35; see regarding the influence of the Advocate General on the CJEU: Carlos Arrebola, Ana Julia Mauricio and Héctor Jiménez Portilla, *An Econometric Analysis of the Influence of the Advocate General on the Court of Justice of the European Union* (Legal Studies Research Paper Series University of Cambridge January 2016) and especially references cited in footnote 2 therein.

¹⁸⁰ Piotr Bogdanowicz, 'Three Steps Ahead, One Step Aside: The AG's Opinion in the Commission v. Poland Case' (*Verfassungsblog*, 11 April 2019) <<https://verfassungsblog.de/three-steps-ahead-one-step-aside-the-ags-opinion-in-the-commission-v-poland-case/>> accessed 18 April 2019

¹⁸¹ Heather Grabbe, 'Six Lessons of Enlargement Ten Years On: The EU's Transformative Power in Retrospect and Prospect' (2014) 52 *JCMS: Journal of Common Market Studies* 40

the best explored and successful mechanisms to the tools the Commission can use and which, in contrast to Article 7(1) TEU, can further lead to financial consequences.¹⁸²

Second, and rather controversial, the Advocate General found that a separate assessment of the material scope of Article 19(1) TEU and Article 47 of the Charter is required.¹⁸³ In this regard Bogdanowicz in *Three Steps Ahead, One Step Aside: The AG's Opinion in the Commission v. Poland Case* disagreed with the Opinion of the Advocate General Tanchev and especially his interpretation on the meaning of case *Associação Sindical dos Juizes Portuguese*.¹⁸⁴ Bogdanowicz, based his opinion, on the one hand on the fact that the CJEU did not exclude the possibility of the application of Article 47 of the Charter in the *Associação Sindical dos Juizes Portuguese*, in fact the CJEU, in his opinion, merely reformulated the question of the referring Court to cover only an interpretation of Article 19(1) TEU and on the other hand, in paragraph 41 of *Associação Sindical dos Juizes Portuguese* the CJEU made reference to Article 47 of the Charter which should be seen as the courts opening to apply Article 47 of the Charter in combination with Article 19(1) TEU.¹⁸⁵ This view stands in contrast, not only to the Opinion of Advocate Generals Tanchev, other Commentators but also to the view of the president of the CJEU: Koen Lenaerts.¹⁸⁶ It is their view, that it follows from *Associação Sindical dos Juizes Portuguese* that Article 19(1)(2) TEU and Article 47 of the Charter do not have the same scope of application.¹⁸⁷ The reference of the CJEU to Article 47 of the Charter in paragraph 35 in *Associação Sindical dos Juizes Portuguese*, in their view, is merely used to support and give guidance on the interpretation of the substance of Article 19(1)(2) TEU.¹⁸⁸ I do agree with the reading of Advocate Generals Tanchev, that it stems from

¹⁸² Blauberger and Kelemen, 'Can courts rescue national democracy? Judicial safeguards against democratic backsliding in the EU' 323.

¹⁸³ *C-619/18 Opinion of Advocate General Tanchev in European Commission v Republic of Poland* para 54.

¹⁸⁴ Bogdanowicz, 'Three Steps Ahead, One Step Aside: The AG's Opinion in the Commission v. Poland Case'.

¹⁸⁵ *Ibid*; *C-64/16 Associação Sindical dos Juizes Portugueses* paras 27, 40, 41.

¹⁸⁶ *C-619/18 Opinion of Advocate General Tanchev in European Commission v Republic of Poland* para 54; see Inter alia: Bonelli and Claes, 'Judicial serendipity: how Portuguese judges came to the rescue of the Polish judiciary: ECJ 27 February 2018, Case C-64/16, Associação Sindical dos Juizes Portugueses' 642; Krajewski, 'Associação Sindical dos Juizes Portugueses: The Court of Justice and Athena's Dilemma' 397; Laurent Pech and Sébastien Platon, 'A. Court of Justice: Judicial independence under threat: The Court of Justice to the rescue in the ASJP case' (2018) 55 Common Market Law Review 1827, 1838; Koen Lenaerts, 'The Court of Justice and National Courts: a Dialogue Based on Mutual Trust and Judicial Independence' *Speech at the Supreme Administrative Court of the Republic of Poland* (Poland, 19 March 2018) <<http://www.aca-europe.eu/index.php/en/114-library>> accessed 18 April 2019 7, 8.

¹⁸⁷ Pech and Platon, 'A. Court of Justice: Judicial independence under threat: The Court of Justice to the rescue in the ASJP case' 1832; Lenaerts, 'The Court of Justice and National Courts: a Dialogue Based on Mutual Trust and Judicial Independence' 7; Bonelli and Claes, 'Judicial serendipity: how Portuguese judges came to the rescue of the Polish judiciary: ECJ 27 February 2018, Case C-64/16, Associação Sindical dos Juizes Portugueses' 642; *C-619/18 Opinion of Advocate General Tanchev in European Commission v Republic of Poland* para 56.

¹⁸⁸ Bonelli and Claes, 'Judicial serendipity: how Portuguese judges came to the rescue of the Polish judiciary: ECJ 27 February 2018, Case C-64/16, Associação Sindical dos Juizes Portugueses' 633; Krajewski, 'Associação Sindical dos Juizes Portugueses: The Court of Justice and Athena's Dilemma' 399.

Associação Sindical dos Juizes Portuguese that Article 19(1)(2) TEU and Article 47 of the Charter do not have the same scope of application, however this does not mean that Article 47 of the Charter cannot be relied on for the interpretation of the substance of Article 19(1)(2) TEU. Thus, in my view, the application of Article 47 of the Charter does still depend on the fact that the contested measures implement EU law within the meaning of Article 51(1) of the Charter. However, if my reading of paragraph 26 of the Opinion of Advocate General Tanchev is correct, then this assessment is in line with the view of the Commission, as:

‘The Commission further stressed at the hearing that, under the Court’s case-law, the contested measures *fall within the scope of the second subparagraph of Article 19(1) TEU*, and *Article 47 of the Charter is relevant* in so far as that article *imports* the requirements of independence and impartiality into the second subparagraph of Article 19(1) TEU. This means that Article 51(1) of the Charter does not apply, so that the Commission, by instituting these proceedings, is in no way extending Union competence, as precluded by Article 6(1) TEU’.¹⁸⁹

In my opinion, the Commission does not rely on Article 47 of the Charter directly (which would require an implementation of EU law) but merely uses it, like the CJEU in *Associação Sindical dos Juizes Portuguese*, as an interpretative tool of the substance of Article 19(1)(2) TEU.¹⁹⁰ This would mean that Article 19 (1) TEU constitutes an *autonomous* standard for ensuring effective judicial protection, including judicial independence as interpreted by the second subparagraph of Article 47 of the Charter. Thus, in contrast to Bogdanowicz, in my view, the Advocate General is correct in stating that there should be a separate assessment of the applicability of Article 19(1) TEU and Article 47 of the Charter to these proceedings.¹⁹¹ However, Article 47 Charter could, in my view, be relied on, not as a legal basis, but to support the substance of Article 19(1)(2) TEU.

Thus, when the Advocate General continues to assess the merits of the action under Article 19(1)(2) TEU, he could not only draw on the principles of EU law stemming from the case law of the ECtHR and guidelines issued by European and international bodies but also on the concepts of ‘independence’ and ‘impartiality’ developed by the CJEU under Article 47(2) of

¹⁸⁹ *C-619/18 Opinion of Advocate General Tanchev in European Commission v Republic of Poland* para 26; see also in regard to the use of Article 47 of the Charter in connection with Article 19 TEU the argument reiterated from the hearing of the Ordinary Courts case in Femke Gremmelprez, ‘Does Poland infringe the principle of effective judicial protection? Recent developments in the CJEU’ (*EU Law Analysis*, 15 April 2019) <<https://eulawanalysis.blogspot.com/2019/04/does-poland-infringe-principle-of.html>> accessed 21 April 2019 (emphasis added).

¹⁹⁰ *C-619/18 Opinion of Advocate General Tanchev in European Commission v Republic of Poland* para 26.

¹⁹¹ *Ibid* para 54.

the Charter.¹⁹² This would not make a difference in regard to the result, but strengthen the reasoning of the assessment under Article 19(1)(2) TEU as the CJEU could rely on its previous case law aligning the substantive content of Article 19(1)(2) TEU and Article 47 of the Charter, without raising new questions on the scope of application of the Charter, which may prove controversial.¹⁹³

Last as regards the assessment of the merits of the case it is most important that the Advocate General Tanchev took a firm stance in his assessment on finding that the Law of the Supreme Court violates the principle of effective judicial protection under Article 19(1)(2) TEU, while decisively rejecting the arguments of Poland.¹⁹⁴ Thus proposing to the CJEU to ‘declare that by lowering the retirement age of the judges of the Supreme Court and applying it to judges appointed to that court before 3rd April 2018, and by granting the President of the Republic the discretion to extend the period of judicial activity of Supreme Court judges, the Republic of Poland failed to fulfil its obligations under 19(1)(2) TEU’¹⁹⁵ is an important development, following the judgment in *Associação Sindical dos Juizes Portugueses*, in defending the rule of law in Europe.

2.4.3.1 The Court of Justice of the European Union

Even though the judgment of the CJEU, in this case, will be given at a later date,¹⁹⁶ it is expected that the CJEU will follow the Opinion of the Advocate General, as the CJEU seems to be determined to defend the rule of law in Europe.¹⁹⁷ The CJEU has sent many signs towards Poland and other rogue states and at the same time to the EU institutions, signalling that the rule of law must be taken seriously.¹⁹⁸ This could not only be observed from the judgement in *Associação Sindical dos Juizes Portugueses* but also from case *C- 441/17 Bialowieza Forest*¹⁹⁹,

¹⁹² Similar to *C-64/16 Associação Sindical dos Juizes Portugueses para 41, 42* where the CJEU referred to CJEU judgements; *C-685/15 Online Games and Others* ECLI:EU:C:2017:452 para 60; *C-403/16 El Hassani* ECLI:EU:C:2017:960 para 40; and in contrast to *C-619/18 Opinion of Advocate General Tanchev in European Commission v Republic of Poland* para 71, 72.

¹⁹³ See in this regard: Bonelli and Claes, ‘Judicial serendipity: how Portuguese judges came to the rescue of the Polish judiciary: ECJ 27 February 2018, Case C-64/16, Associação Sindical dos Juizes Portugueses’ 637; *C-64/16 Associação Sindical dos Juizes Portugueses* para 41.

¹⁹⁴ *C-619/18 Opinion of Advocate General Tanchev in European Commission v Republic of Poland paras 76-77, 89, 93.*

¹⁹⁵ *Ibid* para 99.

¹⁹⁶ Court of Justice of the European Union, ‘Advocate General Tanchev: the Court should rule that the provisions of Polish legislation relating to the lowering of the retirement age for Supreme Court judges are contrary to EU law’.

¹⁹⁷ Gremmelprez, ‘Does Poland infringe the principle of effective judicial protection? Recent developments in the CJEU’; Schmidt and Bogdanowicz, ‘The infringement procedure in the rule of law crisis: How to make effective use of Article 258 TFEU’ 1098.

¹⁹⁸ Tomasz Tadeusz Konciewicz, ‘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, 165.

¹⁹⁹ *C-441/17 R Order of the Court (Grand Chamber) European Commission v Republic of Poland* ECLI:EU:C:2017:877.

where the court, for the first time, imposed a periodic penalty payment on Poland under Article 279 TFEU²⁰⁰ and also from last year's *LM*²⁰¹ case, where the CJEU showed in paragraph 48 that it is committed to upholding the rule of law within the EU by operationalising the rule of law as enshrined in Article 2 TEU and the order of 17th December 2018 where the Grand Chamber of the CJEU granted the Commissions application for interim measures in this case.²⁰² While the outcome of this case will most likely not come with much of a surprise after the judgement in *Associação Sindical dos Juizes Portugueses*, it remains to be seen how far the CJEU is willing to go in its defence of the rule of law.

The most courageous move of the CJEU, hoped for by some commentators such as Jakab, who argues for an extensive interpretation of Article 51 of the Charter using Article 2 and 7 TEU as triggers,²⁰³ could lie in the combined application of Article 19(1)(2) TEU and Article 47 of the Charter in the absence of assessment under Article 51(1) of the Charter. This could lead to a wider application of the Charter, and thus, to use the words of Advocate General Tanchev, 'undermine the current system of review of the compatibility of national measures with the Charter and open the door for Treaty provisions such as Article 19(1) TEU to be used as a "subterfuge" to circumvent the limits of the scope of application of the Charter as set out in Article 51(1) thereof'.²⁰⁴ While the obvious advantage of this might be that the EU could become a 'community of fundamental rights' which would also strengthen the respect for the rule of law,²⁰⁵ the interpretation would not only be contrary to the wording and meaning of Article 51(1) of the Charter but also most likely be received as an unjustified competence creep by the CJEU, as this would intervene in Member States, where constitutional Courts consider it their 'sovereign' entitlement to ensure the protection of fundamental rights enshrined in the national constitution.²⁰⁶ Due to this expected controversy between the constitutional courts and the CJEU and also in light of the findings of the Advocate General, as well as the careful approach taken by the CJEU in *Associação Sindical dos Juizes Portugueses*, I find such an

²⁰⁰ Krajewski, 'Associação Sindical dos Juizes Portugueses: The Court of Justice and Athena's Dilemma' 406.

²⁰¹ C-216/18 PPU *Minister for Justice and Equality*, LM ECLI:EU:C:2018:586.

²⁰² C-64/16 *Associação Sindical dos Juizes Portugueses* para 40; *Order of the Court (Grand Chamber) C-441/17 R European Commission v Republic of Poland* para 102; C-216/18 PPU *Minister for Justice and Equality*, LM para 48; *Order of the Court (Grand Chamber) C-619/18 R European Commission v Republic of Poland* para 118.

²⁰³ András Jakab, 'Application of the EU CFR by National Courts in Purely Domestic Cases' in András Jakab and Dimitry Kochenov (eds), *The Enforcement of EU Law and Values: Ensuring Member States' Compliance* (1 edn, Oxford University Press April 2017) 252 253; Von Bogdandy and others, 'Reverse Solange—Protecting the Essence of Fundamental Rights against EU Member States' 508 ff.

²⁰⁴ C-619/18 *Opinion of Advocate General Tanchev in European Commission v Republic of Poland* para 57.

²⁰⁵ Jakab, 'Application of the EU CFR by National Courts in Purely Domestic Cases' 255.

²⁰⁶ Thomas Von Danwitz, 'The Rule of Law in the Recent Jurisprudence of the ECJ' in Werner Schroeder (ed), *Strengthening the Rule of Law in Europe: From a Common Concept to Mechanisms of Implementation* (1 edn, Hart Publishing 2016) 165.

approach not only highly unlikely but better to be avoided as it will make the CJEU vulnerable due to the lack of legitimacy and thus give grounds for attack to the parties with conflicting interests.

Even without such a courageous approach, this case will have precedent-setting character. The CJEU will hopefully clarify that the Commission can bring infringement proceedings under Article 258 TFEU even where Article 7(1) TEU has been initiated, that the Commission can rely on Article 19(1)(2) TEU autonomously in infringement proceedings while further substantiating the interpretation of Article 19(1)(2) TEU and most importantly show to national governments that the organisation of the national judiciary is not a purely domestic matter and that it is willing to protect the independence of the judiciary and ultimately the rule of law where necessary.

2.4.3.2 The Commission's enforcement of the rule of law

What is more, than the CJEU's willingness to enhance the enforcement of the rule of law, is the Commission's willingness to draw the right consequences from the judgement in *Associação Sindical dos Juizes Portugueses* as well as from Poland's unwillingness to cooperate within the Rule of Law Framework. While the CJEU has shown in many cases that it is willing to enforce the rule of law, the Commission finally followed through with bringing infringement proceedings based, not on a breach of a concrete provision of EU law, but on Article 19(1)(2) TEU which gives concrete expression to the value of the rule of law stated in Article 2 TEU. Also, the Commission asked for an expedited procedure as well as for interim measures. This combination of these measures, even without the final judgement of the CJEU, has already proved its worth as the threat to the Supreme Court judges as well as to the President of the Supreme Court could be averted, as it has led to the amendment of the Law of the Supreme Court. It is therefore argued that the Commission by applying such a holistic approach (expedited procedure, interim measures in combination with Article 19(1)(2) TEU) can provide for an effective enforcement mechanism of the rule of law, at least regarding Poland, and that this shows that the infringement procedure can be effective, even in the rule of law crisis and without a construct of 'systematic infringement proceedings'.

Interim measures (Article 279 TFEU) as well as the expedited procedure (as referred to in Article 23a of the Statute of the Court of Justice of the European Union and Article 133 of the Rules of Procedure of the Court) play an important part in making the infringement procedure in the rule of law crisis effective. This can be observed when the case *C-619/18 Commission v Republic of Poland* on the Law of the Supreme Court where interim measures as well as the expedited procedure were asked for and granted, is compared to the case *C-192/18 Commission*

v Republic of Poland on the Law on the Ordinary Courts.²⁰⁷ While in the former (on the Law of the Supreme Court) the interim measures effectively suspended the application of the law as well as ordered Poland to eliminate its effects,²⁰⁸ the judges of the Ordinary Court did not benefit from such a ruling which has forced many judges to retire due to the lowering of the retirement age, and to the dismissal of many court presidents and their replacement.²⁰⁹ This could probably have been prevented or at least resulted in a reversal of these effects if the Commission would have applied for interim measures in these proceedings too.²¹⁰ Moreover, by the time a judgement will be passed on the Law of the Ordinary Courts, which will be much later than the judgement in case *C-619/18 Commission v Republic of Poland* on the Law of the Supreme Court (as no expedited (accelerated) procedure was asked for),²¹¹ most of the changes will be invertible as new presidents will have been appointed and judges replaced.²¹² Timing is thus especially important when it comes to the ‘rule of law crisis’, as ‘justice delayed is justice denied’.²¹³

Furthermore, it is important that the Commission relies on Article 19(1)(2) TEU in combination with Article 47 of the Charter in regards to concerns about the independence of the judiciary and not as in the case of *C-286/12 Commission v Hungary* on the specific provisions of Directive 2000/78, as compliance with this ruling can be achieved not by reinstatement of judges but with compensation, which does not eliminate the threat to the independence of the judiciary.²¹⁴

Regarding the ‘rule of law crisis’, such a combined approach of these measures promises success at least in Poland, as the attacks on the rule of law in Poland as identified by the

²⁰⁷ *Action brought on 15 March 2018 — C-192/18 Commission v Poland; Order of the President of the Court (Expedited procedure) C-619/18 European Commission v Republic of Poland; Order of the Court (Grand Chamber) C-619/18 R European Commission v Republic of Poland.*

²⁰⁸ *C-619/18 Opinion of Advocate General Tanchev in European Commission v Republic of Poland* para 33.

²⁰⁹ European Commission, *Commission action on the Rule of Law in Poland: Questions & Answers* (European Commission - Fact Sheet, Brussels, 20 December 2017); Schmidt and Bogdanowicz, ‘The infringement procedure in the rule of law crisis: How to make effective use of Article 258 TFEU’ 1079.

²¹⁰ Schmidt and Bogdanowicz, ‘The infringement procedure in the rule of law crisis: How to make effective use of Article 258 TFEU’ 1079.

²¹¹ This difference in timing could be observed between these two judgements *C-286/12 European Commission v Hungary*; and *C-288/12 European Commission v Hungary* ECLI:EU:C:2014:237 where the registration dates at the CJEU are only a couple of days apart but the Judgement dates 1,5 years.

²¹² To this effect see: European Commission, *Commission action on the Rule of Law in Poland: Questions & Answers.*

²¹³ Schmidt and Bogdanowicz, ‘The infringement procedure in the rule of law crisis: How to make effective use of Article 258 TFEU’ 1097; William Penn, *Some fruits of solitude, [Elektronisk resurs] in reflections and maxims relating to the conduct of human life* (The second edition. edn, [s.n.] 1694) 86; Hegedüs, ‘Is there a New Impetus or a Political Paralysis regarding the protection of the EU’s Fundamental Values? A comparative analysis of policy proposals and adopted procedures from the Copenhagen Commission proposal to the Rule of Law Initiative of the European Commission’ 5.

²¹⁴ In analogy to *C-286/12 European Commission v Hungary*; Kochenov and Pech, ‘Upholding the Rule of Law in the EU: On the Commission’s ‘Pre-Article 7 Procedure’ as a Timid Step in the Right Direction’ 4.

Commission mainly concern the judiciary.²¹⁵ It is, therefore, a very positive development, that the Commission has yet launched another infringement procedure, based on Article 19(1) TEU read in connection with Article 47 of the Charter, by sending a Letter of Formal Notice on 3rd April 2019 to Poland regarding the new disciplinary regime for judges.²¹⁶ If Poland does not reply within two months and further fails to discard the Commission's legal concerns it can be hoped that the Commission will act quickly and forcefully, such as in the case of *C-619/18 Commission v Republic of Poland* by asking the CJEU for an expedited procedure as well as interim measures. If the Commission pursues rigorously all cases which impede the capacity of national judicial systems by bringing infringement proceedings based on Article 19(1) TEU read in connection with Article 47 of the Charter, asking for interim measures at the CJEU and an expedited procedure, the Commission has a chance to intervene effectively in the 'rule of law crisis' in Poland.

However, while this approach might be effective regarding Poland, the same does not hold true regarding the 'rule of law crisis' in Hungary. This is due to the fact that while in Poland mostly the judiciary is of concern, in Hungary a variety of different points of attack were identified.²¹⁷ Scholarship identified inter alia a badly written constitution,²¹⁸ separate attacks on public institutions, such as the judiciary or ombudsman and unforeseeable interference with the market economy.²¹⁹ This is why in regards to the 'rule of law crisis' in Hungary, it is not enough to address attacks on the judiciary.

As interference with the rule of law can also be inherent to the interference with the market economy, a second new development shall further be explored. This approach is exemplified by case *C-235/17 Commission v Hungary*, where the Commission is trying to rely on the Charter as a sole basis for infringement proceedings in order to address concerns on the rule of law and not only the problems of the market economy.

²¹⁵ As can be seen from the European Commission, *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 COM (2017) 835 final*.

²¹⁶ European Commission, 'Rule of Law: European Commission launches infringement procedure to protect judges in Poland from political control' *European Commission Press Release Database* (Brussels, 3 April 2019) <http://europa.eu/rapid/press-release_IP-19-1957_en.htm> accessed 25 April 2019.

²¹⁷ Schmidt and Bogdanowicz, 'The infringement procedure in the rule of law crisis: How to make effective use of Article 258 TFEU' 1086.

²¹⁸ András Jakab and Pál Sonnevend, 'Continuity with Deficiencies: The New Basic Law of Hungary' (2013) 9 *European Constitutional Law Review* 102-138.

²¹⁹ Schmidt and Bogdanowicz, 'The infringement procedure in the rule of law crisis: How to make effective use of Article 258 TFEU' 1086, 1087.

3 THE INFRINGEMENT PROCEDURE AND THE CHARTER

Before addressing the case *C-235/17 Commission v Hungary* and thus the possibility of bringing infringement proceedings in relation to the Charter, it is necessary to address the status of fundamental rights in the EU legal order and especially its development through the CJEU first. This will be especially relevant to understand the uncertainties in regard to the scope of application of the Charter which is important not only for understanding the Commissions reluctance to invoke the Charter but also for the analysis of the case of *C-235/17 Commission v Hungary*.

3.1 FUNDAMENTAL RIGHTS DEVELOPMENTS IN THE EU BEFORE THE CHARTER

Even though the EU is founded on fundamental rights,²²⁰ the 1957 Treaty establishing the European Economic Community (EC) did not include specific and exhaustive provisions for fundamental rights protection within the legal order of the EC.²²¹ However, the CJEU already in 1969, in case *29/69 Stauder*²²² held that ‘the provision at issue contains nothing capable of prejudicing the fundamental human rights enshrined in the general principles of Community law and protected by the Court’.²²³ The existence of fundamental rights protection in the form of general principles of Community law, and their impact stemming from the constitutional traditions common to the Member States was later confirmed in case *C-11/70 Internationale Handelsgesellschaft*.²²⁴ This jurisprudence was not unjustified as, especially the judgement of the CJEU in *Internationale Handelsgesellschaft* was adopted in order to resolve issues relating to the primacy of Community law and the respect of fundamental rights and to address specific concerns of the German judiciary regarding the protection of fundamental rights at the Community level.²²⁵ However, the German Constitutional Court found that the protection of fundamental rights at the Community level was not adequate in comparison with the catalogue of fundamental rights contained in the German constitution.²²⁶ Later cases by the CJEU such as *Nold*²²⁷, in which the CJEU not only mentioned that ‘international treaties for the protection

²²⁰ Bárd and others, *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* 1.

²²¹ Xavier Groussot and Laurent Pech, ‘Fundamental Rights Protection in the European Union post Lisbon Treaty’ (2010) 173 *Fondation Robert Schuman Policy Paper* 1, 1.

²²² *C-29/69 Erich Stauder v City of Ulm, Sozialamt* ECLI:EU:C:1969:57.

²²³ *Ibid* para 7.

²²⁴ *C-11/70 Internationale Handelsgesellschaft mbH / Einfuhr- und Vorratsstelle für Getreide und Futtermittel* ECLI:EU:C:1970:114 para 4; Henrik Holmström, ‘Development of the Protection of Fundamental Rights within the European Union – an improved human rights agenda?’ (Master thesis, Faculty of Law Lund University 2011) 11.

²²⁵ Takis Tridimas, *The General Principles of EC Law* (Oxford University Press 1999) 206, 208.

²²⁶ *Ibid.*; *BVerfGE* 37, 271 <285> ‘As long as ... Decision’ [Solange I] 29 May 1974 - 2 BvL 52/71

²²⁷ *C-4/73 Nold KG v Commission* ECLI:EU:C:1974:51.

of human rights on which the Member States have collaborated on or of which they are signatories can supply guidelines which should be followed within the framework of Community law’ but also took initial measures to establish guidelines for Community fundamental rights protection,²²⁸ and *C-44/79 Hauer*²²⁹, where the CJEU referred to the ECHR explicitly for the first time and suggested that Community measures that are obviously incompatible with those fundamental rights protected by national constitutions cannot be upheld under Community law,²³⁰ demonstrate a firm but cautious approach by the CJEU.²³¹ Thus, while the CJEU was active interpreting or reviewing the validity of Community measures in the light of fundamental rights as safeguarded in the Community legal order, the Commission, the Council of Ministers, and the European Parliament signed on 5th April 1977 a declaration on the respect of fundamental rights.²³² Due to these developments in the European Community, the German Constitutional Court in its *Solange II*²³³ decision, stemming from the same dispute in *Internationale Handelsgesellschaft*, altered its previous finding, declaring that fundamental rights are sufficiently protected in the European Community.²³⁴

However, fundamental rights protection did not only develop in regard to Community measures but indeed the CJEU also held in the 1980s that measures adopted by Member States are subject of review on the grounds of compatibility with fundamental rights (general principles), when they implement Community law.²³⁵ In subsequent decisions, the CJEU thus confirmed that it must ensure observance of fundamental rights in the field of Community law if the national measures fall within the scope of Community law,²³⁶ and in the 1990s the CJEU further expanded the applicability of EC fundamental rights (general principles).²³⁷ Although it sometimes remains unclear when a case falls within or outside the scope of Community law,

²²⁸ Ibid para 13; Holmström, ‘Development of the Protection of Fundamental Rights within the European Union – an improved human rights agenda?’ 11.

²²⁹ *C-44/79 Hauer / Land Rheinland-Pfalz* ECLI:EU:C:1979:290 paras 17, 18.

²³⁰ Holmström, ‘Development of the Protection of Fundamental Rights within the European Union – an improved human rights agenda?’ 11.

²³¹ Tridimas, *The General Principles of EC Law* 207.

²³² A. Glenn Jr. Mower, ‘The Implementation of Human Rights through European Community Institutions’ (1980) 2 *Universal Human Rights* 43, 44; Groussot and Pech, ‘Fundamental Rights Protection in the European Union post Lisbon Treaty’ 1.

²³³ *BVerfGE* 73, 339 <378> [*Solange II*] 22 October 1986 - 2 *BvR* 197/83.

²³⁴ Tridimas, *The General Principles of EC Law* 208.

²³⁵ Joined cases 201 and 202/85 *Klensch v Secrétaire d'État* ECLI:EU:C:1986:439; Tridimas, *The General Principles of EC Law* 6, 7.

²³⁶ For cases falling outside the scope of EU law where fundamental rights are not applicable see e.g., Joined cases 60 and 61/84 *Cinéthèque v Fédération nationale des cinémas français* ECLI:EU:C:1985:329; *C-12/86 Demirel v Stadt Schwäbisch Gmünd* ECLI:EU:C:1987:400; *C-159/90 Society for the Protection of Unborn Children Ireland v Grogan and Others* ECLI:EU:C:1991:378.

²³⁷ *C-260/89 Elliniki Radiophonia Tiléorassi AE and Panellinia Omospondia Syllogon Prossopikou v Dimotiki Etairia Pliroforissis and Sotirios Kouvelas and Nicolaos Avdellas and others* ECLI:EU:C:1991:254; Tridimas, *The General Principles of EC Law* 7.

two main categories can be distinguished.²³⁸ These two categories follow from the established case law in the seminal judgments in cases *5/88 Hubert Wachauf*²³⁹ and *C-260/89 ERT*²⁴⁰. The Wachauf line of cases relates to national measures implementing or applying EU law,²⁴¹ while the ERT line of cases relates to national measures derogating from EU law.²⁴²

Two aspects should be highlighted in regards to the case law of the CJEU, first the obligation of the CJEU to supervise fundamental rights protection within the EC has gradually extended its scope of application, not only in regards to the areas of law but also with the requirements they impose,²⁴³ and second, even though the Wachauf and ERT line of case law categories can be distinguished, it remains difficult to establish whether a situation falls within or outside the scope of EU law especially, but not only, because there might be cases not clearly falling within the aforementioned categories,²⁴⁴ which has led to many disagreements between Advocate Generals and the CJEU and proposals on how to define the scope of EU law.²⁴⁵ While the CJEU gradually extended the scope of application of its fundamental rights review,²⁴⁶ it was not until 1992 with the coming into force of the Maastricht Treaty that fundamental rights were formally recognised as part of EU law,²⁴⁷ and until 2000 that the EU included, even though without binding effect, its own codified declaration of fundamental rights, the Charter.²⁴⁸

²³⁸ Xavier Groussot, Laurent Pech and Gunnar Thor Petursson, 'The Scope of Application of EU Fundamental Rights on Member States' Action: In Search of Certainty in EU Adjudication' (2011) 1 Eric Stein Working Paper 1.

²³⁹ Case *5/88 Hubert Wachauf v Bundesamt für Ernährung und Forstwirtschaft* ECLI:EU:C:1989:321.

²⁴⁰ *C-260/89 ERT*.

²⁴¹ In this line of case law Member States are bound by EU fundamental rights when they adopt measures that implement secondary legislation, or where the subject-matter is governed by EU primary and/or secondary law (Xavier Groussot, Laurent Pech and Gunnar Thor Petursson, 'The Reach of EU Fundamental Rights on Member State Action after Lisbon' in Sybe de Vries, Ulf Bernitz and Stephen Weatherill (eds), *The Protection of Fundamental Rights in the EU After Lisbon* (1 edn, Hart Publishing 2013) 98 accessed 2014/11/07/).

²⁴² In this line of case law Member States are bound by EU fundamental rights when they deviate from EU law and invoke justifications recognized by the CJEU (such as reasons of public interest) in order to justify a national measure which limits any of the Treaty rights and in particular hamper EU free movement rights. (ibid 98).

²⁴³ Tridimas, *The General Principles of EC Law* 8.

²⁴⁴ See in regards to a third category of cases e.g., *C-427/06 Opinion of the Advocate General Sharpston in Bartsch* ECLI:EU:C:2008:297 para 69 and case law cited.

²⁴⁵ *C-34/09 Opinion of Advocate General Sharpston in Gerardo Ruiz Zambrano v Office national de l'emploi (ONEM)* ECLI:EU:C:2010:560 para 163 ff; *C-380/05 Opinion of the Advocate General Monduro in Centro Europa 7* ECLI:EU:C:2007:505 para 22; Holmström, 'Development of the Protection of Fundamental Rights within the European Union – an improved human rights agenda?' 16; Groussot, Pech and Petursson, 'The Scope of Application of EU Fundamental Rights on Member States' Action: In Search of Certainty in EU Adjudication' 13-15.

²⁴⁶ Groussot, Pech and Petursson, 'The Scope of Application of EU Fundamental Rights on Member States' Action: In Search of Certainty in EU Adjudication' 11.

²⁴⁷ A. de Vries Sybe, 'The Protection of Fundamental Rights within Europe's Internal Market after Lisbon – An Endeavour for More Harmony' in Sybe de Vries, Ulf Bernitz and Stephen Weatherill (eds), *The Protection of Fundamental Rights in the EU After Lisbon* (1st edn, London: Hart Publishing 2013) 59.

²⁴⁸ Ibid 59.

3.2 FUNDAMENTAL RIGHT DEVELOPMENTS IN THE EU AFTER LISBON

It is only since 2009, that with entry into force of the Lisbon Treaty, the Charter has become primary law and thus a core element for fundamental rights protection, besides general principles, in the EU legal order.²⁴⁹ However, even though the Charter is now legally binding, it does not follow that fundamental rights apply now as a ‘federal standard’ meaning irrespective of whether they fall within the scope of EU law.²⁵⁰ Indeed, this was precisely what was feared by some influential Member States, who did not wish that the CJEU would build, on its initiative, a federal standard for the protection of fundamental rights.²⁵¹ In order to prevent, that the Charter will have such a ‘federalising effect’ Article 6(1)(2) TEU states that ‘[t]he provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties’ which is also repeated in a similar manner in Article 51(2) of the Charter.²⁵² Article 51(1) of the Charter is therefore essential in ensuring that the principle of conferral is complied with.²⁵³ Article 51(1) of the Charter provides that:

‘The provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States *only when they are implementing Union law*. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers and respecting the limits of the powers of the Union as conferred on it in the Treaties’.²⁵⁴

Unfortunately, however, the Charter and especially Article 51(1) thereof, do not bring clarity to the previous mentioned uncertainties in regard to the scope of application of fundamental rights, due to the fact that, while the wording of the provision of Article 51(1) of the Charter seems to narrow the scope of application of fundamental rights in contrast to the general principles, the explanations to the Charter, which shall provide guidance in the interpretation of the Charter (Article 52 (7) of the Charter) cite *Wachauf*, *ERT* and *Annibaldi*²⁵⁵ and further refer to a mixture of different formulas.²⁵⁶ As a consequence, of the fact that the

²⁴⁹ Koen Lenaerts, ‘Exploring the Limits of the EU Charter of Fundamental Rights’ (2012) 8 European Constitutional Law Review 375 375.

²⁵⁰ Groussot, Pech and Petursson, ‘The Scope of Application of EU Fundamental Rights on Member States’ Action: In Search of Certainty in EU Adjudication’ 16.

²⁵¹ Groussot, Pech and Petursson, ‘The Reach of EU Fundamental Rights on Member State Action after Lisbon’

²⁵² Lenaerts, ‘Exploring the Limits of the EU Charter of Fundamental Rights’ 377.

²⁵³ Charter of Fundamental Rights of the European Union [2012] OJ C 326/02 Article 51(1); Lenaerts, ‘Exploring the Limits of the EU Charter of Fundamental Rights’ 377.

²⁵⁴ Charter of Fundamental Rights of the European Union [2012] OJ C 326/02 Article 51(1).

²⁵⁵ C-309/96 *Annibaldi v Sindaco del Comune di Guidonia and Presidente Regione Lazio* ECLI:EU:C:1997:631.

²⁵⁶ Explanations Relating to the Charter of Fundamental Rights [2007] OJ C 303 Article 51; Lenaerts, ‘Exploring the Limits of the EU Charter of Fundamental Rights’ 378; Groussot, Pech and Petursson, ‘The Scope of

Courts shall have ‘due regard’ to the explanations of the Charter, the CJEU can rely on these different and broad formulas when interpreting the scope of application of the Charter.²⁵⁷

3.2.1 Towards clarity regarding the scope of application of the Charter

Thus with the coming into force of the Lisbon Treaty and the binding effect of the Charter the CJEU had two options, either a narrow interpretation of the scope of application as used by Article 51 of the Charter or a broad interpretation in line with its pre-Charter case law.²⁵⁸ The judgements of the CJEU right after the entry into force of the Charter have been ambivalent.²⁵⁹ For example, in *Dereci and Others*²⁶⁰, a case on free movement of persons, the CJEU held in Grand Chamber that ‘if the referring court considers, in the light of the circumstances of the disputes in the main proceedings, that the situation of the applicants in the main proceedings is covered by European Union law,’ then the CJEU must examine whether fundamental rights are undermined.²⁶¹ This can be interpreted as a very broad and far-reaching interpretation in regard to the scope of application of fundamental rights. In contrast, in the case of *Iida*²⁶², also a case on free movement of persons, where the judgement was given a year later than in *Dereci and Others*, the CJEU held in regards to whether the national measure ‘falls within the implementation of European Union law within the meaning of Article 51 of the Charter, it must be ascertained among other things whether the national legislation at issue is intended to implement a provision of European Union law, what the character of that legislation is, and whether it pursues objectives other than those covered by European Union law, even if it is capable of indirectly affecting that law, and also whether there are specific rules of European Union law on the matter or capable of affecting it’.²⁶³ The CJEU thereby referred to the case of *Annibaldi*²⁶⁴, which is referred to in the explanations of the Charter but otherwise a barely cited judgment, which indicates a very narrow interpretation in regard to the scope of application of fundamental rights.²⁶⁵

Application of EU Fundamental Rights on Member States’ Action: In Search of Certainty in EU Adjudication’ 16, 19.

²⁵⁷ Groussot, Pech and Petursson, ‘The Reach of EU Fundamental Rights on Member State Action after Lisbon’ 103; Constanța Mătușescu, ‘The Scope of Application of the Charter of Fundamental Rights guaranteed by European Union law on Member States. Some Jurisprudential Landmarks’ (2017) *Law Review: Judicial Doctrine & Case-Law* 22 36.

²⁵⁸ E. Hancox, ‘The meaning of “implementing” EU law under Article 51(1) of the Charter: Åkerberg Fransson’ (2013) 50 *Common Market Law Review* 1411 1412.

²⁵⁹ Sarmiento, ‘Who’s afraid of the charter? The court of justice, national courts and the new framework of fundamental rights protection in Europe’ 1276.

²⁶⁰ C-256/11 *Dereci and Others v Bundesministerium für Inneres*, ECLI:EU:C:2011:734.

²⁶¹ *Ibid* para 72.

²⁶² C-40/11 *Yoshikazu Iida v Stadt Ulm* ECLI:EU:C:2012:691.

²⁶³ *Ibid* para 79.

²⁶⁴ C-309/96 *Annibaldi paras 21 to 23*.

²⁶⁵ Sarmiento, ‘Who’s afraid of the charter? The court of justice, national courts and the new framework of fundamental rights protection in Europe’ 1276.

3.2.2 The judgement of *Åkerberg Fransson*

Due to this uncertainty about the scope of application of the Fundamental Rights enshrined in the Charter as well as about the scope of application of the general principles the Grand Chamber judgement in *Åkerberg Fransson* was long-awaited and finally seemed to resolve the issue.²⁶⁶

The preliminary reference was sent to the CJEU by the *Haparanda tingsrätt*, which had to resolve a dispute between Åklagaren (Public Prosecutor's Office) and Mr Åkerberg Fransson, a self-employed fisherman, who had submitted a false tax assessment, which infringed the Swedish tax law, the losses for the Swedish national exchequer also included tax losses stemming from Mr Åkerberg Fransson's avoidance to declare (EU harmonized) value added tax (VAT).²⁶⁷ As a result, Mr Åkerberg Fransson was not only fined in accordance with the *Taxeringslagen* by the Skatterverket, but was also subject to criminal proceedings brought by the *Haparanda tingsrätt* for serious tax offences. The question submitted to the CJEU therefore concerned, the interpretation of the *ne bis in idem* principle in EU law and consequently the applicability of Article 50 of the Charter (and the Charter in general) to the national enforcement mechanisms of the VAT Directive.²⁶⁸ Some national governments as well as the Commission argued that the questions referred for a preliminary reference are not admissible as neither the tax penalties imposed on Mr Åkerberg Fransson nor the criminal proceedings brought against him arose from the implementation of EU law.²⁶⁹ While the judgement in *Åkerberg Fransson* raises several other issues, this analysis shall focus only on the part of the judgement which deals with the issue related to Article 51(1) of the Charter.²⁷⁰

The CJEU after recalling that the provisions to the Charter are addressed to the Member States *only* when they are implementing EU law, held that the Article 51(1) of the Charter 'confirms the Court's case-law relating to the extent to which actions of the Member States must comply with the requirements flowing from the fundamental rights guaranteed in the legal order of the European Union'.²⁷¹ The CJEU thus confirms its established case law pre- and post-Charter of the scope of application of fundamental rights by explicitly making reference to judgements such as *ERT*, *Annibaldi* and *Dereci and Others*, the CJEU afterwards justifies

²⁶⁶ Hancox, 'The meaning of "implementing" EU law under Article 51(1) of the Charter: *Åkerberg Fransson*' 1412; Sarmiento, 'Who's afraid of the charter? The court of justice, national courts and the new framework of fundamental rights protection in Europe' 1276.

²⁶⁷ *C-617/10 Åklagaren v Hans Åkerberg Fransson paras 12-15.*

²⁶⁸ *Ibid paras 12-15.*

²⁶⁹ *Ibid para 16.*

²⁷⁰ For a complete analysis of the judgement *Åkerberg Fransson* see e.g., Hancox, 'The meaning of "implementing" EU law under Article 51(1) of the Charter: *Åkerberg Fransson*'.

²⁷¹ *C-617/10 Åklagaren v Hans Åkerberg Fransson paras 17, 18.*

this view with reference to the explanations to the Charter where it is held that to respect fundamental rights is only binding on the Member States ‘when they act in the scope of Union law’.²⁷² Most powerful the CJEU concluded its interpretation of Article 51(1) of the Charter by stating that ‘The applicability of European Union law entails applicability of the fundamental rights guaranteed by the Charter’.²⁷³ The CJEU, found in this regard that tax penalties and criminal proceedings for tax evasion constitute implementation of several provisions of EU law and therefore Article 50 of the Charter applied to the situation of Mr Åkerberg Fransson.²⁷⁴

Three conclusions can be drawn from this judgement. First, it can be concluded from the reasoning of the CJEU that it rejects a narrow interpretation of the scope of application of the Charter. This can be seen from the fact, that the CJEU does not find itself restricted to the wording of Article 51(1) of the Charter ‘only when they are implementing Union law’ even more so the CJEU does not seem to find that there is a relevant distinction between ‘implementing’ and ‘the scope of application’.²⁷⁵ The CJEU thus dismisses the idea that the wording of the Charter limits the scope of application of fundamental rights in the EU legal order.²⁷⁶ Second, the scope of application of the Charter is continuous to the scope of application of the general principles, as the CJEU confirms the continuous application of its previous case law.²⁷⁷ This is especially important as this avoids legal difficulties in regards to a divergence of the scope of application of the Charter and the general principles, both of which constitute primary law of the EU (Article 6 TEU).²⁷⁸ This further clarifies, even though the CJEU does not make reference explicitly to the case of *Wachauf*, possibly as Hancox argues to overcome the language of ‘implementing’ in Article 51 of the Charter, that the *Wachauf* line of cases, relating to national measures implementing or applying EU law, and the *ERT* line of cases, relating to national measures derogating from EU law, are considered to be falling within the scope of application of the Charter.²⁷⁹ This also leads to the third conclusion, that it still remains unclear when a situation falls within the scope of application of the Charter, as the CJEU in *Åkerberg Fransson* does not clarify what connection to EU law might be sufficient to make a case fall within the scope of application of the Charter and inversely which link is

²⁷² Ibid paras 19, 20.

²⁷³ Ibid para 21.

²⁷⁴ Ibid para 31.

²⁷⁵ Sarmiento, ‘Who's afraid of the charter? The court of justice, national courts and the new framework of fundamental rights protection in Europe’ 1277; Laurens Ankersmit, ‘Casting the net of Fundamental Rights Protection: C-617/10 Åkerberg Fransson’ (*European Law Blog*, 26 February 2013) <<http://europeanlawblog.eu/2013/02/26/casting-the-net-of-fundamental-rights-protection-c-61710-akerberg-fransson/>> accessed 4 May 2019.

²⁷⁶ Ankersmit, ‘Casting the net of Fundamental Rights Protection: C-617/10 Åkerberg Fransson’.

²⁷⁷ *C-617/10 Åklagaren v Hans Åkerberg Fransson paras 17, 18.*

²⁷⁸ Ankersmit, ‘Casting the net of Fundamental Rights Protection: C-617/10 Åkerberg Fransson’.

²⁷⁹ Hancox, ‘The meaning of "implementing" EU law under Article 51(1) of the Charter: Åkerberg Fransson’.

insufficient in order to fall outside the scope of EU law.²⁸⁰ To conclude, *Åkerberg Fransson* is a step in the right direction, as it clarifies the scope of the Charter in regard to the general principles of EU law, but it does not add much clarification about its scope of application in comparison to the case law before the Charter.

3.2.3 Developments post *Åkerberg Fransson*

After the CJEU's decision in *Åkerberg Fransson*, the scope of application of the Charter did not become more certain, indeed the CJEU sometimes applies a similarly broad scope of interpretation towards the applicability of the Charter,²⁸¹ other cases apply a seemingly limited scope of applicability of the Charter.²⁸²

*Pfleger and Others*²⁸³, on the one hand, is a case belonging to the first category, where the CJEU confirmed its previous judgement in *Åkerberg Fransson* and especially, that national derogations from free movement rules (ERT line of cases) fall within the scope of application of the Charter.²⁸⁴ The case concerned Austrian Federal Law on games of chance, which restricted the operating of gambling machines, the validity of which was contested in the light of Article 56 TFEU and Articles 15 to 17, 47 and 50 of the Charter.²⁸⁵ The CJEU therein simply reiterated its prior findings in *Åkerberg Fransson* and concluded that the 'obligation to comply with fundamental rights manifestly comes within the scope of EU law and, consequently, within that of the Charter'.²⁸⁶

*Siragusa*²⁸⁷ on the other hand, is a case belonging to the second category, where a narrower approach towards the scope of application of the Charter is applied, the questions concerning the interpretation of Article 17 of the Charter and of the principle of proportionality submitted to the CJEU arose in the proceedings between Mr Siragusa and the Regione Sicilia (Region of Sicily – Directorate for the Cultural and Environmental Heritage, Palermo) concerning an order

²⁸⁰ See in this regard e.g., Sarmiento, 'Who's afraid of the charter? The court of justice, national courts and the new framework of fundamental rights protection in Europe'; Hancox, 'The meaning of "implementing" EU law under Article 51(1) of the Charter: *Åkerberg Fransson*' 1430.

²⁸¹ C-418/11 *Texdata Software GmbH* ECLI:EU:C:2013:588; C-390/12 *Robert Pfleger, Autoart as, Mladen Vucicevic, Maroxx Software GmbH, Hans-Jörg Zehetner* ECLI:EU:C:2014:281; C-419/14 *WebMindLicenses kft v Nemzeti Adó- és Vámhivatal Kiemelt Adó- és Vám Főigazgatóság* ECLI:EU:C:2015:832; C-682/15 *Berlioz Investment Fund S.A. v Directeur de l'administration des contributions directes* ECLI:EU:C:2017:373; C-358/16 *UBS Europe and Others* ECLI:EU:C:2018:715.

²⁸² Joined cases C-488/12, C-489/12, C-490/12, C-491/12 and C-526/12 *Nagy and Others* ECLI:EU:C:2013:703; C-206/13 *Cruciano Siragusa v Regione Sicilia — Soprintendenza Beni Culturali e Ambientali di Palermo* ECLI:EU:C:2014:126.

²⁸³ C-390/12 *Pfleger and Others*.

²⁸⁴ *Ibid* paras 30-36.

²⁸⁵ *Ibid* paras 2, 3, 18.

²⁸⁶ *Ibid* para 36.

²⁸⁷ C-206/13 *Siragusa*.

requiring a site belonging to Mr Siragusa to be restored to its former state.²⁸⁸ In regard to whether the Charter is applicable to the situation at hand the CJEU instead of referring to the judgement in *Åkerberg Fransson*, made reference inter alia to cases of *Annibaldi* and *Iida*, and held '[i]n order to determine whether national legislation involves the implementation of EU law for the purposes of Article 51 of the Charter, some of the points to be determined are whether that legislation is intended to implement a provision of EU law; the nature of that legislation and whether it pursues objectives other than those covered by EU law, even if it is capable of indirectly affecting EU law; and also whether there are specific rules of EU law on the matter or capable of affecting it'.²⁸⁹ The CJEU thereafter found that the link between EU law and national law in this instance was not sufficient to trigger the application of the Charter.²⁹⁰

It thus follows from the case law of the CJEU that the assessment of whether a measure falls within or outside the scope of application of the Charter remains very unclear and complex.²⁹¹ Some, however, such as Spaventa or Mătuşescu, found in a recent analysis of the CJEU's case law, that these differences in the approach by the CJEU show a correlation between the interest of integration and the applicability of the Charter to these situations.²⁹² Thus fundamental rights claims might be more accepted by the CJEU, when they concern the firmer internal market grounds or when doing so can foster the EU's interest in integration than in cases where the measure of the Member State is adopted on the basis of EU coordination.²⁹³

Nevertheless, these difficulties regarding the scope of application of the Charter, fundamental rights in the EU legal order have come a long way and the CJEU has undeniably 'put the Charter at the forefront of European integration'.²⁹⁴ The Charter has thus evolved through the courageous judgements of the CJEU to a persuasive source of rights that can be invoked not only by the EU institutions but also and foremost by individuals.²⁹⁵

²⁸⁸ Ibid paras 1, 2.

²⁸⁹ Ibid para 25.

²⁹⁰ Ibid paras 26-36.

²⁹¹ E. Spaventa, *The interpretation of Article 51 of the EU Charter of Fundamental Rights : the dilemma of stricter or broader application of the Charter to national measures* (Project Report, European Parliament 2016) 24.

²⁹² Ibid 24; Mătuşescu, 'The Scope of Application of the Charter of Fundamental Rights guaranteed by European Union law on Member States. Some Jurisprudential Landmarks' 36.

²⁹³ Spaventa, *The interpretation of Article 51 of the EU Charter of Fundamental Rights : the dilemma of stricter or broader application of the Charter to national measures* 35.

²⁹⁴ I borrowed this terminology from Sarmiento, 'Who's afraid of the charter? The court of justice, national courts and the new framework of fundamental rights protection in Europe' 1268.

²⁹⁵ Adam Łazowski, 'Decoding a Legal Enigma: The Charter of Fundamental Rights of the European Union and infringement proceedings' (2013) 14 ERA Forum 573 574; Daniel Sarmiento, 'Sharpening the Teeth of EU Social Fundamental Rights: A Comment on Bauer' (*Despite our Differences*, 8 November 2018) <<https://despiteourdifferencesblog.wordpress.com/2018/11/08/sharpening-the-teeth-of-eu-social-fundamental-rights-a-comment-on-bauer/>> accessed 4 May 2019.

3.3 ENFORCING FUNDAMENTAL RIGHTS THROUGH THE INFRINGEMENT PROCEDURE

Almost ten years have passed since the Lisbon Treaty has entered into force and changed the legal status of the Charter.²⁹⁶ However, even though the Charter is now legally binding primary law and grew to become a persuasive source of rights, that can be invoked not only by the EU institutions but also by individuals the Commission has refrained from bringing actions under Article 258 TFEU based solely on the Charter against Member States.²⁹⁷ Thus two questions come to mind, first, can the Commission bring actions based on the Charter under Article 258 TFEU and second, if so, why hasn't it done so? These two questions shall be answered before looking at the case *C-235/17 Commission v Hungary*.

3.3.1 Infringement proceedings based on the Charter?

The Commission has always declared that it is competent to bring infringement proceedings against Member States on violations of the Charter.²⁹⁸ The wording of Article 258 TFEU provides in this regard that the Commission can bring infringement proceedings when it 'considers that a Member State has failed to fulfil an obligation under the Treaties'.²⁹⁹ This notion is very broad, in order to ensure that Member States can be held accountable in front of the CJEU for all kind of breaches of EU law.³⁰⁰ Thus, some of the categories that can be ground for infringement proceedings include: Failure to apply and enforce primary law, failure to transpose, apply and enforce regulations; failure to implement, apply and enforce directives; failure to apply EU law in a given case and failure to make a preliminary reference.³⁰¹

Just as general principles of EU law, fundamental rights enshrined in the Charter form an integral part of the EU legal order.³⁰² In regard to general principles, Barav already in 1975 held that '[f]ailure to fulfil Community obligations may [...] consist of infringements of such principles'.³⁰³ This in addition to the fact that as stated in Article 6 TEU the fundamental rights enshrined in the Charter and general principles are now primary law, leaves no doubt that they

²⁹⁶ Łazowski, 'Decoding a Legal Enigma: The Charter of Fundamental Rights of the European Union and infringement proceedings' 573, 574.

²⁹⁷ Ibid 574.

²⁹⁸ European Commission, *Commission Staff working Document Accompanying document to the Report from the Commission to the European Parliament, the Council, The European Economic and social Committee and the Committee of the Regions 2010 Report on the Application of the EU Charter of Fundamental Rights COM(2011) 160 final* (SEC(2011) 396 final 30 March 2011) 4.

²⁹⁹ Consolidated version of the Treaty on the Functioning of the European Union [2012] OJ C 326/01 Article 258.

³⁰⁰ Łazowski, 'Decoding a Legal Enigma: The Charter of Fundamental Rights of the European Union and infringement proceedings' 575.

³⁰¹ Stine Andersen, *Failure to Comply with EU Law: Article 258 TFEU* (Oxford University Press 2012) 46; Łazowski, 'Decoding a Legal Enigma: The Charter of Fundamental Rights of the European Union and infringement proceedings' 575.

³⁰² Ami Barav, 'Failure of member States to Fulfil Their Obligations under Community Law' (1975) 12 Common Market Law Review 369 377.

³⁰³ Ibid 377.

can be enforced by the Commission under Article 258 TFEU.³⁰⁴ Thus, enforcing the Charter should, in principle, be unproblematic.

3.3.2 Why the Commission has refrained from enforcing fundamental rights

As already indicated in the introduction of this chapter, the status of fundamental rights in the EU legal order and their development through the case law of the CJEU is relevant, to understand why the Commission has applied a restrictive approach to bringing infringement proceedings solely based on the Charter. As it is clear that the problem of enforcing fundamental rights does not stem from Article 258 TFEU, the problem may be linked to the uncertainties associated with Article 51 of the Charter, as Member States are only bound by the Charter when they are ‘implementing’ EU law.³⁰⁵ While there is no confidential material on this matter, Łazowski took an educated guess and concluded that the uncertainties associated with the scope of application of the Charter might be one of the reasons why the Commission has not based infringement proceedings against Member States solely on the Charter.³⁰⁶ In this regard, he held that, while the scope of application is crucial for the applicability of the Charter, the uncertainties that prevail at the moment ‘amount to a risky round of poker’ if basing infringements solely on the Charter.³⁰⁷ While this might not be the only reason that the Commission has not brought infringement proceedings based solely on the Charter, this is not only a legally well-founded argument, as one can see from the case law of the CJEU as well as the developments of fundamental rights (and later from the discussion on the case of *C-235/17 Commission v Hungary*), it also connects to a general finding that the Commission usually brings infringement proceedings in cases where it is likely to win, in order not to put its legitimacy at risk.³⁰⁸ This can, therefore, be a reason why the Commission has never brought such infringement proceedings solely based on the Charter.³⁰⁹

Despite these uncertainties, however, the Commission is asking the CJEU for the first time in the Case *C-235/17 Commission v Hungary*, and in subsequent cases *C-66/18 Commission v Hungary*, and *C-78/18 Commission v Hungary*, to find that a Member State is breaching not

³⁰⁴ Łazowski, ‘Decoding a Legal Enigma: The Charter of Fundamental Rights of the European Union and infringement proceedings’ 577; *C-235/17 Opinion of the Advocate General ØE in European Commission v Hungary* ECLI:EU:C:2018:971 para 66; Barav, ‘Failure of member States to Fulfil Their Obligations under Community Law’ 377.

³⁰⁵ As also argued by Łazowski, ‘Decoding a Legal Enigma: The Charter of Fundamental Rights of the European Union and infringement proceedings’ 581, 585-586.

³⁰⁶ Ibid 584.

³⁰⁷ Ibid 581, 582.

³⁰⁸ Ibid 585; Blauburger and Kelemen, ‘Can courts rescue national democracy? Judicial safeguards against democratic backsliding in the EU’ 323.

³⁰⁹ Kochenov, ‘Biting Intergovernmentalism: The Case for the Reinvention of Article 259 TFEU to Make It a Viable Rule of Law Enforcement Tool’ 166.

only the freedoms of movement but in an independent assessment, to determine that the Member State is also breaching the Charter.³¹⁰ It is thus argued that the Commission is trying, and should be successful, in bringing infringement proceedings autonomously on the grounds of application of the Charter in order to ensure respect for the rule of law, where the case falls in the, broader, scope of Union law.³¹¹

3.4 A NEW ERA IN FUNDAMENTAL RIGHTS PROTECTION?

As mentioned above, the ‘rule of law crisis’ in Hungary is not only concerning the judiciary but also interfering with the market economy, one of these interferences has been with the rights of cross-border investors in agricultural land.³¹² Hungary has passed a law in 2013 which terminated, on 1st May 2014, certain so-called ‘usufruct rights’ held by foreign and domestic investors in Hungary, without providing them with compensation.³¹³ In this regard, the Commission is of the opinion that the law deprived existing investors of their acquired usufruct rights and the value of their investments, due to the very short period provided between the publication of the legislation and its date of entry into force.³¹⁴ The Commission maintains that this breaches the principle of legal certainty and the respect of the right to property under Article 17 of the Charter, as well as it breaches the principles of free movement of capital under Article 63 TFEU and freedom of establishment under Article 49 TFEU.³¹⁵ Therefore, the Commission has decided to bring infringement proceedings against Hungary and asked the CJEU to declare that by adopting the legislation of concern, which restricts certain usufruct rights, Hungary has failed to fulfil its obligations under Articles 49 and 63 of the TFEU and under Article 17 of the Charter.³¹⁶

This law from 2013 on the rights of usufruct over agricultural land has also already been subject to Hungarian court proceedings, and subsequently led to a judgement of the CJEU in a preliminary ruling procedure in *joined cases C-52/16 and C-113/16 SEGRO and Horváth*.³¹⁷ Even though, the preliminary ruling requests concern the interpretation of Articles 49 and 63

³¹⁰ C-235/17 *Opinion of the Advocate General ØE in European Commission v Hungary paras 64, 65*; C-66/18 *Action brought on 1 February 2018 — European Commission v Hungary*; C-78/18 *Action brought on 1 June 2018 — European Commission v Hungary*.

³¹¹ C-235/17 *Opinion of the Advocate General ØE in European Commission v Hungary para 99*.

³¹² European Commission, ‘Free movement of capital: Commission refers Hungary to the Court of Justice of the EU for failing to comply with EU rules on the rights of cross-border investors in agricultural land’ *European Commission Press Release Database* (Brussels, 16 June 2016) <http://europa.eu/rapid/press-release_IP-16-2102_en.htm> accessed 27. April. 2019.

³¹³ *Ibid.*

³¹⁴ *Ibid.*

³¹⁵ *Ibid.*

³¹⁶ C-235/17 *Action brought on 5 May 2017 — European Commission v Hungary*.

³¹⁷ *Joined Cases C-52/16 and C-113/16 SEGRO’ Kft v Vas Megyei Kormányhivatal Sárvári Járási Földhivatala and Günther Horváth v Vas Megyei Kormányhivatal* ECLI:EU:C:2018:157.

TFEU and of Articles 17 and 47 of the Charter the CJEU held that it was not necessary to examine the national legislation of concern in the light of the Charter in order to resolve the disputes in the main proceedings, as it found that Article 63 TEU must be interpreted as precluding legislation which restricts the free movement of capital.³¹⁸ However, the Commission stressed that the Court should give its opinion on Articles 17 of the Charter in the case *C-235/17 Commission v Hungary*, irrespective of the examination of the freedoms of movement.³¹⁹ As the Advocate General Øe in paragraph 99 of his Opinion in *C-235/17 Commission v Hungary* has pointed out: such a review of the legislation of the Member States under the Charter in cases such as this would be necessary for the Commission in order to ensure respect for the rule of law in those states.³²⁰ It follows therefrom that the Commission is trying to argue for (as in the *joined cases of SEGRO and Horváth*) an independent examination of Article 17 of the Charter in relation to the Hungarian legislation in order to ensure respect for the rule of law.³²¹

3.4.1 Opinion of Advocate General Øe in *C-235/17 Commission v Hungary*

The Advocate General Øe in his decision from 29th November 2018 therefore focused mainly, not on whether the law from 2013 on the rights of usufruct over agricultural land infringed the market freedoms, since this was already subject to his opinion in *SEGRO and Horváth* and subject of the decision of the CJEU in *SEGRO and Horváth*, but instead mostly on the independent examination of an infringement under Article 17 of the Charter in these proceedings.³²²

The Advocate General Øe first, shortly stated that the case should be admissible, and second, in reference to the CJEU's findings in *SEGRO and Horváth*, that the law in question is not in conformity with the free movement of capital under Article 63 TFEU, while not analysing the conformity of the law with the freedom of establishment under Article 49 TFEU, as this is, in his opinion, unnecessary where one market freedom is subordinate to another.³²³ He continued his analysis more extensively on whether there can be an independent finding of an infringement based on the Charter, in this case Article 17 thereof.³²⁴ For this purpose, the Advocate General analysed whether a breach of a fundamental right can be examined independently of the breach of a freedom of movement.³²⁵ In this regard the Advocate General

³¹⁸ Ibid para 127-129.

³¹⁹ *C-235/17 Opinion of the Advocate General ØE in European Commission v Hungary para 3.*

³²⁰ Ibid para 99.

³²¹ Ibid para 99; *Joined cases C-52/16 and C-113/16 SEGRO und Horváth.*

³²² *C-235/17 Opinion of the Advocate General ØE in European Commission v Hungary para 3.*

³²³ Ibid para 48-54.

³²⁴ Ibid para 56.

³²⁵ Ibid para 67.

referring to the established case law of the CJEU, held that there are usually two categories of cases where the Charter is applicable to Member States, these two situations can be divided into two categories, established in seminal judgments in cases *Wachauf* and *ERT*.³²⁶ The Commission is basing its claim on the *ERT* line of case law, holding that fundamental rights should be examined independently of the question of the infringement of the freedoms of movement, where a Member State is creating an unjustified obstacle to the freedoms of movement guaranteed by the Treaties.³²⁷

The Advocate General disagrees with the Commission, as he is relying on a narrow interpretation of the *ERT* jurisprudence.³²⁸ In his view, it follows from this line of case law, that, where the only connection with EU law lies in the existence of a restriction of free movement, the protection of fundamental rights may cause the loss of a shield raised in order to defend the legislation concerned, but it can never represent an independent ground of incompatibility with EU law.³²⁹ Such a reading, as proposed by the Commission, would be a renewed extension - possibly even a distortion - of the *ERT* jurisprudence.³³⁰ In his view, the *ERT* jurisprudence, allows the CJEU to examine fundamental rights when determining whether a Member State is entitled to make a derogation from the freedoms of movement, thus when fundamental rights are used as a shield and the issue therefore fall within the scope of EU law in their functional dimension, in contrast the renewed extension would allow the CJEU to review national legislation if there exists a restriction of freedoms of movement, thus opening a gateway to the scope of the Charter for the CJEU to rule independently on the compatibility of the national legislation concerned with each of the fundamental rights.³³¹

The Advocate General also holds that the entry into force of the Charter cannot justify extending the jurisdiction of the CJEU in the area of fundamental rights in cases of 'derogation', as this follows explicitly and implicitly from Article 51(1) of the Charter and the judgement of the CJEU in *Åkerberg Fransson*, which confirmed the continuity of the CJEU's competence in the field of fundamental rights before and after the entry into force of the Charter.³³² Last, the Advocate General points towards the multi-layered system of fundamental rights protection in the EU and finds that, unlike the national constitutional courts and the ECtHR, the Court does

³²⁶ *Case 5/88 Wachauf; C-260/89 ERT*.

³²⁷ *C-235/17 Opinion of the Advocate General ØE in European Commission v Hungary paras 74, 75*.

³²⁸ *Ibid* para 91.

³²⁹ *Ibid* paras 74-76, 83-91; *Joined Cases C-52/16 and C-113/16 Opinion of the Advocate General ØE in Joined Cases 'SEGRO' Kft. v Vas Megyei Kormányhivatal Sárvári Járási Földhivatala (C-52/16) and Günther Horváth v Vas Megyei Kormányhivatal* ECLI:EU:C:2017:410 paras 129-135.

³³⁰ *C-235/17 Opinion of the Advocate General ØE in European Commission v Hungary para 95*.

³³¹ *Ibid* paras 97, 98.

³³² *Ibid* paras 106, 107.

not have a specific mandate to sanction possible breaches by Member States of fundamental rights.³³³ This reasoning substantiates why the judgment in *Pfleger and Others*, which raises at least some doubt as to whether an alleged infringement of the Charter can be considered independently of the question whether there is a breach of the freedoms of movement, should require the CJEU not to go beyond the ERT jurisprudence.³³⁴

In the alternative the Advocate General, found that a separate examination of Article 17 of the Charter lacks relevance as, in contrast to the view of the Commission.³³⁵ First, the content of Article 17 of the Charter is not more comprehensive than the content of the free movement of capital or the freedom of establishment.³³⁶ Second, a further assessment is unnecessary in order to secure a better position for the citizens before the national courts.³³⁷ Third, that examination of the legislation at issue cannot have the sole purpose of enabling the Commission, in any future procedure for repeated infringement, to impose a higher fine or a higher penalty payment on Hungary.³³⁸ Last, the procedure under Article 258 TFEU seeks to establish that the conduct of a Member State is contrary to EU law, thus an answer from the perspective of Article 63 TFEU is sufficient to achieve that objective.³³⁹

In the further alternative, the Advocate General set out why, the usufruct rights cancelled under Article 108(1) of the 2013 Law on transitional arrangements constitute 'ownership' which has been 'lawfully acquired', and that the contested provision implies an interference with those rights, which must be regarded as 'deprivation of property', which cannot be justified.³⁴⁰

Even though the Advocate General found, in the further alternative, that Paragraph 108(1) of the 2013 Law on transitional arrangements is incompatible with Article 17(1) of the Charter, he proposed the Court to dismiss this aspect of the action and solely declare that Hungary has failed to fulfil its obligations under Article 63 TFEU, as for him the application of the Charter is subsumed by the application of the provisions on free movement of capital.³⁴¹

3.4.2 Analysis of *C-235/17 Commission v Hungary*

In regard to case *C-235/17 Commission v Hungary* the main concern of this analysis shall be, as in the Opinion of the Advocate General Øe, on the question on whether the Charter is

³³³ Ibid paras 108-111.

³³⁴ Ibid paras 94-112.

³³⁵ Ibid paras 113-116, 122, 124.

³³⁶ Ibid paras 113-116, 122, 124.

³³⁷ Ibid paras 113-116, 122, 124.

³³⁸ Ibid paras 113-116, 122, 124.

³³⁹ Ibid paras 113-116, 122, 124.

³⁴⁰ Ibid paras 131-183.

³⁴¹ Ibid para 184.

applicable independently for purposes of assessing national measures, which do not implement provisions of EU secondary law, but create an unjustified obstacle to the freedoms of movement guaranteed by the Treaties. In a second place, it shall be addressed why such a separate assessment is important for the Commission, as mentioned by the Advocate General in paragraph 99 of his Opinion, in order to ensure respect for the rule of law.³⁴² It is argued that this case shows how the infringement procedure can be used as an effective tool in ensuring the rule of law when there is a political will of the Commission and where this meets an activist CJEU. Whether this was the case here will be examined, when addressing the judgment of the CJEU from the 21st May 2019 in *C-235/17 Commission v Hungary*.

3.4.2.1 Applicability of the Charter independently

First in regard to the admissibility of the action in relation to Article 258 TFEU, I agree with the Advocate General that, the Commission can bring an action for a declaration that a Member State has failed to fulfil an obligation based on the rights guaranteed in the Charter, as the Charter is primary law (see above 3.3.1).³⁴³ Second, as concerning the Charters scope of application which is hampered by its own Article 51 of the Charter, it is argued that this should not be an obstacle here. While the Advocate General argues, that a broad interpretation of the ERT jurisprudence can and should not be applied and that Article 17 of the Charter is subsumed by the application of the provisions on free movement of capital, it will be showed why the CJEU should not follow the thoroughly reasoned Opinion of the Advocate General in this regard. Thus, first, it will be argued that the ERT jurisprudence does not exclude, on the contrary, provides for, such a possibility and second that the CJEU should follow the request of the Commission for a separate assessment in order to ensure respect for the rule of law.

3.4.2.2 The relevant case-law

The starting point of this assessment must be the same as of the Advocate General, namely answering the questions to which extent the Member States are bound by the Charter and to what extent the CJEU can hold them liable. Thus, Article 51 of the Charter and the relevant jurisprudence of the CJEU must be analysed.³⁴⁴

³⁴² Ibid para 99.

³⁴³ Ibid para 66; Frank Hoffmeister, ‘Enforcing the EU Charter of Fundamental Rights in Member States : How Far are Rome, Budapest and Bucharest from Brussels?’ in Armin von Bogdandy and Pál Sonnevend (eds), *Constitutional Crisis in the European Constitutional Area : Theory, Law and Politics in Hungary and Romania* (1 edn, Hart/Beck 2015) 200.

³⁴⁴ *C-235/17 Opinion of the Advocate General ØE in European Commission v Hungary para 67, 68.*

It should be recalled, that Article 51 of the Charter states that the provision of the Charter applies to Member States ‘only when they are *implementing* Union law’.³⁴⁵ The official explanations annexed to the Charter confirmed the existing case law of the CJEU in explaining that the requirement to respect fundamental rights ‘is only binding on the Member States when they act *in the scope of Union law*’.³⁴⁶ The judgement of the CJEU in *Åkerberg Fransson* clarified that the fundamental rights guaranteed by the Charter must be observed where national legislation falls within the scope of EU law.³⁴⁷ The court held therein that applicability of EU law entails applicability of the fundamental rights guaranteed by the Charter.³⁴⁸ *Åkerberg Fransson*, however, did not concern an infringement of the freedoms of movement, but national legislation implementing EU legislation on VAT and Article 325 TFEU.³⁴⁹

The freedoms of movement were addressed one year later in the judgment of *Pfleger and Others*.³⁵⁰ The enforcement of Austrian restrictions on gambling machines has raised several questions concerning the compliance of that law with the freedom to provide services as well as with Articles 15 to 17 of the Charter.³⁵¹ The CJEU held therein that ‘the use by a Member State of exceptions provided for by EU law in order to justify an obstruction of a fundamental freedom guaranteed by the Treaty must, therefore, be regarded, [...], as ‘implementing [EU] law’ within the meaning of Article 51(1) of the Charter’.³⁵² The Advocate General Sharpston in paragraph 46 of her Opinion in *Pfleger and Others*³⁵³ also held, that when a Member State puts in place a derogation from a fundamental freedom, this must be regarded as ‘implementing Union law’ within the meaning of Article 51 of the Charter with the consequence that the Charter applies.³⁵⁴ The Advocate General Sharpston in her Opinion in *Pfleger and Others* in paragraphs 63 to 70 as well as the CJEU in paragraphs 57 to 60 of its judgement in *Pfleger and Others* examined the existence of an infringement of Articles 15 to 17 of the Charter *independently* of whether there had been a breach of the freedom to provide services.³⁵⁵

³⁴⁵ Charter of Fundamental Rights of the European Union [2012] OJ C 326/02 Article 51(1).

³⁴⁶ Explanations Relating to the Charter of Fundamental Rights [2007] OJ C 303 Explanation on Article 51 - Field of application.

³⁴⁷ C-617/10 *Åklagaren v Hans Åkerberg Fransson para 21*.

³⁴⁸ Ibid para 21.

³⁴⁹ Ibid para 27.

³⁵⁰ C-390/12 *Pfleger and Others*.

³⁵¹ Ibid paras 9, 19; Steve Peers, ‘Applying the EU Charter of Rights to Member States’ internal market derogations’ (*EU Law Analysis*, 30 April 2014) <<http://eulawanalysis.blogspot.com/2014/04/applying-eu-charter-of-rights-to-member.html>> accessed 30 April 2019.

³⁵² C-390/12 *Pfleger and Others para 36*.

³⁵³ C-390/12 *Opinion of the Advocate General Sharpston in Robert Pfleger, Autoart as, Mladen Vucicevic, Maroxx Software GmbH, Ing. Hans-Jörg Zehetner* ECLI:EU:C:2013:747.

³⁵⁴ Ibid para 46.

³⁵⁵ Ibid paras 63-70; C-390/12 *Pfleger and Others paras 57-60*; *Joined cases C-52/16 and C-113/16 Opinion of the Advocate General ØE in SEGRO and Horváth para 141*.

It is precisely this case that allows for a broad interpretation of the ERT jurisprudence and thus of Article 51(1) of the Charter, which could justify an autonomous application of the Charter in this case.³⁵⁶ Even the Advocate General Øe cannot without any doubt establish, that such an interpretation is precluded by Article 51 of the Charter,³⁵⁷ it is therefore, that the CJEU should be able to examine an infringement of the Charter independently from a breach of the freedoms of movement.

3.4.2.3 Reasons why the CJEU should build on this case-law

As the Advocate General cannot completely rule out the possibility for a broad interpretation of the ERT jurisprudence, he puts forward three considerations which in his view should require the CJEU not to go beyond the ERT case law (as interpreted by him). In the following, these arguments shall be considered, and counterarguments put forward to prove why the CJEU should follow the request by the Commission, and thus make the Charter a significant legal instrument in the Commission's infringement policy.

First, the Advocate General recalls that, in the EU legal order, respect for the division of competences between the EU and the Member States is as important an aspect of the rule of law as the promotion of a fundamental rights policy.³⁵⁸ This concerns the legitimacy of the intervention of the CJEU in the sphere of national policy in accordance with fundamental rights, the preservation of which it must safeguard.³⁵⁹ He finds that a fair allocation of competences would be disturbed if the CJEU would have jurisdiction to rule independently on the compatibility of the national legislation concerned with each of the fundamental rights, where the Member States do not derive their competence from EU law, and EU law does not determine their exercise.³⁶⁰ Consequently, a broad interpretation of the ERT jurisprudence would excessively restrict the competence of Member States to carry out their national policy decisions.³⁶¹

While the argumentation that the Advocate General has put forward, is well reasoned, I nevertheless consider that an application of the Charter in the way the Commission wants would not disturb the allocation of competences. As a starting point, one should recall that market integration, while being an area of negative harmonisation, constituted the primary goal of the

³⁵⁶ *Joined cases C-52/16 and C-113/16 Opinion of the Advocate General ØE in SEGRO and Horváth* para 140.

³⁵⁷ *C-235/17 Opinion of the Advocate General ØE in European Commission v Hungary*.

³⁵⁸ *Ibid* para 101.

³⁵⁹ *Ibid* para 101.

³⁶⁰ *Ibid* para 102.

³⁶¹ *Ibid* para 102.

EU since the Treaty of Rome.³⁶² Today the goal of the EU to establish an internal market is enshrined in Article 3(3) TEU,³⁶³ and the freedoms of movement, are the means to achieve this end.³⁶⁴ It is, therefore, that the freedoms of movement occupy a ‘privileged constitutional position’ in the EU legal order.³⁶⁵ Furthermore, the freedoms of movement are based upon norms of the Treaties, thus it follows therefrom that a derogation from the freedoms of movement must be based upon norms of EU law as well.³⁶⁶ Hence, especially where the freedoms of movement are restricted, the EU should have strong policy and strong legitimacy to enforce compliance with fundamental rights. This is confirmed by the CJEU’s case law in *ERT* and *Pfleger and Others*, where the CJEU held that the Charter applies where a Member State puts in place a derogation from a fundamental freedom because only a national derogating measure that complies with those EU law criteria will be permissible.³⁶⁷ Since the national measure at issue derogates from the freedom of capital as well as the freedom of establishment, it falls within the scope of EU law and consequently the Charter is applicable. This interpretation would further be coherent with the findings of Spaventa and Mătușescu, who indicated that the CJEU’s case law shows that a connection to the internal market leads to a strong application of fundamental rights by the CJEU.³⁶⁸ The underlying reasons for a strong application of fundamental rights in the area of the internal market might be, that such an approach limits the risk of a ‘political back-lash’ as the EU would be acting in an area of its core activities instead of intervening in an area where Member States retained competences and which are closer to their national constitutional identity.³⁶⁹ Thus, it follows that there are no issues with the division of competences between the EU and the Member States in the situation at hand as freedoms of movement maintain a ‘privileged constitutional position’ in the EU legal order where the EU has strong legitimacy.

³⁶² Ferdinand Wollenschlager, ‘A New Fundamental Freedom beyond Market Integration: Union Citizenship and its Dynamics for Shifting the Economic Paradigm of European Integration’ (2011) 17 *European Law Journal* 1 3.

³⁶³ Consolidated version of the Treaty on European Union [2012] OJ C 326/01 Article 3 (3).

³⁶⁴ Consolidated version of the Treaty on the Functioning of the European Union [2012] OJ C 326/01 Article 26; Francesco de Cecco, ‘Fundamental Freedoms, Fundamental Rights, and the Scope of Free Movement Law’ (2014) 15 *German Law Journal* 383 2.

³⁶⁵ Sarmiento, ‘Who’s afraid of the charter? The court of justice, national courts and the new framework of fundamental rights protection in Europe’ 1297.

³⁶⁶ Christoffer C. Eriksen and Jørgen A. Stubberud, *Legitimacy and the charter of fundamental rights post-lisbon* (T.M.C. Asser Press 2017).

³⁶⁷ *C-260/89 ERT*; *C-390/12 Pfleger and Others*; *C-390/12 Opinion of the Advocate General Sharpston in Pfleger and Others*.

³⁶⁸ Spaventa, *The interpretation of Article 51 of the EU Charter of Fundamental Rights : the dilemma of stricter or broader application of the Charter to national measures* 24; Mătușescu, ‘The Scope of Application of the Charter of Fundamental Rights guaranteed by European Union law on Member States. Some Jurisprudential Landmarks’ 36.

³⁶⁹ See for this line of argumentation also Mark Dawson and Elise Muir, ‘Hungary and the Indirect Protection of EU Fundamental Rights and the Rule of Law’ (2013) 14 *German Law Journal* 1959 1969.

Second, the Advocate General argues that following the plea of the Commission would breach the principle of conferral, as such an interpretation would not only be contrary to the wording but even more so to the logic behind the adoption of Article 51(1) of the Charter in the first place.³⁷⁰

As was already discussed before, the interpretation of the scope of application of the Charter by the CJEU in the case of *Åkerberg Fransson* and *Pfleger and Others* are clear in their language stating that ‘implementing’ Union law as required under Article 51(1) of the Charter has to be interpreted broadly so that it include measures ‘derogating’ from Union law. Thus, instead of reiterating the legal foundations for this view again, it shall be illustrated by example, why this application does not breach the principle of conferral.

First, we shall recall that Article 51(1) of the Charter was included, to prevent fundamental rights to apply as a ‘federal standard’ meaning irrespective of whether they fall within the scope of EU law.³⁷¹ It would, therefore, be a breach of the principle of conferral if fundamental rights would be applied in situations that fall outside the scope of application of the Charter. Such a situation would be established if fundamental rights would be applicable in *C-619/18 Commission v Poland*, but not if applied in the case of *C-235/17 Commission v Hungary*. The crucial difference, in these cases, is the area in which the national measure is applied. The former measure, lowering the retirement age of the Supreme Court judges, is falling in the area of national procedural autonomy where Member States retained competences, while the latter measure, terminating ‘usufruct rights’, is falling in the area of the internal market, where the exercise of national legislative powers is restricted substantively as the market freedoms are inherently deregulatory (meaning that the CJEU has the competence to ultimately decide on the legitimacy of the measure, in so far as the measure falls within the scope of the market freedoms).³⁷² It follows therefrom that, on the one hand, where the EU has not been conferred competences or has not used its competence the national measure will not ‘implement’ or ‘derogate’ from EU law, this is the case under the first situation in *C-619/18 Commission v Poland*, on the other hand, where the EU has been conferred competence and used this competence (even if such a competence is enacted through negative harmonisation) the national measure will be ‘implementing’ or ‘derogating’ from EU law, as in the case *C - 235/17 Commission v Hungary*. Thus, applying the Charter in *C-619/18 Commission v Poland* would indeed breach the principle of conferral, as this is an area where Member States retained their

³⁷⁰ *C-235/17 Opinion of the Advocate General ØE in European Commission v Hungary paras 105-107.*

³⁷¹ Groussot, Pech and Petursson, ‘The Scope of Application of EU Fundamental Rights on Member States’ Action: In Search of Certainty in EU Adjudication’ 16.

³⁷² Pedro author Caro de Sousa, *Restricting Free Movement Rights—Unpacking the Normative Foundations* (Oxford University Press 2015) 120.

competence and the national measure, therefore, does neither 'implement' nor 'derogate' from EU law. Article 19(1)(2) TEU, the obligation of the Member States to provide effective judicial protection, only provides a limited link to EU law, a national measure cannot be regarded to derogate or implement EU law within this context, thus applying the Charter in such cases would extend the scope of application of the Charter. This would circumvent the limits of the scope of application of the Charter and Article 19(1)(2) TEU would thus act as 'subterfuge'. In contrast, where like in *C-235/17 Commission v Hungary* the national measure interferes with the market freedoms, which act as a negative competence rule of the EU, the national measure which is interfering with the freedoms of movement will always be (legally or illegally) derogating from EU law and thus fall 'within the scope of EU law'.³⁷³ This approach does therefore not extend the applicability of the Charter in any way to cover situations that would otherwise fall outside the scope of EU law. It follows that there is no issue in regard to the principle of conferral. Furthermore, this also shows why the recommendations in regard to the applicability of fundamental rights in *C-619/18 Commission v Poland* and *C-235/17 Commission v Hungary* are not conflicting but instead in alignment.

Third, the Advocate General considers that the CJEU is not a fundamental rights court like the national constitutional courts or the ECtHR and that it, unlike those courts, does not have a specific mandate to sanction possible breaches by Member States of fundamental rights and that fundamental rights are protected through this multi-layered system.³⁷⁴ Moreover, he finds that it should not be the task of the CJEU to intervene in a case of 'derogation' if this is not necessary to resolve the issue of freedoms of movement and to ensure the unity and effectiveness of EU law.³⁷⁵

It should be recalled that *fundamental rights*, the *rule of law* and *democracy* are the common principles on which the European Union is founded.³⁷⁶ As can be seen from the developments of the fundamental rights protection in the EU, its importance in the EU legal order has increased over time.³⁷⁷ The Treaty of Lisbon now provides the strongest fundamental right mandate so far, establishing that fundamental rights are primary law and making them more visible through enshrining them in the Charter.³⁷⁸ Building on this strong legal basis of

³⁷³ Ibid 121; see in regard to why derogating from fundamental freedoms is a form of "implementing" EU law Eriksen and Stubberud, *Legitimacy and the charter of fundamental rights post-lisbon* 240.

³⁷⁴ *C-235/17 Opinion of the Advocate General ØE in European Commission v Hungary paras 108-111.*

³⁷⁵ Ibid para 110.

³⁷⁶ Bárd and others, *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* 1; Kochenov, 'The Acquis and Its Principles' 9.

³⁷⁷ See in this regard chapter 3.2.

³⁷⁸ Dawson and Muir, 'Hungary and the Indirect Protection of EU Fundamental Rights and the Rule of Law' 1979.

fundamental rights protection for EU citizens the CJEU already confirmed, in preliminary reference proceedings, that the Charter can be a basis to find infringements, even in areas with a weak connection to EU law.³⁷⁹ It would, therefore, be peculiar if the CJEU would apply a different standard, just because the procedure is brought by the Commission in infringement proceedings.³⁸⁰ This argument of the Advocate General is one of politics and policy rather than a question of law and should for these reasons be disregarded.

3.4.3 Possible implications

So far, it has been argued, that the CJEU should not follow the Opinion of the Advocate General instead it should follow the request of the Commission and apply a separate assessment of whether Hungary has breached its obligations solely under the Charter. Next, it shall be addressed why such a separate assessment is important.

It shall be recalled that the Advocate General has argued that a separate assessment of Article 15, 16 and 17 of the Charter, in this case, is unnecessary.³⁸¹ This view is based on the fact that, on the one hand, the content of the rights and the interests protected under Articles 15, 16 and 17 of the Charter are the same as under the content of the freedoms of movement, and, on the other hand, that the finding of a breach of Article 17 of the Charter would have no added value neither for the citizens in liability actions nor for the Commission in future proceedings.³⁸² Similar arguments were also raised by Łazowski, who even argued that this lack of added value of the Charter (other than a possible higher choice of coefficient regarding the financial penalty of a breach) in infringement proceedings could be a reason why the Commission has not used the Charter in such proceedings.³⁸³

In contrast, the Commission considers that an examination of the laws of the Member States with regard to the Charter in cases such as the present one is necessary, in order to ensure respect for the rule of law in those States.³⁸⁴ In agreement with the Commission, it is argued that finding an infringement not only based on the freedom of capital but also on Article 17 of the Charter makes an important difference when the case is portrayed in light of the rule of law. The importance of this finding of an infringement, therefore, does not lie with the secondary

³⁷⁹ Daniel Sarmiento, 'The Year of the Infringement' (*Despite our Differences*, 10 January 2019) <<https://despiteourdifferencesblog.wordpress.com/>> accessed 7 May 2019.

³⁸⁰ See in this regard *ibid*; C-484/14 *Tobias Mc Fadden v Sony Music Entertainment Germany GmbH* ECLI:EU:C:2016:689 especially para 81 and 82.

³⁸¹ C-235/17 *Opinion of the Advocate General ØE in European Commission v Hungary para 113*.

³⁸² *Ibid* paras 114-127.

³⁸³ Łazowski, 'Decoding a Legal Enigma: The Charter of Fundamental Rights of the European Union and infringement proceedings' 585.

³⁸⁴ C-235/17 *Opinion of the Advocate General ØE in European Commission v Hungary para 99*.

issue of property rights which are, as the Advocate General points out correctly, similar in content and interest with the freedom of capital, but instead lies with the arbitrary exercise of power of the State (arbitrary removing of property rights) which adversely affects two principles that define the core meaning of the rule of law: legal certainty and legality.³⁸⁵ Addressing the concerns with the rule of law and thus applying a systemic approach to the rule of law, would not only be in line with the CJEU's previous approach in *Associação Sindical dos Juizes Portugueses* but moreover ensure that Member States compliance with fundamental rights, which is of essence of the rule of law, can be enforced in infringement proceedings.³⁸⁶ Moreover, the case *C-235/17 Commission v Hungary* thus not only provide the CJEU with the opportunity to address its concerns directly with the rule of law in Hungary (in other areas than the judicial independence) but also make the rule of law a more visible and more enforceable value in the EU legal order. This would further strengthen the legitimacy in the rule of law oversight in the EU, as the interference has a well-founded legal basis in the Treaties through Article 6 TEU which would in turn strengthen the credibility of the EU as it demonstrates that *fundamental rights, the rule of law and democracy* are not only empty phrases but that the Union actively 'contributes to the preservation and to the development of these common values'.³⁸⁷ Nevertheless, it shall be pointed out that the CJEU must strike the right balance between its activism and respect for the limits of its conferred competence in order to avoid opening itself up to attacks by national governments claiming that the CJEU is acting without legitimacy. This case, however, has the potential to strengthen the rule of law and infringement proceedings in a balanced and fair manner. As shown above, it also lies within the conferred competences of the CJEU and could make the Charter a significant legal instrument in the Commission's infringement policy in enforcing rule of law oversight.³⁸⁸

The Commission has shown a high level of political will in this regard, as it has insisted that the CJEU should not only consider the question of a breach of a fundamental freedom but also to engage with the question whether the Charter is applicable and thus to make this case one concerned with the rule of law instead of only the freedoms of movement shifting the focus to the bigger picture.³⁸⁹ This approach would be remarkable as it would breathe new life in the infringement procedure, as it might provide solutions to overcome challenges encountered

³⁸⁵ Lisa M. Austin, 'Property and the rule of law' (2014) 20 *Legal Theory* 79 especially 83, 84; Groussot and Lindholm, 'General Principles: Taking Rights Seriously and Waving the Rule-of-Law Stick in the European Union' 29.

³⁸⁶ See in this regard Groussot and Lindholm, 'General Principles: Taking Rights Seriously and Waving the Rule-of-Law Stick in the European Union' 29.

³⁸⁷ In allusion to the preamble of the Charter of Fundamental Rights of the European Union [2012] OJ C 326/02.

³⁸⁸ For a similar view see Groussot and Lindholm, 'General Principles: Taking Rights Seriously and Waving the Rule-of-Law Stick in the European Union' 29.

³⁸⁹ *C-235/17 Opinion of the Advocate General ØE in European Commission v Hungary paras 64, 99.*

during the past years in the rule of law enforcement. While this is the first time that the Commission has pursued such an approach, it will not be the last as the Commission has already brought two more cases adopting the same approach.³⁹⁰ If the CJEU follows the argumentation of the Commission, the infringement procedure can deploy its full strength in the fight against measures breaching the rule of law that lie outside the independence of the judiciary. Such an approach can thus provide for an effective infringement proceeding, where the national measure does not only infringe on freedoms of movement but moreover show systematic actions infringing the rule of law. If the Commission and the CJEU join forces and stringently apply creative, but well-balanced approaches of the infringement procedure such as the one identified here as well as the approach identified in the previous chapter; Article 258 TFEU can become an effective measure to enforce the rule of law not only in Poland but also in Hungary.

Whether the CJEU has found and applied such a well-balanced approach shall be addressed next, as the CJEU has delivered its judgement in case *C-235/17 Commission v Hungary* on 21st of May 2019.³⁹¹

3.4.4 The Judgment of the CJEU in *C-235/17 Commission v Hungary*

The CJEU sitting in Grand Chamber found in its judgement in *C-235/17 Commission v Hungary* that Hungary, by adopting Paragraph 108(1) of the 2013 Law on transitional measures and thereby cancelling usufructuary rights previously created over agricultural land in Hungary, as between persons who are not close members of the same family, has failed to fulfil its obligations, arising from the principle of the free movement of capital under Article 63 TFEU and the right to property guaranteed by Article 17 of the Charter.³⁹² Similar to the Advocate General the CJEU found the case to be admissible and that the conformity of the law does not need to be considered in regard to the freedom of establishment under Article 49 TFEU, as it is inextricably linked to the freedom of capital under Article 63 TFEU.³⁹³ In contrast to the Advocate General the CJEU, however, continued by first analysing the applicability of Article 63 TFEU and thus the existence of a restriction of the movement of capital before subsequently considering whether the restriction of the free movement of capital is justified and whether Article 17 of the Charter is applicable.³⁹⁴ In regard to whether Article 17 of the Charter is

³⁹⁰ See in this regard *Action brought on 1 February 2018 — C-66/18 European Commission v Hungary; Action brought on 1 June 2018 — C-78/18 European Commission v Hungary*.

³⁹¹ *C-235/17 European Commission v Hungary* ECLI:EU:C:2019:432.

³⁹² *Ibid* paras 130, 131.

³⁹³ *Ibid* paras 25-27, 51-53; in comparison with *C-235/17 Opinion of the Advocate General ØE in European Commission v Hungary* paras 48-54.

³⁹⁴ *C-235/17 European Commission v Hungary* paras 54 ff; in contrast to *C-235/17 Opinion of the Advocate General ØE in European Commission v Hungary* paras 41-55.

applicable, the CJEU first recalled with reference to *Åkerberg Fransson* that: ‘the fundamental rights guaranteed by the Charter are applicable in all situations governed by EU law and that they must, therefore, be complied with inter alia where national legislation falls within the scope of EU law’.³⁹⁵ After that, the CJEU held that national legislation falls within the scope of EU law also where a Member States wishes to justify, on grounds envisaged in Article 65 TFEU, a derogation from a fundamental freedom.³⁹⁶ The CJEU concluded therefrom, that where a Member State, just like Hungary in this case, seeks to justify a restriction of one or more freedoms of movement, ‘the compatibility of the contested provision with EU law must be examined in the light both of the exceptions thus provided for by the Treaty and the Court’s case-law, on the one hand, and of the fundamental rights guaranteed by the Charter, on the other hand’.³⁹⁷ In the remaining judgment, the CJEU finds that the cancellation of usufructuary rights constitutes a deprivation of property within the meaning of Article 17 of the Charter, and further that this deprivation of property cannot be justified in the absence of a public-interest ground and of any arrangements for compensation.³⁹⁸

Two conclusions can be drawn from this judgement. First, the implications of the judgement in *C-235/17 Commission v Hungary* are significant as the CJEU followed the request of the Commission to assess, under an infringement procedure, the compatibility of a national legislation with the Charter separately from the compatibility with a freedom of movement.³⁹⁹ Thus, the CJEU has taken another step towards more fundamental rights protection in Europe and thereby ensured that the Charter can become a significant legal instrument in the Commission’s infringement policy and its enforcement of fundamental rights. In order to achieve this result, the CJEU applied a broad interpretation of the ERT jurisprudence, in contrast to the Opinion of the Advocate General.⁴⁰⁰ Unfortunately, the CJEU has not given many reasons for applying the Charter in this instance other than restating its previous case law in *Åkerberg Fransson* and *ERT*.⁴⁰¹ However, as analysed above, it is precisely these judgments that justify a broad application of the Charter.⁴⁰² Therefore, as explained before,⁴⁰³ the approach is not extending the CJEU’s competences, and thus the CJEU should not fear attacks by national

³⁹⁵ *C-235/17 European Commission v Hungary para 63.*

³⁹⁶ *Ibid para 64.*

³⁹⁷ *Ibid para 66.*

³⁹⁸ *Ibid paras 67-129.*

³⁹⁹ *Ibid paras 59 ff.*

⁴⁰⁰ *Ibid paras 63-66.*

⁴⁰¹ *Ibid paras 63-66; in contrast to C-235/17 Opinion of the Advocate General ØE in European Commission v Hungary paras 77 ff.*

⁴⁰² See in this regard section 3.4.2.1 above.

⁴⁰³ See in this regard section 3.4.2.1.2 above.

governments, claiming that it is acting without legitimacy. As this decision, does not have the effect of ‘federalising’ fundamental rights in the EU.

Second, the CJEU, unfortunately, did not apply a systemic approach to the rule of law in this case and thus make the rule of law more visible, legitimate or enforceable. However, this judgement nevertheless strengthens Member States compliance with fundamental rights. Moreover, as stated above,⁴⁰⁴ the relationship between fundamental rights, the rule of law and democracy is triangular.⁴⁰⁵ Thus, there cannot be respect for the rule of law and democracy without respect for fundamental rights.⁴⁰⁶ Strengthening fundamental right enforcement is thus important also for the rule of law, but not as important as it would have been to address the real concern of the rule of law head-on. Nevertheless, this is only the first case in a series of actions that the Commission has launched.⁴⁰⁷ In this regard, it is still possible for the CJEU to develop a systemic approach to the rule of law in other cases, where it might consider it more applicable or necessary.

To conclude, this case has provided the Commission with a significant legal instrument that can be used to address and enforce breaches of fundamental rights: The Charter. This enhances not only the importance of fundamental rights in the EU legal order but also make it a valuable tool for the Commission to enforce the values enshrined in Article 2 TEU. It remains to be seen, how the CJEU and the Commission continue to use this new legal instrument and whether the CJEU will adhere to its previous thick and systemic approach of the rule of law in further cases.

⁴⁰⁴ See section 1.1 above.

⁴⁰⁵ Pech and others, *An EU mechanism on democracy, the rule of law and fundamental rights Annex I -An EU mechanism on democracy, the rule of law and fundamental rights* 22.

⁴⁰⁶ European Commission, *A new EU Framework to strengthen the Rule of Law* 4; *Joined Cases C-402/05 P and C-415/05 P Kadi* para. 316; *Stafford v United Kingdom* para 63.

⁴⁰⁷ See in this regard: *Action brought on 1 February 2018 — C-66/18 European Commission v Hungary*; *Action brought on 1 June 2018 — C-78/18 European Commission v Hungary*.

4 A NEW DAWN FOR THE INFRINGEMENT PROCEDURE?

This thesis has set out to explore whether there is a new dawn for the infringement procedure and thus more specifically whether the infringement procedure can be used effectively to enforce the rule of law in the Member States. In this regard, the thesis has identified and analysed two new developments in the Commissions application of the infringement procedure illustrated by one case each. To answer the aforementioned question first, the findings from the respective analyses shall be summarised and in a second step, the remaining obstacles and problems shall be identified. In the end, a conclusion shall be drawn as well as outlook and a recommendation for future actions be provided.

4.1 SUMMARY OF THE FINDINGS

Despite the effectiveness of the infringement procedure in thousands of cases, the procedure and the approach of the Commission has been subject to much criticism over the past years, as it was held to be ineffective when dealing with breaches of the rule of law, fundamental rights and other values enshrined in Article 2 TEU.⁴⁰⁸

However, the case of *C-619/18 Commission v Poland*, which has been analysed in the second chapter of this thesis exemplified, how the Commission could use infringement proceedings effectively to protect the national judiciary and thus ensure the separation of powers, which is essential for the rule of law.⁴⁰⁹ The judgement could be ground-breaking for the enforcement of the rule of law in many reasons, as it could clarify that the Commission can bring infringement proceedings under Article 258 TFEU even where Article 7(1) TEU has been initiated, that providing an effective judicial protection under Article 19(1)(2) TEU creates an obligation on Member States which can be enforced through infringement proceedings and that the organisation of the national judiciary is not a purely domestic matter which the Commission and the CJEU are eager to protect. In order to provide for an effective enforcement mechanism, it was found that a combined approach, of expedited procedure, interim measures in combination with Article 19(1)(2) TEU might be necessary as reinstating the national judiciary, after measures such as lowering the retirement of the judges can prove impossible. This approach is thus effective in the ‘rule of law crisis’ in Poland and Hungary, where the judiciary is under attack.

⁴⁰⁸ Blauberger and Kelemen, ‘Can courts rescue national democracy? Judicial safeguards against democratic backsliding in the EU’ 323.

⁴⁰⁹ On the importance of the Role of Courts for the rule of law and democracy see Susanne Baer, ‘The Rule of— and not by any—Law. On Constitutionalism’ (2018) 71 *Current Legal Problems* 335-358-360.

Moreover, the case *C-235/17 Commission v Hungary* exemplified, how the Commission's determination to ask the CJEU to rule on whether the national legislation is compatible with the Charter separately from the freedoms of movement transformed the Charter into a possibly significant legal instrument in the Commission's infringement policy. This is due to the fact that the CJEU by ruling that the Charter can be a sole ground for finding that a Member State has failed to fulfil its obligations under the Treaties makes fundamental rights, which are a valuable component of the rule of law, more visible, legitimate and enforceable. However, it has also shown how the case could have been transformed by the CJEU into a rule of law case, where a systemic understanding of the rule of law could have allowed the CJEU to directly address its concerns with the rule of law based on a legitimate legal basis which would have further strengthened the legitimacy in the rule of law oversight in the EU, as the interference has a well-founded legal basis in the Treaties through Article 6 TEU which would in turn strengthen the credibility of the EU as it demonstrates that fundamental rights, the rule of law and democracy are not only empty phrases but that the EU actively 'contributes to the preservation and to the development of these common values'⁴¹⁰.

To conclude, it has been shown that, if the Commission brings cases such as these to the CJEU, it could have very good chances to effectively determine that a Member State is breaching its obligations under the Treaties and thereby the rule of law or at least fundamental rights. A swift action, through the expedited procedure and interim measures, is, however, necessary in cases, where the measure concerned leads to actions that cannot be reversed, inter alia where the judiciary is concerned, and judges retired or dismissed. Nevertheless, three issues remain, that shall be highlighted, regarding the effectiveness of the procedure.

4.2 REMAINING OBSTACLES

The first is that the CJEU must not act outside its conferred competences. As while the activist approach by the CJEU as applied in *Associação Sindical dos Juizes Portugueses* is a positive development as the continuance of an independent judiciary can now be ensured through Article 19(1)(2) TEU which now provides a legal basis for the Commission to address concerns in regard to the rule of law, the CJEU must not act outside its competences and ensure that it is not conceived as a political actor. If it were to be regarded as a political actor, the CJEU would lose some of its legitimacy and authority, which in turn would hinder the effectiveness of ensuring the rule of law through infringement proceedings.⁴¹¹ This is because the acceptance

⁴¹⁰ In allusion to the preamble of the Charter of Fundamental Rights of the European Union [2012] OJ C 326/02.

⁴¹¹ Blauburger and Kelemen, 'Can courts rescue national democracy? Judicial safeguards against democratic backsliding in the EU' 331.

by Member States of the most activist and controversial actions by the CJEU depends on the perseverance of the CJEU as a non-political actor.⁴¹² However, so far, the CJEU has applied a balanced approach and it is shown that finding a breach in the analysed cases would not cause the CJEU to be perceived as a political actor. Therefore, a continuation of a well-balanced approach is anticipated.

The second issue that can be regarded as an obstacle to effective enforcement of the rule of law is inherent to the infringement procedure. The procedure under Article 258 and Article 259 TFEU can neither prevent a Member State from breaching EU law nor can it reinstate the situation that has maintained before the breach.⁴¹³ The CJEU can merely determine that a Member State has breached EU law and thus require the Member State to take the necessary measure to comply with its judgement.⁴¹⁴ However, where the Member State does not change the situation which caused the breach of EU law, the Commission can only ask the CJEU to financially sanction the Member State with, i.e. a lump sum or a periodic penalty under Article 260(2) TFEU.⁴¹⁵ Therefore the risk remains that the Member State does not comply with the CJEU's judgement where its national interest outweighs the economic pressure.⁴¹⁶ Furthermore, in some cases the original situation will not be reinstated, as in the case *C-286/12 Commission v Hungary*,⁴¹⁷ thus it is necessary for an effective enforcement of the rule of law to act quickly and ask for interim measures as well as an expedited procedure in order to prevent the measures to come into force, in order to prevent issues with the reinstatement of the situation. These additional measures thus help to make the infringement procedure under Article 258 TFEU more effective in the rule of law crisis, as shown above.

The last remaining obstacle in the enforcement of the rule of law is the Commission's discretion to decide whether to bring infringement proceedings or whether to postpone proceedings and use inter alia the Rule of law Framework in order to continue a dialogue with the Member State. This wide discretion of the Commission has previously been an issue as the Commission often postponed politically sensitive conflicts.⁴¹⁸ Effective enforcement of the rule of law through infringement proceedings, therefore, depends to a large extent on the

⁴¹² Ibid 331.

⁴¹³ Roxana-Mariana Popescu, 'General Aspects of the Infringement Procedure' (2010) 17 *Lex ET Scientia International Journal* 59, 66.

⁴¹⁴ Ibid 66.

⁴¹⁵ Werner Vandenbruwaene, Patricia Popelier and Christine Janssens, 'Article 260 TFEU Sanctions in Multi-Tiered Member States' (2015) 7 *Perspectives on Federalism* 133, 135, 138.

⁴¹⁶ Brian Jack, 'Article 260(2) TFEU: An Effective Judicial Procedure for the Enforcement of Judgements?' (2013) 19 *European Law Journal* 404, 413.

⁴¹⁷ Kochenov and Pech, 'Upholding the Rule of Law in the EU: On the Commission's 'Pre-Article 7 Procedure' as a Timid Step in the Right Direction' 4.

⁴¹⁸ Blauburger and Kelemen, 'Can courts rescue national democracy? Judicial safeguards against democratic backsliding in the EU' 323.

Commissions will to bring a case to the CJEU. However, the Commission has stated in its Communication ‘EU law: Better results through better application’ that it will apply a more ‘strategic approach to enforcement in terms of handling infringements’.⁴¹⁹ Priority shall, therefore, be on ‘infringements that reveal systemic weaknesses which undermine the functioning of the EU's institutional framework’.⁴²⁰ Thus, it seems that at least the Juncker Commission is willing to bring infringement proceedings when the judiciary or the rule of law is affected.⁴²¹ If the Commission does apply, the approach that was outlined in the Commissions Communication, which can be reasonably assumed, due to the cases brought by the Commission so far, there should not be an issue regarding the effectiveness in the enforcement of the rule of law.

4.3 CONCLUSION AND OUTLOOK

The infringement procedure is the traditional and the best-explored enforcement mechanism.⁴²² Nevertheless, some possible applications have not been explored until now. This is why, many Commentators concluded that the infringement procedure is ineffective to enforce the rule of law in Europe.

However, it was shown that, on the one hand, the Commission should be able to address the most controversial provisions of Hungary and Poland regarding the judiciary through infringement proceedings (as exemplified by *C-619/18 Commission v Poland*), and that on the other hand the Charter could become a significant legal instrument in the Commission’s infringement policy towards Member States that are undermining fundamental rights and the rule of law (as exemplified by *C-235/17 Commission v Hungary*). Therefore, the infringement procedure is and remains an effective enforcement mechanism which provides a solution to existing problems, even in the ‘rule of law crisis’. But its effectiveness depends more than ever on the Commission’s willingness to continue bringing unprecedented proceedings and the CJEU’s ability to give well-balanced and legally well-founded judgements. This is why it is very unfortunate that the time of the Juncker Commission comes to an end now, as this Commission found new ways to use the infringement procedure in the ‘rule of law crisis’ which was also made priority. Following the elections of the European parliament, the parliament will soon elect a new president of the Commission. The choice of the new president of the Commission will be very important as this influences how effective and progressively the

⁴¹⁹ European Commission, *EU law: Better results through better application*.

⁴²⁰ *Ibid.*

⁴²¹ *Ibid.*

⁴²² Blauburger and Kelemen, ‘Can courts rescue national democracy? Judicial safeguards against democratic backsliding in the EU’ 323.

infringement procedure will be used and what priority the 'rule of law crisis' will have in the enforcement strategy. This is why in the short run the new developments of the use of the infringement procedure by the Commission can be, as was shown above, very effective in the enforcement of the rule of law in Europe, but in the long run the 'rule of law crisis' should not only be ensured by the CJEU, due to the danger of politicization of the court and dependency on the Commissions policy, but through the provided political procedure under Article 7(2) and (3) TEU. The latter, however, will either require a Treaty amendment or another controversial judgment of the CJEU holding, that 'the fellow-traveller veto' cannot apply in situations where Article 7(1) TEU is invoked against both Member States.⁴²³

⁴²³ As argued by e.g. Scheppele, 'Can Poland be Sanctioned by the EU? Not Unless Hungary is Sanctioned Too'; Konchev, Pech and Scheppele, 'The European Commission's Activation of Article 7: Better Late than Never?'

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