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‘Guardian of the Rule of Law’

Effective enforcement of EU values through the rule of law framework

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Contents

Summary

Different EU institutions have handled the rule of law-crisis in different ways, with strong academic criticism towards the Commission regarding that they should have a more systematic and aggressive approach in their Article 258 TFEU procedures. Through an analysis of the different procedures available in Article 7 TEU, Article 258, 259 and 267 TFEU it is researched how effective these procedures are when examined together with a theory of effectiveness, for the purpose of upholding the fundamental principles and values in Article 2 TEU and enforce these.

The research shows that the Article 7 TEU procedure will not lead to sanctioning of the Member States violating the Unions fundamental principles and values, due to that the procedure is in principle impossible to enforce since it requires an unanimity vote in the European Council.

Through studying relevant case law to Article 258 and 267 TFEU it becomes apparent that the Commission has used a more effective and systematic approach in their Article 258 TFEU procedures and that the CJEU is willing to rule in favour for the enforcement of the fundamental principles, both when it is the Commission that launches a case and when a Member State refers questions to the CJEU in a preliminary ruling. The effectiveness of these procedures is however subject to political influence from both the Commission and the CJEU.

Article 259 TFEU could be a procedure deemed effective to uphold the fundamental principles, but it will take a strong will from the Member States to not rely on the Commission but rather launch their own procedures.

Sammanfattning

Olika EU-institutioner har hanterat den rådande rule of law-krisen (rättsstatsprincipen) på olika sätt, med stark akademisk kritik riktad mot EU-kommissionen att de ska använda ett mer systematiskt och aggressivt tillvägagångssätt i deras artikel 258 FEUF-förfarande. Genom en genomgång av de olika förfarandena som finns tillgängliga i artikel 7 FEU, artikel 258, 259 samt 267 FEUF så undersöks det hur effektiva dessa är utifrån en effektivitetsteori för att upprätthålla de fundamentala principerna och värdena i artikel 2 FEU och att verkställa dessa.

Undersökningen visar att förfarandet i artikel 7 FEU inte kommer leda till att de medlemsstater som bryter mot EU:s grundläggande principer sanktioneras, på grund av att förfarandet i princip är omöjligt att realisera nä kravet på full majoritet måste finnas i det Europeiska rådet.

Genom att studera tillhörande rättspraxis till artikel 258 och 267 FEUF-förfarandena så blir det klart att EU-kommissionen har använt sig av ett mer effektivt och systematiskt sätt att driva sina artikel 258 FEUF-förfaranden och att EU-domstolen uppmanar till att sådana fall hänvisas till dem och att de är villiga att döma till fördel för verkställande av de fundamentala principerna, både när det är EU-kommissionen som driver fallet och när medlemsstater hänvisar frågor till EU-domstolen. Effektiviteten av dessa förfaranden är dock föremål för politiskt inflytande från både EU-kommissionens och EU-domstolens sida.

Gällande artikel 259 FEUF så är det ett förfarande som skulle kunna visa sig vara effektivt, men att det där kommer krävas en stark vilja från medlemsstaternas sida att inte förlita sig på EU-kommissionen utan istället driva sina egna förfaranden.

Preface

In concluding this thesis, two expressions of gratitude are in order.

First, to my supervisor Xavier Groussot, for his valuable recommendations.

Second, to my mother and my aunt Siv, for convincing me to pursue law and helping me along the way.

Agnes Magnusson Folkesson
Lund, 25 May 2021

Abbreviations

AG	Advocate general
ASJP	Associação Sindical dos Juízes Portugueses
CJEU, Court	Court of Justice of the European Union
Commission	European Commission
Council	European Council
EU, Union	European Union
Parliament	European Parliament
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union

1 Introduction

1.1 Background

The EU is experiencing, for a number of years now, a 'democratic backsliding' with its Member States. Rapid changes in Hungary and Poland that threatens judicial independence, and therefore the rule of law, are violations which have led the European Commission (hereafter referred to as the Commission) to trigger the Article 7 TEU procedure in 2017 and 2018 against Poland and Hungary.[1] Considering that the Article 7 TEU procedure is the EU's 'last resort' sanction and has been described as their 'nuclear option'[2], it does not seem to be effective enough to prevent the Member States from their continuances of violations.

Even though the violations made by the concerning Member States are targeting the fundamental principles of the EU, the values enshrined in Article 2 TEU, it has been the case that the Commission does not initiate infringement procedures against these Member States based on these values they are violating, but rather the Commission base their infringement procedure on specific EU provisions that has been violated, and therefore does not get to the core of the problem.[3] This 'old' way of seeing the enforceable status of Article 2 TEU has been changed through recent case law, starting with the *ASJP* case in 2018.[4]

In this thesis I will explore the mechanisms and tools the EU has at hand to enforce the values enshrined in Article 2 TEU. These include the procedures which are commonly associated with rule of law and the rest of the Article 2 TEU values, such as the Article 7 TEU procedure and EU's rule of law framework, but it also includes the 'classic infringement procedures' in Article 258 and 259 TFEU. Scholars have in the past few years introduced a new way of thinking regarding the usage of the classic infringement procedures as possible candidates to 'solve' the fundamental principles crisis in the EU.

The proposal involves that the Commission through Article 258 TFEU and a

[1] 'European Parliament resolution of 12 September 2018 on a proposal calling on the Council to determine, pursuant to Article 7(1) of the Treaty on European Union, the existence of a clear risk of a serious breach by Hungary of the values on which the Union is founded' (2017/2131(INL); '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/2017/0835 final - 2017/0360 (NLE).
[2] Dimitry Kochenov 'Busting the myths nuclear: A commentary on Article 7 TEU' (European University Institute Working Paper LAW 2017/10) p.2.
[3] Kim Lane Scheppele 'Constitutional Coups in EU Law', Maurice Adams, Anne Meuwese & Ernst Hirsch Ballin (eds.) *Constitutionalism and the Rule of Law: Bridging Idealism and Realism* (Cambridge University Press, 2017) p.468.
[4] Case C-64/16 *Associação Sindical dos Juízes Portugueses v Tribunal de Contas* [2018] ECLI:EU:C:2018:117.

Member State or a group of Member States through Article 259 TFEU deploy the infringement procedure in a more systematic way, addressing a group of violations in the same infringement proceeding, and relating these to the fundamental principles of EU law.[5] By basing an infringement procedure on the assessment of several infringements, and showing a pattern of violations of the values by a Member State, could be considered a systematic infringement by that Member State and could then require supranational intervention.[6]

1.2 Research questions and theory

My aim for this thesis is to explore the possible ways of enforcing the rule of law principle in the EU and whether or not these ways are effective to uphold the rule of law, and to highlight the different EU actors whose responsibility and/or opportunity it is to do this.

My focus will be on the tools identified within the EU's rule of law framework which eventually can lead to sanctions. These mechanisms are the Article 7 TEU procedure and the classical infringement procedures in Article 258 and 259 TFEU.

To be able to problematise and deepen the discussion, I will also include a chapter about the preliminary reference procedure in Article 267 TFEU. The purpose of this research being to see if the Commission is the best fit for guardian of the rule of law, or if this title should belong to the Court of Justice of the European Union (hereafter referred to as CJEU), considering that the Commission has full discretion when it comes to the infringement procedure in Article 258 TFEU, which has led to criticism regarding the Commissions political nature.

The research questions will be the following:

- Can the values in Article 2 TEU be enforceable through other means than Article 7 TEU, and is Article 7 TEU an effective way of enforcing these?

- Is the Article 258 TFEU procedure an effective tool to enforce the rule of law in Article 2 TEU and is the Commission the right institution to do this, or is the CJEU more suitable?

- Is the infringement procedure in Article 259 TFEU an effective enforcement tool for the rule of law in Article 2 TEU?

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[5] Kim Lane Scheppele, Dimitry Kochenov & Barara Grabowska-Moroz, 'EU Values Are Law after All: Enforcing EU Values through Systematic Infringement Actions by the European Commission and the Member States of the European Union' (Yearbook of European Law, Vol. 39, 2020, pp.1-121) p.18.

[6] ibid, p.9; Kim Lane Scheppele 'Constitutional Coups in EU Law', Maurice Adams, Anne Meuwese & Ernst Hirsch Ballin (eds.) *Constitutionalism and the Rule of Law: Bridging Idealism and Realism* (Cambridge University Press, 2017) p.468.

As my research questions implied, I will study the effectiveness of the rule of law mechanisms the EU currently has available, as well as the suggested way of using them. When studying effectiveness of law, it is first important to understand what I mean by the term and its intended use in this thesis.

When studying legal effectiveness there are two different notions or problems that comes up. The first being whether the law itself is designed in a way that will achieve the desired goals, and the second being whether or not the process of enforcing the law is effective. Enforcement in this context means the enforcement carried out by police, courts and prisons.[7] Bearing that in mind, the first notion of describing the effectiveness of law is more suitable for this thesis, since I will explore if the actual design of these enforcement procedures is effective.

Aleksander Peczenik, in an attempt to describe the main tasks of a common juristic theory of law, described two values that are commonly shared and accepted by jurist, one being the efficiency of law.[8]

Peczenik has formulated a general hypothesis of an efficient normative order:

> A very efficacious normative order must consist of not too many, rather general norms, must be interpreted rather according to the so-called juristic logic, not according to free evaluations made by judges, must contain relatively few gaps and inconsistencies, and must not be too often changed.[9]

While Peczenik talks about the adoption of law in a given society to prevail the value judgement in that given society, and how a legal order in itself can be efficient, I think his method still could be applied analogically to independent provisions of law.[10]

Peczenik talks about the efficiency of law, while I use the term effectiveness. I believe that when Peczenik talks about efficacious norms he means the way these norms are organized to eventually lead to effective results. I believe that the words coexist, efficient norms leading to the favoured results and thus being effective.

1.3 Methodology, methods and material

Methodology is something different than method. The research method is in what way the research project is pursued and how the author answers their

[7] Gordon Tullock 'Two Kinds of Legal Efficiency' (Hofstra Law Review, Vol. 8, Iss. 3, Article 8, 1980) p.659.
[8] Aleksander Peczenik, *Essays in Legal Theory* (New Social Science Monographs, Vol. 4, 1970) p.173.
[9] ibid, p.174.
[10] ibid, pp.173-174.

questions. Methodology is the system of methods applicable in the field of the research project, in my case the methodology is EU law, and what EU law is understood to be. The methodology used will thus be the analysis of the texts produced by the EU law institutions.[11]

The legal dogmatic theory is best described as the 'method' of solving a law-oriented question by applying a rule of law from the generally accepted sources of law. These sources are typically found in the legislation, jurisprudence and the legislative work. For more in-depth analysis, it is typical to seek guidance and answers in legal academic literature.[12]

Since the legal dogmatic theory is the usage of the relevant legal sources, it is best fitted for problem-based research where specific question about a rule of law is answered.[13]

Since different countries has different relevant law sources, it is of course important to specify the meaning of the legal dogmatic theory in EU law.

The European legal method could be described as the EU's legal sources and these sources legal status, and the CJEU's different methods of interpreting these legal sources and applying them.[14]

The relevant sources first and foremost are EU's primary law and secondary law. Primary law in the EU is the EU Treaties, the Treaty on the European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU). To primary law also includes the Charter of Fundamental Rights of the European Union (hereafter referred to as the Charter), which enjoy the same legal value as the Treaties as stated in Article 6(1) TEU. Secondary law are the bodies of law that derives from the treaties. These are directives, decisions, regulation, recommendations and opinions.

Following that is the jurisprudence created by the CJEU, as well as the European Court of Human Rights in those cases where human rights principles overlap in accordance with Article 52(3) of the Charter.

The CJEU is using a somewhat free and purpose driven interpretation method. EU laws should always be interpreted within their context using a systematic method of interpretation and also should to a high degree be interpreted in light of their purpose or intended purpose. When the CJEU is interpreting EU law it thus does so in light of the rule's context and purpose,

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[11] Tamara Hervey, Rob Cryer & Bal Sokhi-Bulley 'Legal Research Methodologies in European Union & International Law: Research Notes (Part 1)' (Journal of Contemporary European Research Vol.3. No.2. pp.161-165) p.162.
[12] Jan Kleineman 'Rättsdogmatisk metod' Maria Nääv & Mauro Zamboni (red.), *Juridisk Metodlära* (Studentlitteratur, 2018) p.21.
[13] ibid, p.23.
[14] Wulf-Henning Roth 'The Importance of the Instruments Provided for in the Treaties for Developing a European Legal Method' Ulla Neergard, Ruth Neilsen & Lynn Roseberry (eds.) *European Legal Method-Paradoxes and Revitalisation* (DJOF Publishing Copenhagen, 2011) p.76.

and not solely based on the rules wording.[15]

Another aspect where these interpretations method of the CJEU comes to show is in its case law and the growth of CJEU precedents. When analysing case law from the CJEU it is important to understand the context in which the precedent is set. When analysing a specific judgement it is important not to get hung up on a specific wording from the CJEU, but rather understand that the judgement is set within a context of previous and also later cases which together forms an established precedence which must be taken into account together rather than separately.[16]

Former AG (advocate general) of the CJEU Miguel Poiares Maduro, in a working paper in 2007, stated that the CJEU has developed its own unique interpretation method which is fit for the EU's own long-term goals where the focus on the interpretation of EU law sometimes does not follow the wording of the rule or even the drafters intention, but rather is interpreted in the light of the EU's purpose.[17] Maduro stated in his work that:

> Teleological interpretation in EU law does not […] refer exclusively to a purpose driven interpretation of the relevant legal rules. It refers to a particular systemic understanding of the EU legal order that permeates the interpretation of all its rules. In other words, the Court was not simply been concerned with ascertaining the aim of a particular legal provision. It also interpreted that rule in the light of the broader context provided by the EC (now EU) legal order and its "constitutional *telos*". There is a clear association between the systemic (context) and teleological elements of interpretation in the Court's reasoning. It is not simply the *telos* of the rules to be interpreted that matters but also the *telos* of the legal context in which those rules exist. We can talk therefore of both a teleological and a meta- teleological reasoning in the Court.[18]

The CJEU has confirmed its interpretations methods in several cases. As early as in 1962 with the *Van Gend en Loos* case where the CJEU specified that when examining the provisions 'it is necessary to consider the spirit, the general scheme and the wording of those provisions'.[19] Also in two cases that was decided around the same time, CJEU specified its own method of interpretation in the *Merck* case as 'in interpreting a provision of Community law it is necessary to consider not only its wording but also the context in which it occurs and the objects of the rules of which it is part'.[20]

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[15] Jörgen Hettne (aut.) & Ida Otken Eriksson (red.), *EU-rättslig metod: Teori och genomslag i svensk rättstillämpning* (2nd ed, Norstedt Juridik AB, 2011) p.36.
[16] ibid, p.37.
[17] ibid, p.158
[18] Miguel Poiares Maduro 'Interpreting European Law: Judicial Adjudication in a Context of Constitutional Pluralism' (European Journal of Legal Studies, Vol. 1, No. 2) p.5.
[19] Case 26/62 *Van Gend en Loos* [1963] ECLI:EU:C:1963:1 p.12.
[20] Case 292/82 *Firma E. Merck* [1983] ECLI:EU:C:1983:335 para.12.

Finally, in is famous *CILFIT* case where the CJEU properly defined the limits of the obligation to refer a case to the CJEU[21], the CJEU highlighted the interpretation of EU law by stating:

> Finally, every provision of Community law must be placed in its context and interpreted in the light of the provisions of Community law as a whole, regard being had to the objectives thereof and to its state of evolution at the date on which the provision in question is to be applied.[22]

The legal sources that I will be using, and analysing, are exclusively EU's primary law sources, together with relevant material of case-law from CJEU where the primary sources has been interpreted, as well as doctrine from scholars which also have interpreted these provisions and rulings.

1.4 Structure of thesis and delimitations

The thesis will be structured in the following way. First, I will give an overview of what democratic backsliding means and give examples of this by using the cases of Poland and Hungary. In the same chapter I will describe the values in Article 2 TEU and the different Articles in primary law where the rule of law is expressed. This serves the purpose of giving an understanding of what the object is, to enforce the values in Article 2 TEU, and what is causing the object of discussion for their enforceability, the democratic backsliding within the Member States.

The *ASJP* case, together with the *SEGRO* case, will be dedicated their own chapter together with a brief explanation of the preliminary ruling procedure in Article 267 TFEU, due to the relevance of those judgements being explained before exploring the classical infringement procedures and the cases there since the material relating to the infringement cases builds upon the precedence from the *ASJP* and *SEGRO* judgements. This chapter also serves the purpose of exploring different ways a Member State could potentially reject a ruling from the CJEU, which is of importance for the discussion in the conclusion

Then I will go into describing the EU legal framework *de lege lata*, the way the law and framework looks like today and what might currently be explained as the applicable law. Then I will introduce the way of using Article 258 and 259 TFEU *de lege ferenda*. Meaning I will describe the way of using these procedures not the way they might have been intended to use, but instead the suggested way to use them and how these procedures 'should

[21] Wulf-Henning Roth 'The Importance of the Instruments Provided for in the Treaties for Developing a European Legal Method' Ulla Neergard, Ruth Neilsen & Lynn Roseberry (eds.) *European Legal Method-Paradoxes and Revitalisation* (DJOF Publishing Copenhagen, 2011) p.86.
[22] Case 283/81 Srl *CILFIT and Lanificio di Gavardo SpA v Ministero dela sanà* [1982] ECLI:EU:C:1982:335, para.20.

be used' to obtain the goal of upholding the rule of law. A chapter will be dedicated to case law and the Commissions legal and political discretion, which I believe will highlight an approach by the Commission which is building on the precedence from the *ASJP* case and be completed with a discussion about the Commissions discretion in relation to the Article 258 TFEU procedure, as to highlight a 'counter argument' to the proposal of the Commissions more aggressive approach with the procedure.

The thesis will be concluded by a discussion of both *de lege lata* and *de lege ferenda* framework, discussing mainly the effectiveness of these procedures as identified by Peczenik. The discussion will be constructed as to follow the research questions of the thesis, and there will be no ongoing discussion throughout the thesis, except for the subchapter where I comment on the presented case law to Article 258 TFEU.

The subchapter dedicated to Article 260 TFEU is there to provide the reader an overview of how cases brought by an infringement procedure can be enforced, given that the Member State subject to the procedure does not comply with the CJEU's judgement. I acknowledge that there is research dedicated to examining Article 260 TFEU's role as an enforcement tool of the rule of law by itself[23], however that is not the purpose of this thesis and perhaps constitutes a topic for examination by itself.

1.5 Existing research

The literature on the proposed way of using Article 258 and 259 TFEU are credited to Kim Lane Scheppele as the one to introduce the way of using Article 258 TFEU in a systematic way, and Dimitry Kochenov to extend this proposal to also apply to Article 259 TFEU. Other authors have since then contributed to the initial proposals.

[23] See e.g. Pål Wennerås 'Making Effective Use of Article 260 TFEU' in András Jakab & Dimitry Kochenov, *The Enforcement of EU Law and Values* (Oxford University Publications, 2017).

2 Democratic backsliding and EU values

2.1 Definition democratic backsliding

To understand the term democratic backsliding and its place in the discussion within the EU it is important to first understand the two words that make up the term separately, what is democracy within the EU and what is backsliding?

The essence of democracy is complex and vastly different in different societies. To illustrate this, famous political philosopher Robert A. Dahl once said that '[o]ne of the difficulties one must face at the outset is that there is no democratic theory- there are only democratic theories'.[24] There is however a common understanding that democracy is the idea of some system of governance where the governments and leaders are either directly or indirectly held accountable for their actions as representatives by the citizens through competition with other representatives.[25] Author Nariné Ghazaryan has identified a few key concepts shared by the leading democratic theories, which are political equality, popular sovereignty and rule by majority.[26]

The EU has in Article 2 TEU defined its values for the Union which the Member States have in common. These values act as criteria when a state is applying to become a Member State and has been further defined and explained in the Copenhagen criteria. The Copenhagen criteria are divided into three bigger considerations the EU has to take before accepting a candidate state, these are the political criteria, the economic criteria and then the EU's own institutional and administrative capacity to take on the obligations of a new Member State.[27]

The considerations for the political criteria and economic criteria gives an idea of how a democracy in the EU is defined. To satisfy the political criteria a candidate state must have a stability of institutions that are guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities. To satisfy the economic criteria the candidate state must have a functioning market economy and the capacity to cope with

[24] Robert A. Dahl, *A Preface to Democratic Theory* (The University of Chicago Press, 1956) p.1.
[25] Anna Gora & Pieter de Wilde 'The essence of democratic backsliding in the European Union deliberation and rule of law' (Journal of European Public Policy, 2020, pp.1-21).
[26] Nariné Ghazaryan, *The European Neighbourhood Policy and the Democratic Values of the EU: A Legal Analysis* (Hart publishing Ltd, 2014) p.98.
[27] 'Accession criteria' (European Commission, last updated 6 December 2016) https://ec.europa.eu/neighbourhood-enlargement/policy/glossary/terms/accession-criteria_en accessed 2021-03-11.

competition and market forces.[28]

Backsliding refers to the process that might halt or reverse democratization. Within the EU it can be explained as some Member States beginning to pursue policies which contravenes their conviction of democracy and rule of law.[29] Different groups of scholars focus on different 'key factors' in the backsliding. Nick Sitter and Elisabeth Bakke have in the article 'Democratic backsliding in the European Union' dived these groups of scholars into three. The first group being EU institutions, legal scholars and judges which seems to heavily focus on the rule of law deterioration of the democratic backsliding. The second group focuses more on the emergence of polarization among elites where political elites within the democratic no longer acknowledge their opponent's legitimacy. The third group of scholars describes the key factor to the democratic backsliding is the decline of democratic participation and political engagement, due to either political disenfranchisement or weakness in the popular component of organized politics.[30]

Kim Lane Scheppele and Laurent Pech offered a definition of rule of law backsliding in 2017, defining it as:

> [T]he process through which elected public authorities deliberately implement governmental blueprints which aim to systematically weaken, annihilate or capture internal checks on power with the view of dismantling the liberal democratic state and entrenching the long-term rule of the dominant party.[31]

2.2 The cases of Poland and Hungary

Nick Sitter and Elisabeth Bakke argues that to present times, the EU has faced three major cases that concerns democratic backsliding within their own Member States, these being in Hungary, Poland and Romania.

The two cases which are often the root of inspiration for legal literature in democratic backsliding are Poland and Hungary, since it is these two cases that have led to the triggering of the Article 7 TEU procedure.

[28] ibid.
[29] Nick Sitter & Elisabeth Bakke 'Democratic Backsliding in the European Union' (Oxford Research Encyclopedia of Politics, 2019).
[30] ibid.
[31] Kim Lane Scheppele & Laurent Pech 'Illiberalism Within: Rule of Law Backsliding in the EU' (Cambridge Yearbook of European Legal Studies, Vol. 19, 2017) p.7.

2.2.1 Poland

On 20 December 2017 the European Council (hereafter referred to as the Council) decided to trigger the Article 7 TEU procedure against Poland after hearing the reasoned opinion from the Commission and regarding consent from the European Parliament (hereafter referred to as the Parliament).[32]

The triggering of the procedure was the result of a process two year prior where the Commission had given Poland recommendations within its 'new' rule of law framework.[33] Since 2015 the Commission has exchanged more than 25 letters with the Polish Government[34], issued a rule of law opinion in 2016, and given four recommendations between 2015 and 2017, the last recommendation being issued at the same time as the reasoned proposal.[35] The situation leading up to the reasoned proposal had multiple levels, but the basis for the reasoned proposal which triggered the Article 7 TEU procedure where the Commissions concerns regarding the Polish Government's judicial independence, separation of powers and legal certainty.[36]

This concern was raised following a series of laws adopted by the Polish Government affecting the Polish Supreme Court, Ordinary Courts Organization and the National School of Judiciary. The laws regulated new retirement regimes for the judges in the Supreme Court and ordinary courts, a new extraordinary appeal procedure in the Supreme Court, the process of dismissal and appointment of presidents in ordinary courts as well as the termination of the mandate and the appointment procedure of judges-members of the National Council for the Judiciary.[37]

2.2.2 Hungary

A press release from 12 September 2018 where a Parliament resolution on a proposal calling the Council to determine the existence of a clear risk of a serious breach by Hungary, pursuant to Article 7(1) TEU.[38]

The request was approved by 448 votes to 197, with 48 abstentions.

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[32] 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/2017/0835 final - 2017/0360 (NLE).

[33] Further explanation in chapter 4.

[34] 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/2017/0835 final - 2017/0360 (NLE), para 8.

[35] ibid, para 186.

[36] ibid, para 2.

[37] ibid.

[38] 'Rule of Law in Hungary: Parliament calls on the EU to act' (News European Parliament, 12 September 2018) https://www.europarl.europa.eu/news/en/press-room/20180906IPR12104/rule-of-law-in-hungary-parliament-calls-on-the-eu-to-act accessed 2021-03-15.

The concerns of the Parliament relating to the situation in Hungary are the functioning of the constitutional and electoral system, the independence of the judiciary, the rights of the judges and the independence of other institutions as well as corruption and conflicts of interests. Other concerns relate to the rights and freedoms of the Hungarian citizens, such as privacy and data protection, freedom of expression, academic freedom, freedom of religion, freedom of association, the right to equal treatment, minority rights and fundamental rights of migrants, asylum seekers and refugees as well as economic and social rights overall.[39]

The Council then adopted the decision, after hearing Hungary in accordance with Article 7(1) TEU, that there is a clear risk of a serious breach by Hungary of the values on which the Union is founded.[40]

In both the cases of Poland and Hungary, the Article 7 TEU procedure is in its 'preventive' phase in paragraph 1. This means that the procedure has not yet reached the sanctioning phase where it is possible for the Council to suspend certain rights from the Member State deriving from the Treaties.[41]

2.3 Democratic backsliding in other Member States

The cases of Hungary and Poland represents the most notable examples of backsliding democracies due to the fact that they are the subjects for Article 7 TEU procedures. This is the reason why I am showcasing them as examples in this thesis due to the elaborate material of discussion provided, both from the Commission in their dialogue with the Member States leading up to a triggering of the Article 7 TEU procedure, as well as the infringement procedures which has been launched against them in the last few years.

However, other Member States of the EU have also shown tendencies of being democratic backsliders. Nick Sitter and Elisabeth Bakke identifies, apart from Poland and Hungary, another clear case of democratic backsliding in Romania.[42]

In another research paper, authors Nick Sitter, Agnes Batory, Joanna Kostka, Andrea Krizsan and Violetta Zentai, identifies different types of backsliding divided into hard backsliding and soft backsliding depending on

[39] 'European Parliament resolution of 12 September 2018 on a proposal calling on the Council to determine, pursuant to Article 7(1) of the Treaty on European Union, the existence of a clear risk of a serious breach by Hungary of the values on which the Union is founded' (2017/2131(INL).
[40] ibid, 'Annex to the resolution'.
[41] Article 7(3) TEU.
[42] Nick Sitter & Elisabeth Bakke 'Democratic Backsliding in the European Union' (Oxford Research Encyclopedia of Politics, 2019) p.2.

if the Member State violate both the *acquis* of the EU and the norms of the EU, or just one of them.[43] The findings of the research showed that regarding to rule of law, Poland and Hungary were in the forefront, but Bulgaria and Romania also showed clear trends of backsliding. Of the old Member States, accessed before 2004 to the EU, Italy and France has on occasions raised concerns regarding their protection of the rule of law, and Greece has shown the most persistent case of backsliding.[44]

2.4 Article 2 TEU

Article 2 TEU states that the Union is founded upon values that are common to the Member States. These values are 'respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities'.[45]

The values have been described as the very 'untouchable core' of the EU legal order[46], assuming in the beginning of the integration process of Member States accessing to the EU that it was only open to democratic European states respecting the rule of law and human rights, which later found more expression in the detailed articulation of the Copenhagen criteria founded at the Copenhagen meeting in 1993.[47]

The codification of the values, which before was treated as more unwritten principles, started with the Maastricht Treaty which introduced democracy as the foundation and basis of the EU. The Amsterdam Treaty then amended the codification to also include rule of law and human rights protection as two of the important principles, and also renumbering the Article to Article 6(1) TEU. Lastly, the Lisbon Treaty enlarged the number of principles to also include minority protection.[48]

It was with the Lisbon Treaty in 2007 that these newly codified principles changed to the word values. The values became closely linked to the sanction process in Article 7 TEU, since it was by violating those values that they Article 7 procedure could be triggered.[49]

A classical understanding of values would mean aspirations or desired ideas,

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[43] Nick Sitter, Agnes Batory, Joanna Kostka, Andrea Krizsan & Violetta Zentai 'Mapping Backsliding in the European Union' (CEU Center for Policy Studies, 2016) p.10.
[44] ibid, p.17.
[45] Article 2 TEU.
[46] See e.g. Nikolaos Lavranos 'Revisiting Article 307 EC: The untouchable core of fundamental European constitutional law values and principles' contribution in Filippo Fontanelli, Giuseppe Martinico & Paolo Carrozza (eds.) *Shaping the Rule of Law Through Dialogue: International and Supranational Experiences* (Europa Law Publishing 2009).
[47] Dimitry Kochenov & Marcus Klamert 'Article 2 TEU' Manuel Kellerbauer, Marcus Klamert & Jonathan Tomkin (eds.), *The EU Treaties and the Charter of Fundamental Rights: A Commentary* (Oxford University Press, 2019) p.23.
[48] ibid, p.24.
[49] ibid.

or a set of vague extravagant proclamations. However, in the context of EU law the understanding of values is different from the classic understanding. It is clear that when TEU speaks of values in Article 2 it really means 'fundamental principles' rather than union-wide goals. Before the Lisbon revision of Article 2 in the Treaty, the wording of that article was actually 'fundamental principles of EU law'.[50] The fact that these values are able to be enforced, most expressly in Article 7 TEU, is another example of why the values enshrined in Article 2 TEU are more than vague ideas and rather are fundamental principles that can be violated by Member States and enforced within the legal framework of the EU.[51] In the Charter, the rule of law is clearly a principle enshrined in the preamble, which has the force of primary law in the EU.[52]

As a whole, the values in Article 2 TEU can only be made operational through the sanction procedure in Article 7 TEU if following the expressively wording of that Article. However, there are other means of enforcing these values if they fall within the scope of the *acquis*[53] of the EU. If these values are connected to another EU rule that has been violated, an ordinary infringement procedure can be applicable in Article 258 or 259 TFEU.[54] Furthermore, due to a recent development in the CJEU's case law, means of enforcing the values of Article 2 TEU without being in conjunction with EU *acquis* has also been explored, which will be explained in a different chapter of this thesis.

It is not my intention in this thesis to go into the revision of Article 2 by the Lisbon Treaty and the possible complications of the ambiguous word 'value'. Instead, this chapter focuses on defining the meaning of values in the context of the EU law framework, to later in the thesis elaborate on how Article 2 TEU is used in the rule of law sanctions initiated by the Commission or a Member State towards a Member States and whether this is effective or not for the upholding of rule of law within the EU.

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[50] Dimitry Kochenov, 'The Acquis and Its Principles' Dimitry Kochenov (ed) & András Jakab (ed), *The Enforcement of EU Law and Values: Ensuring Member States' Compliance* (Oxford Scholarship Online, 2017) p.9.
[51] Dimitry Kochenov & Marcus Klamert 'Article 2 TEU' Manuel Kellerbauer, Marcus Klamert & Jonathan Tomkin (eds.), *The EU Treaties and the Charter of Fundamental Rights: A Commentary* (Oxford University Press, 2019) p.25.
[52] Dimitry Kochenov, 'The Acquis and Its Principles' Dimitry Kochenov (ed) & András Jakab (ed), *The Enforcement of EU Law and Values: Ensuring Member States' Compliance* (Oxford Scholarship Online, 2017) p.10.
[53] The *acquis* of the EU are the common rights and obligations which creates the legal body of the EU and that are binding on all the Member States; 'ACQUIS' (EUR-Lex) https://eur-lex.europa.eu/summary/glossary/acquis.html accessed 9 April 2021.
[54] Dimitry Kochenov & Marcus Klamert 'Article 2 TEU' Manuel Kellerbauer, Marcus Klamert & Jonathan Tomkin (eds.), *The EU Treaties and the Charter of Fundamental Rights: A Commentary* (Oxford University Press, 2019) p.26.

2.5 Rule of law expressions

The type of understanding of the rule of law used in this thesis, the substantive rule of law, is of importance when describing the different provisions in primary EU law which express the rule of law.

The rule of law has several meanings with many scholars suggesting different theories as to its understanding, but a broad notion is that it can be divided into formal/procedural rule of law and substantive rule of law. The formal rule of law could be described as partly a set of formal attributes which ensures quality of legal norms, as well as procedural requirements so that these legal norms can be reviewed by independent judiciaries so that norms uphold the qualities. The substantive rule of law could be described as requiring 'compliance with certain formal requirements, [but] also encompasses elements of political morality such as democracy and substantive rights for individuals'.[55]

It is e.g. argued by Xavier Groussot and Johan Lindholm that the CJEU applies the substantive rule of law within its legal order to protect the rule of law, which is a 'rights-approach' or 'human rights-approach' where the rule of law finds expressions in provisions which links to principles to secure human rights, e.g. the right to effective judicial protection.[56]

This distinction is important because the application by the CJEU of this type of rule of law allows them to broaden their jurisdiction regarding rule of law matters, and thus rule with perhaps a more political agenda, which will be explored in the discussion regarding the *ASJP* and *SEGRO* case in chapter 3 of this thesis.

The values expressed in Article 2 TEU, and most important for this thesis the rule of law, can also be found in the Charter, namely Chapter V and VI of the Charter regulating Justice and Citizen rights.[57]

The CJEU has through case law confirmed that elements of rule of law have been expressed in both the Treaties and the Charter, in the second subparagraph of Article 19(1) TEU and Article 47 of the Charter.

The principle of effective judicial protection of individuals' rights under EU law has its expression in the second subparagraph of Article 19(1) TFEU, which states that 'Member States shall provide remedies sufficient to ensure

[55] Laurent Pech 'The Rule of Law as a Constitutional Principle of the European Union' (Jean Monnet Working Paper, 2009) pp.26-27.
[56] Xavier Groussot & Johan Lindholm 'General Principles: Taking Rights Seriously and Waving the Rule-of-Law Stick in the European Union' (SSRN Electronic Journal, 2019) pp.13-20.
[57] Gabriel N. Toggenburg & Jonas Grimheden 'The Rule of Law and the Role of Fundamental Rights: Seven Practical Pointers' in Carlos Closa & Dimitry Kochenov (eds.), *Reinforcing Rule of Law Oversight in the European Union* (Cambridge University Press, 2016) pp.153-154.

effective legal protection in the fields covered by Union law'.[58]

The CJEU has stated in the *Rosneft* case[59] that Article 47 of the Charter constitutes a reaffirmation of the principle of effective judicial protection, and the Court highlighted that '[t]he very existence of effective judicial review designed to ensure compliance with provisions of EU law is of the essence of the rule of law'.[60]

[58] Article 19(1) TEU.
[59] Case C-72/15 *PJSC Rosneft Oil Company v Her Majesty's Treasury and Others* [2017] ECLI:EU:C:2017:236.
[60] ibid, para 73.

3 Enforcement of the rule of law through preliminary rulings

3.1 Article 267 TFEU

The CJEU has jurisdiction to give preliminary rulings concerning interpretation of the Treaties.[61] If a question concerning the interpretation of the Treaties is raised before any court or tribunal of a Member State, and if a decision on the question is necessary to enable it to give judgement, that court or tribunal may refer the case and request that the CJEU give a ruling on the question.[62] If such a question arises in a case before a national court or tribunal, for which there is no judicial remedy under national law, that court or tribunal shall bring the matter before the CJEU.[63]

The Article provides both an option for Member States national courts or tribunals to refer a question to the CJEU in paragraph 2, but it also contains an obligation for the national courts or tribunals to refer a question to the CJEU in paragraph 3. The obligation to refer in Article 267(3) TFEU serves the purpose of preventing national case law from being established in any Member State that is not in accordance with EU law.[64]

The obligation to refer a question to the CJEU in Article 267(3) TFEU is however only applicable to courts or tribunals to which there is no judicial remedy under national law, which the CJEU has confirmed in cases *Costa*, *Lyckeskog* and *Cartesio* as meaning that national courts or tribunals that are of last instance, which judgements cannot be appealed, are the ones subject for the obligation.[65]

[61] Article 267(1)(a) TFEU.
[62] Article 267(2) TFEU.
[63] Article 267(3) TFEU.
[64] Paul Craig & Gráinne De Búrca, *EU Law: Text, Cases, and Materials* (Oxford University Press, 7th edition, 2020) p.519.
[65] Case 6/64 *Flaminio Costa v E.N.E.L* [1964] ECLI:EU:C:1964:66; Case C-99/00 *Criminal proceedings against Kenny Roland Lyckeskog* [2002] ECLI:EU:C:2002:329; Case C-210/06 *CARTESIO Oktató és Szolgáltató bt* [2008] ECLI:EU:C:2008:723. E.g. para 19 *Lyckeskog.*

3.2 What happens after the CJEU has ruled?

The CJEU cannot rule on application of EU law to the specific case brought before them through a preliminary reference ruling. There is a distinction made between application and interpretation, and in a preliminary ruling the national courts refer questions to the CJEU which the CJEU then interprets according to EU law.[66] The enforcement of the interpretation by the CJEU therefore lies in the hands of the national courts in a Member State.[67]

In the *ICC* case[68], the CJEU clarified the purpose of Article 267 TFEU (then Article 177 EC Treaty) as well as clarifying the status of the CJEU's ruling in preliminary ruling procedures.

Regarding the purpose of the Article, the CJEU stated that:

> The main purpose of the powers accorded to the Court by Article 177 is to ensure that Community law is applied uniformly by national courts. Uniform application of Community law is imperative not only when a national court is faced with a rule of Community law the meaning and scope of which need to be defined; it is just as imperative when the Court is confronted by a dispute as to the validity of an act of the institutions.[69]

Then, regarding the precedence of a preliminary ruling, the CJEU stated:

> [A]lthough a judgment of the Court given under Article 177 of the Treaty declaring an act of an institution […] to be void is directly addressed only to the national court which brought the matter before the Court, it is sufficient reason for any other national court to regard that act as void for the purposes of a judgment which it has to give.[70]

Scholar Andreas Hoffman, in his research regarding possible resistance from national courts concerning a judgement from the CJEU, has found that when it comes to infringement procedures, resistance of a ruling from the CJEU can lead to financial sanctions through Article 260 TFEU, but when it comes to resistance of a preliminary ruling no such special enforcement mechanisms exist. Since a case of preliminary reference is sent back to the Member State after the CJEU has interpreted it, it is presumed that the

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[66] Paul Craig & Gráinne De Búrca, *EU Law: Text, Cases, and Materials* (Oxford University Press, 7th edition, 2020) p.546.
[67] Takis Tridimas 'Knocking on Heaven's Door: Fragmentation, Efficiency and Definance in the Preliminary Reference Procedure' (Common Market Law Review 40: 9-50, 2003) p.37.
[68] Case 66/80 *SpA International Chemical Corporation v Amministrazione delle finanze dello Stato* [1981] ECLI:EU:C:1981:102.
[69] ibid, para 11.
[70] ibid, para 13.

domestic enforcement mechanisms are more forceful than the international ones.[71]

Hoffman describes that a necessary condition for the preliminary ruling procedure to work is that the national judiciaries actually follow the CJEU's interpretations and do not resist it. One strategy which has been identified where national judiciaries resist a ruling from the CJEU regarding interpretation of EU law is to: refer the questions again, to interpret the facts of the case instead so that the interpretation by the CJEU does not apply, or to apply a different interpretation of the case without 'overly stating disagreement'.[72]

The enforcement 'opportunities' of Member States resisting an interpretation by the CJEU are described by Hoffman as follows:

> Technically, the failure of a national court to apply the CJEU's interpretation of EU law can be interpreted as an infringement of EU law, for which the Commission could initiate infringement proceedings. The Commission, however, has been very cautious in using the infringement procedure against national judiciaries, not least since such procedures are always officially directed at member state governments, who in turn have little control over the judiciary.[73]

3.3 Portuguese judges judgement

The ruling was delivered by the CJEU on 27 February 2018 in the case *Associação Sindical dos Juízes Portugueses*.[74]

By Portuguese Law No 75/2014 the Portuguese legislators temporarily reduced remuneration for office holders and employees in the public sectors, and this included the judges in the Portuguese Court of Auditors (ASJP).[75] The ASJP, acting on behalf of the Court of Auditors, sought before the national Supreme Administrative Court an annulment of these administrative measures and that the judges should be reimbursed their withheld salaries and receive full payment.[76] They based their claims on the second subparagraph of Article 19(1) TEU and Article 47 of the Charter, which regulates the judicial independence of judges.[77]

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[71] Andreas Hoffman 'Resistance against the Court of Justice of the European Union' (iCourts Working Paper Series, No. 121, 2018) pp.6-9.
[72] ibid, p.14.
[73] ibid, pp.16-17.
[74] Case C-64/16 *Associação Sindical dos Juízes Portugueses v Tribunal de Contas* [2018] ECLI:EU:C:2018:117.
[75] ibid, para 11.
[76] ibid, para 12.
[77] ibid, para 13.

The Supreme Administrative Court considers that the administrative measures are mandatory requirements for reducing the Portuguese States excessive budget, and that this requirement stems from EU Law. Either that it was adopted in the framework of EU law, or at least are of European origin on the ground that those requirements were imposed on the Portuguese Government by EU decisions granting, in particular, financial assistance to that Member State.[78]

The Supreme Administrative Court observed that the discretion that Member States have to implement EU law into their national legislation does not go beyond their obligation to respect the general principles of the EU[79], and thus the court referred the following question to the CJEU:

> In view of the mandatory requirements of eliminating the excessive budget deficit and of financial assistance regulated by […] rules [of EU law], must the principle of judicial independence, enshrined in the second subparagraph of Article 19(1) TEU, in Article 47 of the [Charter] and in the case-law of the Court of Justice, be interpreted as meaning that it precludes the measures to reduce remuneration that are applied to the judiciary in Portugal, where they are imposed unilaterally and on an ongoing basis by other constitutional authorities and bodies, as is the consequence of Article 2 of Law [No 75/2014]?[80]

3.3.1 Admissibility

Regarding admissibility for the preliminary ruling, the Commission argued that the referring court had not set out the reasons for choosing the provisions of EU law which they sought to be interpreted[81], and the Portuguese Government argued that the case is inadmissible on the ground that the national law in question has since 2014 been totally abolished by a new law (Law No 159-A/2015) and thus the 'alleged infringement of the principle of judicial independence on account of that salary reduction has become devoid of purpose'.[82]

The CJEU answered by stating that:

> In the present case, the order for reference contains sufficient information to enable the Court to understand the reasons why the referring court seeks an interpretation of the second subparagraph of Article 19(1) TEU and Article 47 of the

[78] ibid, para 14.
[79] ibid, para 15.
[80] ibid, para 18.
[81] ibid, para 19.
[82] ibid, para 22.

Charter for the needs of the main proceedings.[83]

The CJEU then answered the claims by the Portuguese Government by first stating the situations when the CJEU can refuse to rule on a question referred by a national court[84], and then they went on to explain that the dispute in question concerns the annulment of the administrative measures of reduced remuneration for judges of the Court of Auditors[85], and the Court concluded that:

> It is apparent from the file submitted to the Court that the amounts withheld from the remuneration of the persons concerned […] have not been repaid to them. Consequently, since the main proceedings have not become devoid of purpose, that plea of inadmissibility must be rejected.[86]

3.3.2 Importance of the judgement

The CJEU found that since the mandatory requirement was temporary and it affected a wide variety of public office holders and employees in the public sector and did not specifically target judges, the principle of judicial independence did not preclude such a mandatory requirement of general salary-reducing measure.[87]

The outcome of the case was somewhat predictable, given that the CJEU has accepted these types of temporary pay reductions in the past[88], but it is not the outcome that makes this case interesting. What is interesting about this case is what it signifies.

In the *ASJP* case, the CJEU stated that:

> The principle of the effective judicial protection of individuals' rights under EU law, referred to in the second subparagraph of Article 19(1) TEU, is a general principle of EU law stemming from the constitutional traditions common to the Member States, which has been enshrined in Articles 6 and 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms […] and which is now reaffirmed by Article 47 of the Charter.[89]

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[83] ibid, para 21.
[84] ibid, para 23.
[85] ibid, para 24.
[86] ibid, para 25.
[87] ibid, paras 48-52.
[88] See e.g. ECtHR Second Section, 8 October 2013, Application Nos. 62235/12 and 57725/12, *António Augusto Da Conceição Mateus* v *Portugal* and *Lino Jesus Santos Januário* v *Portugal.*
[89] Case C-64/16 *Associação Sindical dos Juízes Portugueses v Tribunal de Contas* [2018] ECLI:EU:C:2018:117, para 35.

The CJEU continued by stating that '[t]he very existence of effective judicial review designed to ensure compliance with EU law is of the essence of the rule of law'.[90]

By highlighting the importance of rule of law, and by taking a stance in Article 19(1) TEU, the CJEU almost sends a 'warning signal' to the national courts and Member States trying to undermine the rule of law.[91]

Authors Matteo Bonelli and Monica Claes argue for an interesting reason for the CJEU's judgement. The authors reason that the judgement is delivered in the light of the ongoing situation in Poland and Hungary, which along with other infringing behaviour to rule of law, are having problems with their judiciary independence. By delivering its judgement the CJEU sends a 'warning signal' to the other Member States indeed, but also an invitation to the Commission to initiate infringement procedures on the basis of Article 19 TEU.[92] The CJEU has thus opened up the possibility to assess national measures, which might not necessarily fall within the substantive area of EU law, on the basis of the fundamental principles of the EU (in this specific case, the rule of law principle in Article 19 TEU).[93]

Scholars such as Kim Lane Scheppele, Dimitry Kochenov and Barbara Grabowska-Moroz have expressed a similar reasoning as Bonelli and Claes, stating that the institutions of the EU whose task it is to preserve the values in Article 2 TEU 'have not been effective so far in guaranteeing European Values because the Institutions have demonstrated the lack of political will'.[94]

They mean that the CJEU is the notable exception to this lack of political will because of their judgement in the *ASJP* case which shows that the CJEU is considering judicial independence and the irremovability of judges as crucial elements of rule of law.[95]

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[90] ibid, para 36.
[91] Laurent Pech & Sébastien Platon, 'Judicial Independence Under Threat: The Court of Justice to the Rescue' (Common Market Law Review 55(6), pp.1827-1854, 2020) p.1834.
[92] Matt Bonelli & 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 Juízes Portugueses'* (European constitutional law review, Vol. 14. Iss. 3., pp.622-643, 2018) p.636.
[93] ibid.
[94] Kim Lane Scheppele, Dimitry Kochenov & Barara Grabowska-Moroz, 'EU Values Are Law after All: Enforcing EU Values through Systematic Infringement Actions by the European Commission and the Member States of the European Union' (Yearbook of European Law, Vol 39, 2020, pp. 1-121) p.4.
[95] ibid, p.5.

3.4 SEGRO Judgement

The request for a preliminary ruling in the joint case *SEGRO* concerned the interpretation of Article 49 and 63 TFEU, and Article 17 and 47 of the Charter.[96]

The proceedings were brought respectively by 'SEGRO' Kft., a commercial company with its seat in Hungary and its members are natural persons who are nationals of other Member States and resident in Germany[97], and Mr Horváth, an Austrian national who in 2014 acquired agricultural land in Hungary.[98] The proceedings were brought against Vas Region Administrative Department and Sárvár District Property Register in Hungary.[99]

3.4.1 Case C-52/16 SEGRO

SEGRO acquired rights of usufruct (the right to use/enjoy a possession and to profit from that possession) over two parcels of agricultural land before 1 January 2002, and which was entered into the property register on 8 January 2002. In 2014 those rights were deleted from the property register by the Vas Region Administrative Department.[100]

A brief background to the Hungarian law concerning usufruct is as follows. Previous amended laws on transnational measures stated that 'foreign natural or legal persons could acquire the ownership or usufruct of agricultural land only with prior authorisation from the Minister of Finance'.[101]

The '1994 Law' then 'precluded the acquisition of such land by natural persons not possessing Hungarian nationality' and precluded the acquisition of such land by legal persons. However, any person still remained free to acquire a right of usufruct over such land by contract.[102]

With effect from 1 January 2002 the '1994 Law' was amended to preclude a contract being established in favour of natural persons not possessing Hungarian nationality or legal persons.[103] Following a later amendment of the '1994 Law' with effect from 1 January 2013, 'a right of usufruct over agriculture land could no longer be validly created by contract unless the

[96] Cases C-52/16 and C-113/16 *'SEGRO' Kft. v Vas Megyei Kormányhivatal Sárvári Járási Földhivatala* and *Günther Horváth v Vas Megyei Kormányhivatal* [2018] ECLI:EU:C:2018:157, para 1.
[97] ibid, para 15.
[98] ibid, paras 2, 15 and 30.
[99] ibid, para 2.
[100] ibid, paras 16-17.
[101] ibid, para 5.
[102] ibid, para 6.
[103] ibid, para 7.

right was created in favour of a "close member of the same family"'.[104]

The Administrative Department acted on paragraph 108(1) of the 2013 Law on transnational measures and paragraph 94(5) of the Law on the property register.[105]

Paragraph 108(1) states '[a]ny right of usufruct or right of use existing on 30 April 2014 and created, for an indefinite period or for a fixed term expiring after 30 April 2014, by a contract between persons who are not close members of the same family shall be extinguished by operation of law on 1 May 2014.'[106] Paragraph 94(5) states:

> The authority responsible for administering the property register shall, no later than 31 December 2014, of its own motion delete from the property register any right of usufruct which was registered on behalf of a legal person or an entity not having legal personality but having the capacity to acquire a registrable right and which has been cancelled in application of Paragraph 108(1) of [the 2013 Law on transitional measures].'[107]

The case was brought before the Hungarian Administrative and Labour Court where SEGRO contested that the provisions infringed both Hungarian Fundamental Law and EU law.[108]

The Administrative and Labour Court referred the case to the Hungarian Constitutional Court and requested that the Constitutional Court declared that the above mentioned provisions were 'unconstitutional in that they brought the previously created rights of usufruct to an end and required their deletion from the property register and, second, an order prohibiting the application of those provisions in the case in point'.[109]

The Constitutional Court refused those requests[110], which led the Administrative and Labour Court to stay proceedings and to refer the case to the CJEU.[111]

[104] ibid, para 8.
[105] ibid, para 17.
[106] ibid, para 13.
[107] ibid, para 14.
[108] ibid, para 18.
[109] ibid, para 19.
[110] ibid, para 20.
[111] ibid, para 29.

3.4.2 Case C-113/16 Mr Horváth

Mr Horváth acquired rights of usufruct over two parcels of agricultural land in Hungary before 30 April 2014. Those rights were entered into the property register, by statement of the Hungarian Government, on 2 November 1999.[112]

On 12 October 2015 the Administrative Department deleted those rights of the property register on the basis of paragraph 108(1) of the 2013 Law on transitional measures and paragraph 94(1) and (3) of the Law on the property register.[113]

Paragraph 94(1) and (3) provides that a natural person holding rights of usufruct shall declare, within a given time period after a notification on 31 October 2014, the existence of a close family relationship with the person shown as the owner of the property. If this declaration does not reveal a close family relationship or if the declaration has not been made in the given time period, the authority administrating the property shall delete the rights from the property register.[114]

The case was brought before the Administrative and Labour Court which decided to stay proceedings and refer the case to the CJEU.

3.4.3 Questions referred

The CJEU examined the referred questions together and concluded that the referring court in essence asked:

[W]hether Articles 49 and 63 TFEU and Articles 17 and 47 of the Charter must be interpreted as precluding national legislation, such as that at issue in the main proceedings, under which rights of usufruct which have previously been created over agricultural land and the holders of which do not have the status of close relation of the owner of that land are extinguished by operation of law and are, consequently, deleted from the property registers.[115]

3.4.4 CJEU jurisdiction and admissibility

The Hungarian Government had three objections as to the admissibility of the case. The first being that the national provisions does not concern EU law since the national provisions were entered into force before Hungary joined the EU[116], and the second being that the question relating to

[112] ibid, para 30.
[113] ibid, para 31.
[114] ibid, para 14.
[115] ibid, para 37.
[116] ibid, para 38.

paragraph 108 of the 2013 Law on transnational measures are inadmissible since they were not applied in the main proceedings and that the 'transitional measures had already produced all its effects and the referring court is not able to decide upon the re-establishment or preservation of the rights of usufruct at issue in the main proceedings'.[117] The third objection concerned that the referring court questioned certain guidance provided by the judgement given by the Hungarian Constitutional Court, although under Hungarian constitutional law a judgement from the constitutional court is binding on the lower courts.[118]

The CJEU answered the first objection by stating that the CJEU has jurisdiction to interpret a Member State's application of EU law from the date which the Member States acceded to the EU, and that the national provisions in question still existed on 30 April 2014, and the usufruct rights issue in the main proceedings were not deleted from the property register pursuant to laws which were adopted before Hungary acceded to the EU, but they were adopted nearly 10 years after.[119]

The second objection regarding the national courts ability to refer a question to the CJEU, the Court stated that 'it is solely for the national court before which the dispute has been brought, and which must assume responsibility for the subsequent judicial decision, to determine, in the light of the particular circumstances of the case, both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court'.[120]

The CJEU continued by stating the instances where a reference for a preliminary ruling may be refused, 'only if it is quite obvious that the interpretation of EU law sought bears no relation to the actual facts of the main action or to its purpose, or where the problem is hypothetical or the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it'.[121]

The CJEU found that the contested provision did bear a 'definite relation to the purpose of the main proceedings and, second, that the questions submitted are not hypothetical'.[122] The CJEU then clarified, in relation to the Hungarian Government's claim that the referring court cannot decide upon the preservation of the national provisions, that 'Articles 49 and 63 TFEU, which are directly applicable, may be relied on before national courts and may render national rules that are inconsistent with them inapplicable'.[123] Therefore both the administrative authorities and the national courts that are called upon to apply EU law are under a duty to

[117] ibid, para 41.
[118] ibid, para 47.
[119] ibid, paras 39-40.
[120] ibid, para 42.
[121] ibid, para 43.
[122] ibid, para 44.
[123] ibid, para 45.

'give full effect to those provisions, if necessary refusing of their own motion to apply any conflicting provision of national law, and without requesting or awaiting the prior setting aside of that provision of national law by legislative or other constitutional means'.[124]

The third objection by the Hungarian Government, that a national constitutional rule prevents a national court to go against a judgement by the Hungarian Constitutional Court, was answered by the CJEU as follows:

> [N]ational courts have the widest discretion to refer to the Court of Justice questions of interpretation of relevant provisions of EU law and that a rule of national law cannot prevent a national court from using that discretion. Such a discretion is an inherent part of the system of cooperation between the national courts and the Court established in Article 267 TFEU and of the functions of the court responsible for the application of EU law which are entrusted by that provision to the national courts […] The Court has thus held in particular that the existence of a rule of national law whereby courts against whose decisions there is a judicial remedy are bound on points of law by the rulings of a court superior to them cannot, on the basis of that fact alone, deprive the lower courts of that discretion.[125]

3.4.5 Decision

The CJEU examined if the national legislation constitutes infringements in the freedom of establishment in Article 49 TFEU and/or the free movement of capital in Article 63 TFEU.[126] The CJEU found that 'when the right to acquire, use or dispose of immovable property on the territory of another Member State is exercised as the corollary of the right of establishment, it generates capital movements'[127] and that although that legislation could be covered by both the fundamental freedoms an independent examination of Article 49 TFEU would not be justified due to 'any restrictions on freedom of establishment resulting from that legislation are an inevitable consequence of the restriction of the free movement of capital'.[128]

The CJEU then examined the possible justifications for restrictions in the free movement of capital[129], but ultimately found that no supposed justifications were proportionate to that aim.[130]

The CJEU did not find it 'necessary to examine the national legislation in

[124] ibid, para 46.
[125] ibid, para 48.
[126] ibid, para 52.
[127] ibid, para 54.
[128] ibid, para 55.
[129] ibid, paras 61-125.
[130] ibid, para 126.

the light of Articles 17 and 47 of the Charter in order to resolve the disputes in the main proceedings'.[131]

3.4.6 Importance of the judgement

Xavier Groussot, Niels Kirst and Patrick Leisure have raised interesting perspectives regarding the case in 2019. First the authors argue that the *SEGRO* case 'brings about an important discussion concerning the economic context behind the economic freedoms and fundamental rights as they relate to land us in the European Union'.[132]

Second they bring forward the perspective of functionality, the function of the CJEU and the preliminary reference procedure from a rule of law perspective. The authors make a comparison that Hungary is on a very tight leash held by the CJEU and that the Hungarian courts' margin of discretion 'is slim with respect to their domestic analysis' and that the CJEU 'seems to go through all possible justifications that the national court might put forward to possibly come out the other way on the issue'.[133] The CJEU's extensive interpretation of EU law in the case makes it hard for national courts to deviate from the Court's ruling in their application of EU law in the case, and in that way the CJEU has left the application to the national courts but at the same time has somewhat secured the outcome.[134]

[131] ibid, para 128.
[132] Xavier Groussot, Niels Kirst, Patrick Leisure 'SEGRO and its Aftermath: Between Economic Freedoms, Property Rights and the 'Essence of the Rule of Law'' (Nordic Journal of European Law, Vol. 2, Iss. 2, 2019) p.76.
[133] ibid, p.78.
[134] ibid, p.79.

4 EU Rule of Law Framework *de lege lata*

4.1 New Framework

In March 2014, the Commission published a Communication which adopted a new rule of law framework which aims to complement the infringement procedures in Articles 258 and 259 TFEU as well as the Article 7 TEU procedure. The new framework, based on the Communication 'A New EU Framework to Strengthen Rule of Law'[135], serves as a way for the Commission to have a dialogue with the Member State concerned about the threats to the rule of law, to hopefully prevent the continuation and escalation of the systematic threats. If the dialogue approach proves insufficient for the goal of preventing the systematic infringements to ensure compliance with Article 2 TEU, then as a last resort the Article 7 TEU procedure will be used to resolve the rule of law crisis.[136]

The framework is activated in situations where the authorities of a Member State are taking measures or are allowing measures or tolerating situations which are likely to affect the safeguarding of the rule of law at the national level. The framework has three stages which are the Commission assessment, rule of law recommendation and the follow-up to the rule of law recommendation.[137]

In the Commission assessment, the Commission examines all the relevant information about the situation in the concerned Member State to assess whether there is clear indication of a systematic threat to the rule of law. If the Commission finds that there are clear indications, it will send a rule of law opinion to the Member State which has the possibility to respond to the concerns expressed in the rule of law opinion. If the Commission finds that the answer by the Member State is not satisfactory or that the situation has not been resolved, the Commission will send a rule of law recommendation where they identify their concerns and recommends the Member State to solve the identified problems within a fixed time limit while the Member State also follows up with the Commission on how they resolve the problems. In the last stage the Commission monitors the follow-up given by the Member State to the rule of law recommendation. This entire process is

[135] European Commission, 'Communication from the Commission to the European Parliament and the Council: A new EU Framework to strengthen the Rule of Law' COM (2014) 158 final, 11 March 2014.
[136] 'Promoting and safeguarding the EUs values' (EUR-Lex, last updated 10-06-2016) https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=LEGISSUM%3Al33500 accessed 18 February 2021.
[137] 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/2017/0835 final - 2017/0360 (NLE), para 7.

based on that the Commission and the concerned Member State has a continuous dialogue throughout the process.[138]

4.2 Communication from the Commission 2017

In a Communication from the Commission from 2017, the Commission promises to 'step up its efforts on the application, implementation and enforcement of EU law'.[139] This means a more strategic approach to handling infringement procedures as well as gives an overview of other actions the Commission will take to help the Member States and the public ensure that EU law is applied correctly and effectively. These measures of implementation and enforcement are in line with the Juncker Commissions[140] commitment to be 'bigger and more ambitious on big things, and smaller and more modest on small things'.[141] These efforts include dialogue with the Member States, capacity building in the Member States, better law-making for the application and implementation of EU law.[142]

In the Commission's commitment for a more strategic approach to their enforcement actions, the Commission committed to:

> [G]ive high priority to infringements that reveal systemic weaknesses which undermine the functioning of the EU's institutional framework. This applies in particular to infringements which affect the capacity of national judicial systems to contribute to the effective enforcement of EU law. The Commission will therefore pursue rigorously all cases of national rules or general practices which impede the procedure for preliminary rulings by the Court of Justice, or where national law prevents the national courts from acknowledging the primacy of EU law. It will also pursue cases in which national law provides no effective redress procedures for a breach of EU law or otherwise prevents national judicial systems from ensuring that EU law is applied effectively in accordance with the requirements of the rule of law and Article 47 of the Charter on Fundamental Rights of the EU.[143]

[138] ibid.
[139] Communication from the Commission – EU law: Better results through better application C/2016/8600, (2017/C 18/02) p.2.
[140] The Juncker Commission was the Commission established during 1 November 2014 to 30 November 2019, the President of the European Commission being Jean-Claude Juncker.
[141] Communication from the Commission – EU law: Better results through better application C/2016/8600, (2017/C 18/02) p.2.
[142] ibid, pp. 2-4.
[143] ibid, p.5.

4.3 Communication from the Commission 2019

In the latest communication directive from the Commission regarding the further strengthening of the rule of law within the EU, the Commission describes the measures which have already been taken within the rule of law toolbox.[144] The Commission explains they have 'launched several infringement proceedings in reaction to serious rule of law problems, linked to a breach of Union law, an avenue for EU action which has increasingly gained traction through recent rulings of the European Court of Justice'.[145]

The Commission also highlights the important jurisprudence by the CJEU from the *ASJP* case in 2018, as well as other judgements where the CJEU has established the importance for 'both the proper working of the judicial cooperation system embodied by the preliminary ruling mechanism under Article 267 TFEU and for secondary law instruments based on the principle of mutual trust'.[146]

Assessing the Commissions experience, as well as the possible avenues for the future, the Commission reflects that there is a need to promote rule of law standards, recognize warning signs in Member States early, deepening Member State specific knowledge, improve EU capacity to react to rule of law issues, and addressing shortcomings in the long term through structural reforms.[147]

4.4 Article 7 TEU

The current sanction mechanism in Article 7 TEU has its origin in the Amsterdam Treaty. It was adopted in the direct anticipation of the accession of Member States from eastern Europe in 2004 and it was designed with these new Member States in mind, but the instrument was of course framed to apply to all Member States in the EU. The early version of the sanction mechanism in the Amsterdam Treaty only allowed for the sanction to be triggered if there was 'a serious and persistent breach' of the values in Article 2 (then Article 6(1) TEU), thus failing to be triggered if there was a threat of a serious breach as it is today.[148]

The addition of the preventive mechanism in Article 7(1) TEU was

[144] Communication from the Commission to the European Parliament, the European Council and the Council – Further strengthening the Rule of Law within the Union: state of play and possible next steps COM(2019) 163 final.
[145] ibid, p.4.
[146] ibid, p.4.
[147] ibid, pp.7-10.
[148] Dimitry Kochenov 'Article 7 TEU' Manuel Kellerbauer, Marcus Klamert & Jonathan Tomkin (eds.), *The EU Treaties and the Charter of Fundamental Rights: A Commentary* (Oxford University Press, 2019) pp.89-90.

introduced by the Nice Treaty in 2003 as a result of the ad hoc bilateral sanctions by 14 of the EU Member States against Austria in 2000.[149] The incident, often referred to as the 'Haider affair', was about the far-right party in Austria called FPÖ who during the election in 1999 gathered a vote of 27% which made them the second largest party in the Austrian Parliament. The FPÖ made agreements with the conservative party ÖVP to form a new government, which was later sworn in in February 2000. The Prime Minister of Portugal had in January previously made a statement on behalf of the other 14 Member States that they will not support or accept an Austrian Government where FPÖ is integrated. The Austrian President, before he sworn in the new government, made a statement that he feared that Austria may suffer internationally because of this, but that it was important in a democracy to respect the parliamentary majority.[150]

These sanctions by the Member States were not based on Article 7 TEU and was made entirely outside of the framework of the EU, and later was found, or at least has been argued, to have been imposed on Austria for no good reason at all.[151] From the report on the situation, adopted in Paris on 8 September 2000, the authors Martti Ahtisaari, Jochen Frowein and Marcelino Oreja concluded their examination of the measures adopted by the 14 Member States as follows:

> [T]he measures taken by the XIV Member States, if continued, would become counterproductive and should therefore be ended. The measures have already stirred up nationalist feeling in the country, as they have in some cases been wrongly understood as sanctions directed against Austrian citizens.[152]

As a result of this incident two important consequences happened. The first being an effect of 'unwillingness' to use Article 7 TEU since then, even though it was not used in the case of Austria, due to the incident being referred to as a 'tale of caution' by the EU institutions in regard to Austria. Second, it led to the changes of the Article with the Nice Treaty to include the preventive mechanism in Article 7(1) TEU when 'there is a clear risk of a serious breach by a Member State of the values referred to in Article 2'.[153]

Article 7 TEU is a sanction mechanism in two parts. The first part is the

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[149] ibid, pp.90-91.
[150] Per Cramér & Pål Wrange 'The Haider affair, law and European integration' (SSRN Electronic Journal (1):28-60, 2001) pp.28-29.
[151] Dimitry Kochenov 'Article 7 TEU' Manuel Kellerbauer, Marcus Klamert & Jonathan Tomkin (eds.), *The EU Treaties and the Charter of Fundamental Rights: A Commentary* (Oxford University Press, 2019) p.91.
[152] Martti Ahtisaari, Jochen Frowein & Marcelino Oreja 'Report on the Austrian Governemnts Commitment to the Common European Values, in Particular Concerning the Rights of Minorities, Refugees and Immigrants, and the Revolution of the Political Nature of the FPÖ (the Wise Men Report' (International Legal Materials, Vol.40, No.1, pp.102-123, 2001) p.120, par.116.
[153] Article 7(1) TEU; Dimitry Kochenov 'Article 7 TEU' Manuel Kellerbauer, Marcus Klamert & Jonathan Tomkin (eds.), *The EU Treaties and the Charter of Fundamental Rights: A Commentary* (Oxford University Press, 2019) p.91.

preventive mechanism in 7(1) TEU where after a reasoned proposal by one third of the Member States, by the Parliament or by the Commission, the Council, acting by a majority of four fifths of its members after obtaining the consent of the Parliament, may determine that there is a clear risk of a serious breach by a Member State of the values referred to in Article 2.[154]

Before the determination of a serious breach has been made the Member State in question will be informed that the determination can be actualized and the Member State shall be heard by the Council.[155]

The second part in the procedure is the sanctioning mechanism in Article 7(2) TEU. After inviting the Member State in question to submit its observations to the preventive step in Article 7(1) TEU, the Council acting by unanimity on a proposal by one third of the Member States or by the Commission and after obtaining the consent of the Parliament, may determine the existence of a serious and persistent breach by a Member State of the values referred to in Article 2. After the determination has been actualized it allows the Council to suspend certain rights described in Article 7(3) TEU. These are the rights which derives from the application of the Treaties to the concerned Member State, including the voting rights.[156]

As soon as the Council, acting by a qualified majority, notices changes in the Member States actions which first led the Article 7 TEU procedure to be imposed, they may decide to vary or revoke the sanction measures taken against the Member State in accordance with Article 7(3) TEU.[157]

It is misleading to view the Article 7 TEU procedure as a procedure with three steps in its first, second and third paragraph. Even though I have divided and explained the different paragraphs of the article in three steps, the usage of them does not need to be in that chronological order. Article 7 TEU does not preclude to start the procedure laid down in Article 7(2) directly and 'skipping' 7(1).[158]

Article 7 TEU is quite different from the other typical approaches of enforcing Article 2 TEU in that it is a purely political enforcement tool which expressly states that it is a procedure for Member States who violate or is at a clear risk of violating the values set out in Article 2 TEU.[159]

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[154] 'Promoting and safeguarding the EUs values' (EUR-Lex, last updated 10-06-2016) https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=LEGISSUM%3Al33500 accessed 18 February 2021.
[155] ibid.
[156] ibid.
[157] Article 7(4) TEU.
[158] Dimitry Kochenov 'Article 7 TEU' Manuel Kellerbauer, Marcus Klamert & Jonathan Tomkin (eds.), *The EU Treaties and the Charter of Fundamental Rights: A Commentary* (Oxford University Press, 2019) p.91.
[159] Dimitry Kochenov, 'The Acquis and Its Principles' Dimitry Kochenov & András Jakab (eds.), *The Enforcement of EU Law and Values: Ensuring Member States' Compliance* (Oxford Scholarship Online, 2017).

The procedure in Article 7 TEU was recently interpreted by AG Bobek, with a judgement from the CJEU expected to be delivered on 3 June 2021.

In the *Hungary v European Parliament* case, Hungary is seeking an annulment of the resolution adopted on 12 September 2018, where the Parliament adopted a resolution on a proposal calling on the Council to determine, pursuant to Article 7(1) TEU, the existence of a clear risk of a serious breach by Hungary of the values in Article 2 TEU. The annulment of that resolution is sought under Article 263 TFEU.[160]

The AG, in his assessment of the different steps of the procedure, concluded that:

> It follows that, apart from the reasoned proposals under Article 7(1) TEU, a wide range of legal acts may be adopted by the institutions under the Article 7 TEU procedure before potentially culminating in the adoption of sanction measures by the Council under Article 7(3) TEU. It is rather clear, on the face of it, that the procedure under Article 7 TEU is likely to be neither a quick nor a straightforward exercise; but there is some logic to the structure of that provision. In particular, the individual cascades of decisions follow a given pattern, which is also reflected in the terminology chosen.[161]

4.4.1 Why is the sanctioning mechanism hard to initiate?

As has already been described in a previous chapter of this essay, the Article 7 TEU procedure against Poland and Hungary is 'only' in its preventive stage in paragraph 1 of the Article, meaning that no sanctions against these Member States have been triggered yet in accordance with Article 7(2) and (3) TEU of the procedure.

To state a clear risk of a serious breach in Article 7(1) TEU can be done by various actors in the EU with a one third majority (the Member States, the Parliament and the Commission).[162] However, to trigger the second paragraph in Article 7 TEU a higher threshold is required because of the serious implications it contains, the actual existence of a serious and persistent breach rather than a threat. The activation of the Article must be proposed by one third of the Member States or by the Commission and the Council must act in unanimity and it must have consent from the

[160] Case C-650/18 *Hungary v European Parliament* [2020] ECLI:EU:C:2020:985, Opinion of AG Bobek, para 1.
[161] ibid, para 42.
[162] Article 7(1) TEU.

Parliament.[163]

The procedural rules for Article 7 TEU is contained in Article 354 TFEU. Paragraph 1 of that Article regulates the procedural rules for Article 7(2) TEU and it states that 'the member of the Council or of the Council representing the Member State in question shall not take part in the vote'.[164] Article 354 TFEU also declares that '[a]bstentions by members present in person or represented shall not prevent the adoption of decisions referred to in paragraph 2 of that Article'.[165] Therefore the unanimity vote by the Council includes all representatives for the Member States expect for the Member State which is the subject for the activation of the article, and the Member States representatives who cannot participate in the vote.

A proposal has been made by scholars Kim Lane Scheppele and Laurent Pech in 2016 that Member States which are subject to an Article 7 TEU procedure at the same time shall not be allowed to participate in the vote in the Council, regarding Article 7(2) TEU. According to the authors, the legal wording of Article 7(2) TEU could support this proposal since the same logic of a Member State not being able to have any veto power in sanctioning measures taken against them, could also be applied to a Member State which also have an Article 7 TEU procedure initiated against them.[166]

As the Article stands now, and the reason for why it is hard to initiate, is due to that unanimity in the Council is required, and any Member State can lay a veto to stop the procedure. Understandably, this can be expected to be the case if the Article 7 TEU procedure continues forward against Hungary and Poland, where these Member States can lay in a veto in each other's cases to stop the procedure. This is supported by a statement made by Hungary's Prime Minister Viktor Orbán in Hungarian public radio, where he stated that '[t]he European Union should not think about introducing any sanctions against Poland, because that would require full unanimity and Hungary never will support any sanctions against Poland'.[167]

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[163] Article 7(2) TEU; Dimitry Kochenov 'Article 7 TEU' Manuel Kellerbauer, Marcus Klamert & Jonathan Tomkin (eds.), *The EU Treaties and the Charter of Fundamental Rights: A Commentary* (Oxford University Press, 2019) p.95.
[164] Article 354(1) TFEU.
[165] Article 354(1) TFEU.
[166] 'Can Poland be Sanctioned by the EU? Not Unless Hungary is Sanctioned Too' (Verfassungsblog: on matters constitutional, updated 24 October 2016) https://verfassungsblog.de/can-poland-be-sanctioned-by-the-eu-not-unless-hungary-is-sanctioned-too/ accessed 19 April 2021.
[167] 'Poland strikes back at EU on media law' (Politico, updated January 8 2016) https://www.politico.eu/article/poland-strikes-back-at-eu-on-media-law-frans-timmermans-stepkowski-andrzej-duda/ accessed 19 April 2021.

4.5 Classical infringement procedures

It is presumed that Article 2 TEU violations can be subject to the procedures in Article 258, 259 and 260 TFEU alongside with Article 7 TEU, even though Article 7 TEU is the only article that expressly states that it can enforce the values in Article 2 TEU and establishes a specific EU competence to tackle these specific types of violations.[168] However, as Dimitry Kochenov puts it, the existence of Article 7 TEU testifies that the intentions of the drafters of the EU Treaties were that Article 2 TEU was meant to be an enforceable legal provision, and therefore the classic infringement procedures in Article 258-260 TFEU have function in this respect too.[169]

This understanding follows from the Commissions obligation in Article 17(1) TEU where it states that '[i]t shall ensure the application of the Treaties, and of measures adopted by the institutions pursuant to them. It shall oversee the application of Union law under the control of the Court of Justice of the European Union'.[170]

There seems to be no exception to this obligation in EU primary law, apart from the limitation in Article 24(1) TEU where the Commission's enforcement powers are limited with regards to the Common Foreign and Security Policy.[171]

This understanding could also be derived from the CJEU's jurisdiction over the matter, where the Treaties does not seem to limit or exclude the CJEU jurisdiction over Article 2 TEU. If it was the drafter's intention to limit the CJEU's jurisdiction over Article 2 TEU, they could have made this obvious such as the limits set out in relation to the Common Foreign and Security Policy[172] and in relation to Article 7 TEU where the CJEU's control lies in the articles procedural stipulation.[173]

It is therefore possible, in principle, to enforce the values in Article 2 TEU with means outside of the expressly stated enforceable tool in Article 7 TEU.[174]

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[168] Christophe Hillion 'Overseeing the rule of law in the European Union: Legal mandate and means' (European Policy Analysis, iss. 1, 2016) p.5.
[169] ibid; Dimitry Kochenov 'The EU and the Rule of Law – Naïveté or a Grand Design?' Maurice Adams, Anne Meuwese & Ernst Hirsch Ballin (eds.), *Constitutionalism and the Rule of Law: Bridging Idealism and Realism* (Cambridge university Press, 2017) p.430
[170] Article 17(1) TEU.
[171] Article 24(1) TEU; Christophe Hillion 'Overseeing the rule of law in the European Union: Legal mandate and means' (European Policy Analysis, iss. 1, 2016) p.5.
[172] Article 275(1) TFEU.
[173] Article 269 TFEU; Christophe Hillion 'Overseeing the rule of law in the European Union: Legal mandate and means' (European Policy Analysis, iss. 1, 2016) p.5.
[174] ibid, p.5.

4.5.1 Article 258 TFEU

Article 258 TFEU empowers the Commission to conduct proceedings against a Member State if they find that the Member State has infringed EU law. The objective of the procedure is to obtain compliance from the Member State that might be infringing EU law, and the broader perspective is to ensure a uniform application of EU law in the whole Union.[175]

The infringement procedure under Article 258 TFEU is divided into two stages which is then divided into three stages. There is an administrative stage and a judicial stage, which is broken down to a formal notice, then a reasoned opinion and lastly a referral to the CJEU.[176]

In its formal notice, the Commission sends a letter of formal notice to the Member State concerned where the Commission requests more detailed information about the situation. The Member State shall send a reply within a specific time period which is usually two months. This allows for the Member State to 'justify' their behaviour and it gives the Commission the opportunity to understand the Member States situation and possibly persuade them into settling the situation so that the dispute does not reach the CJEU.[177] If the Commission considers that the Member State has failed its obligations then the Commission can give a reasoned opinion on why they consider that the Member State is failing to comply with EU law and requests that appropriate measures should be taken.[178]

The reasoned opinion explains the Commission's stance in the dispute, usually drawing on their letter of formal notice, and it also takes into account a possible answer to the formal notice from the Member State and the Commissions arguments to debunk the Member States answer. The concerned Member State will have time to respond and adjust their behaviour within a specific time period, usually two months, and if the Commission does not consider that any appropriate measures has been taken by the Member State then it is clearly expressed in the reasoned opinion that the Commission reserves the right to take the dispute to the CJEU.[179] There is some discretion on the Commission's part to exercise this right. For example, if there is an upcoming election in the Member State concerned then the Commission might decide to put the infringement procedure on hold so that an interference/or impact on the public opinion can be

[175] Bernhard Schima 'Article 258 TFEU' Manuel Kellerbauer, Marcus Klamert & Jonathan Tomkin (eds.), *The EU Treaties and the Charter of Fundamental Rights: A Commentary* (Oxford University Press, 2019) p.1774.
[176] Laurence W Gormley, 'Infringement Proceedings' Dimitry Kochenov & András Jakab (eds.), *The Enforcement of EU Law and Values: Ensuring Member States' Compliance* (Oxford Scholarship Online, 2017) p.66.
[177] ibid.
[178] Article 258(1) TFEU.
[179] Article 258(2) TFEU.

avoided.[180]

If the Member State still does not comply in a sufficient way, then the Commission can refer the case to the CJEU. At this stage, if the Member State fails to comply then the CJEU can give a declaratory judgement that the Member State has breached EU law, and the Member States national authorities must take actions to comply with the judgement. The declaratory judgement often does not give any direction as to how to resolve the situation since it is up to the Member States national authorities to resolve the breach of EU law which is the basis for the infringement. If the Member States national authorities still do not rectify their situation, despite the judgement by the CJEU, then the Commission may refer the Member State back to the CJEU.[181]

The ultimate goal for the Commission is not to sanction the Member State for infringing EU law but to make the Member State comply with EU law. If the Commission finds during the procedure that the Member State has stopped the infringement and complied with EU law in a satisfying way, then the Commission will in most circumstances close the case.[182]

The history of the usage of Article 258 TFEU has been one of decline since 2009. Before 1980 there was a hesitation to use the article, but the usage after 1980 peaked to up to around 200 cases each year that was brought before the CJEU. In 2009 a steady decrease of the referrals to the CJEU started and in 2016 it was at an all-time low with 31 new cases. This decrease cannot solely be explained by Member States compliance with EU law as a whole, but rather it shows that the Commission has adopted a favour of solving the dispute with cooperation with the Member State through one of the earlier stages of the procedure. The first stage of the formal notice is triggered quite frequently while the second stage of the reasoned opinion is triggered less, and the referrals to the CJEU are made in just a number of small cases where a lot of them are withdrawn when the Commission thinks that the Member State has complied in a sufficient way.[183]

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[180] Laurence W Gormley, 'Infringement Proceedings' Dimitry Kochenov & András Jakab (eds.), *The Enforcement of EU Law and Values: Ensuring Member States' Compliance* (Oxford Scholarship Online, 2017) p.68.
[181] Laurence W Gormley, 'Infringement Proceedings' Dimitry Kochenov & András Jakab (eds.), *The Enforcement of EU Law and Values: Ensuring Member States' Compliance* (Oxford Scholarship Online, 2017) pp.68-70; 'Infringement procedure'(European Commission) https://ec.europa.eu/info/law/law-making-process/applying-eu-law/infringement-procedure_en accessed 7 May 2021.
[182] Bernhard Schima 'Article 258 TFEU' Manuel Kellerbauer, Marcus Klamert & Jonathan Tomkin (eds.), *The EU Treaties and the Charter of Fundamental Rights: A Commentary* (Oxford University Press, 2019) p.1775.
[183] ibid.

4.5.1.1 Previous enforcement of EU values through Article 258 TFEU

The wording of Article 258(1) TFEU refers to a failure to fulfil an obligation under the Treaties. This failure to fulfil an obligation must be understood as a failure to fulfil an obligation under all EU law and includes any obligation that is stated in the Treaties of the EU. This comes with the exception of those obligations relating to the common foreign and security policy provided for in binding acts adopted by the Union institutions and in international agreements concluded by the Union or in general principles of Union law.[184]

However, when it comes to the enforcement of EU values in Article 2 TEU, when a Member State is infringing on those values, an infringement procedure through Article 258 TFEU was for a long time perceived as only being able to be launched if it is made in conjunction with an infringement of a specific EU provision at the same time.[185]

This belief followed from COM(14) where the Commission states that the infringement procedures based on Article 258 TFEU 'has proven to be an important instrument addressing certain rule of law concerns' but that 'infringement procedures can be launched by the Commission only where these concerns constitute, at the same time, a breach of a specific provision of EU law'.[186]

This legal limitation of not basing an infringement procedure on the values in Article 2 TEU stems from the Commissions compliance with the Charter. In Article 51 of the Charter where it states its field of application that the EU institutions can only address the Member States in matters of the Charter when the Member States are implementing EU law.[187] From COM(2010)[188] the Commission further clarifies that the Charter does not apply in situations where there is no link to EU law and that the provisions in the Charter does not extend the powers of the EU as defined in the EU Treaties.[189] When there are situations outside of the scope of the Charter, meaning when there are breaches of fundamental rights that has no connection to EU law, the only way to enforce these fundamental rights are through an Article 7 TEU procedure. However, the Commission underlines

[184] ibid, p.1776.
[185] ibid, footnote 17.
[186] 'Communication from the Commission to the European Parliament and the Council: A new EU Framework to strengthen the Rule of Law' COM (2014) 158 final, 11 March 2014. p.5.
[187] ibid, footnote 14.
[188] Commission, 'Communication from the Commission: Strategy for the effective implementation of the Charter of Fundamental Rights by the European Union' COM (2010) 573 final, 19 October 2010.
[189] ibid, p.3.

that this is a political procedure meant as a last resort.[190]

The Communication dates back to 2010 and since then interesting case law has developed on the subject of value enforcement, famously in the *ASJP* case and cases building upon that precedence. A few of these will be examined in chapter 7 of this thesis.

4.5.2 Article 259 TFEU

The difference between Article 258 and 259 TFEU is that in Article 258 TFEU it is the Commission that initiates the infringement procedure against the Member State and enjoys full discretion in doing so, and in Article 259 TFEU it is another Member State that initiates the procedure and may bring the matter before the CJEU.[191] Article 259 TFEU is the only possible way for a Member State to bring legal actions against another Member State, as stated in Article 344 TFEU.[192]

However, in Article 259 TFEU the Commission still has some say in the procedure. There is an obligation for the initiating Member State to bring the matter before the Commission first, thus the Commission has a right to leave a reasoned opinion about the matter.[193] However, this right to leave a reasoned opinion is not an obligation for the Commission, they can choose not to give a reasoned opinion or even fail to do so within a three-month period and the initiating member state can still proceed with taking the matter before the CJEU.[194]

The practical use and importance of Article 259 TFEU has been limited due to a number of a reasons. So far there have been roughly eight cases brought before the CJEU based on Article 259 TFEU.[195]

The first reason for this is, understandably, that Member States may be reluctant to issue an infringement procedure against another Member State because of its political implications. It is much more preferable to leave that to the Commission which acts as an independent part with its own infringement procedure in Article 258 TFEU. The second reason being that if the Commission does not leave a reasoned opinion on the case, the case

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[190] ibid, p.10.
[191] Article 259(1) TFEU.
[192] Bernhard Schima 'Article 259 TFEU' Manuel Kellerbauer, Marcus Klamert & Jonathan Tomkin (eds.), *The EU Treaties and the Charter of Fundamental Rights: A Commentary* (Oxford University Press, 2019) p.1785.
[193] Article 259(2) TFEU.
[194] Article 259(4) TFEU; Bernhard Schima 'Article 259 TFEU' Manuel Kellerbauer, Marcus Klamert & Jonathan Tomkin (eds.), *The EU Treaties and the Charter of Fundamental Rights: A Commentary* (Oxford University Press, 2019)
[195] Phedon Nicolaides '"Member State v Member State" and other pecularities of EU Law' (Maastricht University, 24 June 2019) https://www.maastrichtuniversity.nl/blog/2019/06/"member-state-v-member-state"-and-other-peculiarities-eu-law accessed 2 February 2021.

might not be worth to pursue. Also, if the Commission finds that a case might be worth pursuing, the Commission can 'take over' the case and turn it into an ordinary infringement procedure under Article 258 TFEU.[196]

Despite this, and probably a product of the times, the Netherlands may be launching an infringement procedure against Poland. The 1st December 2020 the lower house of the Dutch Parliament urged the Government to launch an infringement procedure against Poland, concerning their violations of rule of law because of political interference in their appointment of judges.[197]

4.5.3 Article 260 TFEU

After the first referral to the CJEU, it might be the case that the concerned Member State still does not comply with the judgement in an efficient matter according to the Commission. If that is the case the Commission has an opportunity to refer the case to the CJEU for a second time, and the CJEU assess whether the Member State has complied with the judgement from the first referral or not.[198]

A decision from the CJEU following from a procedure through either Article 258 or 259 TFEU is only declaratory. It is only within the CJEU's power to declare that there is an infringement, or an infringement has been made, and the CJEU cannot in its judgement order the concerned Member State to take any measures to stop the infringement.[199]

However, it follows from Article 260(1) TFEU that the Member State in question has a duty to take the necessary measures to comply with that judgement.[200]

The second referral to the CJEU must be accompanied by a proposal by the Commission of a financial sanction, either a penalty payment or a lump sum payment or both.[201]

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[196] Bernhard Schima 'Article 259 TFEU' Manuel Kellerbauer, Marcus Klamert & Jonathan Tomkin (eds.), *The EU Treaties and the Charter of Fundamental Rights: A Commentary* (Oxford University Press, 2019) pp.1785-1786.
[197] Aleksandra Krzysztoszek 'Dutch government urged to sue Poland in top EU court over rule of law debacle' (EURACTIV, 2 December 2020) https://www.euractiv.com/section/politics/short_news/dutch-government-urged-to-sue-poland-in-top-eu-court-over-rule-of-law-debacle/ accessed 8 February 2021.
[198] 'Legal Enforcement' (European Commission) https://ec.europa.eu/environment/legal/law/procedure.htm accessed 21 May 2021.
[199] Bernhard Schima 'Article 260 TFEU' Manuel Kellerbauer, Marcus Klamert & Jonathan Tomkin (eds.), *The EU Treaties and the Charter of Fundamental Rights: A Commentary* (Oxford University Press, 2019) pp.1786-1787.
[200] Ibid, p.1788.
[201] Article 260(2) TFEU; 'Financial sanctions' (European Commission, last updated 22.12.17) https://ec.europa.eu/atwork/applying-eu-law/infringements-proceedings/financial-sanctions/index_en.htm accessed 25 February 2021.

5 Systematic infringement procedures *de lege ferenda*

5.1 Introduction

Other than the sanctioning tool in the Article 7 TEU procedure, the Commission has powerful and more readily available tools for ensuring Member States compliance with EU law: the infringement procedures in Article 258 and 259 TFEU. Article 258 TFEU is commonly used as a tool to 'attack' infringements by Member States relating to the EU *acquis,* but this procedure is carried out with the assumption that the Member State otherwise is generally compliant with EU law. The question arise regarding what the Commission should do when a Member States conduct deviates from this general assumption of compliance which potentially threatens the values and principles in Article 2 TEU and undermines the enforcement of EU law within its jurisdiction?[202]

Kim Lane Scheppele, together with Dimitry Kochenov and and Barbara Grabowska-Moroz, authors of the article 'EU Values Are Law, after All: Enforcing EU Values through Systematic Infringement Actions by the European Commission and the Member States of the European Union' presents their research on how to enforce the values in Article 2 TEU through EU law and also proposes a way to use the already existing framework in a new way.

The aim and structure of the research, as the authors describe it, is that the tools for sanctioning Member States that do not comply with Article 2 TEU is contained in Articles 258-260 TFEU, and these tools can be turned into tools of 'militant democracy' if there is a political will behind it. So far, according to the authors, this political will has been missing, but as the violations continue and the situation within the EU gets worse the relevant actors may realize that it is crucial to act.[203]

The article proposes a new way to use the already existing Article 258 and 259 TFEU. The idea is that:

> The Commission under Article 258 TFEU or an activist Member State (or group of Member States) under Article 259 TFEU could signal a *systematic breach* of EU values by an

[202] Kim Lane Scheppele & R. Daniel Kelemen 'Defending Democracy in EU Member States: Beyond Article 7 TEU' Francesca Bignami (ed.), *EU Law in Populist Times: Crises and Prospects* (Cambridge University Press, 2020) pp.433-434.
[203] Kim Lane Scheppele, Dimitry Kochenov & Barara Grabowska-Moroz, 'EU Values Are Law after All: Enforcing EU Values through Systematic Infringement Actions by the European Commission and the Member States of the European Union' (Yearbook of European Law, Vol. 39 pp.1-121, 2020) p.9.

> offending Member State by *bundling a group of specific alleged violations together* to argue before the ECJ that the infringement of EU law in a Member State is not minor or transient, but systematic and persistent.[204]

The reason for the systematic approach is that often an infringement procedure is initiated on the basis of a single violation and it does not address whether the concerned Member State is violating the fundamental principles of the EU. By launching a systematic 'attack' the concerned Member State is forced to enforce the foundational premise of EU law in general within its borders.[205]

The initial proposal for using the infringement Articles in a more systematic way was made by Kim Lane Scheppele[206], and the article that came out in 2021 builds upon the initial proposal but suggests a more far-reaching assessment of the national-level developments in the Member States that shows signs of being a backsliding democracy. If the assessment leads to the conclusion that the Member State has violated the values of the EU numerous times, then the situation might require a supranational intervention.[207]

5.2 Three ways of systematic infringement procedures through Article 258 TFEU

Kim Lane Scheppele proposes a rethinking of the way that the Commission brings infringement procedures under Article 258 TFEU. Contrary to an ordinary infringement procedure where 'narrowly focused elements of a Member State actions are singled out for attention one at a time'[208], the suggestion is that the Commission could 'bundle' a group of specific allegations together as to argue before the CJEU and prove that the infringement of EU law in a Member State is 'not minor or transient, but systematic and persistent and that it rises to the level of infringement of basic values of the Union'.[209] The idea is that by bundling these allegations together a pattern could be recognized which altogether could constitute an even more serious violation of the values in Article 2 TEU than the same

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[204] ibid, p.18.
[205] ibid.
[206] See Kim Lane Scheppele, 'Enforcing the Basic Principles of EU Law through Systemic Infringement Actions' (Cambridge University Press, 2016).
[207] Kim Lane Scheppele, Dimitry Kochenov & Barara Grabowska-Moroz, 'EU Values Are Law after All: Enforcing EU Values through Systematic Infringement Actions by the European Commission and the Member States of the European Union' (Yearbook of European Law, Vol. 39 pp.1-121, 2020) p.9.
[208] Kim Lane Scheppele 'Constitutional Coups in EU Law', Maurice Adams, Anne Meuwese & Ernst Hirsch Ballin (eds.) *Constitutionalism and the Rule of Law: Bridging Idealism and Realism* (Cambridge University Press, 2017) p.468.
[209] ibid.

allegations being assessed separately, and it is that pattern that could give rise to the finding of a systematic breach.[210]

This new way of systematic infringement actions would focus on claims that raise questions of a more fundamental sort and would therefore distinguish itself from the classic infringement procedure where a violation of a single source of EU law is proven by a pattern of separate instances.[211]

Kim Lane Scheppele and R. Daniel Klemen argue that there are three ways that a systematic infringement procedure could be brought before the CJEU according to doctrine.

The first way would be to bring cases before the CJEU where a Member State has shown a pattern of directly violating one or more of the values in Article 2 TEU. A judgement on the matter from the CJEU would secure effective national remedies in national courts for violations of EU law.[212]

This way has been widely discussed in doctrine as a 'no-go' due to academic's belief that Article 2 TEU can only be enforced by Article 7 TEU procedures. However, with the CJEU's judgement in the *ASJP* case, which other academics has argued in favour of, the CJEU seems to believe now that the values in Article 2 TEU are legal as well as political.[213]

Secondly, as a way of enforcing the Article 2 TEU values through a systematic infringement procedure before the CJEU could be to argue that systematic violations of the values by a Member State puts that Member State in violation of Article 4(3) TEU, which states '[p]ursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties'.[214]

The CJEU already has developed jurisprudence on sincere cooperation and loyalty, which it used in the *ASJP* case in conjunction with Article 2 TEU. The Commission could argue here that Member States who enforce laws which violates the EU values are violating their loyalty and sincere cooperation obligation which follows from the Treaties.[215]

Lastly, the Commission could bring a Member State before the CJEU because that Member State allegedly has engaged in violations of the Charter. Instead of bringing a specific violation of an individual right, the

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[210] ibid, p.468.
[211] ibid, p.649.
[212] Kim Lane Scheppele & R. Daniel Kelemen 'Defending Democracy in EU Member States: Beyond Article 7 TEU' Francesca Bignami (ed.), *EU Law in Populist Times: Crises and Prospects* (Cambridge University Press, 2020) p.437.
[213] ibid.
[214] Article 4(3) TEU.
[215] Kim Lane Scheppele & R. Daniel Kelemen 'Defending Democracy in EU Member States: Beyond Article 7 TEU' Francesca Bignami (ed.), *EU Law in Populist Times: Crises and Prospects* (Cambridge University Press, 2020) p.437.

Commission would bring an action for situations in which a regular misapplication of EU law in itself constitutes a practice of widespread rights violations.[216]

5.3 Systematic infringement procedures through Article 259 TFEU

In the article 'Biting Intergovernmentalism: The Case for the Reinvention of Article 259 TFEU to Make It a Viable Rule of Law Enforcement Tool'[217], author Dimitry Kochenov argues for the use of Article 259 TFEU to enforce the rule of law within the EU Member States. The Article 259 TFEU procedure allows Member States to bring actions against another Member State and refer the matter to the CJEU directly, without necessarily having to go through the Commission first.[218]

Kochenov argues on the basis of three starting points, the first being that Article 259 TFEU has been unjustly overlooked by commentators so far and that it is useful in the area of value enforcement, that the direct action is usable in practice and that the triggering of a process through Article 259 TFEU should not be excessively difficult.[219]

As a starting point, Kochenov emphasizes that the use of Article 259 TFEU shifts the focus from the institutional enforcement of values to the Member States. The potential problem of criticizing the EU institutions for abusing their power of conferral and an overly broad interpretation of the legal effects of Article 2 TEU could be avoided by instead making the Member States the guardian of the values.[220] The same line of argumentation has been used by Kim Lane Scheppele and Barbara Grabowska-Moroz, that an infringement procedure based on Article 259 TFEU 'sidesteps the worry that systematic infringement actions allow the Commission to grow its enforcement powers beyond the scope of conferral as represented by the *acquis sensu stricto*'.[221]

The aim of Article 259 TFEU, the same as Article 258 TFEU, is simply to ensure compliance with EU law. Therefore, the procedure does not require a

[216] ibid, p.438.
[217] Dimitry Kochenov 'Biting Intergovernmentalism: The Case for the Reinvention of Article 259 TFEU to Make It a Viable Rule of Law Enforcement Tool' (Hague Journal on the Rule of Law, 2016).
[218] ibid, p.1.
[219] ibid, pp.4-7.
[220] ibid, pp.8-9.
[221] Kim Lane Scheppele, Dimitry Kochenov & Barara Grabowska-Moroz, 'EU Values Are Law after All: Enforcing EU Values through Systematic Infringement Actions by the European Commission and the Member States of the European Union' (Yearbook of European Law, Vol. 39 pp.1-121, 2020) p.96.

demonstration of harm to the claiming Member State, the fact that there is a breach of EU law is enough.[222]

Article 259 TFEU does not exclude the possibility of several Member States to bring an action against a Member State, and even if there is 'just' one Member State initiating the procedure against another Member State, when the case is referred to the CJEU all Member State who wishes to be involved are allowed to submit their observations to the Court.[223]

Article 259 TFEU has a history of being a highly politicized procedure, famously tainted by the Haider affair, as well as the cases based on it. E.g. the case of *Slovakia v Hungary*, where the Hungarian President was denied entry into Slovakia, received a lot of attention due to political tension between the two Member States.[224] The Commission has notoriously shied away from cases with federal questions, and this unwillingness from the Commission to bring such a case before the CJEU through an Article 258 TFEU procedure, would make the Article 259 TFEU procedure suitable for these types of cases instead.[225] The previous history of the usage of the procedure should not taint the possible use of the procedure moving forward. Any procedure 'targeting' democratic backsliding in a Member State will lead to some sort of reaction, however that does not mean the procedure in itself cannot and should not be deployed.[226]

Kochenov recognizes that the proposal for a systematic infringement procedure made by Kim Lane Scheppele could also be useful, and perhaps more useful, in the context of Article 259 TFEU procedures. The proposal by Scheppele could be more helpful, 'as deploying it in this new context will not require overcoming the Commission's inertia against considering the EU's values (and the Charter, also) as worth enforcing'.[227]

Member States, or a group of Member States, could prepare systematic violation cases and rely on all the arguments on numerous infringements to

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[222] Dimitry Kochenov 'Biting Intergovernmentalism: The Case for the Reinvention of Article 259 TFEU to Make It a Viable Rule of Law Enforcement Tool' (Hague Journal on the Rule of Law, 2016) p.12, see footnote 51.
[223] Article 259(1) TFEU; Kim Lane Scheppele, Dimitry Kochenov & Barara Grabowska-Moroz, 'EU Values Are Law after All: Enforcing EU Values through Systematic Infringement Actions by the European Commission and the Member States of the European Union' (Yearbook of European Law, Vol. 39 pp.1-121, 2020) p.98.
[224] See Case C-364/10 *Hungary v Slovak Republic* [2012] ECLI:EU:C:2012:630.
[225] Dimitry Kochenov 'Biting Intergovernmentalism: The Case for the Reinvention of Article 259 TFEU to Make It a Viable Rule of Law Enforcement Tool' (Hague Journal on the Rule of Law, 2016) p.13.
[226] Kim Lane Scheppele, Dimitry Kochenov & Barara Grabowska-Moroz, 'EU Values Are Law after All: Enforcing EU Values through Systematic Infringement Actions by the European Commission and the Member States of the European Union' (Yearbook of European Law, Vol. 39 pp.1-121, 2020) p.97.
[227] Dimitry Kochenov 'Biting Intergovernmentalism: The Case for the Reinvention of Article 259 TFEU to Make It a Viable Rule of Law Enforcement Tool' (Hague Journal on the Rule of Law, 2016) pp.20-21.

indicate an ongoing breach of Article 2 TEU values.[228] Kochenov argues that it is difficult to imagine that the CJEU would turn down a well-documented case of systematic infringement brought by a Member State or a group of Member States, and the fact that if the case is admissible, it will mean a rethinking of the European legal order as it stands, and the importance of the role of Article 259 TFEU in it.[229]

Kochenov recognizes however, that if the Commission decides to join in on the infringement brought by a Member State, this could potentially 'water down the core arguments'.[230] To ensure the enforcement if this were to happen, a Member State which does not agree with the Commission's arguments can proceed to the CJEU on their own, a possibility which is established by the CJEU's case-law.[231] Article 259 TFEU does require that the case is presented to the Commission, and that the Commission can choose to intervene or not in the procedure. If the Commission decides to intervene, it can choose to take over the case and make it an ordinary infringement procedure.[232] This is the reason why there only exists a handful of infringement procedures based on Article 259 TFEU, because if the Commission is convinced there is a strong case then they can make it an infringement procedure under Article 258 TFEU, and if the Commission is not convinced there might be a reason why, which has resulted in that the infringement procedures under Article 259 TFEU are highly controversial and political.[233]

5.4 Systematic compliance

Regardless of if a case referred to the CJEU is brought by the Commission under Article 258 TFEU or a Member State or a group of Member States under Article 259 TFEU, a systematic infringement procedure addressing systematic violations by a Member State must be remedied by systematic compliance. Systematic compliance would require that the Member State subject for the procedure correct its violations of a systematic threat of the EU principles rather than focusing on correcting a small part of it, and thus ignoring the essence of the proven infringement.[234]

This problem of 'cherry-picking' has been addressed by Agnes Batory in 2016, when discussing trends and strategies in cases brought by the Commission. Batory acknowledged that when the Commission launches an

[228] ibid, pp.22-23.
[229] ibid, p.24.
[230] ibid, p.24.
[231] ibid; see e.g. Case 141/78 *France v UK* [1979] ECLI:EU:C:1979:225.
[232] Kim Lane Scheppele, Dimitry Kochenov & Barara Grabowska-Moroz, 'EU Values Are Law after All: Enforcing EU Values through Systematic Infringement Actions by the European Commission and the Member States of the European Union' (Yearbook of European Law, Vol. 39 pp.1-121, 2020) p.100.
[233] ibid.
[234] ibid, p.103.

infringement procedure the Member States may have different strategies to not comply with EU law that the alleged infringements are targeting, such as:

> Violators' strategies may include rushing through wide-scale changes all at once, knowing that the Commission would pinpoint only a small number of the most controversial changes. Member states may also cherry pick, making concessions that are inconsequential from the point of view of the measure(s)' intended aim, yet allow the member state to claim to have been flexible. Member state governments may also simply pretend to comply and in practice ignore the spirit of the agreement reached with the Commission.[235]

To avoid this situation, Scheppele, Kochenov and Grabowska-Moroz suggests that compliance should be assessed differently in systematic infringement actions and that:

> A systematic infringement action should therefore open up a wider range of options for what would count as compliance, something which the ECJ would contribute by finding a range of linked practices to be violations of EU values.[236]

[235] Agnes Batory 'Defying the Commission: Creative Compliance and Respect for the Rule of Law in the EU' (Public Administrations, Vol. 94, Iss. 3, pp.685-699, 2016) p.696.
[236] Kim Lane Scheppele, Dimitry Kochenov & Barara Grabowska-Moroz, 'EU Values Are Law after All: Enforcing EU Values through Systematic Infringement Actions by the European Commission and the Member States of the European Union' (Yearbook of European Law, Vol. 39 pp.1-121, 2020) pp.103-104.

6 Infringement cases and the Commissions discretion

6.1 Initial considerations

As been explored in this thesis, there are different opinions regarding whether Article 258 TFEU can be used to enforce Article 2 TEU values without being in a conjunction with another EU rule related to the *acquis.*

According to the Commission in its communication directive from 2014, this is not possible.[237] However, according to Chritsophe Hillion as well as Kim Lane Scheppele, it should in principle be possible. Kim Lane Scheppele has also suggested the conjunction of Article 2 TEU with another principle in TEU, the principle of sincere cooperation and loyalty in Article 4(3) TEU.[238]

Concerning the enforceability of the values through Article 258 TFEU, which has been touched upon in previous chapters, it was believed for a long time that it was not possible to enforce the fundamental principles in Article 2 TEU such as rule of law, if at the same there was not a specific EU provision that was also a subject for violation. This led to problems in previous cases concerning Poland and Hungary[239], however, this narrative changed with the CJEU's ruling in the *ASJP* case.[240]

The CJEU confirmed in the judgement that Article 19 TEU gives concrete expression to the rule of law stated in Article 2 TEU and that Article 2 TEU is a legally binding provision that is obligatory and can create concrete duties on Member States. This judgement therefore opened up to the Commission to initiate infringement procedures based on Article 19 TEU directly.[241] The CJEU thus cleared up two previous problems in relation to enforceability of rule of law, first the legal status of Article 2 TEU, and second whether or not an infringement procedure could be initiated without being specifically linked to a specific provision of EU law.

After the ruling in 2018, this is exactly what the Commission did in the case *Commission v Poland*[242] where the Commission initiated an infringement

[237] See chapter 4.5.1.1.
[238] See chapter 4.5 and 5.2.
[239] See e.g. Case C-286/12 *Commission v Hungary* [2012] ECLI:EU:C:2012:687 and Case C-192/18 *Commission v Poland* [2019] ECLI:EU:C:2019:924.
[240] Franziska-Marie Hilpert 'An Old Procedure with New Solutions for the Rule of Law'(Nordic Journal of European Law, Vol. 2, Iss. 2, 2019) p. 4.
[241] ibid, p.5.
[242] Cases C-619/18 *Commission v Poland* [2018] ECLI:EU:C:2018:910.

procedure against Poland based on the second subparagraph of Article 19(1) TEU, read in conjunction with Article 47 of the Charter.[243]

6.2 Cases Poland

6.2.1 Cases C-619/18 Commission v Poland

A new law entered into force in Poland on 3 April 2018, amending the retirement age for judges of the Supreme Court in Poland from 70 years, with the possibility of a continuance of employment until age 72[244], to 65 years with the possibility of being granted continued employment for a period of three more years. The continuance of employment could be granted twice.[245]

Based on this law-amendment, the Commission initiated an infringement procedure through Article 258 TFEU based on the second subparagraph of Article 19(1) TEU and Article 47 of the Charter by sending a letter of formal notice to Poland on 2 July 2018. Poland disputed the claims of infringement by the Commission in a reply on 2 August 2018, which led the Commission to issue a reasoned opinion on the matter. Poland responded to the reasoned opinion on 14 September 2018 where they denied the alleged infringements.[246]

The matter was brought before the CJEU by the Commission, and the Commission presented two complaints. Firstly, that the new law was violating the principle of irremovability of judges, since the new law was to be applied to the judges who were appointed to that post before the law entered into force (meaning: judges who were appointed to the post before the new law entered into force, if they were 65 years old, would be forced to retire as the new law entered into force). Secondly, the new law violated the principle of judicial independence, since the President of Poland could grant an extension of the judge's judicial activity.[247]

Before addressing the Commission's complaints, the CJEU first ruled on the application and scope of the second subparagraph of Article 19(1) TEU. The Commission relied on the previous judgement in the *ASJP* case, stating that for a Member State to meet the requirement set out in the second subparagraph of Article 19(1) TEU, the national courts and tribunals which may rule on matters relating to EU law must meet these requirements. Since the Supreme Court of Poland constitutes such a court it must meet these

[243] Franziska-Marie Hilpert 'An Old Procedure with New Solutions for the Rule of Law'(Nordic Journal of European Law, Vol. 2, Iss. 2, 2019) p.5.
[244] Cases C-619/18 *Commission v Poland* [2018] ECLI:EU:C:2018:910, para 9.
[245] ibid, para 11.
[246] ibid, paras 15-16.
[247] ibid, para 26.

requirements, not only in the way a case is conducted but also the construction of the court and justice system.[248]

The Polish Government contested the stance of the Commission, supported in this connection by Hungary, saying that the national rules in this case cannot be the object of review in the light of the second subparagraph of Article 19(1) TEU and Article 47 of the Charter.[249] Poland continued its complaints with that '[i]t is common ground that the organization of the national justice system constitutes a competence reserved exclusively to the Member States, so that the EU cannot arrogate competence in that domain'.[250] Poland finished their complaints regarding the scope and application of Article 19 TEU by saying that these 'general principles of EU law such as the principle of judicial independence, are applicable only in situations governed under EU law'.[251]

As a last statement, Poland stated that the present case has no connection with EU law, unlike the *ASJP* case, which was connected to EU law with the grant of financial assistance by the EU.[252]

6.2.1.1 Findings of the CJEU regarding scope and application of Article 19(1) TEU

The CJEU started by stating the common values in Article 2 TEU which is shared by the Member States and which the Member States have freely committed to when applying to become a member of the Union.[253] This premise entails that national courts will respect the rule of law and the other values the Union is founded upon.[254] The second subparagraph of Article 19(1) TEU provides the Member States and entrusts them with the responsibility of applying EU law and for ensuring judicial protection 'of the rights of individuals under that law to national courts and tribunals and to the Court of Justice'.[255] It is therefore a responsibility for the Member States to establish a system of legal remedies and procedures ensuring effective judicial review in the fields covered by EU law.[256]

The principle of effective judicial protection in the second subparagraph of Article 19(1) TEU is a general principle stemming from the constitutional traditions which are common to all the Member States[257], and the scope of the provision 'refers to "the fields covered by Union law", irrespective of whether the Member States are implementing Union law within the meaning

[248] ibid, paras 34-36.
[249] ibid, para 37.
[250] ibid, para 38.
[251] ibid, para 39.
[252] ibid, para 40.
[253] ibid, para 42.
[254] ibid, para 43.
[255] ibid, para 47.
[256] ibid, para 48.
[257] ibid, para 49.

of Article 51(1) of the Charter'.[258]

The CJEU continues their description of the material scope by stating that:

> [E]very Member State must, under the second subparagraph of Article 19(1) TEU, 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 EU law meet the requirements of effective judicial protection.[259]

In the present case, the CJEU found that the Polish Supreme Court may be called to rule on questions concerning the interpretation of EU law, and thus the Supreme Court falls within the fields covered by Union law within the meaning of the second subparagraph of Article 19(1) TEU so that the Supreme Court must meet the requirements of effective judicial protection.[260]

6.2.1.2 Findings of the CJEU regarding the principles of irremovability of judges and judicial independence

The Commission held that Poland infringed the principle of judicial independence and the principle of irremovability of judges due to measures lowering the retirement age for judges[261], as well as Poland infringed the principle of judicial independence due to the President's ability to extend the time period of judicial activity of the judges.[262]

The CJEU took in all the aspects of consideration of judicial independence, which are the external nature where the court concerned must exercise its function wholly autonomously[263], the internal nature is linked to impartiality and an equal distance is maintained from the parties of the proceedings and their respective interests relating to the subject matter of those proceedings as well as it requires an absence of any interest of the outcome of the proceedings.[264]

The CJEU found that Poland did violate the principle of irremovability of judges, since the new law lowering the retirement age was not justified by a legitimate objective.[265] The CJEU stated that the Member States are entrusted with the decision to grant an extension of judicial activity, however this decision must not undermine the principle of judicial

[258] ibid, para 50.
[259] ibid, para 55.
[260] ibid, para 56.
[261] ibid, para 63.
[262] ibid, para 98.
[263] ibid, para 72.
[264] ibid, para 73.
[265] ibid, para 96.

independence.[266] It continued by saying that is important that the procedural rules governing the extension of employment are designed in a way that 'those judges are protected from potential temptations to give in to external intervention or pressure that is liable to jeopardise their independence'.[267] The CJEU found that the discretion that the Polish President held to authorize a judge to continue their judicial activity was such as to give reasonable doubts as to the judges neutrality.[268]

Franziska-Marie Hilpert has identified a few reasons for why this case, and this procedure could be effective in solving the rule of law crisis. One of them being that the Commission asked for an expedited procedure, as well as requested interim measures. The judgement was able to be delivered quickly due to the expedited procedure, and the interim measures effectively suspended the application of the law and obliged Poland to suspend the effects of the law.[269]

6.2.2 Press release Commission v Poland

On 31 March 2021, after almost a year of communication with Poland through letters of formal notice and reasoned opinions, the Commission referred Poland to the CJEU on the basis of Article 258 TFEU.[270]

The reason for the referral is a new Polish law, which entered into force on 14 February 2020, regarding the law of the judiciary. According to the Commission, the new law undermines the independence of the judiciary, and the law prevents the Polish courts from applying certain EU provisions which protects the judicial independence, as well as prevents putting references for preliminary rulings concerning these questions to the CJEU.[271]

In addition to the new law, the Commission also considers that Poland violates EU law by allowing the Disciplinary Chamber of the Polish Supreme Court, whose independence cannot be guaranteed, to make decisions which have direct impact on judges and the way they exercise their judicial function.[272]

Besides the referral to the CJEU, the Commission also requested the CJEU to order interim measures in the case, so as to prevent the aggravation of

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[266] ibid, para 110.
[267] ibid, para 112.
[268] ibid, para 118.
[269] Franziska-Marie Hilpert 'An Old Procedure with New Solutions for the Rule of Law' (Nordic Journal of European Law, Vol. 2, Iss. 2, 2019) p.12.
[270] 'Rule of Law: European Commission launches infringement procedure to protect judges in Poland from political control' https://ec.europa.eu/commission/presscorner/detail/en/IP_19_1957 (European Commission, updated 31 March 2021) accessed 17 April 2021.
[271] ibid.
[272] ibid.

harm inflicted on the judicial independence and the EU legal order.[273]

In its request for interim measures, the Commission asked the CJEU in particular to suspend the provisions which is currently empowering the Disciplinary Chamber of the Polish Supreme Court to decide on matters regarding the judges, to suspend these decisions which have already been taken, and to suspend the provisions preventing the Polish courts to directly apply the certain provisions of EU law and to refer these questions for a preliminary ruling to the CJEU.[274]

6.3 Cases Hungary

6.3.1 Commission v Hungary C-235/17

The Commission brought an infringement matter against Hungary before the CJEU in case *Commission v Hungary*[275], on the grounds that Hungarian provisions regarding productive, agricultural and forestry land were violating Article 49 and 63 TFEU as well as Article 17 of the Charter, 'by restricting in a manifestly disproportionate manner the rights of usufruct over agricultural and forestry land'.[276]

Hilpert argues that what makes this case important is that the Commission stressed that irrespective of what CJEU concluded in its examination of the freedoms of movement in TFEU, the Commission wanted the CJEU to leave its opinion about Article 17 of the Charter.[277] The CJEU did so in its judgement by considering the applicability of Article 17(1) of the Charter by itself in an individual assessment of the judgement.

The CJEU first stated that it must be borne in mind that the fundamental rights of the Charter are applicable in all situations governed by EU law and must therefore be complied with in situations where national legislation falls within the scope of EU law.[278] If a Member State in its national legislation obstructs one or more of the fundamental freedoms provided for in the TFEU, this exception must comply with the fundamental rights which are under the observance of the Court.[279] Therefore, when a Member State means to use one of the exceptions to justify and impediment of the fundamental freedoms, this must be regarded as implementing Union law within the meaning of the Charter.[280]

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[273] ibid.
[274] ibid.
[275] Case C-235/17 *Commission v Hungary* [2019] ECLI:EU:C:2019:432.
[276] ibid, para 1.
[277] Franziska-Marie Hilpert 'An Old Procedure with New Solutions for the Rule of Law' (Nordic Journal of European Law, Vol. 2, Iss. 2, 2019) p.14.
[278] Case C-235/17 *Commission v Hungary* [2019] ECLI:EU:C:2019:432, para 63.
[279] ibid, para 64.
[280] ibid, para 65.

In the present case, the CJEU emphasized that the contested provision of Hungarian law is a restriction of the free movement and Hungary relies on the exceptions provided for in Article 65 TFEU to justify this contested provision. The compatibility of the provision with EU law must be examined in the light of the exceptions provided for in the TFEU and the courts case-law on the one hand, and on the other hand it must be examined in the light of the fundamental rights guaranteed by the Charter.[281]

Franziska Marie-Hilpert raised some points of significance as to what this judgement means for the effective rule of law enforcement. Most importantly, she brought up the point of admissibility as a confirmation that the Commission is willing to bring a case before the CJEU through an infringement procedure in Article 258 TFEU based on a fundamental right in the Charter, and it also confirmed that the CJEU is willing to accept such a case and do an individual assessment of the Charter in relation to a national legislation rather than assessing its compatibility with a freedom of movement in the TFEU.[282]

However, Franziska-Marie Hilpert also offered some criticism against the CJEU in her article. According to Hilpert, the CJEU could have gone for a more aggressive approach as to enforce the rule of law narrative it offered in its *ASJP* case, but instead the CJEU settled for by explaining its stance in previous case-law such as *Åkerberg Fransson*[283], and not explore a more systematic approach of the rule of law. As Hilpert put it:

> The significance was not with the secondary issue of property rights, but on the arbitrary exercise of power of the State (arbitrary removing of property rights) which adversely affects the core meaning of the rule of law, as it breaches the principle of legal certainty and legality.[284]

The CJEU thus failed to explore the triangular effect of democracy, the rule of law and fundamental principles and emphasizing that respect for fundamental rights cannot exist without also respecting the rule of law and democracy. Hilpert here finds that the CJEU had the opportunity to make the Charter a valuable tool for enforcing the values enshrined in Article 2 TEU but did not take that opportunity.[285]

However, since this case was the catalyst for basing an infringement procedure on the Charter, the Commission has since then brought more infringement procedures before the CJEU where it adopted the same approach.

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[281] ibid, para 66.
[282] Franziska-Marie Hilpert 'An Old Procedure with New Solutions for the Rule of Law' (Nordic Journal of European Law, Vol. 2, Iss. 2, 2019) p.16.
[283] See Case C-617/10 *Åklagaren v Hans Åkerberg Fransson* [2013] ECLI:EU:C:2013:105.
[284] Franziska-Marie Hilpert 'An Old Procedure with New Solutions for the Rule of Law' (Nordic Journal of European Law, Vol. 2, Iss. 2, 2019) p.17.
[285] ibid, pp.16-17.

6.3.2 Commission v Hungary C-78/18

The Commission sought a declaration from the CJEU in the *Commission v Hungary* case[286], about the Hungarian Transparency law for organizations which receives support from abroad, that Hungary has introduced 'discriminatory, unjustified and unnecessary restrictions on foreign donations to civil society organizations, in breach of its obligations under Article 63 TFEU and Articles 7, 8 and 12 of [the Charter]'.[287]

The law, according to the Commission:

[I]mpose obligations of registration, declaration and publication on certain categories of civil society organizations directly or indirectly receiving support from abroad exceeding a certain threshold and which provide for the possibility of applying penalties to organizations that do not comply with those obligations.[288]

The Commission, supported by Sweden who asked to intervene in the case, submits that since the Hungarian Transparency law 'restricts a fundamental freedom guaranteed by the FEU Treaty, it must also be compatible with the Charter'.[289]

The CJEU stated:

> [W]here a Member State argues that a measure of which it is the author and which restricts a fundamental freedom guaranteed by the FEU Treaty is justified on the basis of that Treaty or by an overriding reason in the public interest recognised by EU law, such a measure must be regarded as implementing Union law within the meaning of Article 51(1) of the Charter, such that it must comply with the fundamental rights enshrined in the Charter.[290]

6.3.3 Commission v Hungary C-66/18

In the *Commission v Hungary* case[291], the Commission claimed that Hungary has failed to fulfil obligations under GATS (General Agreement on Trade in Services), which is part of EU law, by adopting a national law (the Law on higher education) 'by requiring foreign higher education institutions situated outside the EEA to conclude an international agreement as a

[286] Case C-78/18 *Commission v Hungary* [2020] ECLI:EU:C:2020:476
[287] ibid, para 1.
[288] ibid.
[289] ibid, para 98.
[290] ibid, para 101.
[291] Case C-66/18 *Commission v Hungary* [2020] ECLI:EU:C:2020:792.

prerequisite for providing education services'.[292]

The CJEU states first of all that GATS forms a part of EU law[293] and therefore Hungary must be considered to implement EU law when performing their obligations under GATS, within the meaning of Article 51(1) of the Charter.[294]

Second, the CJEU emphasizes that when a national measures is restricting the freedom of movement in the TFEU and the Member State is arguing that such a measure is justified by an interest recognized by EU law, then such a measure must be considered to be implementing EU law within the meaning of Article 51(1) of the Charter and subsequently must comply with the fundamental rights enshrined in the Charter. This is in accordance with a previous judgement in *Commission v Hungary* case C-78/18.[295]

6.4 Commentary on the cases

I believe that the importance of these judgements is first that the CJEU has continued its precedence from the *ASJP* case where they highlight the rule of law expression in Article 19 TEU, and that the Commission followed suit to bring infringement procedures forward based on the EU law provisions which express the rule of law. This allows the precedence from the *ASJP* case to be even stronger with future rulings, and it can perhaps be expected that the new infringement procedure which have been launched against Poland on 31 March 2021 and concerns the independence of the Polish judiciary can be another added case to this strong precedence.

The second important aspect of these cases is the way which the Commission and the CJEU argues in favour for the CJEU's jurisdiction regarding cases that are admissible, stating that the scope of the Article 19(1) TEU provision 'refers to "the fields covered by Union law", irrespective of whether the Member States are implementing Union law within the meaning of Article 51(1) of the Charter'.[296] This, in combination with that the CJEU accepts infringement procedures based on fundamental rights in the Charter to be referred to them, has allowed the CJEU to broaden their jurisdiction and take on more cases regarding the rule of law. It has also given the Commission a strong incitement to refer these types of cases, likely to stop further infringements of the rule of law.

[292] ibid, para 1.
[293] ibid, para 71.
[294] ibid, para 213.
[295] ibid, para 214.
[296] Cases C-619/18 *Commission v Poland* [2018] ECLI:EU:C:2018:910, para 50.

6.5 Discretion of the Commission

The Commissions discretion in bringing Member States before the CJEU through an infringement procedure in Article 258 TFEU has been subject for much debate.[297] The debate concerns that there is a risk, in Paul Craig and Gráinne De Búrcas words, 'that the Commission may use its discretion in a way that is excessively lenient, or arbitrarily selective with defaulting Member States'.[298] Another risk with the Commission's discretion has been described by the authors as 'that enforcement proceedings might be used oppressively if there are insufficient procedural constraints on the Commission'.[299]

The Commission has absolute discretion to initiate infringement proceedings against a Member State, when the different formal actions are to take place and when the case should be referred to the CJEU. If several Member States commit the same type of infringements, then the Commission decides which Member State to start the procedure against first, and also has the discretion to determine what constitutes an infringement under the relevant articles of EU law.[300] The Commissions discretion to decide which Member State to start an infringement procedure against first, in a case where another Member State have committed the same infringement, has raised concerns about the principle of non-discrimination.[301] This was the case in *Commission v Portugal*[302], where Portugal raised the argument in the case brought against them by the Commission, that 'the Commission has not informed it of any other actions commenced against other Member States for the same reasons'.[303]

The CJEU gave the response to this argument that the Commission enjoys full discretion to decide to commence an action against a Member State and it is not required to justify its decision. The CJEU states that '[t]he Court of Justice need only ensure that the procedure adopted may, in principle, be employed with regard to the alleged infringement'.[304] The CJEU responded to the argument made by the Portuguese Government that 'the Commission ought […] to have brought against other Member States actions similar to the present one is clearly irrelevant'.[305]

Another counter argument has been made by the CJEU in a different case, *Commission v Finland*[306], where the CJEU stated that '[i]n the first place, it

[297] Paul Craig & Gráinne De Búrca, *EU Law: Text, Cases, and Materials* (Oxford University Press, 7th edition, 2020) p.487.
[298] ibid.
[299] ibid.
[300] Ernő Várnay 'Discretion in the Articles 258 and 260(2) TFEU Procedures' (Maastricht Journal of European and Comparative Law, 2015) p.839.
[301] ibid, p.848.
[302] Case C-70/99 *Commission v Portugal* [2001] ECLI:EU:C:2001:355.
[303] ibid, para 15.
[304] ibid, para 17.
[305] ibid, para 18.
[306] Case C-118/07 *Commission v Finland* [2009] ECLI:EU:C:2009:715.

must be observed that a Member State may not rely on the fact that other Member States have also failed to perform their obligations in order to justify its own failure to fulfil its obligations under the Treaty'[307] and that 'Articles 226 EC and 227 EC provide the appropriate remedies in cases where Member States fail to fulfil their obligations under the Treaty'.[308] Former Article 226 EC and 227 EC are now Article 258 TFEU and 259 TFEU, meaning that the CJEU further argues that if a Member State is unhappy with the Commission's approach to them in relation to other Member States similar violations, they are free to bring an infringement procedure on their own through Article 259 TFEU.[309]

[307] ibid, para 48.
[308] ibid.
[309] Ernő Várnay 'Discretion in the Articles 258 and 260(2) TFEU Procedures' (Maastricht Journal of European and Comparative Law, 2015) p.849.

7 Conclusion

7.1 Enforceability of Article 2 TEU and effective enforcement of Article 7 TEU

To answer the first research question, if the values in Article 2 TEU can be enforceable through other means than Article 7 TEU, and if Article 7 TEU an effective way of enforcing these, it is appropriate to divide the question into two subchapters.

7.1.1 The legal status of Article 2 TEU

As has been explained in previous chapters, the enforceability of the values in Article 2 TEU has long been a topic of discussion, with arguments both for and against its enforceability.

It was long believed that the values could only be enforced by themselves through the Article 7 TEU procedure since the Article expressly states so, and the Commission declared in their COM(2010) directive that infringement procedures, as a means of enforceability, can only be launched when it constitutes a concern of a specific EU provision. The same applied to the Charter, that it could not be applied here there is no link to an EU law provision.

However, presumably as the democratic backsliding within the EU became a more actualized concern, this previous stance has changed through case law, where the CJEU first declared this a possibility in the *ASJP* case, and the Commission has followed suit in infringement procedures leading up to it. The CJEU cleverly applied the rule of law as it is declared and defined in the second subparagraph of Article 19(1) TEU, and the Commission in the case *Commission v Hungary*[310] showed willingness to bring an infringement procedure before the CJEU based on Article 17 of the Charter, and the CJEU accepted and welcomed this new narrative of applying the fundamental principles of EU law directly.

The legal status of Article 2 TEU, at least the rule of law, is therefore, in my opinion, confirmed to be enforceable through other means than the Article 7 TEU procedure, perhaps not expressly, but through its expressions in other EU primary law provisions.

[310] Case C-235/17.

7.1.2 Effective value enforcement through Article 7 TEU?

I can only agree with other authors on this subject that the tools of enforcing the values in Article 2 TEU are readily available in Article 7 TEU, but there seems to be a lack of will to truly trigger the sanctioning part of the procedure. In the two cases of Poland and Hungary where the procedure has been initiated it is still in its initial stage of dialogue and recommendations when the establishment of a clear risk has been made, but there seems to be no will push it further.

As I have already written about in the previous chapters, even if there was a will to initiate the sanctioning procedure, it has also been highlighted in this thesis about how hard it is to initiate this sanctioning process. There can be a problem with coordinating the votes, as there is required unanimity by the Council. From this outlook it is not very effective if it is hard to enforce, at the same time there is of course a clear understanding of why it is hard to enforce and why it must be, since one of the fundamental principles in the EU is democracy which must be a prerequisite for the Member States as well as within the EU institutions, and by triggering the sanctioning process of Article 7(3) TEU some of these democratic functions for the Member States within the EU institutions are stripped away.

It is very clear why the Article 7 TEU procedure is referred to as the nuclear option because of the implications it results in for the concerned Member States if used to its full potential, but it is also clear that the full potential of Article 7 TEU may never be realized.

However, when talking about the effectiveness of Article 7 TEU it is important to remember what the purpose of the Article is. The Article has three stages to it where the first stage is based on dialogue and trying to solve the crisis, while the third step is purely punitive and has the main function of sanctioning the Member State. Therefore, perhaps the question should not be whether or not Article 7 TEU is effective as a whole, but rather whether Article 7 TEU is effective in relation to either solving the democratic crisis in the Member State or sanctioning the Member State due to failed attempts to solve the crises.

When discussing efficiency of the procedures, something important to also discuss is the element of unanimity in decisions.

We see this clearly in Article 7(3) TEU and has been discussed in a previous chapter about why the Article 7 TEU procedure is hard to initiate, because there is an expressive requirement of unanimity in the Council. This unanimity requirement is both the cause of the inefficiency of the procedure but also a requirement that I think, when speaking about efficiency, is important. It will indeed make the process harder to initiate, but as of now

the sanctioning process in Article 7(3) TEU has never been actualized so we do not know for sure how the process of voting would have played out. In return of making the process harder or slower to initiate, if all the Member State's representatives in the Council do vote in unanimity of starting the sanctioning process, then the strong political will behind this unanimity will indeed make it more efficient. If all the Member States in consensus votes for something that for them is vital for the Union and a vital interest for all of the that they share, then the procedure will indeed be effective. As has previously been stated numerous times by other authors and me, the Article 7 TEU procedure in itself is not the cause of the lack of sanctioning the Member States that are considered democratic backsliders, but the political will behind using the procedure is the 'problem'. The available tools are there, and there needs to be a will to use them, and if that will exist then I do think that the procedure will be efficient.

However, it would be naïve not to consider that a potential amendment of Article 7 TEU, in relation to the unanimity requirement in the Council, could make the procedure more effective. The unanimity requirement, as important as it is for the efficiency of law, does make the Article 7 TEU procedure almost impossible to enforce. As the Hungarian Prime Minister Viktor Orbán has stated, that if Poland becomes the subject for a sanctioning process through Article 7 TEU, Hungary will never vote in favour for such an initiation. Therefore, an amendment of Article 7 TEU, in the way that is proposed by Kim Lane Scheppele and Laurent Pech that another Member State subject for an Article 7 TEU procedure cannot participate in the vote in the Council for the activation of the sanctioning mechanism against another Member State, could prove to be helpful in solving the problem of Member States having each other's backs.

For the effectiveness of norms, it is discussed by Aleksander Peczenik that it is important that they are consistent and not too often changed to be able to secure that what has been tested in the same ways has also been giving results. This cannot be applied to Article 7 TEU procedure since it has not been tested in its full potential and has not been giving results of sanctioning. However, if following the theory of norm effectiveness, then perhaps the answer is not to change the mechanism the Article 7 TEU procedure offers, but rather find solutions in other alternative mechanisms. This is something that other authors have pointed out already, that the problem will not be solved by amending Article 7 TEU at this stage, but rather use the other tools and not relying on change through Article 7 TEU.

7.2 Effective value enforcement through Article 258 TFEU and the Commmissions political nature

Like the first research question, two answer the second question it is appropriate to divide the discussion into two subchapters, first discussing the effectiveness of Article 258 TFEU and then discussing the political element of the Commission as well as the possibility of CJEU being more suitable for upholding the rule of law through using an Article 267 TFEU procedure.

7.2.1 Effective value enforcement through Article 258 TFEU?

The proposed way to use Article 258 TFEU by Kim Lane Scheppele is still very 'experimental' since it has actually never been realized in its full potential where the Commission 'bundles up' infringements to show a systematic pattern of violations. The closest the EU institutions have been to realizing this is through the *ASJP* case which was not a case of infringement procedure but a case of referral for a preliminary ruling by the Member State to the CJEU, making the CJEU the EU institutions who maybe unexpectedly made a precedent in favour of enforcing Article 2 TEU through other means then Article 7 TEU.

However, along with what Scheppele proposed regarding bringing infringement procedures in conjunction with provisions of the Charter, the Commission has in the cases examined in chapter 6 brought infringement procedures based on provisions in the Charter, namely Article 47.

I think, in line with what author Franziska-Marie Hilpert already has allured to, that in recent years the Commission has shown a considerably more political will to enforce the rule of law and other fundamental rights as well as the values in Article 2 TEU through its case law since the *ASJP* case was delivered. This can be shown through the case law which has been explained in the previous chapters that the Commission is adopting a more aggressive approach of dealing with fundamental rights issues in the context of infringement procedures, which previously was not the case. Criticism has been raised that the Commission could adopt an even more aggressive approach, but as new cases of infringement procedures become ready for referrals to the CJEU, I do believe the Commission does adopt a more aggressive approach, but it does so at its own pace. As academics experience a sense of urgency in their critic against the Commission for not doing enough and not doing what they do fast enough, I think the Commission focuses on setting a strong precedence.

As far as effectiveness goes in the aspect of the time period when a case is

referred to the CJEU, the Commission has worked out a system of combining the infringement procedures in Article 258 TFEU with an expeditated procedure as well as requesting for interim measures, which has proven to be quite effectful and effective in regards to the time period which a case can be ruled upon.

Considering the conditions for efficiency made by Aleksander Peczenik, the condition of a general norm which is not too often changed and stays consistent could apply in the case of the procedure in Article 258 TFEU, in the aspect that it is not the rule of the procedure which changes in itself, but rather how it is applied. The legality, the wording of the Article 258 TFEU would not change to be able to enforce it in its proposed way. Even though the doctrinal concerns or criticism regarding the enforceability of the Article 2 TEU values through an Article 258 TFEU procedure has not gone away, the reality of the change in case law regarding the enforceability has changed and can be presumed to stay consistent in the narrative of the new precedence, and the Commission seems to be approaching the proposal made by Scheppele in their infringement procedures.

7.2.2 The Commissions political element and the Article 267 TFEU procedure

The Commission is, however, as objective they may seem to be, still an institution which enjoys full discretion in their infringement proceedings and may have a political intention with their proceedings. Their duty under the Treaties is to start proceedings against Member States for the purpose of making them comply with EU law, but there is still a political element to it in how they decide what constitutes an infringement and against which Member States. The Commission has already, as can be seen with Poland and Hungary, brought several proceedings against them to now target the judicial independence of their national courts to uphold the values in Article 2 TEU, which is welcome (at last) for several critics. However, the question arises whether the procedure can be truly effective when the Commission has this political element and is the Commission truly the guardian of the treaties then, as is suggested in Article 17 TEU?

It is a difficult distinction, one which will not be given a true and full answer in this thesis. Several critics who have been highlighted in this thesis claims that the Commission for long has lacked the political will to seriously uphold the rule of law in the Member States and if they just did then the Article 258 TFEU procedure could be able to be the tool of enforcement that the rule of law crisis needs. However, the question remains, which has been a topic of criticism for a long time with several Member States raising the topic of the Commissions discretion in launching infringement procedures, if this political willingness truly has lacked at all, or if the Commission has had this political element to its decision from the beginning of Article 258 TFEU due to its full discretion.

The critic following the Commissions full discretion from the Article 258 TFEU procedure, as it has been shown in case law, regards discrimination against the Member States that the Commission supposedly 'singles out' and that this discrimination is a political decision. The political will that authors attribute to the Commission as lacking, regarding the possible use of the infringement procedure in a systematic way, are described by these authors as lacking in the sense that the Commission could be more aggressive in their approach to bring infringement procedures. A more aggressive approach would be more political, which is something that the authors do not necessarily deem to be a problem, rather they seem to think it is a crucial element to properly 'sanction' these Member State to uphold the rule of law.

Finding a right answer here, if the Commission should be more political than it already is, is something that is hard to do. I think it is safe to assume however that the Commission has always had this element of political will in its infringement procedures, and the critic concerning this is that the Commission should be even more political and aggressive, rather than that this political will is lacking as a whole.

To avoid the political element of the Commission, and the infringement procedure as a whole, the CJEU could be the sole 'solver' of the rule of law question instead. According to Peczenik, a general principle could lose its effectiveness if it is subject to interpretation of judges too much. However, the foundation of the CJEU is that CJEU is the sole interpreter of the Treaties and in developing an EU method it is based on the interpretation methods of the CJEU.

The Member States are expected to follow the ruling of the CJEU where they have interpreted EU law. Even though the CJEU cannot rule on application but only interpretation in a preliminary ruling, the CJEU has still ruled on the correct interpretation of EU law, and if the Member States apply the interpretation in an incorrect manner, they would in fact violate EU law. The direct effect of these judgements does not only apply to the Member State which referred the questions, but the ruling becomes precedent for all Member States of the Union, which has been confirmed in the *ICC* case.

This seems to be an effective way of enforcing questions and interpretations of the rule of law, since it allows for the CJEU to give answers to the correct interpretations of rule of law related question and set precedence as to how correctly interpret these questions for the other Member States and not only the one that referred the case to the CJEU.

Member States could potentially avoid a judgement by simply refusing to refer a case to the CJEU, e.g. in a situation where the Member States judiciaries independence can be questioned (e.g. as shown in cases regarding Hungary and Poland). However, the preliminary ruling procedure contains the obligation for last instance courts or tribunals to refer a

question to the CJEU in Article 267(3) TFEU if it is needed for the interpretation of EU law, and the refusal of referring questions to the CJEU would then constitute a violation of EU law.

As for efficiency, the preliminary ruling procedure relies on a Member State's court or tribunal actually referring questions, either as an option or as an obligation, while in an infringement procedure brought by the Commission the cases could be more frequently brought before the CJEU if a national court or tribunal does not refer questions. Therefore, the development of case law could go faster through cases brought by an infringement procedure.

In the end, through Article 267 TFEU or Article 258 TFEU, the last to rule on the case and the interpretation of EU law is the CJEU. Regardless of the political intention of the Commission, if the case ends up before the CJEU, the CJEU is expected to make an objective ruling which is not influenced by the political nature of the case, but the infringement the Commission claims a Member State has made of an EU law provision or a fundamental principle.

However, in making such an argument it is important to circle back to the judgement of the CJEU in the *SEGRO* case. Once again it would be naïve not to consider that the CJEU, even though they should not be influenced by the possible political element of the Commission, shows to have a political mind of their own in the way they choose to prove their admissibility to interpret cases referred to them. In line with what scholars Groussot, Kirst and Leisure already has argued for, the CJEU seems to be holding the Hungarian Government and judiciary on a very tight leash when it comes to being able to interpret the cases referred to them as well as leaving little up to the application by the national judiciary. Even though the CJEU cannot rule on application they seem to be very eager to do so.

However, as has been stated, the CJEU cannot rule on application of their interpretation in the national judiciaries, even if the CJEU seems to be eager to do so, and there is little means for the CJEU to control the enforcement of this interpretation if a Member States judiciary decides not to enforce the CJEU's interpretation. The different ways which have been stated for a Member States judiciary to go about this includes to refer the question again, to only rule on the facts of the case or to apply a different interpretation to the case in a way which will not be 'noticeable'. Hofmann has described that even though the Commission could bring an infringement procedure against the Member State and constitute the 'non-application' of the interpretation as an infringement of EU law, they are hesitant to do so. The effectiveness of the Article 267 TFEU procedure therefore relies on that Member States follow the CJEU's interpretations in their application. If the national judiciaries choose not to do so, there do not seem to be much that the Commission can do about it, which would again raise questions about the effectiveness of the procedure.

7.3 Effective value enforcement through Article 259 TFEU?

The last research question will be discussing the infringement procedure in Article 259 TFEU, and whether it is an effective tool for enforcement of the rule of law through its proposed use by Dimitry Kochenov.

The Article 259 TFEU procedure could prove to be a useful tool of enforcing the values in the aspect that the Member States that do feel strongly about the rule of law crisis could group up and initiate a procedure which will then hopefully lead to a judgement from the CJEU, and in that sense avoid the unanimity criteria in the Council in regard to the impossible enforcement of the Article 7(3) TEU procedure. If the situation ever arises where there is time to vote for sanctions which limit the democratic rights of a Member State subject to the Article 7 TEU procedure, and another Member State publicly has made an announcement that they will never vote in favour for such sanctions, then the other Member States have another way of enforcing the same values without having to go through the unanimity vote.

As has already been discussed in the previous chapter regarding the conditions of efficiency for norms, in that they should be consistent and not too often changed, the case of an Article 259 TFEU procedure, like the Article 258 TFEU procedure, would fill this mould in that the procedure would not have to change its legality to be enforceable. The Article 259 TFEU procedure does experience the same doctrinal criticism regarding the enforceability of the values in Article 2 TEU as the procedure in Article 258 TFEU, however, the procedure in Article 259 TFEU has the ‘advantage’ of not being the subject for speculation on whether or not it is within the Member States jurisdiction to enforce these principles, like the Commission is.

The idea of enforcing these values though Article 259 TFEU as a way of not involving the Commission and going straight to the CJEU could be more effective considering the time aspect, since bringing an infringement procedure requires an initial procedure of formal notices and reasoned opinions by the Commission, of which the standard time period of sending a response is set at two months. However, using it in the sense of just leaving the Commission out of the procedure due to the Commissions previous lack of political will might be a wrongful accusation now.

Lastly, even if the procedure could be considered to be an effective way of enforcing the values in Article 2 TEU and tackle the rule of law crisis, the procedure would not be able to do so if it is never enforced. As much as the political will of the Commission as well as the other institutions of the EU has been discussed, the Member States of the Union seems to be lacking in this matter as well.

7.4 Concluding remarks

Systematic infringement procedures through Article 258 TFEU and 259 TFEU could serve as sufficient complement. It would not have the same sanctioning effect as the political procedure in Article 7 TEU, which can suspend some of the democratic rights which are derived from the Treaties to a Member State, but it would still force the Member State subject for the infringement procedure to comply with the CJEU's judgement. If the procedure is based on the values in the TEU as well as the fundamental principles in the Charter, and a pattern is shown by the Commission or the Member States that these values and fundamental principles are being systematically breached, then the CJEU would be required to properly address this pattern in a systematic way.

A trend can be seen in the presented case law on Article 258 TFEU procedures, where the Commission has started to incorporate the fundamental principles of EU law and its values and base the proceedings on these. As can be seen by the press release, the Commission continues to build upon the precedence from the *ASJP* case, and together with the request for an expedite procedure as well as request for interim measures this approach could be an effective way of tackling the rule of law crisis, or at least the Commission seems to think it is.

When discussing the infringement procedure in Article 258 TFEU and the preliminary reference procedure in Article 267 TFEU, it becomes apparent that both of the EU institutions 'responsible' for these procedures have elements to them which are political and could be considered discriminatory, but this discussion gets lost in the attempt to solve the rule of law crisis.

As far as the infringement procedure in Article 259 TFEU goes, it is legally possible to deploy it in the same way that the Commission has already done or to approach it the same way as the suggested systematic approach, but there needs to be a political will from the Member States to actually do so. Article 259 TFEU has been tainted with the reputation of being an aggressive political procedure, which should not keep the Member States willing to enforce it to not enforce it, but it probably will. It remains to be an approach which is good in theory, but still is uncharted in practice. I believe it will take a while for the Member States to stop relying solely on the Commission and take matters into their own hands.

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