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Dimitry Kochenov

**Biting Intergovernmentalism:  
The Case for the Reinvention of Article 259 TFEU to  
Make It a Viable Rule of Law Enforcement Tool**

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## THE JEAN MONNET PROGRAM

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Biting Intergovernmentalism:  
The Case for the Reinvention of Article 259 TFEU to Make It a Viable Rule of Law  
Enforcement Tool

Dimitry Kochenov\*

**Abstract**

In this largely instrumental thought experiment I make the case for exploring the potential of Article 259 TFEU, allowing for direct actions brought by the Member States of the European Union against other Member States in the context of the enforcement of the Rule of Law in the Member States deviating from the principles of Article 2 TEU. Deploying this proposal will imply changing the established practice of (non-)application of Article 259 TFEU. Such a change, while not departing from the letter or the spirit of the law, has several advantages, from not getting the Commission directly involved in the action about the values of Article 2 TEU (should it wish to keep on staying away), to avoiding the unhelpful construction of Article 258 TFEU, which has been interpreted too cautiously and emerged as unhelpful in the context of Rule of Law enforcement and entirely unused in the context of the Charter of Fundamental Rights violations. Change should start somewhere and the Member States, using Article 259 TFEU potentially could take the lead. In making the plea for paying more attention to horizontal enforcement of values among the Member States (albeit via the Court of Justice) this contribution draws on the helpful analysis of the possibility of bundling evidence of Member State disregard of the Rule of Law to start ‘systemic infringement actions’ before the Court of Justice. This technique, proposed by Kim Lane Scheppele, could make a difference in the world of enforcement of the promise of compliance with the very basics contained in Article 2 TEU.

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## Introduction

This brief contribution makes the case for exploring the potential of Article 259 TFEU, allowing for direct actions brought by the Member States of the European Union, in the context of the enforcement of the Rule of Law in the Member States deviating from the principles of Article 2 TEU.<sup>1</sup> While plentiful possible ways to enforce the Rule of Law have been proposed so far<sup>2</sup> – some more likely to be effective than others<sup>3</sup> – all the proposals overwhelmingly focus on institutional action, either within the context of the Union – including the actions by the existing institutions: Council,<sup>4</sup> the European Commission,<sup>5</sup> the Fundamental Rights Agency of the EU (FRA)<sup>6</sup> and actions by institutions yet to be created, such as the Copenhagen Commission<sup>7</sup> – or outside the EU context, such as the involvement of the Venice Commission.<sup>8</sup> Reliance on the Member

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<sup>1</sup> For a normative analysis of the context necessitating intervention, see e.g. A. von Bogdandy and M. Ioannidis, 'Systemic Deficiency in the Rule of Law: What It Is, What Has Been Done, What Can Be Done' (2014) 51 *Common Market Law Review*, 59; C. Closa, 'Reinforcing EU Monitoring of the Rule of Law: Normative Arguments, Institutional Proposals and the Procedural Limitations', in C. Closa and D. Kochenov (eds.), *Reinforcing Rule of Law Oversight in the European Union* (Cambridge: Cambridge University Press, 2015).

<sup>2</sup> For a brief overview, see C. Closa, D. Kochenov and J. H. H. Weiler, 'Reinforcing the Rule of Law Oversight in the European Union' (2014) *RSCAS Working Paper* (EUI Florence), 25. For a more in-depth approach, see the contributions in C. Closa and D. Kochenov (eds.), *Reinforcing Rule of Law Oversight in the European Union* (Cambridge: Cambridge University Press, 2015); A. Jakab and D. Kochenov (eds.), *The Enforcement of EU Law and Values: Methods against Defiance* (Oxford: Oxford University Press, 2016).

<sup>3</sup> For comparative analyses, see e.g., Closa et al., 'Reinforcing the Rule of Law Oversight', *op cit.*; D. Kochenov, 'On Policing Article 2 TEU Compliance – Reverse *Solange* and Systemic Infringements Analyzed' (2014) XXXIII *Polish Yearbook of International Law*, 145.

<sup>4</sup> Council of the EU, press release no. 16936/14, 3362nd Council meeting, General Affairs, Brussels, 16 December 2014, pp. 20–21; E. Hirsch Ballin, 'Mutual Trust: The Virtue of Reciprocity Strengthening the Acceptance of the Rule of Law through Peer Review', in C. Closa and D. Kochenov (eds.), *Reinforcing Rule of Law Oversight in the European Union* (Cambridge: Cambridge University Press, 2015).

<sup>5</sup> European Commission, 'A New EU Framework to Strengthen the Rule of Law', Strasbourg, 11 March 2014, COM(2014) 158 final. For an analysis, see D. Kochenov and L. Pech, 'Monitoring and Enforcement of the Rule of Law in the European Union: Rhetoric and Reality' (2015) *European Constitutional Law Review* (forthcoming). See also, crucially, K. L. Scheppele, 'Enforcing the Basic Principles of EU Law through Systemic Infringement Actions', in C. Closa and D. Kochenov (eds.), *Reinforcing Rule of Law Oversight in the European Union* (Cambridge: Cambridge University Press, 2015) (outlining how to empower the Commission to intervene in the cases related to the breach of Art. 2 TEU based on a so-called 'systemic infringement procedure', allowing for a more effective deployment of Art. 258 TFEU).

<sup>6</sup> G. N. Toggenburg and J. Grimheden, 'The Rule of Law and the Role of Fundamental Rights: Seven Practical Pointers', in C. Closa and D. Kochenov (eds.), *Reinforcing Rule of Law Oversight in the European Union* (Cambridge: Cambridge University Press, 2015).

<sup>7</sup> J.-W. Müller, 'Should the European Union Protect Democracy and the Rule of Law in Its Member States' (2015) 21 *ELJ*, 141; J.-W. Müller, 'The EU as a Militant Democracy' (2014) 165 *Revista de Estudios Políticos*, 141.

<sup>8</sup> K. Tuori, 'From Copenhagen to Venice', in C. Closa and D. Kochenov (eds.), *Reinforcing Rule of Law Oversight in the European Union* (Cambridge: Cambridge University Press, 2015); J. Nergelius, 'The Role of the Venice Commission in Maintaining the Rule of Law', in A. von Bogdandy and P. Sonnevend (eds.),

States' courts,<sup>9</sup> and a potential fine-tuning of the EU's powers through a broad interpretation of the Charter of Fundamental Rights of the EU (CFR)<sup>10</sup> by the Court of Justice of the European Union (ECJ) has also been advocated.

Yet I would argue that in all the diversity of the proposed approaches, the scholars and institutions proposing them tend to underplay the potential role that the Member States of the European Union can and should play through direct actions before the ECJ, bringing before the Court those their peers that depart from the fundamental principles of Article 2 TEU – an argument potentially bringing the largely ignored Article 259 TFEU,<sup>11</sup> which contains the following rule: 'A Member State which considers that another Member State has failed to fulfil an obligation under the Treaties may bring the matter before the Court of Justice of the European Union' to the fore.<sup>12</sup>

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*Constitutional Crisis in the European Constitutional Area: Theory, Law and Politics in Hungary and Romania* (Oxford: Hart, 2015).

<sup>9</sup> A. von Bogdandy et al., 'Reverse *Solange* – Protecting the Essence of Fundamental Rights against EU Member States' (2012) 49 *CMLRev.*, 489. For analyses, see J. Croon-Gestefeld, 'Reverse *Solange* – Union Citizenship as a Detour on the Route to European Rights Protection against National Infringements', in D. Kochenov (ed.), *EU Citizenship and Federalism: The Role of Rights* (Cambridge: Cambridge University Press, 2016); Kochenov, 'On Policing Article 2 TEU Compliance', *op cit.* See also an upgraded versions of this proposal: A. von Bogdandy et al., 'A European Response to Domestic Constitutional Crisis: Advancing the Reverse-*Solange* Doctrine', in A. von Bogdandy and P. Sonnevend (eds.), *Constitutional Crisis in the European Constitutional Area: Theory, Law and Politics in Hungary and Romania* (Oxford: Hart, 2015); A. von Bogdandy, C. Antpöller and M. Ioannidis, 'Enforcing European Values', in A. Jakab and D. Kochenov (eds.), *The Enforcement of EU Law and Values* (Oxford: Oxford University Press, 2016).

<sup>10</sup> A. Jakab, 'The EU Charter of Fundamental Rights as the Most Promising Way of Enforcing the Rule of Law against EU Member States', in C. Closa and D. Kochenov (eds.), *Reinforcing Rule of Law Oversight in the European Union* (Cambridge: Cambridge University Press, 2015). The Charter's potential is as far-reaching as it is unused: F. Hoffmeiser, 'Enforcing the EU Charter of Fundamental Rights in Member States: How Far Are Rome, Budapest and Bucharest from Brussels?', in A. von Bogdandy and P. Sonnevend (eds.), *Constitutional Crisis in the European Constitutional Area: Theory, Law and Politics in Hungary and Romania* (Oxford: Hart, 2015); A. Łazowski, 'Decoding a Legal Enigma: The Charter of Fundamental Rights of the European Union and Infringement Proceedings' (2013) 14 *ERA Forum*, 573. See also P. Eeckhout, 'The EU Charter of Fundamental Rights and the Federal Question' (2002) 39 *CMLRev.*, 945.

<sup>11</sup> See most importantly, M. Smith, 'The Evolution of Infringement and Sanction Procedures. Of Pilots, Diversions, Collisions, and Circling', in A. Arnulf and D. Chalmers (eds.), *The Oxford Handbook of European Law* (Oxford: Oxford University Press, 2015) 350; K. Lenaerts, I. Maselis and K. Gutman (J. T. Nowak (ed.)), *EU Procedural Law* (Oxford: Oxford University Press, 2013), pp. 159–213; T. Materne, *La procédure en manquement d'État: Guide à la lumière de la jurisprudence de la Cour de justice de l'Union européenne* (Paris: Larcier, 2012); L. Prete and B. Smulders, 'The Coming of Age of Infringement Proceedings' (2010) 47 *CMLRev.*, 9. See also Łazowski, 'Decoding a Legal Enigma', *op cit.*, R. Baratta, 'Un recente procedimento di infrazione "interstatale" dinanzi alla Commissione europea' (2010) *XCIII Rivista di diritto internazionale*, 115. For a compelling account of the enforcement of EU law as it stands, see, M. Cremona (ed.), *Compliance and the Enforcement of EU Law* (Oxford: Oxford University Press, 2012).

<sup>12</sup> Art. 259(1) TFEU.

This paper's argument is based on three fundamental starting points.

Firstly, the potential for direct actions under Article 259 TFEU has been unjustly overlooked by the commentators so far, while offering a much less cumbersome way to attempt to enforce the *acquis* and values, allowing one (or more) Member State to act directly in a context where all other instruments depend on meeting relatively high institutional thresholds, often implying the need to achieve difficult political agreements, potentially putting the enforcement of the law (and values) in jeopardy.<sup>13</sup> The 'letters of foreign ministers'<sup>14</sup> are a clear sign that some Member States tend to be more upset than others with the state of affairs in values enforcement in the EU – the contrary can also be true: some Member States, even while holding the Presidency of the EU,<sup>15</sup> would not be disturbed by disruptions in values protection. While the EU is based,

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The provision continues as follows:

Before a Member State brings an action against another Member State for an alleged infringement of an obligation under the Treaties, it shall bring the matter before the Commission.

The Commission shall deliver a reasoned opinion after each of the States concerned has been given the opportunity to submit its own case and its observations on the other party's case both orally and in writing.

If the Commission has not delivered an opinion within three months of the date on which the matter was brought before it, the absence of such opinion shall not prevent the matter from being brought before the Court.

<sup>13</sup> Art. 7 TEU, in particular, comes to mind in this context: W. Sadurski, 'Adding Bite to a Bark: The Story of Article 7, EU Enlargement, and Jörg Haider' (2010) 16 *Columbia Journal of European Law*, 385; B. Bugarič, 'Protecting Democracy inside the EU: On Article 7 TEU and the Hungarian Turn to Authoritarianism', in C. Closa and D. Kochenov (eds.), *Reinforcing the Rule of Law Oversight in the European Union* (Cambridge: Cambridge University Press, 2016); L. F. M. Besselink, 'The Bite, the Bark and the Howl: Article 7 and the Rule of Law Initiatives', in A. Jakab and D. Kochenov (ed.), *The Enforcement of EU Law and Values: Methods against Defiance* (Oxford: Oxford University Press, 2016 (forthcoming)).

<sup>14</sup> See the letter of 6 March 2013 sent by four Foreign Affairs Ministers to the President of the Commission <http://www.rijksoverheid.nl/bestanden/documenten-en-ublicaties/brieven/2013/03/13/brief-aan-europese-commissie-over-opzetten-rechtsstatelijkheidsmechanisme/brief-aan-europese-commissie-over-opzetten-rechtsstatelijkheidsmechanisme.pdf>. The crucial thing to understand about such letters is that *all* Member States are always invited, through their Foreign Ministers, to sign. That only four Ministers ultimately signed thus means that 24 others do not consider extending the EU's capacity for action in the domain of values either timely or necessary.

<sup>15</sup> So the Latvian presidency refused to attend a European Parliament debate on the state of the Rule of Law in Hungary in May 2015. See Politics.hu, 'European Liberals Condemn Latvian EU Presidency for Shunning Debate on Hungary': <http://www.politics.hu/20150519/european-liberals-condemn-latvian-eu-presidency-for-shunning-debate-on-hungary/>. Interestingly, Hungary held the Presidency of the EU when the problematic constitutional perturbations happened. On the story of the Hungarian 'reforms', see L. Sólyom, 'The Rise and Decline of Constitutional Culture in Hungary', in A. von Bogdandy and P. Sonnevend, *Constitutional Crisis in the European Constitutional Area: Theory, Law and Politics in*



*inter alia*, on the principle of subsidiarity and also requires blocking *ultra vires* action, Article 259 TFEU provides for obvious respect for both such considerations, as the Member States are empowered by the Treaty to seize the Court in a situation where the institutions are silent and the violation of the law is ongoing.

Secondly, the idea of such direct actions is as appealing as it is usable in practice, notwithstanding a most restricted history of use of the relevant Treaty provision.<sup>16</sup> This is due to the intricate connection, which emerged between Article 259 TFEU and the Commission-initiated Article 258 TFEU:<sup>17</sup> the Member State initiating the action approaches the Commission first, which then takes over the action, should it agree with the arguments presented. This says nothing about the potential effectiveness of Article 259 TFEU taken alone in the context of values' enforcement. Moreover, parallels with the use of direct state-versus-state actions in the context of other legal systems in Europe testify to the appeal of the idea.<sup>18</sup> The Council of Europe experience is particularly valuable in this respect:<sup>19</sup> direct state actions should not be dismissed outright, especially not in the difficult circumstances.

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*Hungary and Romania* (Oxford: Hart, 2015); M. Bánkuti, G. Halmai, and K. L. Scheppele, 'Hungary's Illiberal Turn: Disabling the Constitution' (2012) 23 *Journal of Democracy* 138. See also R. Uitz, 'Can You Tell When and Illiberal Democracy Is in the Making? An Appeal to Comparative Constitutional Scholarship from Hungary' (2015) 13 *I-CON*, 279.

<sup>16</sup> Only a handful of cases have been brought based on Art. 259 TFEU, most of them highly controversial: e.g. Case 141/78 *France v. UK* [1979] ECR 2923; Case C-388/95 *Belgium v. Spain* [2000] ECR I-3123; Case C-145/04 *Spain v. UK* [2006] ECR I-7917; C-364/10 *Hungary v. Slovakia* [2012] ECLI:EU:C:2012:630.

<sup>17</sup> See, most importantly, Lenaerts et al., *EU Procedural Law*, *op cit.*; Prete and Smulders, 'The Coming of Age of Infringement Proceedings', *op cit.*

<sup>18</sup> On the general need to apply comparative arguments in the context of the enforcement of the Rule of Law and other values by regional organisations, see the impressive overview by Carlos Closa, including precise mechanics of action under the law of each of the regional organisations: C. Closa, 'Law Enforcement by Regional Organisations', in A. Jakab and D. Kochenov (eds.), *Enforcement of EU Law and Values: Methods against Defiance* (Oxford: Oxford University Press, 2016 (forthcoming)).

<sup>19</sup> A handful of inter-state cases have been brought before the ECtHR. The full list is as follows: *Greece v. UK* (I and II) (application nos. 176/56 and 299/57); *Austria v. Italy* (application no. 788/60); *Denmark, Norway, Sweden and the Netherlands v. Greece* (I and II) (application nos. 3321–3323/67, 3344/67 and 4448/70); *Ireland v. UK* (I and II) (application nos. 5310/71 and 5451/72); *Cyprus v. Turkey* (I, II and III) (application nos. 6780/74, 6950/75 and 8007/77); *Denmark, France, Norway, Sweden and the Netherlands v. Turkey* (application nos. 9940–9944/82); *Cyprus v. Turkey* (IV) (application no. 25781/94); *Denmark v. Turkey* (application no. 34382/97); *Georgia v. Russia* (I, II and III) (application nos. 13255/07, 38263/08 and 61186/09) *Ukraine v. Russia* (I and II) (application nos. 20958/14 and 43800/14). The absolute majority of these cases relate to open conflicts between states. For a critical appraisal, see B. Browning, 'Georgia, Russia and the Crisis of the Council of Europe: Inter-State Applications, Individual Complaints, and the Future of the Strasbourg Model of Human Rights Litigation', in J. Green and C. Waters (eds.), *Conflict in the Caucasus: Implications for International Legal Order*

Thirdly, this contribution demonstrates that the triggering of Article 259 TFEU should not be excessively difficult, legally speaking, in the context of growing interdependence and mutual reliance in the EU,<sup>20</sup> where not only *acquis* violations *sensu stricto* but also violations of the fundamental values as expressed in Article 2 TEU<sup>21</sup> have clear potential to result in negative externalities for all the EU Member States.<sup>22</sup> In this sense the argument relies on the idea that bringing systemic infringement actions in the area of values based on Article 2 TEU<sup>23</sup> in cumulation with other instruments,<sup>24</sup> such the duty of loyalty,<sup>25</sup> should broaden the room for manoeuvre enjoyed by the Union – and its Member States, of course – and supply a sound method of grounding infringement actions in the Treaties.

This being said, procedurally speaking Article 259 TFEU does not set a high threshold at all. ‘Externalities’ *per se* are not even required.<sup>26</sup> Closely following the initial proposal concerning the deployment of systemic infringement actions made by Kim Lane Scheppele,<sup>27</sup> this contribution borrows the cumulation idea and methodology<sup>28</sup> and applies it to the direct action context, where one Member State challenges another. The idea of itself is not entirely new, as the Court of Justice has applied cumulation before, but only within the realm of the *acquis sensu stricto* – never in relation to the breaches of the values (and, previously, principles) of Article 2 TEU.

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(London: Palgrave Macmillan, 2010). For an analysis which approaches the ECHR procedure in the context of other international inter-state actions, see e.g., S. Leckie, ‘The Inter-State Complaint Procedure in International Human Rights Law: Hopeful Prospects or Wishful Thinking?’ (1988) 10 *HRQ* 249, 271–276.

<sup>20</sup> C. Closa, ‘Reinforcing EU Monitoring of the Rule of Law’, *op cit.*

<sup>21</sup> For a detailed distinction between the *acquis* and the values of democracy and the Rule of Law now reflected in Article 2 TEU, please consult D. Kochenov, *EU Enlargement and the Failure of Conditionality* (The Hague: Kluwer Law International, 2008) (on the pre-accession context) and D. Kochenov, ‘Self-Constitution through Unenforceable Promises’, in J. Příbáň (ed.) *Self-Constitution of Europe* (Farnham: Ashgate, 2015 (forthcoming)).

<sup>22</sup> See, for a general analysis, D. Kochenov, ‘The Internal Aspects of Good Neighbourliness in the EU: Loyalty and Values’, in D. Kochenov and E. Basheska (eds.), *Good Neighbourliness in the European Legal Context* (Leiden: Brill-Nijhoff, 2015).

<sup>23</sup> Scheppele, ‘Enforcing the Basic Principles of EU Law’, *op cit.*

<sup>24</sup> Closa et al., ‘Reinforcing the Rule of Law Oversight’, *op cit.*

<sup>25</sup> M. Klamert, *The Duty of Loyalty in EU Law* (Oxford: Oxford University Press, 2014). See, also, C. Hillion, ‘Overseeing the Rule of Law in the EU: Legal Mandate and Means’, in C. Closa and D. Kochenov (eds.), *Reinforcing the Rule of Law Oversight in the European Union* (Cambridge: Cambridge University Press, 2015 (forthcoming)).

<sup>26</sup> See the analysis below.

<sup>27</sup> Scheppele, ‘Enforcing the Basic Principles of EU Law’, *op cit.* See also P. Craig and G. de Búrca, *EU Law: Texts, Cases Materials* (6th edn, Oxford: Oxford University Press, 2015), pp. 431–453.

<sup>28</sup> For a great overview of the law as it stands, see, Lenaerts et al. *EU Procedural Law*, *op cit.* For a clear selection of the most relevant cases, see Scheppele, ‘Enforcing the Basic Principles of EU Law’, *op cit.*

The novelty of the proposal is thus precisely in moving the cumulation technique to the sphere of the enforcement of Article 2 TEU coupled with other provisions, such as the duty of loyalty of Article 4(3) TEU, for instance. In terms of the steps to come following a declaration of breach by the ECJ, Scheppele's approach is applicable in full, as Article 260 TFEU works equally in the context of any failure to implement a judgment of the ECJ, be it a declaration of breach on the basis of Article 258 TFEU, 259 TFEU, or a judgment rooted procedurally in any other provision.

The paper will progress along the lines of the three points made above: arguing that direct actions by the Member States are particularly useful in the context of the current discussions in the area of values' enforcement; that Article 259 TFEU is easy to deploy and that it is also perfectly possible in practice; and drawing inspiration from Kim Lane Scheppele's proposal for systemic infringement actions made in the context of the utilisation of Article 258 TFEU and, as a natural follow-up, of Article 260 TFEU. The paper concludes by praising Article 259 TFEU for its hitherto unused potential and by urging most serious consideration of its application in practice against a deviant Member State to set the tone for a more regular, strict scrutiny of adherence to the values of Article 2 TEU by the Member States.

### **I. Direct state vs. state actions in the current values-enforcement climate**

In making the case for not ignoring the obvious potential of Article 259 TFEU in bringing about compliance with the Rule of Law and other values across the EU, this contribution assumes the need for the EU's intervention to achieve such ends. This is far from illogical; indeed, there are compelling arguments for the EU's intervention.<sup>29</sup> Yet when speaking about enhancing the EU's potential effectiveness to intervene in the area of values' enforcement which is not *per se* squarely placed within the realm of the *acquis*, the counterarguments against such interventions must also be borne in mind. These are based on the coherence of the division of powers between the EU and the

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<sup>29</sup> Closa, 'Reinforcing EU Monitoring of the Rule of Law', *op cit.*; Müller, 'Should the European Union Protect Democracy and the Rule of Law in Its Member States', *op cit.*; Müller, 'The EU as a Militant Democracy', *op cit.*

Member States,<sup>30</sup> rooted in the caution stemming from the EU's democratic deficit,<sup>31</sup> and are also based on the EU's own Rule of Law deficiencies, which become all the more able to taint even properly functioning Member States,<sup>32</sup> the more powers the EU acquires in the context of values' enforcement. These three strands of critical response should not be ignored, clearly illustrating as they do the great dangers for the EU and for the Member States which could stem from any enforcement reform enacted without seriously rethinking the Union's essence, as well as possibly adapting its legal-political system to the new reality of the need for values enforcement.

This paper distinguishes itself from such observations – some of them the author's own<sup>33</sup> – at two levels. On the one hand, the argument made here is purely instrumental rather than philosophical: the problem of non-compliance with the values of Article 2 TEU in some quarters is quite clear and this paper proposes a possible solution, thus taking its place alongside the other valuable proposals made to this end over the last years. In doing so, its most obvious contribution consists in developing the essentially important proposition made by Kim Lane Scheppele with regard to the possibility of bringing systemic infringement actions. The proposal is thus sold to the reader as purely instrumental.

On the other hand, however, Article 259 TFEU actually helps us avoid the conceptual scepticism regarding allowing the EU to grow its enforcement powers out of proportion in comparison with the scope of conferral. Virtually all such criticism focuses on the potential harmfulness of extending the EU's action in the area of values in the current climate of the EU's design and functioning – all the said need to enforce the values notwithstanding. The way Article 259 TFEU works, however, puts the Member States themselves – not the Union and its institutions – into the spotlight. This means that when an action by a Member State which is related to the adherence to the values

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<sup>30</sup> J. Cornides, 'The European Union: Rule of Law or Rule of Judges?' (2013) *EJIL Analysis* (blog) available at: <http://www.ejiltalk.org/the-european-union-rule-of-law-or-rule-of-judges/>

<sup>31</sup> J. H. H. Weiler, 'Epilogue: Living in a Glass House: Europe, Democracy, and the Rule of Law', in C. Closa and D. Kochenov (eds.), *Reinforcing Rule of Law Oversight in the European Union* (Cambridge: Cambridge University Press, 2016).

<sup>32</sup> D. Kochenov, 'EU Law without the Rule of Law. Is the Veneration of Autonomy Worth It?' (2015) 34 *Yearbook of European Law*. See also, G. Palombella, 'Beyond Legality – before Democracy: Rule of Law Caveats in a Two-Level System', in C. Closa and D. Kochenov (eds.), *Reinforcing Rule of Law Oversight in the European Union* (Cambridge: Cambridge University Press, 2016).

<sup>33</sup> Kochenov, 'EU Law without the Rule of Law', *op cit*.

expressed in Article 2 TEU by some other Member State is brought directly to the Court of Justice, it is obviously the Member State bringing the action which acts as the guardian of values in the first place, not an institution of the Union. This potentially diminishes the arguably problematic aspects related to an overly broad interpretation of the legal effects of Article 2 TEU.<sup>34</sup>

Accepting the possible objections to the very idea of enhancing the EU's toolkit for enforcing the values of Article 2 TEU in defiant Member States, this article thus makes a simple claim: Article 259 TFEU is a relatively natural and easy way out, since deploying this instrument amounts to empowering the *Member States*, not the Union's institutions directly, with the ECJ acting as a mediator in this context. The provision in question, if deployed wisely, could solve an array of outstanding problems. It can enable swift EU-level action; such action will not depend on achieving implausible thresholds of institutional consensus – as the deployment of Article 7 TEU requires, for instance – and such action will eventually push the (relatively passive) EU institutions,<sup>35</sup> especially the Commission, to rethink their behaviour, as they will be confronted with a clear expression of the disaffection of the Member States with developments in the values arena.

## **II. Direct state vs. state actions as a tool of the enforcement of values**

Article 259 TFEU tends to be overlooked by commentators,<sup>36</sup> if not viewed as an outright unusable tool for at least four reasons concerning the history of the prior deployment of this provision, its place in the law enforcement system shaped by the Treaties and the perception of the negative influences it might have on the inter-state relations in the Union, let alone the potential difficulties of triggering this provision in

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<sup>34</sup> Even if I actually agree with Christophe Hillion's opinion that some of the criticism of Article 2 TEU-based actions is legally unsound, as the article clearly boasts clear legal value and was meant to be enforced, to which the very existence of the Article 7 TEU procedure abundantly testifies: Hillion, 'Overseeing the Rule of Law in the EU', *op cit.*

<sup>35</sup> Bringing a case based on an allegation of inaction is of course not an option in such cases, as the Commission enjoys full discretion under Art. 258 TFEU: Case 247/87 *Star Fruit v. Commission* [1989] ECR 291 ECLI:EU:C:1989:58. Compare Prete and Smulders, 'The Coming of Age', *op cit.*, 13–15.

<sup>36</sup> To the best of my knowledge, not a single one of the key proposals related to the mechanics of the enforcement of EU values was related to the use of Art. 259 TFEU to this end.

the first place. While the mechanics of how Article 259 TFEU could be deployed in practice to police values compliance will be assessed in the part which follows, some other technical as well as ideological objections will be addressed here individually, only to demonstrate that the difficulties they are associated with, as well as their potential ineffectiveness, might be somewhat overstated. This is particularly true in the case of value enforcement as opposed to the enforcement of the black letter of the *acquis*.<sup>37</sup>

The fact that enforcement strategies based on Article 259 TFEU are not frequently put forward is not surprising at all. This provision in the minds of many is quite rightly associated with the futile attempts by the Member States to distort the cogent functioning of the EU law enforcement system for internal political ends, as opposed to empowering the expression of genuine concern about the enforcement of EU law and the achievement of full compliance. The Article thus came to be associated, in many quarters, with a leeway provision for merely channelling national political interest and thus of small, if not quite non-existent, EU law value. A brief exploration of the very few cases brought to the ECJ on the basis of this provision only reinforces the said negative perception: virtually all of them in essence have little if nothing to do with the enforcement of EU law.

Take two among the most recent examples. In *Hungary v. Slovakia*<sup>38</sup> Hungary invoked free movement of persons law to argue that Slovakia's refusal to let the Hungarian President cross the border to be present at the unveiling of a statue of Saint Stephan, the founder of the Hungarian state, on the very sensitive anniversary of the invasion of Czechoslovakia by Warsaw pact troops (including Hungarians) in 1968, was in violation of EU law.<sup>39</sup> Even in the context of the Slovak Republic's own most despicable behaviour, which institutionalised the humiliation of its citizens belonging to minorities by expressly introducing the legal requirement that those accepting Hungarian nationality be stripped of their Slovak citizenship<sup>40</sup> – a move which is out of

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<sup>37</sup> On this essential distinction, see e.g., Kochenov, 'Self-Constitution through Unenforceable Promises', *op cit*.

<sup>38</sup> C-364/10 *Hungary v. Slovakia* [2012] ECLI:EU:C:2012:630.

<sup>39</sup> Annotated by L. S. Rossi in (2013) 50 *CMLRev.*, 1451.

<sup>40</sup> J.-M. Araiza, 'Good Neighbourliness as the Limit of Extra-territorial Citizenship: The Case of Hungary and Slovakia', in D. Kochenov and E. Basheska (eds.), *Good Neighbourliness in the European Legal Context* (Leiden: Brill-Nijhoff, 2015); Kochenov, 'The Internal Aspects of Good Neighbourliness in the EU', *op cit*.

tune with the whole context of the rising importance of EU citizenship<sup>41</sup> and a growing toleration of dual nationality in the EU,<sup>42</sup> and which was done to target a particular ethnic minority<sup>43</sup> – it is difficult to argue that the free movement of citizens was somehow breached as a result of the fact that Hungarian president was unwelcome. The ECJ confirmed the absurdity of this artificially concocted case.

Similarly, in *Spain v. UK*,<sup>44</sup> Spain purported to allege that the UK was not in full sovereign control of Gibraltar,<sup>45</sup> trying to use a rather artificial pretext in the context of EU law to block the UK government's compliance with the decision of the European Court of Human Rights in *Matthews v. UK*,<sup>46</sup> which obliged the UK to enfranchise the inhabitants of Gibraltar for European Parliament elections.<sup>47</sup> However carefully Spain tried to make its moot point, questioning the enfranchisement of non-nationals in particular,<sup>48</sup> the goals of the Spanish action, as well as its illegal assumptions regarding the undisputed legal position of Gibraltar (however much Spain pretends that this is not the case)<sup>49</sup> did not conceal the fact that the case was unrelated to instilling compliance with EU law in a deviant Member State. Also *Spain v. UK*, very similarly to *Hungary v.*

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<sup>41</sup> For the particular effects of EU citizenship on the nationalities of the Member States showcasing the key processes of importance in the Slovak context, see D. Kochenov, 'Member State Nationalities and the Internal Market: Illusions and Reality', in N. Nic Shuibhne and L.W. Gormley (eds.), *From Single Market to Economic Union: Essays in Memory of John A. Usher* (Oxford: Oxford University Press, 2012).

<sup>42</sup> P. Spiro, 'Dual Citizenship as a Human Right' (2010) 8 *I-CON* 111. See, also, D. Kochenov, 'Double Nationality in the EU: An Argument for Tolerance' (2011) 17 *ELJ* 323 (providing an EU law perspective).

<sup>43</sup> Kochenov, 'The Internal Aspects of Good Neighbourliness in the EU', *op cit.*; Araiza, 'Good Neighbourliness as the Limit of Extra-territorial Citizenship', *op cit.*

<sup>44</sup> Case C-145/04 *Spain v. UK* [2006] ECR I-7917.

<sup>45</sup> For a general discussion in the context of EU law, see A. Khachatryan, 'Applying the Principle of Good Neighbourliness in EU Law: The Case of Gibraltar', D. Kochenov and E. Basheska (eds.), *Good Neighbourliness in the European Legal Context* (Leiden: Brill-Nijhoff, 2015). The facts of *Spain v. UK* are obscure and atypical enough to be fascinating and concerned a claim of violation of EU law through the undue unilateral amendment of an *ad hoc sui generis acquis* instrument by the UK in order to ensure compliance with an ECtHR judgment. See the annotation by L. F. M. Besselink in (2008) 45 *CMLRev.*, 787.

<sup>46</sup> *Matthews v. U.K.* (application no. 24833/94). T. King, 'Ensuring Human Rights Review of Intergovernmental Acts in Europe' (2000) 25 *ELRev.*, 79; O. de Schutter and O. L'Hoest, 'La cour européenne des droits de l'homme juge du droit communautaire: Gibraltar, l'Union européenne, et la Convention européenne des Droits de l'Homme' (2000) 36 *Cahiers de droit européen*, 141.

<sup>47</sup> For a detailed discussion, see F. Fabbrini, 'The Political Side of EU Citizenship in the Context of EU Federalism', in D. Kochenov (ed.), *EU Citizenship and Federalism: The Role of Rights* (Cambridge: Cambridge University Press, 2016 (forthcoming)).

<sup>48</sup> On the unnecessary connection between political rights and nationality, see H. Lardy, 'Citizenship and the Right to Vote' (1997) *OJLS*, 75, 97–98.

<sup>49</sup> K. Azopardi, *Sovereignty and the Stateless Nation: Gibraltar in the Modern Legal Context* (Oxford: Hart Publishing, 2009).

*Slovakia*, is thus a covert attempt to abuse EU law<sup>50</sup> to achieve internal political goals which have nothing in common with the aim of the provision under which the case is brought: the ECJ was clear in both cases that one cannot speak of an infringement of EU law in the context of the factual situations at issue.

The aim of Article 259 TFEU is quite clear: the provision is there to ensure that Member States enjoy the ability to bring their peers to the Court in cases when a failure to comply with EU law is observed. The presumption behind the provision is that since all the Member States are in the same boat, they have a vivid interest in ensuring sustained compliance with EU law by their peers. Formally, however, the provision – like Article 258 TFEU, of which it is a twin – does not require the demonstration of any harm or concern on the part of the Member State bringing the suit: the mere fact of a breach of EU law is sufficient.<sup>51</sup> The systemic role of this provision is crucial in a context where the Commission enjoys absolute discretion in bringing Article 258 TFEU cases.<sup>52</sup> Any EU law textbook will explain how this noble goal lent itself to attempts to abuse EU law in practice. Articles 259 and 258 TFEU naturally lend themselves to working in tandem, so the first stage of the Article 259 TFEU procedure consists of approaching the Commission. In the absolute majority of cases, as the story goes, the Commission will simply start a case under Article 258 TFEU itself, leaving the initiator Member State with no need to insist on Article 259 TFEU action. It goes without saying that a Member State cannot oblige the Commission to take over. The Commission can only be convinced by compelling evidence, which does not remove its full discretion, of course. The connection between the two provisions explains why Article 259 TFEU has a notorious reputation of channelling cases like to *Hungary v. Slovakia* and *Spain v. UK* through to the Court: by making an honest assessment of the alleged violation of EU law, the Commission for quite obvious reasons would never be inclined to support any highly politicised action which invented a violation of EU law where, in reality, the respondent Member State is fully in compliance with what EU law demands.

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<sup>50</sup> It is conceded that this is a somewhat atypical use of the term. For the general state of the art, see A. Saydé, *Abuse of EU Law and Regulation of the Internal Market* (Oxford: Hart Publishing, 2014).

<sup>51</sup> This is the case since Art. 259 – just like 258 TFEU – is not intended to protect the claimants' rights. Rather, the provisions aim to ensure general compliance with EU law: *e.g.* Case C-431/92 *Commission v. Germany* [1995] ECR I-2189, para. 21. Compare Prete and Smulders, 'The Coming of Age', *op cit.*, 13.

<sup>52</sup> *E.g.* Opinion of AG Tizzano in Joined cases C-466 and 476/98 *Commission v. UK et al.* [2002] ECR I-9741, para. 30. Compare Prete and Smulders, 'The Coming of Age', *op cit.*, 14.



Importantly, while the above applies fully to cases of alleged *acquis* violations, the situation could be quite different in the context of possible values enforcement strategies, where the Commission would otherwise shy away from action, or would bring cases on the basis of concrete provisions of secondary law, while ignoring the context of a greater failure to comply with key values: democracy, human rights protection, the Rule of Law, on the part of the respondent Member State. The reasons for this are numerous but are mostly concerned, it seems, with the Commission's unwillingness to open the Pandora's box of the federal question.<sup>53</sup> This largely amounts to being over-cautious with values and rights which are not entirely rooted in the supranational legal order. Neither Article 2 TEU nor the Charter have – not even cumulatively with other provisions – figured among the triggers for Article 258 TFEU actions,<sup>54</sup> no matter what kind of violations the Commission was trying to prevent.<sup>55</sup>

In other words, in the context of *acquis* enforcement Article 259 TFEU would be, as we have seen, mostly deployed by *de facto* abusive Member States seeking to reap political benefit by instrumentalising an allegation of non-compliance with the *acquis* not supported by the Commission. But cases of values compliance should be different: a very valid set of arguments might fail to win the support of the Commission due to some residual over-caution and institutional inertia (as demonstrated in practice by now, especially with regards to the use of the provisions of the Charter),<sup>56</sup> to say nothing of trying to persuade a College of Commissioners with a commissioner from the offending

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<sup>53</sup> R. Schütze, *From Dual to Cooperative Federalism* (Oxford: Oxford University Press, 2009); D. Kochenov (ed.), *EU Citizenship and Federalism: The Role of Rights* (Cambridge: Cambridge University Press, 2016).

<sup>54</sup> Łazowski, 'Decoding a Legal Enigma', *op cit.*

<sup>55</sup> This is what happened with the judicial retirement and the data protection cases involving Hungary: C-286/12 *Commission v. Hungary* [2012] ECLI:EU:C:2012:687; Case C-288/12 *Commission v. Hungary* [2014] ECLI:EU:C:2014:237. While the Commission won on paper, the victory was clearly a Pyrrhic one, as it failed to drive compliance with the fundamental values of Art. 2 TEU. For a detailed explanation see Scheppele, 'Enforcing the Basic Principles of EU Law', *op cit.*; U. Belavusau, 'Case C-286/12 *Commission v. Hungary*', 50 *CMLRev.*, 2013, 1145. For a somewhat more positive assessment of the *Commission v. Hungary* cases, see an analysis by a lawyer who serves on the Commission: Hoffmeister, 'Enforcing the EU Charter in Member States', *op cit.*

<sup>56</sup> Łazowski, 'Decoding a Legal Enigma', *op cit.*, 583–586. Indeed, that the Charter could and should be used there is no doubt: Hoffmeister, 'Enforcing the EU Charter of Fundamental Rights in Member States', *op cit.*

government sitting in the room.<sup>57</sup> Another reason could be the lack of popularity of values arguments in the eyes of the ECJ: even in the preliminary leading cases alleging clear Article 2 TEU violations<sup>58</sup> – such as the tweaking of the criminal law by the (then) Prime Minister Berlusconi in order to avoid responsibility for his crimes, the Court was not persuaded by the need to defend the Rule of Law in principle.<sup>59</sup> We can only hope that clearer examples of value violations appearing before the Court will help it develop its practice to capture the core of the problem, thus solve the questions left outstanding. All in all, while Article 259 TFEU has so far given rise to a handful of highly dubious cases, this does not mean that this provision is not potentially useful in the context of the new challenges which confront the Union.<sup>60</sup>

A similar point can be made with regard to the possible objections to the effective deployment of Article 259 TFEU which arise from the context of the analysis of its systemic place within the framework of provisions aimed at guaranteeing the effective enforcement of the law. While the EU boasts an effective system of judicial protection, numerous scholars have outlined gaps in this system in the context of values' enforcement.<sup>61</sup> Although much can be done without Treaty change,<sup>62</sup> effective involvement of the institutions is difficult due to the high thresholds for the activation of existing provisions,<sup>63</sup> as well as the different nature of response required by values violations compared with the *acquis* violations, as exemplified by Kim Lane Scheppele in her analysis of the actual outcomes of the Hungarian judicial retirement case for the Rule of Law in the Member State in question.<sup>64</sup> Consequently, not all assumptions which

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<sup>57</sup> The ECJ clarified that the Commission is obliged by law to discuss the issue of bringing infringement proceedings at the meetings of the college. See Prete and Smulders, 'The Coming of Age', *op cit.*, 29, with abundant references to case law.

<sup>58</sup> On the enforcement of EU law through the use of the preliminary ruling procedure, see M. Broberg, 'Private Enforcement through Preliminary Ruling Procedure', in A. Jakab and D. Kochenov (eds.), *The Enforcement of EU Law and Values: Methods against Defiance* (Oxford: Oxford University Press, 2016).

<sup>59</sup> Case C-387/02 *Berlusconi and others* [2005] ECR I-3565, paras 68–69; Hoffmeister, 'Enforcing the EU Charter of Fundamental Rights in Member States', *op cit.*, 206–208.

<sup>60</sup> For a broad analysis of this context, see e.g., J.-W. Müller, 'Safeguarding Democracy inside the EU: Brussels and the Future of Liberal Order' (2013) *Working Paper* No. 3 (Washington DC: Transatlantic Academy).

<sup>61</sup> Müller, 'Should the European Union Protect Democracy and the Rule of Law in Its Member States?', *op cit.*; von Bogdandy and Ioannidis, 'Systemic Deficiency', *op cit.* For an overview, see, Closa et al. 'Reinforcement of the Rule of Law Oversight in the EU', *op cit.*

<sup>62</sup> Hillion, 'Overseeing the Rule of Law in the EU', *op cit.*

<sup>63</sup> E.g. Sadurski, 'Adding Bite to a Bark', *op cit.*

<sup>64</sup> Scheppele, 'Enforcing the Basic Principles of EU Law', *op cit.*

are true in the context of *acquis* enforcement are justified in the context of the value enforcement machinery. Most importantly, while the very structure of the law-enforcement provisions in the EU seems to beg the conclusion that Article 259 TFEU enjoys a rather auxiliary place in the grand scheme, with the institutions taking over the task of *acquis* enforcement from the individual Member States, the same does not seem to be entirely true in the values enforcement context. Since the values declared in Article 2 TEU are shared between the EU and its Member States' legal orders, it is impossible to claim that the institutions of the Union are the key actors primarily responsible for their enforcement. On the contrary, in the context of the complete interdependence of the Union *and* its Member States in general Article 2 TEU compliance throughout the Union, the Member States should by definition be allowed to play a much greater role here compared to the ordinary context of *acquis* enforcement. The Article 7 TEU procedure also supplies an argument in support of this statement, as the key provision tailored for values' enforcement is crucially political and relies to a great degree on the will of the individual Member States (even if channelled via the institutions). Given that a fundamentally different role needs to be played by the Member States in the enforcement of values story, the potential importance of Article 259 TFEU rises to a great extent: in a context where self-help is traditionally prohibited,<sup>65</sup> this provision acquires crucial importance if the institutions use their discretion either to be silent on a matter of concrete violations – proposing some ephemeral procedures for future use notwithstanding<sup>66</sup> – or winning irrelevant cases which have no bearing on the actual state of the Rule of Law in the non-compliant Member States.<sup>67</sup> In other words, also approached from the perspective of the global systemic assessment of the provisions aimed at ensuring compliance, Article 259 TFEU acquires a new life – the one of much

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<sup>65</sup> Joined cases 90&91/63 *Commission v. Luxembourg and Belgium* [1964] ECR 625. For an analysis, see W. Phelan, 'Supremacy, Direct Effect, and Dairy Products in the Early History of European Law' (2014) *IIIS Discussion Paper* No. 455. This prohibition effectively bars Member States from deploying 'horizontal *Solange*' logic against each other. On 'horizontal *Solange*', see I. Canor, 'My Brother's Keeper? Horizontal *Solange*: "An Ever Closer Distrust Among the Peoples of Europe"' (2013) 50 *CMLRev* 384.

<sup>66</sup> For an analysis of the Commission's and the Council's proposed solutions, see D. Kochenov and L. Pech, 'Monitoring and Enforcement of the Rule of Law in the EU: Rhetoric and Reality' (2015) *European Constitutional Law Review* (forthcoming).

<sup>67</sup> Case C-286/12 *Commission v. Hungary* [2012] ECLI:EU:C:2012:687; Case C-288/12 *Commission v. Hungary* [2014] ECLI:EU:C:2014:237.

greater importance – in the context of values’ enforcement as opposed to simply guaranteeing *acquis* compliance.

That activating Article 259 TFEU is most likely impossible if its use appears likely to provoke international scandals and political tensions is not really a sound argument against deploying it in the struggle for the uniform observance of Article 2 TEU values throughout the Union. The rich vista of state-versus-state litigation found within the auspices of the Council of Europe, where largely similar – if not identical – values are at stake,<sup>68</sup> proves that direct state-versus-state actions in Europe can indeed be deployed, albeit in quite extreme circumstances; those seem quite similar, however, to the crisis of values the EU is expected to deal with right now. Moreover, in the context of the EU’s own values crisis, a number of Member States have already emerged as the ones ready to go further than the majority in enforcing compliance with the fundamentals of EU integration. The most recent example of this is the ‘letter of the four foreign ministers’ signed by Denmark, Finland, Germany and the Netherlands. Crucially, the text of Article 259 TFEU does not seem to exclude actions brought by several Member States. In other words, it would make the case of *The Four Willing v. Hungary* possible.<sup>69</sup> Moreover, we have seen examples of similar collective litigation in the context of the Council of Europe.

Where the four Member States are clearly negatively affected by the fact that the key fundamentals of the Union founded on the presumption of general compliance with the values of Article 2 TEU cannot mobilise sufficient support for resolute action under Article 7 TEU and face an over-cautious Commission, direct action under Article 259 TFEU emerges as an important opportunity to take action. Again, since such action will not necessarily be supported by the Union institutions as such, it is infinitely more appealing than Commission action under Article 258 TFEU would be, given the

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<sup>68</sup> See T. Altwicker, ‘Convention Rights as Minimum Constitutional Guarantees? The Conflict between Domestic Constitutional Law and the European Convention on Human Rights’, in A. von Bogdandy and P. Sonnevend (eds.), *Constitutional Crisis in the European Constitutional Area: Theory, Law and Politics in Hungary and Romania* (Oxford: Hart Publishing, 2015). The Union constitutional system fully recognises this by accepting the ECHR rules among its sources of inspiration, in addition to the obligation on the Union to join the Convention.

<sup>69</sup> Garnering large numbers of initiating Member States is actually absolutely unnecessary, as all the Member States would be able to submit observations anyway, once the case reaches the Court.

competence maze in which Article 2 TEU seems to be lost.<sup>70</sup> What we are speaking about in the context of Article 259 TFEU is thus not a power-grab by the Commission, but a development akin to ‘biting intergovernmentalism’, where the Member States take the enforcement of values into their own hands; without however breaking EU law, as a horizontal *Solange* approach would demand,<sup>71</sup> for instance, or moving the dispute beyond the confines of EU law, as was done with Austria in the past.<sup>72</sup> Article 259 is thus the most sensitive way, in the context of EU federalism, to approach the values crises and enforce Article 2 TEU, in a way that would be co-owned by the EU and the Member States. Moreover, should Article 259 TFEU action be brought, it could supply the much-needed momentum to push the Commission to take a somewhat more active stance on the matter. It could thus be combined with the deployment of other measures available in the EU’s values’ enforcement palette, such as the pre-Article 7 procedure for instance.

### III. Systemic infringement actions brought by Member States

The last – and probably the most important – issue which arises in the context of the potential deployment of Article 259 TFEU in values enforcement cases can misleadingly appear as the trickiest one: the one of standing. How to persuade the ECJ to take the case? In essence, the challenge of using Article 259 TFEU effectively to go after a Member State in breach of the fundamental values of Article 2 TEU, including democracy, the protection of human rights and the Rule of Law is in many respects similar to the difficulties arising in the context of using Article 258 TFEU, which is worded very similarly but depends on the Commission’s discretion.

Two points should be made clear before going into details. Firstly, the key values on which the EU is based are clearly meant to be endowed with legal value, they are more than just aspirational pronouncements. In the correct words of Jean-Claude Piris, ‘Article 2 TEU on the Union’s values is not only a political and symbolic statement. It

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<sup>70</sup> Editorial comments, ‘Safeguarding EU Values in the Member States – Is Something Finally Happening?’ (2015) 52 *CMLRev.* 619; Hillion, ‘Overseeing the Rule of Law in the EU’, *op cit.*

<sup>71</sup> Canor, ‘My Brother’s Keeper?’, *op cit.*

<sup>72</sup> G. N. Toggenburg, ‘La crisi austriaca: delicate equilibrii sospesi tra molte dimensioni’ (2001) *Diritto pubblico comparato ed europeo*, 735; K. Lachmayer, ‘Questioning the Basic Values – Hungary and Jörg Haider’, in A. Jakab and D. Kochenov (eds.), *The Enforcement of EU Law and Values* (Oxford: Oxford University Press, 2016 (forthcoming)).

has concrete legal effects'.<sup>73</sup> This is clear from the Union's own constitutional make-up, which obliges the Member States to presume each-others' adherence to the values, thus policing the common acceptance of the virtual values playing field.<sup>74</sup> Simultaneously, however, the substance of duties is not policed, creating a situation where the presumptions about reality have a much higher value in the eyes of the law in this crucial field than the reality – read 'non-compliance' – itself.<sup>75</sup> The only exception from focusing on presumptions while generally ignoring the actual rule of law compliance at the Member State level was the context of the pre-accession promotion of democracy and the rule of law by the Commission<sup>76</sup> in the candidate countries. This process was not a resounding success, to say the least.<sup>77</sup>

Secondly, while all the instruments in the Treaties can thus potentially be used to shape the environment of full compliance, Article 258 TFEU, as deployed so far, has clearly suffered from important drawbacks, limiting its effectiveness in the values enforcement context: 'perpetually grounded and unable to take flight',<sup>78</sup> in the words of Melanie Smith. The deficiencies are exacerbated outside of the context of the *acquis sensu stricto*, where values enter the picture. Given the essential systemic differences, in the eyes of the institutions, at least, between the enforcement of the *acquis* and the enforcement of values in the context of the current law in force, the same approaches cannot be applied to both, equally effectively.<sup>79</sup> Accordingly, in the oft-cited example where the Commission won a case on age discrimination grounds against Hungary, where the retirement age for the judges was significantly reduced; while booking a victory for the Commission and eventually securing compensation for the retired judges, it does not solve the problem of that state's interference in judicial independence by decapitating many local courts.<sup>80</sup> The difference between the Article 2 TEU paradigm and the *acquis* paradigm is thus overwhelmingly clear: by compensating the judges who

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<sup>73</sup> J.-C. Pirijs, *The Lisbon Treaty* (Cambridge: Cambridge University Press, 2010), 71. See for a detailed analysis, Hillion, 'Overseeing the Rule of Law in the EU', *op cit.*

<sup>74</sup> See, most recently, Opinion 2/13 (*ECHR Accession II*) [2014] ECLI:EU:C:2014:2454, para. 192.

<sup>75</sup> Kochenov, 'EU Law without the Rule of Law', *op cit.*

<sup>76</sup> M. Maresceau, 'Quelques réflexions sur l'application des principes fondamentaux dans la stratégie d'adhésion de l'UE', in J. Raux, *Le droit de l'Union européenne en principes: Liber amicorum en l'honneur de Jean Raux* (Paris: LGDJ, 2006), p. 69.

<sup>77</sup> Kochenov, *EU Enlargement and the Failure of Conditionality*, *op cit.*

<sup>78</sup> M. Smith, 'The Evolution of Infringement and Sanction Procedures', *op cit.*, 351.

<sup>79</sup> Kochenov, 'Self-Constitution through Unenforceable Promises', *op cit.*

<sup>80</sup> Scheppele, 'Enforcing the Basic Principles of EU Law', *op cit.*

were forced to retire, Hungary made up for the wrong committed by retiring them, rectifying the violation of EU law *sensu stricto*. Yet compensating the retired judges obviously did not get to the heart of the problem: the national government's successful attempt to undermine the independence of the national judiciary by appointing ideologically compatible judges. The Commission's intervention under Article 258 TFEU was therefore ineffective as regards the major breach of the Rule of Law this case revealed.<sup>81</sup> The first priority of any reform should therefore be to enable the Commission to identify a possibility, based on the enforcement procedures in place, to challenge systemic breaches of Article 2 TEU (in cumulation with other provisions) directly. Currently, Article 258 TFEU is construed circumspectly, to force the Commission to win pointless battles in infringement actions against narrow violations of the EU *acquis*. It is clear, in this respect, that a more effective approach to tackling the value side of *acquis* violations is thus indispensable. Indeed, the stance of the institutions on the matter is scandalous, to say the least. This stance explains why Berlusconi can change criminal law by passing *de facto ad personam* legislation to avoid prosecution for his crimes,<sup>82</sup> why Hungary can attack its own judiciary,<sup>83</sup> or the data-protection supervisor office<sup>84</sup> and – once the cases come before the ECJ – the unhelpful presumption that the *acquis* and the values of Article 2 TEU are the creatures of two different planets still holds, to well-known results. Add to this the Commission's failure to invoke the Charter of Fundamental Rights in its Article 258 TFEU proceedings and the faithful picture of the grim reality of values enforcement becomes complete.<sup>85</sup> Again, the law in the books is fine – Article 258 TFEU addresses itself to breaches of EU law and Article 2 TEU is part of that law, as Piris, Hillion and numerous other scholars and practitioners read the

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<sup>81</sup> We could fear that the second case it is reported to have 'won' against Hungary is no different at all: Case C-288/12 *Commission v. Hungary* [2014] ECLI:EU:C:2014:237. For an analysis see K. L. Scheppele, 'Making Infringement Procedures More Effective', EUTopia Law: <http://eutopialaw.com/2014/04/29/making-infringement-procedures-more-effective-a-comment-on-commission-v-hungary-case-c-28812-8-april-2014-grand-chamber/>. See also Scheppele, 'Enforcing the Basic Principles of EU Law', *op cit*.

<sup>82</sup> Hoffmeister, 'Enforcing the EU Charter of Fundamental Rights in Member States', *op cit.*, 206–208.

<sup>83</sup> Sólyom, 'The Rise and Decline of Constitutional Culture in Hungary', *op cit*.

<sup>84</sup> G. Polyák, 'Context, Rules and Praxis of the New Hungarian Media Laws: How Does the Media Law Affect the Structure and Functioning of Publicity?', in A. von Bogdandy and P. Sonnevend (eds.), *Constitutional Crisis in the European Constitutional Area: Theory, Law and Politics in Hungary and Romania* (Oxford: Hart Publishing, 2015).

<sup>85</sup> Łazowski, 'Decoding a Legal Enigma', *op cit*.

Treaties. It is the unhelpfully narrow interpretation of the law – as is so often the case<sup>86</sup> – which profoundly undermines the effectiveness of the provisions in question.

An important lesson can be learnt from the two considerations above: while values can and should be enforced – and all the arguments listed in the previous parts support the idea that this could also be done by Applying Article 259 TFEU – it would be a bad idea to be inspired by the contemporary use of Article 258 TFEU, notwithstanding the fact that the core clauses of the two provisions boast almost identical wording. In the area of values, where Article 258 TFEU has never been used, as well as with regard to the Charter, which the Commission seems to dissociate from Article 258 TFEU. It is particularly clear that Smith might be right in suggesting that the decades-old provision is an example of a ‘failure to launch’.<sup>87</sup> There is no reason at all for the Member States to be over-cautious, copying the Commission’s behaviour, instead of striving to ensure their peers’ compliance with the spirit and the letter of the law. To transform Article 259 TFEU from being a valve for political dissatisfaction for internal consumption in the Member States – which it was not intended to be, one must add – into a viable tool for enforcing crucial considerations of importance to all the Member States and the institutions alike, the approach to the deployment of the article should be altered to meet the challenges posed by the differences between *acquis* and values enforcement. In this context Kim Lane Scheppele’s proposal, focusing on the systemic infringement action and introduced in the context of Article 258 TFEU could provide the crucial point of inspiration, guiding the practical use of Article 259 TFEU as well.<sup>88</sup> Moreover, that proposal could be more helpful here than with Article 258 TFEU, as deploying it in this

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<sup>86</sup> E.g. L. W. Gormley, ‘Judicial Review: Advice for the Deaf?’ (2005) 29 *Fordham International Law Journal*, 655.

<sup>87</sup> Smith, ‘The Evolution of Infringement and Sanction Procedures’, *op cit.*, 352.

<sup>88</sup> Scheppele, ‘Enforcing the Basic Principles of EU Law’, *op cit.* Her proposal has been analyzed in the *Verfassungsblog* in great detail. For the details of the proposal, see, K.L. Scheppele, ‘What Can the European Commission Do When Member States Violate Basic Principles of the European Union? The Case for Systematic Infringement Actions’ (2013), available at [http://ec.europa.eu/justice/events/assises-justice-2013/files/contributions/45.princetonuniversitiescheppelesystemicinfringementactionbrusselsversion\\_en.pdf](http://ec.europa.eu/justice/events/assises-justice-2013/files/contributions/45.princetonuniversitiescheppelesystemicinfringementactionbrusselsversion_en.pdf); for the proposal in brief, see, K. L. Scheppele, ‘EU *Commission v. Hungary*: The Case for the “Systemic Infringement Action”’, *Verfassungsblog*, 22 November 2013, available online at <http://www.verfassungsblog.de/en/the-eu-commission-v-hungary-the-case-for-the-systemic-infringement-action/#.Uw4mfPuzm5I>. For the discussion, see, *Verfassungsblog*, ‘Hungary – Taking Action, Episode 2: The Systemic Infringement Action’, available online at <http://www.verfassungsblog.de/en/category/focus/ungarn-vertragsverletzungsverfahren-scheppele/#.Uw4m4Puzm5J>.



new context will not require overcoming the Commission's inertia against considering the EU's values (and the Charter, also) as worth enforcing. In this context, I would argue that wise reliance on Article 259 TFEU could help change the practice of application of Article 258 TFEU, which leaves much to be desired, if not help the ECJ to reassess the systemic place of Article 2 TEU values within the edifice of EU law.

In a nutshell my proposal aims to ensure the most effective use of existing infringement procedures, which have been used relatively successfully by the Commission in the context of the enforcement of EU law since the founding of the Communities analysed above. The proposal makes a sound attempt to address the shortcomings of existing EU law enforcement machinery for addressing potential and actual serious breaches of EU values. This is done in two fundamental steps.

Firstly, in the context of actions under Article 258 TFEU, Kim Lane Scheppele, making a vital addition to the EU legal scholarship on the issue, which has recently been characterised as 'rather doctrinal and anæmic in nature',<sup>89</sup> suggests enabling the bundling up of infringements so as to empower the Commission to present a whole infringement package to the Court of Justice, rather than pursuing single instances of non-compliance on a case-by-case basis. The crucial underlying assumption in this approach is that pursuing numerous infringements simultaneously amounts to more than just the sum of its parts, as it should enable the Commission to present a clear picture of systemic non-compliance *regarding Article 2 TEU*, not merely the elements of the well-tested *acquis*. In this way – especially if Article 2 TEU is coupled with the duty of loyalty laid down in Article 4(3) TEU,<sup>90</sup> the Court could for instance find that the Rule of Law has been breached by a Member State on the basis of multiple single breaches of EU law bundled together and submitted by the Commission in one go. This 'bundling approach' would not in fact be entirely new, although it has only been used so far with respect to a systemic breach of the EU *acquis*.<sup>91</sup> Scheppele's proposal should

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<sup>89</sup> Smith, 'The Evolution of Infringement and Sanction Procedures', *op cit.*, 353.

<sup>90</sup> 'Pursuant 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. The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union'.

<sup>91</sup> E.g. Case C-494/01 *Commission v. Ireland (Irish Waste)* [2005] ECR I-3331.

therefore be commended for offering a creative route to enforcing Article 2 TEU on the basis of an existing and proven procedure.<sup>92</sup>

The second part of Scheppele's proposal is as important and is designed to deal with the limited effectiveness of financial sanctions – the second step after finding a breach under Article 258 TFEU is necessarily returning to the Court with a request to impose a fine or a lump-sum, should non-compliance persist, thus using the Article 260 TFEU procedure. The proposal is simple: rather than imposing financial sanctions, the EU should seek to subtract any EU funds which the relevant Member State would be entitled to receive. Although some secondary legislation would probably be needed to make this part of the proposal a reality, it is definitely an approach which merits serious consideration. While this change might not work with countries which do not depend on EU funds, it could be effective with Member States particularly dependent on EU funds, such as Hungary.<sup>93</sup>

To summarise, Kim Lane Scheppele's proposal creatively attempts to solve two key problems which have prevented the effective use of the EU's infringement procedure against Member States guilty of violating Article 2 TEU values:<sup>94</sup> the ignorance of the essential difference between the 'ordinary *acquis*' and the values of Article 2 TEU emerging from Article 258 TFEU jurisprudence, and the related incapacity of this provision as currently interpreted to catch the most troublesome violations of the essential systemic elements of the Rule of Law, democracy and human rights protection lying at the core of the constitutional system of the Union, while simultaneously also pertaining, at least in part, to national competences.

It is submitted that applying what Kim Lane Scheppele proposed to the direct actions by Member States against other Member States will free the potential of Article 259 TFEU to play an active role in the system policing the values of the Union with defiant Member States. Should systemic violation cases be prepared by individual Member States or groups, they can rely on all of the arguments on numerous infringements amounting to more than the sum of their parts as indicators of an

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<sup>92</sup> Scheppele, 'Enforcing the Basic Principles of EU Law', *op cit*.

<sup>93</sup> *Ibid*.

<sup>94</sup> For a more detailed assessment and criticism of this proposal, see Verfassungsblog, 'Hungary – Taking Action, Episode 2: The Systemic Infringement Action', available online at <http://www.verfassungsblog.de/en/category/focus/ungarn-vertragsverletzungsverfahren-scheppele/#.Uw4m4Puzm5J>. Closa et al., 'Reinforcing Rule of Law Oversight', *op cit*; Kochenov, 'On Policing Article 2 TEU Compliance', *op cit*.

ongoing breach of the Article 2 TEU values. Article 260 TFEU – however imperfect<sup>95</sup> – will then be fully applicable,<sup>96</sup> should the Member State impeached fail to change its behaviour once the ECJ declares the breach.

The argument here is a plea to reconsider the importance and usability of Article 259 TFEU – not a step-by-step guide. Even at the most general level of analysis, however, it is absolutely clear that there are convincing arguments in the fabric of EU law to ground the standing of the Member State or States initiating an action under this provision. Importantly, the arguments for the specific deployment of Article 259 TFEU reach beyond – albeit supported by – the standard oft-cited set of normative considerations behind interventions on behalf of the Union’s values, as outlined for instance by Carlos Closa.<sup>97</sup> In addition to congruence and interdependence, as well as the systemic coherence of the Union legal system, any Member State can point to the essential presumption of general compliance with Article 2 TEU, which informs all the reasoning underlying supranational law, through mutual recognition and the ever-closer Union between the peoples of the Member States. Already, the attempts to enforce the values of the Union in the pre-accession context has demonstrated with abundant clarity that the Union is unlikely to work if some of its members are seriously deficient at this most basic level.

The issue goes well beyond Jan Klabbers’ going ‘to bed with bad guys’:<sup>98</sup> it renders the whole architecture of the Union unsustainable, by demonstrating that the key presumption underlying the integration construct does not hold.<sup>99</sup> In the face of such a challenge it is difficult to imagine the ECJ turning down a well-documented case

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<sup>95</sup> P. Wennerås, ‘Making Effective Use of Article 260’, in A. Jakab and D. Kochenov (eds.), *The Enforcement of EU Law and Values* (Oxford: Oxford University Press, 2016 (forthcoming)); Smith, ‘The Evolution of Infringement and Sanction Procedures’, *op cit.*; Brian Jack, ‘Article 260(2) TFEU: An Effective Judicial Procedure for the Enforcement of Judgments?’ (2013) 19 *ELJ*, 420; Pål Wennerås, ‘Sanctions against Member States under Article 260 TFEU: Alive, but not Kicking?’ (2012) 49 *CMLRev*, 145; M. Smith, ‘Inter-institutional Dialogue and the Establishment of Enforcement Norms: A decade of Financial Penalties under Article 228 EC (now Article 260 TFEU)’ (2010)16 *European Public Law*, 547.

<sup>96</sup> Wennerås, ‘Making Effective Use of Article 260’, *op cit.*

<sup>97</sup> Closa, ‘Reinforcing EU Monitoring of the Rule of Law’, *op cit.* See also Closa et al., ‘Reinforcing Rule of Law Oversight’, *op cit.*

<sup>98</sup> J. Klabbers, ‘On Babies, Bathwater and the Three Musketeers, or the Beginning of the End of European Integration’, in V. Heiskanen and K. Kulovesi (eds.), *Function and Future of European Law* (Publications of the Faculty of Law, University of Helsinki, 1999).

<sup>99</sup> Kochenov, ‘EU Law without the Rule of Law’, *op cit.*

of systemic infringement brought by a Member State or a group of Member States. There is no doubt that the fact of finding such an action admissible will necessarily mean the profound rethinking of the European legal order as it stands, importantly also of the role played by Article 259 TFEU in it. The unhelpful presumption of the rigid distinction between the *acquis* and values is untenable in systemic infringement cases and will have to be rethought, to give Article 2 TEU a chance of showing its full potential. Given the compelling arguments for the need for values-inspired systemic Article 259 TFEU action and particularly the fact that finding such action admissible will most likely be easier for all kinds of reasons if the challenge came from the *Herren der Verträge* rather than one of the institutions of the Union, looking at Article 259 TFEU sufficiently creatively presents us with a viable possibility to improve seriously the compliance machinery in the area of the EU's foundational fundamental values. Whether the Commission joins in is not the key consideration at this point. What is crucial is not to allow the helping hand of the Commission, should it decide to play along, to water down the core arguments, rendering systemic infringement into yet another pyrrhic victory along the lines of the *Commission v. Hungary* cases. Ensuring this is easy, however: it is long-established case law that Member States unhappy with Commission's arguments can proceed to Court on their own, unbound by the Commission's actions under Article 258 TFEU.<sup>100</sup>

The wording of Article 259 TFEU is truly broad with regard to its requirements for standing: 'A Member State which considers that another Member State has failed to fulfil an obligation under the Treaties can bring the matter before the Court of Justice of the European Union'.<sup>101</sup> Adherence to general principles of law, or the failure thereof, proved on the basis of a systemic analysis of an array of possible infringements following Scheppele's methodology will unquestionably fall within the scope of fulfilling 'obligations under the Treaties'. Note the absence from the text of the provision of any obligation on the Member State bringing the action to demonstrate direct and individual concern with the violation in question. While it is quite obvious that the Member States of the Union find themselves in a context of constant and far-reaching interdependence,

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<sup>100</sup> As demonstrated in Case 141/78 *France v. UK* [1979] ECR 2923 and accepted in the literature. For an overview, see e.g., Prete and Smulders, 'The Coming of Age', *op cit.*, 27 (and the references cited therein).

<sup>101</sup> For an analysis see Lenaerts et al., *EU Procedural Law*, *op cit.*; Prete and Smulders, 'The Coming of Age', *op cit.*; Łazowski, 'Decoding a Legal Enigma', *op cit.*

the text of the provision is very amenable to the idea of deploying Article 259 TFEU to policing values, as it does not even require the Member State or States bringing the action to restate the obvious.

Article 259 TFEU is thus perfectly suited for bringing infringement actions against Member States which fail to adhere to the core principles and values on which the Union is founded. This is particularly true if a systemic infringement action, as proposed by Kim Lane Scheppele, is applied in this context. The deployment of systemic infringement actions in the context of Article 259 TFEU would permit catching Rule of Law violations which impact negatively on the very essence of the national constitutional system of the non-compliant Member State, thus going beyond mere *acquis* policing. This adds an additional important tool to the palette of the possible available courses of action against the ideologically non-compliant Member States.

### **Conclusion**

Direct actions under Article 259 TFEU can play an important role in enforcing compliance with the EU's values and core principles in defiant Member States. This is particularly the case if systemic infringement actions are brought. The benefits of deploying Article 259 TFEU as opposed to other Treaty provisions are clear: the Article requires *national* as opposed to the EU-level institutional action, which solves the issue of the high thresholds for using the other mechanisms and also respects the federal sensitivities, by limiting the possibility of supranational power-grabs under the pretext of values enforcement. The provision is deployable immediately and can develop into the key element of biting intergovernmentalism, where the Member States themselves – even when confronted by reluctance or indecision in the Union institutions – can call upon the Court to enforce the values on which the Union is founded.

