

Infringement Actions 2.0: How to Protect EU Values before the Court of Justice

Matteo Bonelli* 

Infringement actions and EU values – constitutional backsliding in Hungary and Poland – the role of the Court of Justice – judicial independence and Article 19 TEU – the Charter of Fundamental Rights – the toolkit to protect EU values – political and judicial mechanisms – a bottom-up approach

INTRODUCTION

The infringement procedure is a well-established tool of EU law, a key component of the Community and the Union's enforcement system since its early years. Its main characteristics and procedural steps have not fundamentally changed over time, with the most important innovation being the creation and then strengthening of the follow-up procedure of Article 260 TFEU, which allows for the imposition of financial penalties when a member state does not comply with a first ruling of the Court of Justice under Article 258 TFEU. Infringement actions can be used to tackle both bigger cases of infringement and smaller ones.¹ While concrete infringement cases may obviously be highly controversial, both from a legal and from a more political perspective, the instrument as such has robust

*Assistant professor, Faculty of Law, Maastricht University, ORCID ID 0000-0003-2683-2481. A first version of this paper was discussed at the conference 'The Rule of Law in the EU: Consensus and Discontent'. I thank the organisers and the participants for their remarks and suggestions. I thank also Jan-Herman Reestman and the reviewer for very helpful comments on the submitted draft. All remaining mistakes are mine.

¹See e.g. K. Banks and G. von Rintelen, 'Infringement Procedures and the Juncker Commission', 45(5) *European Law Review* (2020) p. 620.

European Constitutional Law Review, 18: 30–58, 2022

© The Author(s), 2022. Published by Cambridge University Press in association with *European Constitutional Law Review*. This is an Open Access article, distributed under the terms of the Creative Commons Attribution-NonCommercial-ShareAlike licence (<https://creativecommons.org/licenses/by-nc-sa/4.0/>), which permits non-commercial re-use, distribution, and reproduction in any medium, provided the same Creative Commons licence is included and the original work is properly cited. The written permission of Cambridge University Press must be obtained for commercial re-use.
doi:10.1017/S1574019622000049

legitimacy, considering the solid legal basis of Article 258 TFEU as well as a well-known and well-formalised procedure developed over the decades. In many ways, the use of the infringement action by the Commission has become part of the day-to-day life of the Union.²

From this perspective, it is not entirely surprising that, in the first moments of the Hungarian constitutional backsliding process, the almost immediate reaction of the Commission was to follow this well-beaten path and pursue a series of infringement actions that were meant to tackle specific elements of the Hungarian constitutional reforms.³ While not unreasonable, this ‘indirect’⁴ approach, where the Commission did not explicitly rely on rule of law or fundamental rights arguments but brought before the Court of Justice narrower questions related to the correct implementation of EU primary or secondary law, was largely unsuccessful, as is well known. The limited results have forced the Commission to rethink its ‘values-protection’ strategy in more recent times. Supported and even incentivised to do so by the Court of Justice, the Commission has started using much more ‘direct’ infringement actions, based explicitly on Article 19 TEU, which protects the independence of the judiciary, or on the Charter of Fundamental Rights. Even if the democratic, rule of law and human rights situations in both Poland and Hungary remain far from satisfactory, this new infringement procedure’s practice better shows both the potential and the concrete impact of the infringement procedure as a tool to protect EU values.

This article has two main objectives. In the first part, it analyses how the Commission’s approach has evolved over time, starting from the first steps taken against Hungary, until the more recent actions based on Article 19 TEU and the Charter. It reflects on both the successes and the shortcomings of what I will define as ‘infringement actions 2.0’. The second part then reflects on possible future developments in the infringement strategy and, more broadly, on the place of infringement actions in the EU values-protection toolkit. In line with many contributions on the topic,⁵ the article argues that the infringement procedure

²S. Peers and M. Costa, ‘The Old Dog Learns New Tricks: Reinvigorating Infringement Proceedings to Enhance the Effectiveness of EU Law’, 46(2) *European Law Review* (2021) p. 237 draw a distinction between the ‘nuclear weapon’ of Art. 7 (though that is probably a misnomer) and the ‘conventional weapon’ of Art 258.

³On the new Hungarian constitution, *see*, among many, K. Kovacs and G.A. Toth, ‘Hungary’s Constitutional Transformation’, 7(2) *EuConst* (2011) p. 183, and A. Jakab and P. Sonnevend, ‘Continuity with Deficiencies: The New Basic Law of Hungary’, 9(1) *EuConst* (2011) p. 102.

⁴M. Dawson and E. Muir, ‘Hungary and the Indirect Protection of EU Fundamental Rights and the Rule of Law’, 14(10) *German Law Journal* (2013) p. 1959.

⁵M. Schmidt and P. Bogdanowicz, ‘The Infringement Procedure in the Rule of Law Crisis: How to Make Effective Use of Article 258 TFEU’, 55(4) *Common Market Law Review* (2018) p. 1061 and, by the same authors, ‘Ascertaining the “Guarantee of Guarantees”: Recent Developments Regarding the Infringement Procedure in the EU’s Rule of Law Crisis’, in A. von Bogdandy

should be seen as one of the key elements of this toolkit; yet, it does not go as far as some of the recent literature, which has called for an extremely broad reading of the scope of application of Article 258 TFEU, arguing that infringement actions may become tools of ‘militant democracy’.⁶ This contribution supports a more limited understanding of the scope of application of the infringement procedure and of its function as a values-protection instrument. Nonetheless, it is evident that further steps can be taken by the Commission, and the article suggests possible pathways for further action in its final paragraphs.

INFRINGEMENT ACTIONS 2.0: WHAT HAS CHANGED?

The first attempts: infringement actions and the Hungarian constitutional reforms

In 2012, a few weeks after the entry into force of the new Hungarian Basic Law, perhaps the key moment in the Hungarian constitutional backsliding process, the Commission decided to launch three separate infringement actions, targeting limited and specific aspects of the Hungarian reforms.⁷ One action, which was closed in the pre-judicial phase, concerned the functioning of the Hungarian Central Bank. A second action addressed the creation of a new data protection agency and the removal of the Data Protection Supervisor from his post.⁸ The third action related to the controversial reforms of the judiciary.

The Commission’s approach was defined as an indirect⁹ (or ‘piecemeal’¹⁰) one, as the Commission decided to concentrate on fairly technical questions of

et al. (eds.), *Defending Checks and Balances in EU Member States* (Springer 2021); K.L. Schepele et al., ‘EU Values Are Law, after All: Enforcing EU Values through Systemic Infringement Actions by the European Commission and the Member States of the European Union’, 39 *Yearbook of European Law* (2020) p. 3; P. Pohjankoski, ‘Rule of Law with Leverage: Policing Structural Obligations in EU Law with the Infringement Procedure, Fines, and Set-off’, 58(5) *Common Market Law Review* (2021) p. 1341; T. Boekenstein, ‘Making Do With What We Have: On the Interpretation and Enforcement of the EU’s Founding Values’, *German Law Journal* (forthcoming).

⁶See Schepele et al., *supra* n. 5.

⁷European Commission, Press Release, ‘European Commission launches accelerated infringement proceedings against Hungary over the independence of its central bank and data protection authorities as well as over measures affecting the judiciary’, Strasbourg, 17 January 2012, Doc. IP/12/14.

⁸Concluded by ECJ 8 April 2014, Case C-288/12, *Commission v Hungary*, ECLI:EU:C:2014:237.

⁹Dawson and Muir, *supra* n. 4.

¹⁰F. Hoffmeister, ‘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* (Hart Publishing 2015) p. 231.

compatibility of the reforms with specific provisions of EU primary and secondary law, with no reference to the broader democratic and rule of law questions at stake. The approach was based on a narrow understanding of the procedure of Article 258 TFEU, which, the Commission considered, could only be used to tackle national measures falling squarely within the scope of EU law. In other words, the official reaction of the Commission at the time was to see the Hungarian problem merely as an issue about the correct application of EU law. The infringement action on the judicial reforms illustrates that approach clearly. At first, the Commission expressed greater concerns, on the lowering of the retirement age for judges and prosecutors, but also more generally on the new legislation on the organisation of courts, including on the creation of the controversial National Judicial Office and the early termination of the mandate of the Supreme Court President.¹¹ However, when it had to define the scope of its action in the reasoned opinion, it focused uniquely on the question of the early retirement of judges and framed the issue purely as an age discrimination question, a question related to the compatibility of new constitutional provisions with EU non-discrimination Directive 2000/78. The original broad concern with the independence of the judiciary was narrowed down into a question that had at its focal point a different subject matter: EU age discrimination law.

The infringement action was quickly brought before the Court of Justice and decided in November 2012. The Commission won its legal battle, as the Court found that Hungary had breached Directive 2000/78, but the judgment had very limited impact on the Hungarian constitutional backsliding process.¹² Because of the action's narrow focus, Hungary could simply fix the concrete EU law breach by offering the judges who were to be retired either monetary compensation or reinstatement, but with no guarantee that they could occupy the same position. National authorities thus had ample space to engage in what has been defined as symbolic and creative compliance.¹³

The Commission's approach has been often criticised.¹⁴ It has been said that the Commission failed to grasp the real judicial independence challenges, or that it decided to play it safe. While in hindsight the results have undoubtedly been disappointing, the choices were at least understandable at the time. For example, it is obvious today to say that the Commission should have used Article 19 TEU

¹¹On this matter, see ECtHR 23 June 2016, No. 20261/12, *Baka v Hungary*.

¹²See G. Halmay, 'The Case of the Retirement Age of Hungarian Judges', in F. Nicola and B. Davies (eds.), *EU Law Stories: Contextual and Critical Histories of European Jurisprudence* (Cambridge University Press 2017).

¹³A. Batory, 'Defying the Commission: Creative Compliance and Respect for the Rule of Law in the EU', 94(3) *Public Administration* (2016) p. 685.

¹⁴See e.g. L. Pech and K.L. Scheppele, 'Illiberalism Within: Rule of Law Backsliding in the EU', 19 *Cambridge Yearbook of European Legal Studies* (2017) p. 3.

in the infringement action on the judicial reforms. As we now know, Article 19 TEU includes the key obligation to ensure judicial independence of national courts and tribunals acting in the fields covered by Union law. Yet, the groundbreaking interpretation of Article 19 TEU offered by the Court of Justice in *ASJP*¹⁵ could have hardly been anticipated back then, and it was far from evident that Article 19 TEU could have been read in that sense.¹⁶

More fundamentally, a narrow understanding of Article 258 TFEU prevailed at the time.¹⁷ Commission President Barroso tried to explain the prevailing institutional understanding distinguishing between a ‘legal’ dimension of the Hungarian question, to be tackled by the Commission in infringement actions, and a more political dimension, which should have been addressed, at the EU level, by the Parliament and the Council.¹⁸ For all its proved deficiencies, that approach was not absurd in terms of ensuring the legitimacy of EU intervention, considering in particular the novelty of the challenge:¹⁹ the Commission was on firmer ground when it justified its action on the basis of the need to enforce concrete EU law obligations, rather than systematically assessing the constitutional framework of a member state, on the basis of standards that, especially at the time, could have not been considered well-defined.

The Commission’s position in the aftermath of these first actions was, however, less justifiable. Both officially and in the political debate, the Commission claimed full success,²⁰ and in the following years the Commission consistently maintained that its intervention had adequately protected the independence of the judicial system, despite clear indications to the contrary.²¹ While again, because of the

¹⁵See ECJ 27 February 2018, Case C-64/16, *ASJP*, ECLI:EU:C:2018:117.

¹⁶For a more extensive analysis, see M. Bonelli and M. Claes, ‘Judicial Serendipity: How Portuguese Judges Came to the Rescue of the Polish Judiciary’, 14(4) *EuConst* (2018) p. 622; L. Pech and S. Platon, ‘Judicial Independence under Threat: The Court of Justice to the Rescue in the *ASJP* Case’, 55(6) *Common Market Law Review* (2018) p. 1827.

¹⁷See also Editorial Comments, ‘Hungary’s New Constitutional Order and “European Unity”’, 49(3) *Common Market Law Review* (2012) p. 871.

¹⁸J.M.D. Barroso, ‘A Europe of Values and Principles’, Speech at the Plenary Debate on the situation in Hungary, Strasbourg, 18 January 2012.

¹⁹See also C. Closa, ‘The Politics of Guarding the Treaties: Commission Scrutiny of Rule of Law Compliance’, 26(5) *Journal of European Public Policy* (2019) p. 696.

²⁰European Commission, Press Release, ‘European Commission Closes Infringement Procedure on Forced Retirement of Hungarian Judges’, 23 November 2013, available at (http://europa.eu/rapid/pressrelease_IP-13-1112_en.html), visited 2 March 2022; V. Reding, ‘The EU and the Rule of Law – What Next?’, speech at the Centre for European Policy Studies, Brussels, 4 September 2013, available at (www.ec.europa.eu/commission/presscorner/detail/de/SPEECH_13_677), visited 2 March 2022.

²¹On the challenges for the Hungarian judiciary, see e.g. A. Jakab, ‘What is Wrong with the Hungarian Legal System and How to Fix it’, MPIL Research Paper Series No. 2018-13.

limited framing of its original action, no immediate follow-up action under Article 260 TFEU would have been possible, the Commission should have arguably recognised more explicitly the remaining questions on the independence of the Hungarian judiciary, and avoid celebrating what was evidently only a ‘Pyrrhic victory’.²² Ultimately, while the approach might have been defensible in theory, it cannot be denied that it had limited – if any – success in practice. Winning the three infringement cases only resulted in narrow amendments of Hungarian legislation, but did not change the larger rule of law and democratic picture. The decision to focus only on Article 258 TFEU, without complementary political action, and with a narrow reading of the powers under the infringement procedure, meant crucially that the most controversial aspects of the Hungarian reforms could not be addressed at the EU level.

After the very limited results achieved in the first phase, the Commission preferred to rely on other strategies when the Polish crisis began. Most importantly, it activated the ‘Rule of Law Framework’, the dialogical pre-Article 7 process to tackle the Polish’s judicial reforms, while it also maintained mostly informal political pressure on Hungary. Between 2012 and 2017, the Commission did not pursue any infringement action more or less explicitly concerned with the protection of EU values.²³

Infringement actions on the independence of the judiciary

In 2017, the Communication ‘EU law: Better results through better application’ anticipated a change in the Commission’s infringement policy.²⁴ The Commission promised a more strategic approach, identifying positive structural and policy priorities²⁵ that could serve to tackle ‘wider problems with the enforcement of EU law’. Addressing ‘cases in which national law . . . 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’ and focusing on ‘infringements which affect the capacity of national judicial systems to contribute to the effective enforcement of EU law’ were two key priorities identified in the Communication.

²²Pech and Scheppele, *supra* n. 14, p. 20.

²³For a partial exception, see however the infringement action on the amendments to asylum legislation in Hungary: European Commission, Press Release, ‘Commission opens infringement procedure against Hungary concerning its asylum law’, Brussels, 10 December 2015, Doc. IP/15/6228.

²⁴European Commission, ‘Communication from the Commission – EU Law: Better Results through Better Application’, Brussels, 19 January 2017, Doc. 2017/C 18/02.

²⁵Formalising a practice of ‘selective enforcement’: see L. Prete and B. Smulders, ‘The Age of Maturity of Infringement Procedures’, 58(2) *Common Market Law Review* (2021) p. 298.

Yet it was only after the landmark *ASJP* decision of the Court of Justice in February 2018 that the Commission started turning that promise into concrete action. The Court's expansive reading of the scope of application of Article 19 TEU – broader than the rest of EU law²⁶ – and of its material content, including – most crucially – the obligation to guarantee judicial independence of, essentially, all national courts, allowed the Commission to start infringement actions against measures undermining the independence of the judiciary directly on the basis of Article 19 TEU, without having to prove the existence of a link with other substantive provisions of EU law. Since then, infringement actions protecting the independence of the judiciary have become a true priority of the Commission.²⁷

The first and key example is the action on the independence of the Polish Supreme Court, already widely discussed in the literature.²⁸ The action was launched in July 2018, shortly after the entry into force of the provisions that envisaged lowering the retirement age of the Polish Supreme Court judges from 70 to 65 years, with these amendments being applicable also to sitting judges. The law also assigned to the President of the Republic, upon consultation with the National Council of the Judiciary, a discretionary power to decide on the extension with those mandates. The action is remarkable because, for the first time, the Commission initiated an infringement procedure on the basis of Article 19 TEU, and in its decision of June 2019, the Court, again for the first time, found a breach of Article 19 TEU 'read in conjunction with' Article 47 of the Charter.²⁹ The Polish measures were considered to be in violation of the principle of the irremovability of judges, a core component of judicial independence,³⁰ most crucially as they failed to pursue any legitimate objective. Furthermore, the discretionary powers granted to the President of the Republic to decide on the prolongation of the judges' mandate undermined the 'external independence' of the judiciary, as they could 'give rise to reasonable doubts, inter alia in the minds of individuals, as to the imperviousness of the judges concerned to external factors and as to their neutrality with respect to any interests before them'.³¹

²⁶To put it briefly, Art. 19 TEU applies 'in the fields covered by Union law', which is a different and broader formulation than 'within the scope of Union law': see Bonelli and Claes, *supra* n. 16.

²⁷See Commission Communication, 'Strengthening the Rule of Law within the Union – A Blueprint for Action', COM(2019)343 final.

²⁸See e.g. P. Bogdanowicz and M. Taborowski, 'How to Save a Supreme Court in a Rule of Law Crisis: the Polish Experience', 16(2) *EuConst* (2020) p. 306 and A. Śledzińska-Simon and P. Bárd, 'On the Principle of Irremovability of Judges beyond Age Discrimination: Commission v. Poland', 57(5) *Common Market Law Review* (2020) p. 1555.

²⁹ECJ 26 June 2019, Case C-619/18, *Commission v Poland*, ECLI:EU:C:2019:531.

³⁰*Ibid.*, para. 63.

³¹*Ibid.*, para. 118.

The infringement action, thanks also – if not first and foremost – to the interim order delivered by the Court,³² had a positive impact on the Polish situation, at least in the immediate aftermath of the rulings. The interim order had in fact already asked Poland to suspend the application of the new measures on the retirement age, to allow the sitting judges to continue carrying out their duties in the same position, and to refrain from nominating other judges to those positions. It truly had a ‘remarkable reach and magnitude’,³³ as it essentially operated in a retroactive manner, forcing a return to the situation predating the entry into force of the measures imposing early retirement.³⁴ The order and the final judgment prevented a full takeover of the Supreme Court, which in the months following the judgments continued to resist the government’s attempt to capture the court, including by sending several preliminary references to the Court of Justice.³⁵

While the government’s control over the Supreme Court, and in general over the Polish judiciary, has gradually increased since then,³⁶ the infringement action itself demonstrated the potential for a more direct approach by the Commission.³⁷ The key difference between the Supreme Court case and the earlier action against Hungary in similar factual circumstances was the legal basis of the procedure: Article 19 TEU, in the Polish case; Directive 2000/78, in the Hungarian one. In the Supreme Court case, the Commission and the Court could, first of all, concentrate on the key issue at stake – the independence of the Polish court – and second, require more than technical changes, such as introducing the possibility to grant compensation to the forcefully retired judges. In order to comply with the interim order and the final judgment, the Polish authorities had to demonstrate that the new framework regulating the Supreme Court complied with the basic requirements of independence, including the principles of irremovability and of no undue external influence over the Supreme Court’s judges.

³²ECJ 17 December 2018, Case C-619/18 R, *Commission v Poland*, ECLI:EU:C:2018:1021.

³³Prete and Smulders, *supra* n. 25, p. 315.

³⁴Banks and von Rintelen, *supra* n. 1, highlight several procedural elements that are worthy of attention in the case: the Commission started the infringement action immediately after the approval of the Polish law, and gave shorter-than-usual time limits (one month) to comply with the letter of formal notice and the reasoned opinion, before a quick referral to the Court of Justice; it then asked for, and obtained, the application of the expedited procedure before the Court; and finally requested the interim order.

³⁵Most notably, *see* ECJ 19 November 2019, Case C-585/18, *A.K.*, ECLI:EU:C:2019:982.

³⁶As described in M. Gersdorf and M. Pilich, ‘Judges and Representatives of the People: A Polish Perspective’, 16(3) *EuConst* (2020) p. 345.

³⁷*See also* L. Pech and D. Kochenov, ‘Respect for the Rule of Law in the Case Law of the European Court of Justice’, *SIEPS* 2021:3, p 74, arguing that this infringement action represents a ‘template to follow’.

Since the judgment in the Supreme Court case, the Court of Justice has ruled on two other infringement actions based on Article 19 TEU, and another one is still pending in Luxembourg. The first action was decided in November 2019,³⁸ few months after the Supreme Court's ruling, and concerned the reforms to the ordinary courts' system. One of the aspects raising concerns was again an issue of retirement age, with the Polish authorities introducing a differentiation between men and women, and granting to the Ministry of Justice the possibility to extend the judges' mandates. The Commission relied both on equal treatment provisions – Article 157 TFEU, as well as Directive 2006/54 – and on Article 19 TEU. In its decision, the Court of Justice decided in favour of the Commission.

The second action related to the creation of the infamous 'Disciplinary Chamber' within the Supreme Court and more generally to the reforms of the disciplinary regime of judges.³⁹ Once again, the Commission relied most crucially on Article 19 TEU, but also claimed an infringement of Article 267 TFEU, insofar as the new disciplinary regime restricted the Polish courts' possibility to make use of the preliminary reference procedure. The infringement action was decided in July 2021, more than a year after the Court of Justice had adopted an interim order⁴⁰ asking Poland to stop the operations of the Disciplinary Chamber. In its judgment on the infringement case, the Court most importantly agreed that Poland had breached Article 19 TEU by failing to guarantee the independence and impartiality of the Disciplinary Chamber of the Supreme Court, as the latter could not be considered an independent court according to EU law standards,⁴¹ in particular when taking into consideration the broader context in which it was created, the systemic overhaul of the Polish judiciary, and the politicisation of the Council of the Judiciary that has a key role in the appointment of the Supreme Court judges.⁴² The Court of Justice then also concluded that the other reforms to the disciplinary regime, including the expansion of the notion of disciplinary offence to the content of judicial decisions, breached Article 19 TEU and Article 267 TFEU. Despite the Commission's win in Luxembourg, this decision was, however, not as immediately

³⁸ECJ 5 November 2019, Case C-192/18, *Commission v Poland* (Ordinary Courts), ECLI:EU:C:2019:924.

³⁹ECJ 15 July 2021, Case C-791/19, *Commission v Poland* (Disciplinary Regime), ECLI:EU:C:2021:596.

⁴⁰ECJ 8 April 2020, Case C-791/19 R, *Commission v Poland*, ECLI:EU:C:2020:277 and the analysis of L. Pech, 'Court of Justice Protecting Polish judges from Poland's Disciplinary "Star Chamber": *Commission v. Poland* (Interim Proceedings)', 58(1) *Common Market Law Review* (2021) p. 137.

⁴¹The Court had already established the standards to assess the independence of that court in C-585/18 *A.K.*, and the Labour law and Social Security Chamber of the Polish Supreme Court had then concluded that the Disciplinary Chamber could not be considered independent: see Polish Supreme Court, Labour Law and Social Security Chamber, judgment of 5 December 2019 (III PO 7/18).

⁴²See *Commission v Poland* (Disciplinary Regime), *supra* n. 39, paras. 104 and 108.

effective as that of the Supreme Court, and soon after the Court's decision, the Commission was forced to initiate an Article 260 TFEU procedure in light of the Polish authorities' failure to take measures to implement the interim order and the judgment.

The third and final action related to the so-called 'Muzzle law', which Poland adopted in the aftermath of the *A.K.* ruling, in order – broadly speaking – to limit the growing impact of the Court of Justice's case law on judicial independence. The action is still pending in Luxembourg. In this case too, the Commission brought a request for an interim order, which was granted by the Court of Justice in July 2021.⁴³ The Court of Justice asked the Polish authorities to suspend all remaining activities of the Disciplinary Chamber, including those on the authorisation to initiate criminal proceedings against judges, as well as to suspend the application of norms that prohibit national courts from verifying compliance with EU requirements of judicial independence, and finally to ensure that judges do not have face disciplinary liability for examining compliance with the same EU law requirements. The Commission and the Court's arguments are, once again, based on Article 19 TEU, supported also by Article 47 of the Charter and Article 267 TFEU. In light of the Polish refusal to comply with the order, in September 2021 the Commission launched an Article 260 TFEU action⁴⁴ requesting the Court to impose penalty payments.

Seen together, these infringement actions reveal a mixed picture, with the Supreme Court and Ordinary court cases suggesting a more positive analysis, and the other two procedures a more sceptical one. On the one hand, there is no doubt that these actions are a remarkable step forward compared to the indirect approach followed in the Hungarian case described in the section above. In substance, the Commission can bring before the Court the key issue at stake: whether or not Polish (or potentially any other member state, of course) measures are undermining the principle of judicial independence affirmed by Article 19 TEU. What is crucial is that the judgments of the Court in these infringement actions cannot be answered with technical adjustments or by reverting to techniques of symbolic or creative compliance. Or at the very least, it is much more difficult to do so: if the Commission correctly frames the case,⁴⁵ and the Court of Justice decides in its favour, after the ruling the member state responsible for the breach of EU law must show that national rules, as amended after the Court's

⁴³ECJ 14 July 2021, Case C-204/21 R, *Commission v Poland*, ECLI:EU:C:2021:593.

⁴⁴The possibility to impose penalty payments in cases of non-compliance with a Court's interim order was established in another Polish case unrelated to the judicial reforms: see ECJ 20 November 2017, Case C-441/17 R, *Commission v Poland*, ECLI:EU:C:2017:877; and P. Wennerås, 'Saving a Forest and the Rule of Law: Commission v. Poland', 56(2) *Common Market Law Review* (2019) p. 541.

⁴⁵The responsibility for correctly framing the case lies almost entirely with the Commission. The Court of Justice is in fact bound by the *petitum* requested by the Commission, and has to rely on it; it cannot, on its own motion, reframe or restructure the reasoning proposed by the Commission.

ruling, adequately respect and ensure judicial independence. And the Commission can make use of the financial penalties procedure under Article 260 TFEU if and when the member state fails or refuses to do so.

On the other hand, what is also becoming evident is that even these more robust infringement actions have not radically changed the bigger picture. A government truly determined to push forward an illiberal agenda may still attempt to find workarounds and avoid a full implementation of the Court's decisions, as was done by Poland with the Muzzle law; or even open a direct confrontation with the Court and the Commission, as the Polish government has done, *inter alia*, by instrumentally asking the Polish Constitutional Tribunal to declare the Court of Justice's case law on judicial independence *ultra vires*.⁴⁶ This shows, first, that the Court of Justice's decision is not the final step of the story, and that the Commission should carefully follow what happens after it, and be ready to activate Article 260 TFEU where necessary; second, and more generally, that infringement actions need always to work together with other values-protection tools. I will return to these themes in the following sections.

Infringement actions based on the Charter of Fundamental Rights

The second development to be considered is the Commission's reliance on the Charter of Fundamental Rights in a series of infringement actions against Hungary. This novelty, which has solved the 'legal enigma'⁴⁷ on whether the Charter could be used in Article 258 TFEU proceedings, has been seen as part of the more 'political' approach to infringement actions developed by the last two Commissions.⁴⁸ After the rulings of the Court of Justice in the *Usufruct*,⁴⁹ *NGOs*,⁵⁰ and *CEU*⁵¹ cases, the debate is settled: the Commission may start an infringement action based on the Charter whenever a national measure falls within the scope of EU law, including when a national measure restricts free movement, and the member state in question relies on one of the accepted grounds of derogation under EU law.

The question of the applicability of the Charter in infringement actions was clarified for the first time in the *Usufruct* case.⁵² In this action, the Commission brought

⁴⁶Polish Constitutional Tribunal, case K 3/21, decision of 7 October 2021.

⁴⁷A. Łazowski, 'Decoding a Legal Enigma: the Charter of Fundamental Rights of the European Union and infringement proceedings', *ERA Forum* (2013).

⁴⁸Banks and von Rintelen, *supra* n. 1.

⁴⁹ECJ 21 May 2019, Case C-235/17, *Commission v Hungary*, ECLI:EU:C:2019:432.

⁵⁰ECJ 18 June 2020, Case C-78/18, *Commission v Hungary*, ECLI:EU:C:2020:476.

⁵¹ECJ 6 October 2020, Case C-66/18, *Commission v Hungary*, ECLI:EU:C:2020:792.

⁵²On the novelty of the case, *see also* AG Øe, Opinion in ECJ 29 November 2018, Case C-235/17, *Commission v Hungary*, ECLI:EU:C:2018:971, para. 64.

before the Court⁵³ a series of Hungarian measures terminating usufruct rights for foreign and domestic investors, arguing that they restricted free movement of capital under Article 63 TFEU. In addition, it also claimed, as an independent ground of review,⁵⁴ that Hungarian legislation infringed Article 17 of the Charter on the right to property. While the Advocate General in his opinion suggested that the Court should not examine the fundamental rights' point, as in his view that would have entailed an undesirable extension of the *ERT* jurisprudence,⁵⁵ the Court did consider it, found the Charter applicable, and ultimately determined that Hungary had breached Article 17 of the Charter.

In the *NGOs* case, the Court then further clarified that the possible breach of the Charter can be raised as a fully independent point. This second infringement action concerned the 2017 law on the 'Transparency of Civil Society Organizations', which included a series of demanding 'transparency' and publicity requirements for organisations 'receiving funding from abroad'.⁵⁶ The Commission argued that with the adoption of that law, Hungary had breached EU free movement of services, as well as the Charter. The action was launched in July 2017, only two weeks after the entry into force of the Hungarian law, and brought before the Court of Justice in December 2017, but unfortunately was only decided in June 2020. The Court fully agreed with the Commission's arguments and found a violation of Article 63 TFEU on free movement of services, as well as Articles 7 (right to respect for private life), 8 (right to the protection of personal data) and 12 (freedom of association) of the Charter. It relied on the earlier decision in *Usufruct* in order to demonstrate that the Charter was applicable to the case, repeating that when a member state justifies a measure restricting a fundamental freedom on the basis of one of the grounds provided in the Treaties, or relying on an overriding reason of public interest, that member state is implementing EU law in the sense of Article 51 of the Charter, and thus the Charter is applicable. Then, in partial contrast to *Usufruct*, it went on to analyse the Charter claims in an autonomous fashion: after finding a breach of Article 63 TFEU, the Court moved to assess the alleged infringement of Article 12, first, and then of Articles 7 and 8 of the Charter. For all three fundamental rights at stake, the Court assessed whether there was a limitation of the right, and then whether

⁵³These questions had already come before the ECJ in the *SEGRO* case, though the Court in that preliminary reference decided not to address the fundamental rights point: see ECJ 6 March 2018, Case C-52/16, *SEGRO*, ECLI:EU:C:2018:157.

⁵⁴See also Prete and Smulders, *supra* n. 25, p. 289 on the independence or autonomy of the fundamental rights claim.

⁵⁵See Opinion of AG Øe, *supra* n. 52, para. 95.

⁵⁶For a more detailed analysis, see M. Bonelli, 'The "NGOs case": on How to Use the EU Charter of Fundamental Rights in Infringement Actions', 46(2) *European Law Review* (2021) p. 258.

that limitation was justified, concluding that the Charter was breached as the Hungarian legislation failed to pursue any objective of general interest.

A largely similar approach was then followed in the so-called *CEU* case, in which the Commission challenged the reform of the Higher Education Law that imposed restrictive requirements for foreign higher education institutions in Hungary, and which had the clear objective to target the Central European University (CEU).⁵⁷ The Commission found the Hungarian amendments incompatible with EU free movement of services, the GATS agreement, but also with three fundamental rights protected by the Charter: the right to academic freedom (Article 13), the right to education (Article 14), and the freedom to conduct a business (Article 16). As was the case in the *NGOs* ruling, the fundamental rights' points were assessed as autonomous grounds of infringement.

The step taken by the Commission and the Court in these three cases is extremely significant. The Court was called to do something unprecedented in these infringement actions: to directly assess whether a member state had breached the Charter and EU fundamental rights. In his Opinion in the *Usufruct* case, Advocate General Øe found this new type of cases to some extent concerning, and possibly leading to an over-expansion of the Court's competences. Yet I would argue that it perfectly follows from the logic of the Treaties that the Court can have jurisdiction to decide on a breach of the Charter in an infringement action, as the Charter contains primary law obligations that can certainly be enforced via Article 258 TFEU.

The Charter is an important addition to the infringement procedure. It brings an added value comparable to Article 19 TEU: it allows the Commission and the Court to focus on the core matter – the fundamental rights' restriction – and not only on what can often be the less dramatic and less significant substantive point of EU law, such as a free movement of capital or services' restriction. As well put by Advocate General Kokott in her Opinion in the *CEU* case, 'the separate examination of fundamental rights . . . reflects the particular significance and nature of the infringement more clearly'.⁵⁸ It also becomes harder for the national authorities to engage in forms of creative or symbolic compliance, considering that the member state cannot simply fix the narrow infringement of, e.g., free movement law, but it will have to show that the amendments to national legislation ensure respect for the Charter rights in question.

⁵⁷On the law see P Bárd, 'The Open Society and Its Enemies: An Attack against CEU, Academic Freedom and the Rule of Law', CEPS Policy Insights No. 2017/14.

⁵⁸ECJ 5 March 2020, AG Opinion in Case C-66/18, *Commission v Hungary (Enseignement supérieur)*, ECLI:EU:C:2020:172, para. 180.

At the same time, the three rulings described should not be seen as the groundbreaking new approach suggested by some literature.⁵⁹ All three decisions make clear that the mandate of the Commission, and in turn of the Court, is still limited. The Commission has not tried to advance, and the Court has not accepted, infringement actions based on the Charter for cases falling outside the scope of EU law, or actions based directly on Article 2 TEU. The Commission, when it wants to rely on the Charter in infringement actions, will still need to prove that the national measures under review fall within the scope of EU law, for example because they restrict free movement law, and this in turn triggers the applicability of the Charter.⁶⁰ In other words, the usual limits of Article 51 of the Charter continue to apply in the context of an Article 258 TFEU procedure.

However, in comparison to at least the first actions based on Article 19 TEU, the *NGOs* and *CEU* infringement procedures have not been as successful. Far from it. Most crucially, the Commission failed to file a request for interim orders, and the actions were ultimately decided more than three years after the entry into force of the relative law and the initiation of the Article 258 procedure by the Commission. This has had significantly negative consequences in the *CEU* case, as the University had already relocated part of its programmes to Vienna in the meantime. The same is true also for other civil society organisations targeted by the ‘Transparency law’, such as the Open Society Foundation, which moved its offices to Berlin. In the latter case, furthermore, while Hungary, after a Commission letter of formal notice under Article 260 TFEU,⁶¹ replaced the first NGO law with a new piece of legislation, the new regulation might still be problematic from a fundamental rights’ perspective.⁶² The Commission will therefore need to closely monitor the Hungarian situation in order to verify whether the new system complies with the ruling of the Court, including where it asks for the fundamental rights breaches to be remedied.

⁵⁹See e.g. 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, *Reinforcing Rule of Law Oversight in the European Union* (Cambridge University Press 2016).

⁶⁰On the concept of triggering rules, see D. Sarmiento, ‘Who’s Afraid of the Charter? The Court of Justice, National Courts and the New Framework of Fundamental Rights Protection in Europe’, 50(5) *Common Market Law Review* (2013) p. 1267.

⁶¹See European Commission, ‘February Infringements Package: Key Decisions’, 18 February 2021, available at (https://ec.europa.eu/commission/presscorner/detail/it/inf_21_441), visited 2 March 2022.

⁶²As reported by Amnesty International: see (<https://www.amnesty.org/en/latest/news/2021/05/hungary-lexngo-finally-repealed-but-a-new-threat-is-on-the-horizon/>), visited 2 March 2022.

INFRINGEMENT ACTIONS AS A VALUES-PROTECTION TOOL: OPEN QUESTIONS AND FUTURE PERSPECTIVES

In comparison to the early actions, much has improved in the Commission's infringement policy. The 2.0 approach just described allows the Commission to bring to the attention of the Court the key rule of law or fundamental rights issues, rather than more technical provisions of EU law which only indirectly contribute to protecting EU values, and to impose on member states more demanding requirements when it comes to compliance with a Court's judgment. The new approach has brought positive results, most notably in the first Polish cases, yet it has not fundamentally altered the situation on the ground. In both Hungary and Poland, we continue to witness systemic attacks on EU values, and the EU is still reflecting on how to best respond to them and develop more effective solutions. The infringement action is again at the centre of this discussion. One idea that has been advanced, both in the academic⁶³ and in the institutional⁶⁴ debate, is the launch of (systemic) infringement proceedings based directly on Article 2 TEU, which would allow, at least in certain exceptional cases,⁶⁵ the Court to assess whether national measures are in breach of 'the rule of law' or other EU values contained in Article 2 TEU. Most remarkably, Scheppele, Kochenov and Grabowska-Moroz have recently argued that a broad interpretation of the powers under Article 258 TFEU would allow the use of the infringement procedure as a true militant democracy tool, empowering the Court of Justice to act as a shield against any form of democratic and rule of law backsliding in the member states. This would then turn the EU 'into a nascent militant democracy'.⁶⁶

This article takes a different line. It opts for a narrower reading of the scope of application of the infringement procedure, concluding that infringement actions cannot be based on Article 2 TEU alone, on issues that fall outside the scope of Union law, but always require a link to another provision of EU law. Considering also the fragility of the Court of Justice's authority and legitimacy, the article

⁶³See 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 University Press 2021); Scheppele et al., *supra* n. 5; Schmidt and Bogdanowicz, *supra* n. 5; A. von Bogdandy and L.D. Spieker, 'Countering the Judicial Silencing of Critics: Article 2 TEU Values, Reverse Solange, and the Responsibilities of National Judges', 15(3) *EuConst* (2019) p. 391.

⁶⁴See European Parliament, 'Report on the Situation of Fundamental Rights: Standards and Practices in Hungary' (2013); and Resolution on the Need for a comprehensive Democracy, Rule of Law and Fundamental Rights mechanism, Strasbourg, 14 November 2018, Doc. 2018/2886(RSP).

⁶⁵von Bogdandy and Spieker, *supra* n. 63, are especially concerned with limiting judicial reliance on Art. 2 TEU to truly exceptional situations.

⁶⁶Scheppele et al., *supra* n. 5, p. 13.

supports a more limited understanding of the role of infringement actions in the Union's values-protection toolbox: while they may have a fundamental role to play – and the final section of this part of the article will in fact suggest further possible steps in the Commission's infringement strategy – infringement actions alone will not and cannot, by themselves, solve the ongoing constitutional crises in Hungary, Poland, or potentially any other member state. They cannot be seen as the 'silver bullet' that we have too often sought – and which does not actually exist.

The scope of application of the infringement procedure

The first question to be tackled is the precise scope of application of the infringement procedure, and most crucially whether it would be possible to rely on Article 2 TEU in order to bring before the Court of Justice national measures that breach EU values, but otherwise fall outside the scope of EU law. The question is a complex one, as the Treaties do not answer it in a straightforward manner.⁶⁷ There is no provision that explicitly excludes the Court's jurisdiction on Article 2 TEU in the same way that Article 24(1) TEU limits it on Common Foreign and Security Policy matters, nor do the Treaties clearly state that the infringement procedure is not available for values' violations, as Article 126(1) TFEU does with respect to the excessive deficit procedure. At the same time, the Treaties establish that the Court cannot review in substance decisions on threats to, or breaches of, EU values taken under Article 7 TEU. According to Article 269 TFEU, the Court can only review respect for the procedural stipulations of Article 7 TEU. More generally, the Treaties created a specific system for the protection of EU values: Article 7 TEU.

The Court of Justice has not clarified the point either. It has acknowledged that Article 2 TEU produces legal effects. It is, notably, the constitutional foundation of mutual trust.⁶⁸ Linking Article 2 TEU to Article 49 TEU, the Court then recently established the so-called non-regression principle, which prohibits the member states from adopting legislation that brings about a reduction in the protection of the rule of law.⁶⁹ In that context, the Court affirmed that 'compliance by a Member State with the values enshrined in Article 2 TEU is a condition for the enjoyment of all the rights deriving from the application of the Treaties to that

⁶⁷See e.g. Hoffmeister, *supra* n. 10, and C. Hillion, 'Overseeing the Rule of Law in the EU: Legal Mandate and Means', in Closa and Kochenov, *supra* n. 63.

⁶⁸See ECJ 18 December 2014, *Opinion 2/13*, ECLI:EU:C:2014:2454.

⁶⁹ECJ 20 April 2021, Case C-896/19, *Repubblika*, ECLI:EU:C:2021:311. It is still unclear whether this non-regression principle is only linked to the rule of law and judicial independence issues, or is broader than that.

Member State'.⁷⁰ In broader terms, the case law shows a growing number of references to Article 2 TEU.⁷¹

On the other hand, the Court has not yet confirmed that Article 2 TEU is directly enforceable. Article 2 has so far been used, by and large, as an interpretative device, to support conclusions reached on the basis of different provisions, including for example Article 19 TEU, but it has never been the key focal point of a Court of Justice decision. The cases discussed in the previous sections, for example, cannot be seen as an opening to the direct judicial enforcement of Article 2 TEU, as they were based on Article 19 TEU or on the Charter of Fundamental Rights, with the latter being applicable because the contested national measures fell within the scope of EU law.⁷² In an opinion in another Polish case, in which the referring court relied on Article 2 TEU as a standalone provision, Advocate General Tanchev has even claimed that 'that article does not as such figure among provisions under which the compatibility of national legislation with EU law should be assessed and which could therefore per se lead the referring court to disapply a national provision by following the interpretation given by the Court of Justice'.⁷³ While it is unclear whether that statement could be generalised beyond its specific context, it resonates with other views expressed at the Court.⁷⁴

The Treaties and the current Court's case law, therefore, leave room for at least two conflicting interpretations. The first supports the view that infringement actions can be based directly on Article 2 TEU, as a standalone norm or eventually in combination⁷⁵ with other EU law provisions.⁷⁶ According to this first reading, relying on Article 2 TEU would allow the bringing before the Court of issues that would otherwise fall outside the scope of Union law. A second reading argues, in contrast, that Article 2 TEU does not create sufficiently precise legal obligations

⁷⁰Ibid., para. 63. Note however that the language used in this paragraph implicitly refers to the system of Art. 7(3) TEU, where the latter speaks of the suspension of rights 'deriving from the application of the Treaties'.

⁷¹L.D. Spieker, 'From Moral Values to Legal Obligations – On How to Activate the Common Values in the EU Rule of Law Crisis', 20(8) *German Law Journal* (2019) p. 1182; von Bogdandy and Spieker, *supra* n. 63.

⁷²In the infringement actions described above, Art. 2 only plays 'an ancillary function': Boekenstein, *supra* n. 5.

⁷³ECJ 17 December 2020, Opinion of AG Tanchev in Case C-824/18, *A.B.*, ECLI:EU:C:2020:1053, para. 35. In its judgment, the Court then used Art. 2 TEU only as a support to the interpretation of Art. 19 TEU, and not as an independent benchmark of assessment.

⁷⁴ECJ 11 December 2019, Opinion of AG Pikamäe in Case C-457/18, *Slovenia v Croatia*, ECLI:EU:C:2019:1067, paras. 132-133.

⁷⁵Suggesting a combined used of Art. 2 and other EU law provisions: von Bogdandy and Spieker, *supra* n. 63, p. 420.

⁷⁶Scheppele et al. *supra* n. 5; Schmidt and Bogdanowicz, *supra* n. 5.

that can be enforced in infringement actions.⁷⁷ In order to start an infringement action, the Commission would always have to show that a national measure falls within the scope of EU law as it breaches another EU law norm. The latter view was also expressed by the Commission a few years ago, when in its Communication on the adoption of the Rule of Law Framework, it argued that the adoption of the new mechanism was necessary as ‘there are situations of concern which fall outside the scope of EU law and therefore cannot be considered as a breach of obligations under the Treaties’.⁷⁸

The latter reading is preferred here, essentially for two related reasons. The first has to do with the very text of Article 2 TEU. Article 2 TEU merely affirms that the founding values of democracy, the rule of law and human rights ‘are common to the Member States’, but as such it does not impose any explicit obligation on the member states to respect or promote those values, as would be required by Article 258 TFEU which allows the Commission to start infringement actions when a member state ‘has failed to fulfil an obligation under the Treaties’. A clear obligation only emerges when Article 7 TEU or Article 49 TEU are brought within the picture – as was done by the Court in developing the non-regression principle.

This brings us to the second point. As noted above, it should not be forgotten that the Treaties consciously and explicitly created a different system for the protection of the EU founding values: Article 7 TEU.⁷⁹ For questions falling outside the scope of EU law – and which cannot be brought under the Court of Justice’s purview under Article 19 TEU or other EU law provisions – the more convincing reading is that Article 7 TEU still represents a *lex specialis* for the enforcement of EU values.⁸⁰ This is to be understood in a narrow sense: wherever there is a specific Treaty obligation breached by a national measure, the infringement procedure and Article 7 can be used at the same time. But when there is no link between the national measure

⁷⁷For similar conclusions see: J.W. Müller, ‘Should the EU Protect Democracy and the Rule of Law inside Member States?’, 21(2) *European Law Journal* (2015) p. 146; L. Prete, *Infringement Proceedings in EU Law* (Kluwer 2017) and J. Wouters, ‘Revisiting Art. 2 TEU: A True Union of Values?’, 5(1) *European Papers* (2020) p. 275.

⁷⁸European Commission, ‘A New EU Framework to Strengthen the Rule of Law’ (2014) p. 5. See also E. Crabit and N. Bel, ‘The EU Rule of Law Framework’, in W. Schroeder (ed.), *Strengthening the Rule of Law in Europe – From a Common Concept to Mechanisms of Implementation* (Hart Publishing 2016).

⁷⁹As noted by the Court’s President a few years ago, ‘Outside the scope of application of EU law, the authors of the Treaties have entrusted the EU’s political institutions, not the ECJ, with the task of monitoring whether “there is a clear risk of a serious breach by a Member State of the values referred to in Article 2 [TEU]”’: K Lenaerts, ‘Linking EU Citizenship to Democracy’, 11 *Croatian Yearbook of European Law and Policy* (2015) p. XVII.

⁸⁰For an opposite reading, see L.S. Rossi, ‘Il valore giuridico dei valori. L’articolo 2 TUE: relazioni con altre disposizioni del diritto primario dell’UE e rimedi giurisdizionali’, *Federalismi.it* n.19/2020.

threatening or breaching one of the EU values and a provision of EU law other than Article 2 TEU, then only Article 7 TEU is applicable. To reach a different conclusion would amount to a circumvention of the enforcement scheme created by the Treaties, which would render the special decisions-making procedure and the special institutional roles of Article 7 TEU⁸¹ practically meaningless.

This reading is also better aligned with the *current* state of the Commission's practice and the Court of Justice's case law. As argued earlier, the Court has so far only used Article 2 TEU as a rhetorical or interpretative device, but never as an independent ground of review of national or EU measures. And the Commission has been reluctant to deploy it in infringement actions. Only last year, in one of the new procedures on the anti-LGBTQ+ legislation in Hungary,⁸² the Commission made a first explicit reference to Article 2 TEU in its letter of formal notice to Hungary. Even in that case, however, the Commission did not use Article 2 TEU in a fully autonomous manner, nor did it use it to expand the scope of EU law. On the contrary, it first showed that the national legislation under discussion fell within the scope of EU law, as it violated a series of norms of primary and secondary law, including the Charter. Then, the Commission argued that 'because of the gravity of these violations, the contested provisions also violate the values laid down in Article 2 TEU'. The Commission's position in the letter of formal notice suggested, therefore, a more direct – though still not fully independent – route for the enforcement of Article 2 TEU. The Article 2 point was, however, not repeated in the press release announcing the second step of the infringement action, the letter of formal notice.⁸³ It seems that the Commission has dropped that argument at least in this case, showing once more a certain caution in relying directly on Article 2 TEU.

Admittedly, the case law and institutional practice is very much in flux, and given that the Treaties leave the question relatively open, a development in a different direction than the one proposed cannot be completely excluded. In particular, the Court's development of the non-regression principle in the *Repubblika* case might pave the way for a broader interpretation of Article 2 TEU than the one preferred so far. On a broad reading of the non-regression principle,⁸⁴ it could even be suggested that any national measure that brings about a reduction in the level of protection of the rule of law (or potentially any other EU value?) could be targeted by an infringement action. So far, however, the non-regression principle

⁸¹On which *see also* the Opinion of the Council Legal Service on the 'rule of law conditionality' regulation: Council of the European Union, Opinion of the Legal Service, Doc. 13593/18, Brussels, 25 October 2018.

⁸²Discussed below.

⁸³European Commission, 'December Infringements Package: Key Decisions', 2 December 2021.

⁸⁴*See e.g.* M. Leloup et al., 'Opening the Door to Solving the "Copenhagen Dilemma"? All Eyes on *Repubblika v Il-Prim Ministru*', 46(5) *European Law Review* (2021) p. 692.

has had a much smaller impact in the Court's case law, and has been used only to support conclusions based on other EU law provisions, most crucially Article 19 TEU.⁸⁵ In any event, regardless of the legal feasibility of a move towards infringement actions based on Article 2, there are also other normative concerns that may play in favour of a limited reading of the scope of application of the infringement procedure, and that have to do with how we conceive the role and place of infringement actions in the EU values-protection toolbox.

The place of infringement actions in the values-protection toolbox

In comparison with views that suggest that infringement actions can become a tool of militant democracy,⁸⁶ and that more generally make Article 258 the centerpiece of the EU response to constitutional backsliding, this article opts for a more limited reading of the function and place of infringement actions in the values-protection toolbox. It argues that infringement actions, however framed, will never be able to bring those challenges and breaches to an end in a top-down fashion, as they are structurally unable to tackle the root causes of constitutional backsliding. Furthermore, shifting the responsibility for values-protection almost entirely to the Court of Justice, and forcing it to adjudicate those complex questions on the basis of often relatively unclear standards, could endanger the Court's authority and legitimacy.

As for the first point, it must be highlighted how the processes of constitutional backsliding the EU is confronted with have a clear political dimension.⁸⁷ These processes cannot be reduced to a sum of technical infringements of EU law that can be tackled and remedied by targeted judicial interventions of the Court of Justice, to be implemented through narrow amendments of domestic legislation by national authorities. As noted when discussing the early Hungarian cases, tackling constitutional backsliding as if it was a series of 'ordinary' infringements of EU law is a strategy that has already failed. Above and beyond the precise amendments to national legislation that may create conflicts with EU law,⁸⁸ constitutional backsliding processes

⁸⁵ See *Repubblika*, *supra* n. 69, but also *Commission v Poland* (Disciplinary Regime), *supra* n. 39.

⁸⁶ Scheppele et al., *supra* n. 5, p. 65.

⁸⁷ Highlighted for example in D. Adamski, 'The Social Contract of Democratic Backsliding in the "New Eu" Countries', 56(3) *Common Market Law Review* (2019) p. 623; J.H.H. Weiler, 'Not on Bread Alone Doth Man Liveth (Deut. 8:3; Mat 4:4): Some Iconoclastic Views on Populism, Democracy, the Rule of Law and the Polish Circumstance', in von Bogdandy et al., *supra* n. 5; B Bugarič, 'A Crisis of Constitutional Democracy in Post-Communist Europe: "Lands in-between" Democracy and Authoritarianism', 13(1) *International Journal of Constitutional Law* (2015) p. 219.

⁸⁸ On the need to look beyond individual legal changes, see K.L. Scheppele, 'Autocratic Legalism', 85(2) *The University of Chicago Law Review* (2018) p. 545; A. von Bogdandy, 'Principles of a Systemic Deficiencies Doctrine: How to Protect Checks and Balances in the Member States', 57(3) *Common Market Law Review* (2020) p. 705 at p. 735.

can be seen as entailing a more comprehensive and systemic project of dismantling domestic constitutional structures and guarantees, undermining the separation of powers and/or checks-and-balances systems at the national level.⁸⁹ Constitutional backsliding creates a new ‘social contract’, as highlighted by Adamski, that cannot be undone by national or international courts,⁹⁰ which are almost by definition unable to provide solutions to the underlying conflicts that offer context and reasons for concrete amendments to, for example, rules on judicial independence. In tackling these challenges, judicial solutions alone cannot replace domestic and European political processes.⁹¹

This is all the more true if we consider that, in the EU legal order, compliance still largely rests on the willingness of member states to abide the Court of Justice’s rulings and on the cooperation of national courts, in the absence of direct mechanisms of enforcement comparable to federal systems.⁹² In highly controversial cases such as those that could be based on Article 2 TEU, where the domestic ‘costs’ of compliance and obedience would be very high, that willingness could at the very least not be taken for granted. As the Polish – but also Hungarian – cases show, there is no guarantee of a positive result even after the intervention of the Court of Justice or of (international) courts in general. Political, legislative, administrative – and even societal and cultural – changes are required at the national level. Judicial intervention at the EU level may stimulate those changes, but is only a step in a much broader process.

An extensive reliance on Article 258 TFEU could also be problematic from the point of view of the Court’s authority and legitimacy, and put them under strain.⁹³ Asking the Court of Justice to determine whether a member state is complying with ‘the rule of law’ or the other values of Article 2 TEU entails a high risk of politicisation of the European judiciary,⁹⁴ especially taking into account that for

⁸⁹ See e.g. von Bogdandy, *supra* n. 88, p. 706; Pech and Scheppele, *supra* n. 14.

⁹⁰ Adamski, *supra* n. 87, p. 659.

⁹¹ For a similar view, see M. van den Brink: ‘EU Citizenship and (Fundamental) Rights: Empirical, Normative, and Conceptual Problems’, 25(1) *European Law Journal* (2019) p. 35; L. Besselink, ‘The Bite, the Bark and the Howl: Article 7 TEU and the Rule of Law Initiatives’, in D. Kochenov and A. Jakab, *The Enforcement of EU Law and Values* (Oxford University Press 2017) p. 143-144.

⁹² See Closa, *supra* n. 19, and R. Bieber and F. Maiani, ‘Enhancing Centralized Enforcement of EU Law: Pandora’s Toolbox?’, 51(4) *Common Market Law Review* (2014) p. 1057.

⁹³ As acknowledged also by Spieker, *supra* n. 71, p. 1185, who, even if arguing in favour of stronger judicial intervention, recognises how the Court’s growing involvement will ‘place an immense burden’ on its legitimacy.

⁹⁴ M. Blauburger and R.D. Kelemen, ‘Can Courts Rescue National Democracy? Judicial Safeguards against Democratic Backsliding in the EU’, 24(3) *Journal of European Public Policy* (2017) p. 321; C. Möllers and L. Schneider, *Safeguarding Democracy in the European Union – A Study on European Responsibility* (Henrich Böll Stiftung – Publications Series on Europe Volume 9, 2018).

many sub-components of those values, clear standards are hard to find. While it is true that the accession process, as well as the recent practice of the institutions,⁹⁵ has helped to clarify in particular a common rule of law core, the level of abstraction of many sub-principles remains fairly high. In many cases, it would be difficult to identify sufficiently detailed obligations that a member state would have breached and that could be assessed by a judicial body. Only in the area of judicial independence have clearer obligations been identified, but respecting judicial independence is in any event a binding obligation that can be enforced under Article 19 TEU and 47 of the Charter, without relying on Article 2 TEU. For many other rule of law or democratic aspects, precise standards remain much harder to find,⁹⁶ and asking the Court to develop them would enormously stretch the expansion of EU judicial competences.⁹⁷

It should perhaps be added that the steps already taken by the Commission and the Court are not uncontroversial: the interpretation of Article 19 TEU, both in terms of substance and of scope of application, is a broad extension of the Court's purview over domestic judiciaries, and one that already raises the question of the precise judicial independence standards to be applied.⁹⁸ Even in the now well-established infringements actions under Article 19, the Court of Justice 'is knowingly confronting . . . live domestic political conflict[s]'⁹⁹ and its rulings therefore have highly political implications. The use of the Charter in infringement actions can also be seen by some as an extension of the Court's jurisdiction,¹⁰⁰ and it certainly entails a new and unique type of assessment, where the Court of Justice directly evaluates whether national measures comply with fundamental rights, an exercise comparable to that of the European Court of Human Rights. All things considered, the Court's more robust intervention in the rule of law and fundamental rights arena has already triggered harsh reactions in some national arenas. Especially in Poland, the Court seems to be increasingly perceived as a partisan actor, rather than an objective arbiter, and the direct and explicit disobedience of the Polish Constitutional Tribunal is a strong challenge to

⁹⁵See for example the definition of the rule of law and of breaches to the rule of law in Regulation (EU, Euratom) 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a general regime of conditionality for the protection of the Union budget, Arts. 2 and 3.

⁹⁶In agreement, see Pohjankoski, *supra* n. 5, p. 1346.

⁹⁷Boekenstein, *supra* n. 5.

⁹⁸See M. Dawson, 'How Can EU Law Respond to Populism?', 40(1) *Oxford Journal of Legal Studies* (2020) p. 183 at p. 211. See also M. Krajewski, 'The EU Right to an Independent Judge: How Much Consensus Across the EU?', in M. Bonelli et al., *Article 47 of the EU Charter and Effective Judicial Protection: Volume 1: The Court of Justice's Perspective* (Hart Publishing, forthcoming) reflecting on the fine balance the Court is asked to strike in judicial independence cases.

⁹⁹Dawson, *supra* n. 98, p. 210.

¹⁰⁰See again Opinion of Ag Øe, *supra* n. 52.

the Court's authority. Taking a new fundamental step forward may open broader authority and legitimacy questions. The Court crucially stepped into the values-protection battle, almost forcing the Commission to take up the challenge more firmly; but the burden to protect the shared values cannot be left to the Court alone.

What role then should infringement actions have in the values-protection toolkit? My argument is that Article 258 is more suitable to tackle the more concrete consequences, rather than the root causes, of constitutional backsliding, or in other words to fight the symptoms, rather than the disease itself.¹⁰¹ While it is hard to imagine Article 258 TFEU becoming an instrument for a top-down rescue of national constitutional systems,¹⁰² taking a more bottom-up perspective could help in better conceiving the role of the infringement procedure. The focus in using Article 258 should be on fighting concrete measures that undermine EU values – such as fundamental rights infringements, but also attacks to judicial independence – thus slowing down¹⁰³ the process of backsliding¹⁰⁴ and then protecting those domestic actors that can contribute to bottom-up resistance within the member states and to rule of law and democratic renewal in the medium and long term.¹⁰⁵ A narrower yet targeted and precise approach to the use of the infringement procedure might go a longer way than broader actions with ill-defined objectives. The good news is that the Commission has already taken steps in that direction: the infringement actions 2.0 described in the first part of the article can be seen as crucially contributing to these objectives. Further initiatives will be explored in the next paragraphs, reflecting on how the effectiveness of infringement actions could be further bolstered with these goals in mind. It should not be forgotten, then, that infringement actions should be seen as part of a multi-dimensional toolkit: and thus, judicial intervention via Article 258 TFEU must be also coordinated with political pressure under Article 7 TEU – despite the often-mentioned difficulties of that system – on the use of the new budgetary conditionality regulation, as well as the other EU monitoring and reporting tools.

¹⁰¹For the opposite view, see Scheppele et al., *supra* n. 5, p. 45.

¹⁰²On the ineffectiveness of top-down (judicial) solutions, see also D Kosař et al., 'The Twin Challenges to Separation of Powers in Central Europe: Technocratic Governance and Populism', 15(3) *EuConst* (2019) p. 461.

¹⁰³Even scholars arguing in favour more a more intense use of Art. 258 ultimately acknowledge that Art. 258 cannot 'reverse' constitutional backsliding, but only 'withhold or delay' it: see Śledzińska-Simon and Bárd, *supra* n. 28, p. 1569.

¹⁰⁴And perhaps destabilising the social contract at its basis: see Adamski, *supra* n. 87, p. 650.

¹⁰⁵What P Sonnevend, 'Preserving the Acquis of Transformative Constitutionalism in Times of Constitutional Crisis: Lessons from the Hungarian Case', in A. von Bogdandy et al. (eds.), *Transformative Constitutionalism in Latin America* (Oxford University Press 2017) p. 123 and von Bogdandy, *supra* n. 88, p. 720, describe as 'self-healing through domestic processes'.

Protecting EU values via the infringement action: the next steps

The first and obvious area in which further work could be done is that of judicial independence, continuing to develop the line of infringement cases based on Article 19 TEU, and ensuring that national judges can continue to give full effect to EU law, including EU fundamental rights, in the member states. As regards Poland, the Commission took a new key step in December 2021, launching an infringement action related to the Polish Constitutional Tribunal.¹⁰⁶ The action first targets the two 2021 rulings of the Tribunal that have challenged the primacy of EU law, following the example of the earlier action launched in the aftermath of the *Bundesverfassungsgericht* judgment in *Weiss/PSPP*. The Commission's argument is that the rulings breach the principles of autonomy, primacy, effectiveness and uniform application of Union law, as well as Article 19 TEU by giving an 'unduly restrictive interpretation' of the principle of effective judicial protection. The second point raised by the Commission is, however, even more relevant for our discussion. The Commission states that it has 'serious doubts' about the independence and impartiality of the Constitutional Tribunal and, following the European Court of Human Rights decision in *Xero Flor*,¹⁰⁷ argues that the Tribunal cannot be considered a court 'established by law'.¹⁰⁸ Poland would, therefore, be in breach of Article 19 TEU as it entrusts questions of interpretation and application of EU law to a body that is not an independent and impartial tribunal established by law.

The new infringement action is a fundamental step taken by the Commission, as it targets for the first time in a EU judicial¹⁰⁹ procedure the 'original sin' of the Polish constitutional backsliding saga: the capture of the Constitutional Tribunal. But it brings new complex challenges. Not only does it further escalate the conflict between the EU and the Polish political and legal orders, again potentially pushing another extremely sensitive question to the Court of Justice, which would once more be called to step into the rule of law battle. But perhaps more crucially, precisely framing the case is much more difficult in the circumstances of the case, as the Commission is not questioning whether a *new* measure undermines judicial independence, but the very composition of the Polish court. The Commission needs to carefully consider what exactly it aims to achieve before the Court of

¹⁰⁶European Commission, 'Press release – Rule of Law: Commission launches infringement procedure against Poland for violations of EU law by its Constitutional Tribunal', Brussels, 22 December 2021.

¹⁰⁷ECtHR 7 May 2021, No. 4907/18, *Xero Flor v Poland*.

¹⁰⁸On the 'established by law' criterion see C. Rizcallah and V. Davio, 'The Requirement that Tribunals be Established by Law: A Valuable Principle Safeguarding the Rule of Law and the Separation of Powers in a Context of Trust', 17(4) *EuConst* (2022).

¹⁰⁹Questions related to the Constitutional Tribunal composition had however been extensively discussed under the Rule of law Framework and in the Commission Reasoned Opinion on Art.7(1) TEU.

Justice and what compliance with a possible Court ruling would eventually look like.

Another possibility to be considered is whether the reforms of the National Council of the Judiciary could also be targeted via Article 258 TFEU. As the Court of Justice had made clear in its *A.B.* decision on a preliminary reference of the Polish Supreme Administrative Court,¹¹⁰ the amendments to the Council of the Judiciary system create broad concerns for the entire Polish judicial independence structure, due to the Council's role in the appointment of judges. Once again, such an action would arguably be more difficult than the previous ones, both in terms of its precise framing and also because it would raise difficult questions of the standards to be applied when assessing the independence of national councils of the judiciary. There is not much uniformity at the European level on the matter, in terms of composition, function, and even the very existence of similar organs in the member states.¹¹¹ In any event, despite the possible difficulties in framing these new actions, Article 19 TEU continues to be the most promising way to fight the Polish attempt to undermine judicial independence.

Of course, the situation of the Hungarian judiciary – or of any other member state – could also be scrutinised under Article 19 TEU: the standards developed in the Polish cases (but also the Maltese¹¹² and Romanian¹¹³ ones) are not country-specific, but applicable throughout the Union. The difficulty in Hungary seems to be that changes were entrenched several years ago, and unless new reforms further undermining judicial independence were to be adopted,¹¹⁴ it is much more difficult to precisely frame an Article 258 action. In other words, the new line of Article 19 TEU cases is a good platform for tackling new measures reducing judicial independence; it remains to be seen whether it offers adequate responses also for cases in which negative changes to the judicial system have already been entrenched in the domestic constitutional order, like in Hungary, but possibly also in the case of the Polish Constitutional Tribunal.

The Hungarian scenario offers then further opportunities for advancing the line of infringement cases based on the EU Charter of Fundamental Rights.

¹¹⁰ECJ 2 March 2021, Case C-824/18, *A.B. and Others (Appointment of judges to the Supreme Court)*, ECLI:EU:C:2021:153.

¹¹¹See e.g. D. Kosář, *Perils of Judicial Self-Government in Transitional Societies* (Cambridge University Press 2017).

¹¹²*Repubblica*, *supra* n. 69.

¹¹³ECJ 18 May 2021, Joined Cases C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19, *Asociația 'Forumul Judecătorilor din România' et al.*, ECLI:EU:C:2021:393.

¹¹⁴See the – abandoned – project to reform the system of administrative courts: E. Várnay and M. Varju, 'Whiter Administrative Justice in Hungary? European Requirements and the Setting Up of a Separate Administrative Judiciary', 25(3) *European Public Law* (2019) p. 283.

As noted above, the Charter is applicable in infringement actions whenever the Commission can show that the member state is acting within the scope of EU law. In this respect, the Commission could follow a ‘procedural’ approach, such as the one suggested by Dawson, relying in turn on the work of Ely and Habermas,¹¹⁵ and focus especially on those key areas that serve to ensure political debate and democratic contestation. The Commission could thus target measures that undermine those fundamental rights that guarantee, in a broad sense, equal access to the public debate and to the political process,¹¹⁶ such as freedom of expression, freedom of information, freedom of association, or the protection of minorities. The infringement action in the *NGOs* case is a positive example¹¹⁷ and may inspire similar future actions: by protecting freedom of association, the Commission and the EU as a whole may also protect and promote individual and collective access to the public debate, and it is particularly crucial that civil society organisations are free to receive support from abroad when national (funding) channels may no longer be available.

In that sense, an important step was taken in June 2021, when the Commission launched what is, to my knowledge, the first infringement action against Hungary that relates to question of media pluralism and freedom of information. The action concentrates in particular on the decision of the controversial¹¹⁸ Hungarian Media Council to reject the application of a radio – Klubradio – for the use of the national radio spectrum. In its infringement action, the Commission relies on the European Electronic Communications Code (Directive (EU) 2018/1972) and the principles of non-discrimination and proportionality therein contained. Regrettably, the Commission did not explicitly mention the Charter in the infringement action, but this remains an important step, even if it concerns a seemingly narrow issue. Fighting restrictions to media pluralism and freedom of information is certainly crucial in the EU’s battle to protect democracy and human rights,¹¹⁹ but the response has been limited so far, also due to the limited competences of the EU on the subject. Yet it is crucial that the fundamental rights and democratic

¹¹⁵M. Dawson, *The Governance of EU Fundamental Rights* (Cambridge University Press 2017).

¹¹⁶For a positive step, see the (re-)launched infringement action against Poland on the restriction of political rights of EU citizens: European Commission, ‘EU citizens’ electoral rights: Commission decides to refer CZECHIA and POLAND to the Court of Justice’, Brussels, 9 June 2021.

¹¹⁷At least in substance, as the timing – as noted above – was certainly disappointing.

¹¹⁸G. Polyák, ‘Context, Rules and Praxis of the New Hungarian Media Laws: How Does the Media Law Affect the Structure and Functioning of Publicity?’, in von Bogdandy and Sonnabend, *supra* n. 10.

¹¹⁹See for example the intervention of former Polish Ombudsman Adam Bodnar and John Morijn, ‘How Europe can protect independent media in Hungary and Poland, Politico, 18 May 2021, (<https://www.politico.eu/article/europe-protect-independent-media-poland-hungary/>), visited 2 March 2022.

dimension of such cases is made more evident, in order to avoid the shortcomings of the earlier actions against Hungary and ensure that national authorities are not left free to engage in creative compliance.

The infringement action relating to Klubradio can also be seen in the context of a broader attempt of the Commission to launch values-related infringement action. Even without always mentioning the Charter, in June and July 2021, the Commission started a series of important infringement cases linked to fundamental values and fundamental rights questions, including on the asylum procedure directive in Hungary, on non-discrimination on the basis of racial or ethnic origin in the field of education in Hungary, but also on citizens' electoral rights in Czech Republic and Poland.¹²⁰ Perhaps the most remarkable example, however, is the July decision to open infringement actions against Hungary and Poland on their anti-LGBTIQ+ legislation. The action against Poland is not based on fundamental rights arguments, though, but on a breach of the principle of sincere cooperation, and the Commission targets in particular the lack of response from Polish authorities on its requests for clarification relating to the 'LGBT-ideology free zones' resolutions adopted by some local authorities in the country. The two actions against Hungary, in contrast, raise explicit fundamental rights' arguments based on the Charter. In the first action, which concentrates on the measures limiting minors' access to content that portrays homosexuality, the Commission relies on a variety of primary and secondary law norms (from free movement provisions to the Audiovisual Media Services Directive and the e-Commerce Directive), but those claims mostly serve an instrumental purpose, namely to show that the national measures fall within the scope of EU law and therefore that the Charter is applicable. The last claim raised by the Commission is actually the central one: those measures infringe human dignity (Article 1 of the Charter), freedom of expression and information (Article 11), the right to respect of private life (Article 7) and the right to non-discrimination (Article 21). The reasoned opinion issued in December 2021¹²¹ confirms the fundamental rights' arguments developed in the letter of formal notice, but, as noted earlier, at least in the press release the Commission has made no further explicit reference to Article 2 TEU.

As a final remark, concentrating only on the substance of infringement actions would not be enough. The procedural side is equally important, and further action is needed on that front as well. Three elements can be briefly mentioned. First, here in full agreement with Scheppele and her co-authors,¹²² different infringement actions on connected issues (e.g., restrictions to free movement and freedom of association in Hungary) could be brought together in a single procedure,

¹²⁰European Commission, 'June Infringements Package: Key Decision', Brussels, 9 June 2021.

¹²¹See Commission, *supra* n. 83.

¹²²Scheppele et al., *supra* n. 5.

though not based on Article 2 TEU, but on other norms of EU primary (including the Charter) or secondary law, and proving that the national measures at stake fall within the scope of EU law. Second, the timing of the action is crucial in values-based infringement,¹²³ as the experience with the Hungarian infringement has once more shown: both in the NGO and in the CEU cases, the final ruling of the Court of Justice came too late, i.e. after the government had already achieved its aims. Whenever possible, therefore, the Commission should ask for accelerated proceedings and for interim orders.¹²⁴ Third, the Commission must always be active in the follow-up phase. Even after a positive ruling under Article 258 TFEU (or a positive interim order), the job is not done: the Commission has the responsibility to constantly monitor the situation at the domestic level and eventually bring a member state before the Court under Article 260 TFEU if implementation is not satisfactory,¹²⁵ and if pecuniary sanctions are imposed, then materially recover the amounts to be paid by the member state.¹²⁶ The Hungarian *NGOs* judgment is an important test: after the Commission filed its letter of formal notice ex Article 260 TFEU, Hungary finally amended the Transparency law, but civil society has signalled concerns with the new system, as noted earlier. The Commission, therefore, has the key responsibility to assess whether the implemented reforms can effectively ensure compliance with the Charter rights that Hungary had breached with its first amendments to the system.

CONCLUSION

This article has analysed the role of infringement actions as a tool to protect the EU founding values affirmed by Article 2 TEU. Despite the limited results obtained by this procedure at the beginning of the Hungarian crisis, Article 258 TFEU is actually far from being toothless. On the contrary, the more recent practice of the Commission and the Court under Article 258 suggests that it can produce significant results. The substantive developments discussed in the article – most importantly, infringement actions based on Article 19 TEU, or on the Charter of Fundamental Rights – have allowed the institutions to overcome the structural limitations of the indirect approach that was followed in the first phase of the Hungarian crisis.

¹²³On the importance of this swift and rapid decisions see e.g. Pech and Scheppele, *supra* n. 14.

¹²⁴See also Peers and Costa, *supra* n. 2, p. 237.

¹²⁵For a recent example in the Hungarian case, see the letter of formal notice sent to Hungary for its failure to comply with to the infringement action on asylum procedures: ECJ 17 December 2020, Case C-808/18, *Commission v Hungary*, ECLI:EU:C:2020:1029, in the June 2021 infringement package press release.

¹²⁶On this issue see Pohjankoski, *supra* n. 5.

Yet, I have expressed scepticism of the idea that the Article 258 TFEU can become a tool of militant democracy and more generally *the* key instrument to tackle cases of constitutional backsliding. The article has argued that there are legal limits to that transformation, crucially concluding that infringement actions cannot be based on Article 2 TEU alone. The infringement procedure is not available when a national measure falls outside the scope of EU law. In any event, such a development is not even desirable, as it overlooks the more political dimension of the challenges faced by the EU in Hungary and Poland, and it would put the Court of Justice in a difficult position, considering the limited clarity of many sub-components of Article 2 TEU that would have to be used as yardsticks.

There is no silver bullet to deal with the Hungarian or Polish problems, and the infringement procedure cannot and will not become one. It is best seen as one of the instruments of a broader toolkit, composed of judicial as well as political mechanisms, including Article 7 TEU, and also financial mechanisms, such as the new budget conditionality Regulation. The importance of further legislative action to promote EU values and specify their content, such as those announced under the European Democracy Action Plan,¹²⁷ should also not be forgotten. In this article I have argued that, rather than focusing on an improbable top-down rescue of national rule of law and democratic systems, the key contribution of the infringement procedure may be the protection of those domestic actors, including most crucially national courts, that may resist rule of law and constitutional backsliding within the national constitutional system, as well as the protection of those procedural fundamental rights that allow for participation to the public and political debate and that offer a platform for bottom-up resistance and constitutional renewal.¹²⁸



¹²⁷European Commission, Communication – On the European Democracy Action Plan, 3 December 2020, Doc. COM/2020/790 final.

¹²⁸On which see the *Verfassungsblog* debate ‘Restoring Constitutionalism’: (<https://verfassungsblog.de/category/debates/restoring-constitutionalism/>), visited 2 March 2022.